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on  on the proposals to amend the European System of Financial Supervisions

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I. Introduction

1. In the immediate aftermath of the financial crisis in 2009, the Commission proposed to establish the European System of Financial Supervision (EFSF), consisting of three European Supervisory Authorities (ESAs), one for each sector: banking, insurance, securities and the European Systemic Risk Board (ESRB ). The three ESAs, i.e. the European Banking Authority (EBA ), the European Insurance and Occupational Pensions Authority (EIOPA ) and the European Securities and Markets Authority (ESMA ), were all established on 1 January 2011, building on the work done by their predecessors: the Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR), and also taking into account the work by the high level group led by Jacques de Larosière which delivered a report on 25 February 2009.

2. In the previous legislature, following the co-legislators' request to the Commission to publish a first report on the ESAs by 2 January 2014, the Parliament adopted a resolution with recommendations to the Commission on the European System of Financial Supervision (ESFS) Review (2013/2166(INL)) on 11 March 2014. The resolution made early recommendations in relation to further adaptations of the EFSF to the Single Supervisory Mechanism (SSM), governance (organisation, decision making, independence and transparency), single rule book and internal market, supervisory cooperation and convergence, enhancing powers, and the working of the ESRB. The Resolution was accompanied by two studies . With a delay of a few months, the Commission adopted the requested report (under a requirement laid down in Article 81 of the ESA Regulations), although not all issues listed in that Article were addressed. Since then, the development of the Banking Union legislation, in particular the creation and practical implementation of the Single Supervisory Mechanism and the Single Resolution Mechanism (SSM and SRM) and the build-up of a Capital Markets Union have further changed the regulatory and supervisory landscape. Furthermore, during the present legislature, on 9 December 2015, the Parliament adopted a resolution on stocktaking and challenges of the EU Financial Services Regulation: impact and the way forward to a more efficient and effective EU framework for Financial Regulation and a Capital Markets Union (2015/2106(INI)). The resolution made recommendations in relation to the coherence, consistency, complexity, proportionality and the overall effects of the existing regulation and supervision, including the revision of the ESA regulations, the ESA standard-setting and the ESA involvement in the procedures of law making in the area of financial services.

3. The original texts of the founding regulations establishing the three ESAs were the same, though not identical; differences merely reflected sectoral differences. However, in practice the three Authorities have evolved into different directions, in relation to supervisory tasks and powers, funding, and governance. ESMA is currently the only ESA which directly supervises specific entities (credit rating agencies, trade repositories) and receives fees from them as part of its funding. EBA's governance structure was significantly amended to facilitate developments related to Banking Union and EBA is as a result also the only ESA specifically tasked with developing a European supervisory handbook. The ESAs undertook numerous own initiatives in the form of opinions, guidelines and Questions &Answers on multiple issues. EIOPA is engaged in balance sheet reviews in Member States.

4. On 20 September 2017, the Commission adopted a package of three proposals consisting of

a regulation amending not only the three ESA Regulations, but also six other regulations in the securities/financial markets area, a directive amending MiFID and Solvency II, and a regulation amending the ESRB Regulation. Furthermore, the Commission proposal on establishing a PEPP Regulation and the Commission proposal on the EMIR location policy address matters of potential direct ESA competences which have to be taken into account when completing the picture of revising the ESA responsibilities.

## II. Commission proposals amending the ESA Regulations

### II.i Powers and tasks

The following paragraphs set out the main elements of the Commission proposals.

5. Article 1 (Establishment and scope of action): The scope of the Regulations is broadened to also include the Consumer Credit Directive  and the Payment Accounts Directive  within the scope of the EBA Regulation; to bring within the scope of the EIOPA Regulation the Motor Insurance Directive ; and to bring the Accounting Directive  within the scope of the ESMA Regulation.

6. Article 8 (Tasks and powers of the Authority) + 29 (Common supervisory culture): As a result of the revision of the EBA Regulation in 2014 EBA has been tasked with developing a Union supervisory handbook. The relevant provision has been slightly changed and also inserted in the EIOPA and ESMA Regulations. In addition, EBA is proposed to be tasked with developing a Union resolution handbook.

