



Central Bank of Ireland response to the public consultation on the operations of the European Supervisory Authorities

I. Tasks and powers of the ESAs

A. Optimising existing tasks and powers

1 Supervisory convergence

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? Please elaborate on your response and provide examples.

The Central Bank recognises the importance of this work and the substantial progress that has been made by the ESAs in promoting greater supervisory convergence. The work so far has resulted in both success and limitations. The Central Bank's analysis of tools and powers in response to the following questions elaborates on this overall perspective.

2. With respect to each of the following tools and powers at the disposal of the ESAs:

- peer reviews (Article 30 of the ESA Regulations);
- binding mediation and more broadly the settlement of disagreements between competent authorities in cross-border situations or cross-sectorial situations (Articles 19 and 20 of the ESA Regulations)
- supervisory colleges (Article 21 of the ESA Regulations);

To what extent:

- a) have these tools and powers been effective for the ESAs to foster supervisory convergence and supervisory cooperation across borders and achieve the objective of having a level playing field in the area of supervision;
- b) to what extent has a potential lack of an EU interest orientation in the decision making process in the Boards of Supervisors impacted on the ESAs use of these tools and powers?

Please elaborate on questions (a) and (b) and, importantly, explain how any weaknesses could be addressed.

Peer Reviews:



Peer reviews have been effective in supporting identification of best practices, which can then be used for further policy work, particularly when reviewing cross border supervision and generally with regard to implementation of guidelines and technical standards. They enable NCAs to learn from each other and to adapt their processes accordingly. Peer reviews also provide a useful channel for discussion between NCAs on specific topics. They are particularly beneficial for new processes, especially where a process or procedure has optional or discretionary sections.

The peer review process itself could be improved. For example, a number of peer reviews have taken considerable time to complete and if critical issues are identified there may be significant time lag between the identification of risks and their resolution. The composition of peer review teams could also be considered. Other than introducing efficiency into the process, peer reviews could be usefully supplemented by the following:

- Within EIOPA there is an “Oversight and Supervisory Convergence Department” with a dedicated Supervisory Oversight Team. The team’s mandate is to drive the quality, consistency and convergence of supervision by bilateral engagement with NCAs on their supervisory practices. This approach could be further developed in EIOPA and also applied in the other ESAs.
- Currently there is limited follow-up by the ESAs of the recommendations and concerns arising from the Peer reviews. Existing procedures should be reviewed to develop an effective approach to monitor progress with the implementation of recommendations.
- As an alternative, or to complement the EIOPA approach, ESAs could conduct periodic reviews of supervisory approaches in individual Member States. Under this approach the findings would issue to the governing body of the NCA only. Therefore this would be similar to bilateral peer reviews which, from time to time, Member States arrange with each other to have carried out, in relation to certain elements of their supervisory practice.

Mediation

The Central Bank considers that there could be a more flexible framework for ESA involvement in settlement of disputes prior to the triggering of a formal mediation process. ESAs could, at their own initiative, require two or more competent authorities to work together to enhance supervisory practices.

Supervisory colleges

Generally, the Central Bank has found that supervisory colleges work well and make a considerable contribution to effective cross-border supervision. One point to highlight however is that ESAs have adopted a risk-based approach to their involvement in colleges and participate in those which are deemed most significant. The downside is that other colleges do not have the same level of oversight.

It is suggested that:



- With additional resources, ESAs could take part in all colleges and also be in a position to take a more proactive stance in identifying key issues and risks and in determining suitable actions to mitigate those risks;
- All ESAs could follow the process under development in EIOPA to create a portal to allow NCAs share college information;
- There should be a full understanding by college participants of the potential confidentiality challenges when third country authorities are involved.

Resolution perspective

ESAs, and in particular, the EBA and ESMA, have dual and sometimes conflicting roles in relation to supervision and resolution. A key principle of the relevant EU Recovery and Resolution directive and regulations is that where resolution and supervisory functions reside in one authority, operational separateness is required to ensure independent decision making by both functions. While the relevant legislative provisions apply to national authorities, the overarching principle is, to an extent, respected by the ESAs. It could however be further reinforced by adding a similar provision to the ESA regulations and changing some practices within the ESAs to ensure there could be no conflict of interest when taking decisions. In this regard, consideration could be given to providing ESA resolution committees with increased autonomy and the membership of mediation panels established to arbitrate between resolution authorities could be reviewed.

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.

See response to question 4.

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

The Central Bank advocates greater involvement by ESAs and host Member State NCAs in cross-border situations, in the case of authorisations of insurance undertakings, asset managers and investment firms. When these entities intend to operate mostly outside of their home Member State, an engagement process should be mandated to ensure that legitimate consumer protection concerns of the host Member State are fully considered during the authorisation process. In broad terms the consultation process would consist of an obligation on the home Member State to provide a comprehensive description of the application and invite the relevant host Member States to comment and express any reservations or objections to the granting of an authorisation. The objective is to ensure that in both authorisation decisions and subsequent supervisory judgements, the home

Member State is well informed of relevant considerations arising in host Member State markets. This would need to be without prejudice to the exclusive responsibilities of the home NCA to take and be accountable for authorisation and supervisory decisions.

There is already a somewhat similar procedure within EIOPA where the revision of the General Protocol includes a process which allows the home NCA interact and discuss issues with the host NCA(s) where an entity writes or intends to write material levels of cross-border business.