7. Article 9 (Tasks related to consumer protection and financial activities): It is proposed that in future the ESAs will have to take account of technological innovation and environmental, social and governance related factors when carrying out their tasks. A committee on financial innovation is to be established as an integral part of each ESA, with a view to a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities.

8. Article 16 (Guidelines and recommendations): Over the years, quite some criticism was expressed over the interpretation of the mandate, the use and the scope of guidelines and, to a lesser extend, recommendations. Amendments are made to make carrying out of cost-benefit-analyses the rule. If a two-thirds of the members of the relevant ESA Stakeholder Groups consider that the ESA has exceeded its competences when issuing a guideline or recommendation, the stakeholder group may issue a reasoned opinion to the Commission. In such a case the Commission shall assess the scope of the guidelines and may require the relevant ESA to withdraw the guidelines concerned.

9. Article 17 (Breach of Union law): In 2014, a by Parliament induced amendment provided the ESAs with the power to require from the National Competent Authorities (NCAs) all information which the ESA considers necessary for its investigation in to breach of Union law. The new amendments ensure that the ESAs will be able to address a duly justified and reasoned request for information directly not only to competent authorities, but also to relevant financial institutions/financial market participants. The Executive Board will be responsible for breaches of law investigations.

10. Article 19 (Settlement of disagreements between competent authorities in cross-border situations): The amendments further clarify the criteria based on which ESAs can act on their own initiative on settlement of disagreements. The Executive Board will be responsible for settling disputes.

11. Article 21a (EIOPA - Internal models): A new article 21a is proposed, which should only apply to EIOPA. Powers are given to EIOPA to issue an opinion to the NCAs concerned on internal models, the approval of internal models, and modifications to approved internal models, which the NCA must respect. To this end, EIOPA may request all relevant information from NCAs.

12. Article 29a (Strategic Supervisory Plan): Under the proposed new Article 29a, the ESAs will be required to set EU-wide priorities for supervision in the form of a 'Strategic Supervisory Plan'. On that basis, each NCA should submit a draft annual work programme for its activities to the ESA, whose comments on it must be taken into account by the NCA. At the end of each year NCA must submit an report on the implementation of the work programme, which will be assessed by the ESAs. Any shortcomings in the execution of the work programme will feed into Article 30 reviews, formerly known as “peer reviews”. Within the ESAs the Executive Board will be competent for actions and decisions.

13. Article 30 (Reviews of competent authorities): The proposal amends the current “peer reviews” authorised and executed under the responsibility of the Board of Supevisors (BoS) into “reviews” authorised and executed under the responsibility of the new Executive Board, which may delegate tasks and decisions to a “review committee” exclusively composed of ESA staff . The ESA shall produce a report that in principle is made public, setting out the results of the review. NCAs should “comply or explain” with any follow-up guidelines and recommendations that the ESA may take.

14. Article 31a (Coordination on delegation and outsourcing of activities as well as of risk transfers): A specific concern addressed in the proposal results from the relocation of market participants currently established in the United Kingdom to establish a presence in the EU in order to ensure they will be able to continue providing services also after the United Kingdom has left the EU. The proposal provides for inclusion of the ESA for notifications, monitoring and recommendations, both for authorisations and on an ongoing basis, so that outsourcing, delegations and risk transfers to a third country entity are subject to supervisory review under the responsibility of the Executive Board.

15. Article 31b (ESMA - Coordination function in relation to orders, transactions and activities with significant cross-border effects): A new Article 31b, which should only apply to ESMA. Powers are given to ESMA to adopt recommendations addressed to NCAs to initiate an investigation where ESMA has reasonable grounds to suspect that activities with significant cross-border effects that threatens the orderly functioning and integrity of financial markets or the financial stability in the Union an enhanced coordination role in recommending the competent authorities to initiate investigations and facilitating the exchange of information relevant for those investigations. For this purpose, ESMA shall establish a data storage facility.

16. Article 32 (Assessment of market developments): The amendments partly align EIOPA and ESMA with the current provisions in the EBA Regulation. Furthermore, they also clarify that professional secrecy obligations of competent authorities shall not prevent them from

transmitting stress test outcomes to the ESAs for the purpose of publication. Stress test will be conducted under the responsibilty of the Executive Board.

17. Article 33 (International relations): The existing provision to assist the Commission in preparing equivalence decisions is further elaborated on in the amendments. They also require the ESAs to monitor the regulatory and supervisory developments and enforcement practices in equivalent third countries and submit a confidential report on their findings to the Commission annually.

18. Articles 35 to 35h (Collection of information, Request for information, Fines, Periodic penalty payments, Right to be heard, Review by the CJEU) and Article 39 (Decision-making procedures): The ESAs' powers to request information and data from a number of selected national authorities and financial institutions is largely increased. The amendments also allow the ESAs to impose fines and of up to 20% of the annual turnover and periodic penalty payments up to 3% of the average daily turnover in relation to financial institutions / financial market participants where information is not provided. These decisions would be subject to review by the Court of Justice, and subject to the right for the entity to be heard. Amendments to Article 39 specify that the general decision-making procedures do not apply, which implies in particular that decisions will not be made public.

19. Article 37 (Stakeholder Group): In 2013, the European Ombudsman criticised the manner in which EBA selected the members of the Banking Stakeholder Group , and concluded that EBA had committed an instance of maladministration with regard to geographical balance within each category of membership and by including in the "users" category members who were clearly not representing retail users.

The amendments increase the term of office of the members of the Stakeholder Groups from two-and-a-half years to 4 years. Furthermore, where members of the Stakeholder Group cannot reach a common opinion or advice, the members representing one group of stakeholders can submit a separate opinion or advice. The cooperation between Stakeholder Groups is also amended by providing the option to issue joint opinions and advice.

II.ii Governance (Chapters III and IV - Articles 40 to 59)

20. The proposal amends the governance structure for the ESAs by introducing an Executive Board with full-time members, replacing the current Executive Director and Management Board. It also amends the composition of the Board of Supervisor, and clarifies the competences of these two boards. In the future, the Executive Board will take decisions in relation to supervisory matters, whereas the decision making powers of the Board of Supervisors will be limited to regulatory matters. In addition, the powers of the Chairperson will be strengthened. All these amendments may make the Executive Board effectively the more powerful board. Other amendments include the introduction of the position of Vice-Chairperson and the extension of the remit of action of the Joint Committee to include consumer and investor protection issues.

21. The new Executive Board will consist of the Chairperson with a casting vote, a "member in charge" responsible for tasks currently performed by the Executive Director, and two other members in the case of EBA and EIOPA, and four other members for ESMA. In terms of

salary and budgetary implications, this implies a Chairperson (AD 15) and Member in charge (AD 14) without budgetary implications, and two, resp. four other members (at least AD 13) which are new posts. One of the full-time members (i.e. the member in charge or one of the other members) will act as Vice-Chairperson. The position of alternate Chairperson is eliminated.

22. The full-time members shall be appointed on the basis of an open call for candidates organised by the Commission. The Commission will shortlist the candidates and submit it the European Parliament for approval. Following the approval of the shortlist, the Council shall appoint the full time members. For the EBA Executive Board is it explicitly required that it is balanced and proportionate and reflects the Union as a whole.

23. The Executive Board will retain the role of the Management Board in relation to the preparation of the ESAs work programs and budget. However, the transformation of the Management Board into Executive Board allows for attributing supervisory decision making powers except with regard to CCP matters for which the "CCP Executive Session", to be established under EMIR II, will be competent.

24. The Executive Board's decision making powers will include supervisory matters related to: breach of Union law (Article 17), settlement of disagreement between NCAs (Article 19), systemic risk related decisions (Article 22), the strategic supervisory plan and NCAs' work programmes (Article 29a), review of NCAs' activities (Article 30), coordination of delegation, outsourcing and risk transfer arrangements to non-EU countries (Article 31a), stress tests (Article 32), and decisions in relation to requests for information from financial institutions and financial markets participants (Articles 35b to 35h).

25. The Board of Supervisors remains the main body of the ESAs in charge of its overall guidance and decision making, but with restricted powers in relation to supervisory matters. The proposed amendments change the composition of the Board of Supervisors to include the full time members of the Executive Board but without voting rights. The amendments also allow for the presence of consumer protection authorities where relevant.

26. It is proposed to keep the double majority voting system for measures and decisions adopted by EBA Board of Supervisors that was introduced in 2013 as part of the "Banking Union" package. However, the current system makes decision-making in the EBA burdensome as decisions cannot be taken even in cases where no majority of non-participating Member States considers the vote sufficiently important to be present. To ensure that the EBA can continue to take decisions in an effective manner, voting rules are proposed to be modified to ensure that votes would not have to be postponed in case of absences. The amendment therefore clarifies that a decision would need to be supported by a simple majority of national competent authorities from non-participating Member States present at the vote and of national competent authorities from participating Member States present at the vote.

27. The appointment procedure for the Chairperson is further clarified. It is proposed that he/she will be appointed on the basis of an open call for candidates organised by the Commission. The Commission will then shortlist the candidates and submit it to the Parliament for approval. Following the approval of the shortlist by the Parliament, the Council shall appoint the Chairperson. The procedure of dismissal mirrors the one on appointment and leaves the final decision to the Council. The Chairperson will also get a

casting vote in the Executive Board.

II.iii Funding (Article 62)

28. It is proposed that the current fixed distribution between contributions from the EU General Budget and contributions from national competent authorities (40%/60%) is eliminated. The proposed system retains the public funding element currently provided by the EU and combines it with contributions from financial institutions and financial market participants, replacing current contributions from the national competent authorities. The legal basis for setting up the ESAs (Article 114 TFEU) allows amending the funding system and collecting contributions from the industry.

29. The amendments provide that the revenue of the ESAs will now stem from three main sources: 1) a balancing contribution from the Union which may be up to 40% of the estimated revenues, 2) annual contributions from financial institutions supervised by NCAs channeled through those NCAs, 3) fees from entities that are subject to direct supervision (unchanged), 4) voluntary contributions by Member States and observers if the contribution does not cast doubt on the independence of the ESA, and 5) charges for publications and other services requested by NCAs.

30. The amendment to the balancing Union contribution from a fixed 40% to a maximum of 40% will allow the ESAs to increase their other sources of revenues. The annual contributions from financial institutions will be provided in a delegated act that should establish how the total amount of annual contributions are shared among the different categories of financial institutions, and criteria based on size to calculate the actual annual contribution. The delegated act may establish de minimis thresholds under which small financial institutions do not pay financial contributions or set minimum contributions.

III. Commission proposal amending Regulation (EU) No 1092/2010 (ESRB)

31. The ESRB proposal amends the current regulation but does not introduce significant changes to the current situation. It:

- makes permanent the ex officio chairmanship of the ESRB by the President of the ECB

- includes in the ESRB Regulation greater detail about the appointment and tasks of the head of the ESRB secretariat

- adds the SSM and SRB Chairs as voting members to the General Board (dropping the 2 Vice Chairs of the Advisory Scientific Committee, so the size of the Board remains the same)

- opens membership by national competent authorities to macroprudential and not just bank supervisory authorities

- deletes the list of stakeholders to be consulted, where appropriate, by the Advisory Scientific Committee (in particular, deleting the reference to consumer bodies)

- adds the SSM to the list of possible addressees of ESRB recommendations, and ensures all recommendations are transmitted both to the EP and to all the ESAs.

IV. Commission proposals amending sectoral legislation

IV.i Amendments to Regulation (EU) No 345/2013 on European venture capital funds (EuVECA), Regulation (EU) No 346/2013 on European social entrepreneurship funds (EuSEF) and Regulation (EU) No 2015/760 on European long-term investment funds (ELTIF)

32. The amendments introduce a direct supervision of European venture capital funds, European social entrepreneurship funds and European long-term investment funds by a single EU supervisor. ESMA is entrusted with centralising registration and authorisation, withdrawals of registrations or authorisations, ongoing supervision and investigatory and enforcement powers. A manager authorised under Directive 2011/61/EU (AIFMD) managing qualifying venture capital funds, social entrepreneurship funds or European long-term investment funds it to be supervised by ESMA for both compliance with EuVECA, EuSEF or ELTIF Regulations and compliance with the national law implementing the relevant requirements of the AIFMD of a Member State where the alternative fund manager is established. According to the proposal, ESMA shall charge fees directly to a manager that cover all administrative costs incurred by ESMA for its activities in relation to registration and on-going supervision of a manager and that are proportionate to assets under management of the funds concerned. ESMA is also tasked with developing a number of draft regulatory technical standards and draft implementing technical standards. As the transfer of powers from the national competent authorities to ESMA requires a necessary capacity building, a transition period of 36 months is proposed.

IV.ii Amendments to Regulation (EU) No 2014/600 on markets in financial instruments (MiFIR) and to Directive (EU) No 2014/65 on markets in financial instruments (MiFID II)

33. The Commission proposes to transfer the powers to authorise and supervise the data reporting service providers from the national competent authorities to ESMA by introducing new Articles 27a-27h in MiFIR and deleting Articles 59-66 in MiFID II. Specific amendments provide that ESMA and national supervisors in certain exceptional and well-defined cases could restrict or prohibit the marketing, sale or distribution of units or shares in UCITS or alternative investment funds. The proposal aims at ensuring that intervention powers are enforceable against all financial entities on the market, including fund managers. It is also proposed that ESMA charges fees to the data reporting service providers that cover all administrative costs incurred by ESMA and that are proportionate to the turnover of the providers. Supervisory and enforcement powers in the field of data reporting services providers are to be transferred to ESMA after a transition period of 36 months.

IV.iii Amendments to Regulation (EU) No 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment

funds

34. It is proposed that ESMA becomes a direct supervisor for administrators of critical benchmarks and of all benchmarks that are used in the Union but where an administrator is located in a third country. Article 20 stipulates that the Commission shall designate as critical benchmarks those, which are used as a reference for financial instruments or financial contracts or to measure the performance of investment funds with a value above EUR 500 billion. Article 30 states that the Commission may adopt equivalence decisions and that those are monitored on an ongoing basis. For this purpose, ESMA should conclude cooperation agreements with supervisory authorities of those countries. The college of supervisors for critical benchmarks (Article 46) is abolished as ESMA should ensure a Union-wide approach. It is proposed that ESMA charges fees to administrators that fully cover all administrative costs incurred by ESMA for its activities in relation to supervision and that are proportionate to the turnover of the administrator. A transition period of 36 months is put forward for the transfer of competences and duties related to the supervisory and enforcement activity from the national competent authorities to ESMA.

IV.iv Amendments to Regulation (EU) No 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market

35. The Commission proposes a direct supervision of certain prospectuses by ESMA, including prospectuses drawn up by third country issuers. The power to supervise the advertisements related to these prospectuses is also transferred to ESMA. Where ESMA is the competent authority, the prospectus shall be drawn up either in a language accepted by the competent authorities of each host Member State or in a language customary in the sphere of international finance. Article 29 sets rules for the acceptance of a prospectus approved in accordance with the laws of a third country where the Commission declares such national rules equivalent. For that purpose, ESMA shall conclude cooperation arrangements with supervisory authorities of those third countries. Article 43l establishes that ESMA charges fees directly to issuers, offerors or persons asking for admission to trading on a regulated market that fully cover ESMA's administrative costs in relation to the prospectus and that are proportionate to the turnover of those undertakings/persons. A transitional period of 36 months is foreseen with regard to the transfer of supervisory, investigatory and enforcement powers from the national competent authorities to ESMA.

IV.v Amendments to Directive (EU) No 2009/138 on the taking up and pursuit of the business of Insurance and Reinsurance (Solvency II)

36. The amendments to the Solvency II Directive relate to the new Article 21a in the EIOPA Regulation, which provides powers to EIOPA to issue an opinion to the NCAs concerned on internal models, the approval of internal models, and modifications to approved internal models, which the NCA must respect. A further specification of procedures is provided. In addition, a review clause in proposed to specifically deal with these new powers.

V. Non-exclusive selection of issues for further discussion

37. The European Parliament's Research Service concluded that the accompanying Commission's Impact Assessment "provides useful information on the functioning of the three ESAs in the context of increasing financial regulation in the EU. However, it does not provide a thorough assessment of the economic, social and environmental impacts of the policy options to tackle current problems, but rather a description of their respective advantages and disadvantages, based on internal desk research and quite varied feedback from stakeholders. The analysis lacks evidence-based substantiation and external sources, except for the section on the funding of the ESAs. Furthermore, its structure, split into one general and three specific parts, makes it unnecessarily difficult for the reader to see the whole picture (of the problems, objectives and options, including their assessment). In sum, it appears that the preferred option(s) have been determined to a large extent independently from the IA, which does not support them in a transparent and solidly evidence-based manner." The IIA on Better Law-Making (para 14) requires the Impact Assessment to facilitate the consideration made by the co-legislators of the choices made by the Commission.

38. How to strengthen the monitoring and enforcement of the application of Union law in the Member States?

39. Which path should the ESAs go in terms of supervisory versus regulatory powers? Is it possible to clearly distinguish between supervision and regulation? If yes, how? And should there be more differentiation in how regulatory and supervisory tasks are conducted?

40. Should the scope of the ESAs be broadened, kept the same or be narrowed? And if yes, to which extent, in which areas?

41. Should the issue of financial conglomerates be addressed?

42. How do the potential future ESAs' competences as proposed by the Commission in the PEPP Regulation and the EMIR Regulation interfere with the proposals on the ESA review?

43. Do the ESAs' possibilities for own initiatives need further framing and better accountability standards? If yes, how?

44. With more power comes greater accountability. How to render the new system more democratic and accountable to the European Parliament? Should the scrutiny role of the EP be strengthened? Should the ESAs be asked to report to the EP yearly on the basis of their work programme?

45. Should the ESAs, when performing their supervisory and regulatory functions and within the overall requirements and objectives set by the co-legislators explicitly pursue objectives in terms of efficiency of markets respecting their sectoral and regional specificities and the economic rationale as part of financial stability?

46. Are the powers given to the EP regarding the appointment or dismissal of the Chairs and the permanent Members in the proposed Executive Boards of the ESAs satisfactory? What should be the role of the EP in case of extension of the mandates?

47. Is there a clarification of competence necessary in the area of FinTech, sustainable finance

or consumer protection?

48. How should the governance and the role of the ESRB evolve?

49. How to combine good governance principles, high quality supervision and supervisory convergence with the necessity to avoid an excessive concentration of legislative, executive, and judicial tasks and powers within the ESAs? In that respect, what could be an appropriate distribution of responsibilities between the Board of Supervisors and the proposed new Executive Board?

50. How to most efficiently reduce divergence between national supervisory practices across the EU? How to strike the right balance and proportionality between the role of ESAs and national supervisors in particular with regard to promoting European interests and harmonised supervision versus day-to-day supervision, expertise in national markets and monitoring of application of national law? How to make the proportionality regime more effective?

51. With the increase of delegated acts, ESA RTS/ITS, ESA guidelines: Which lessons learnt does ECON have in terms of scrutinising delegated acts, RTS/ITS and guidelines? How may procedures be better organised and be made more transparent?

52. While acknowledging shortcomings of the current funding mechanism of ESAs, how to ensure that the proposed model would allow the ESAs to fulfil their tasks, act in accordance with the co-legislators' mandate and in an independent manner, and bring about fairness and transparency? How to keep the budget of the ESAs under control? Should there be a minimum threshold for the EU budget contribution? How to establish efficient budget control mechanisms?

53. What evolution should take place as regards the composition of stakeholders groups and their contribution to the decision making process? How to enable contributions already at an early stage of the processes? Should cost-benefit-analyses be improved, and if yes, how?

54. What are the pros and cons to allow for ESMA supervision of EuVECA/EuSEF/ELTIF? What would be the language regime for managers of these funds vis-a-vis dealings with ESMA?

55. How to evaluate the engagement of the ESAs in international bodies? How to further develop the role of ESAs in the regulatory and supervisory framework with third countries?