Any consultation process in relation to authorisations must nevertheless ensure that:

- Operational efficiency is maintained;
- The integrity of the decision making process within NCAs continues in order to ensure accountability. There cannot be any doubt about the decision maker in the context of authorisations;
- Other NCAs operate in a clearly advisory capacity only.

Where the cross-border character of the proposed authorisation is pan-European¹, the Central Bank believes that the relevant ESA should chair the consultation process referred to here.

2 Non-binding measures: guidelines and recommendations

5. To what extent are the ESAs tasks and powers in relation to guidelines and recommendations sufficiently well formulated to ensure their proper application? If there are weaknesses, how could those be addressed? Please elaborate and provide examples.

ESA guidelines are an important tool in building a single Rulebook. However, there are some weaknesses in the current approach. Firstly, it is not always evident whether a guideline, or a certain provision within guidelines, is:

- a guideline where compliance should be required; or
- a provision which is issued in the form of “guidance” in relation to that guideline.

This may sometimes cause problems and it could therefore be useful to introduce a distinction between guidelines with which NCAs / market participants are expected to comply and guidance on good practices. As a further suggestion, an NCA could be required to say that it is not in compliance with ESA Guidelines until such time as it does comply. The current position allows NCAs to indicate that they will comply and, while the NCA must specify a date for its compliance, a clear statement as to whether that Member State complies or does not comply is more transparent and avoids the potential for ambiguity.

¹ A financial service entity where it is not possible to proceed on the basis that its business is concentrated in a small number, e.g. two or three of the Member States.



3. Consumer and investor protection

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.

To date, except for matters dealt with by the Joint Committee (JC), consumer protection measures are pursued at an EU level on a predominantly sectoral basis. This sectoral approach to consumer protection creates a challenge in ensuring a coherent cross-sectoral consumer protection framework, for the consumers who avail of and need to understand those protections, for institutions that must comply with them and for cross-sectoral regulators who monitor and test that compliance.

The Central Bank advocates a cross-sectoral approach to consumer protection. While any discussion on cross-sectoral work by the ESAs must first acknowledge that Level 1 legislation is typically sectoral in nature, the Central Bank believes that there is a need for a clearer, stronger consumer protection framework at Level 1 with common rules across all financial services sectors. This would be underpinned by a clear legal basis within which the ESAs and competent authorities can carry out their work. In particular, the Central Bank suggests that:

- There is a need for comprehensive and consistent Level 1 measures that provide for an explicit consumer protection mandate covering all aspects of financial services across sectors. For example, there is no one single piece of legislation covering all aspects of the banking sector.
- The lack of aligned legislative provisions in sectoral legislation providing for the development of joint guidelines has in fact impeded the ability of the ESAs to apply guidelines across all sectors. This was the case, for example, when the Joint Committee of the ESAs developed cross-selling guidelines.
- In relation to definitions, there are differences in the same concepts between sectors. For example, the definition of “advice” in MiFID and IDD is similar but the Mortgage Credit Directive defines ‘advisory services’. Also, advice as it applies to the remainder of banking products is not defined at all. The treatment of “conflicts of interest” is similarly inconsistent with differing requirements across sectoral legislation.

The benefit of developing cross-sectoral consumer protection measures is apparent from policy developed by the Joint Committee. A good example is the cross-sectoral guidelines on complaints handling. These provide a clear and consistent complaints handling consumer protection framework, whereby a consumer making a complaint, against any of the financial institutions falling within the ESAs’ scope of action, is treated in the same way regardless of the type of institution. Therefore, a consumer can have the same expectations of how a complaint is handled by all institution types. Similarly, institutions operating across a number of sectors can apply a consistent complaints handling process and procedure across all of their business and educate all of their staff on the same requirements, thus reducing the possibility of compliance arbitrage within the same institution/group. The same efficiencies apply for cross-sectoral NCAs.



While the Central Bank recognises that it may sometimes be necessary to tailor consumer protection measures to the specific risks of a particular sector, we believe that all policy should be underpinned by common consumer protection goals, with flexibility allowed for additional sectoral requirements, where appropriate. To ensure that a coherent consumer protection framework is developed and maintained, the default position for all consumer protection policy should be that it is first developed on a cross-sectoral basis and then over-layered with requirements to address sectoral specificities. This will also limit incidences of regulatory arbitrage and increase consumers' familiarity and understanding of the consumer protections available to them.

Similarly, in the area of financial innovation, there is benefit to a cross-sectoral approach, proceeding from the starting point of how consumers engage with financial services. The JC has generated discussions on financial innovations, such as automation in financial advice tools and the use of Big Data by financial institutions. This has resulted in a common discussion on these issues, highlighting the sectors where innovations are more advanced and sign-posted possible future developments for other sectors.

However, notwithstanding the cross-sectoral work completed to date by the JC, it is restricted to only committing to three topics/projects at a given time, with those topics to cover both consumer protection and financial innovation. As such, the current model of the JC dealing with cross-sectoral issues is limited by its own capacity. The Central Bank therefore favours the approach of a single body responsible for cross-sectoral consumer protection.

The Central Bank sees merit in making provision for the establishment of a permanent secretariat to the JC which would develop and administer a prioritised Joint ESA work programme.

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? If you identify specific areas, please list them and provide examples.

In addition to our comments under Question 6, the Central Bank believes that a focus on the development of a consumer-centered culture needs to be promoted at an EU level on a cross-sectoral basis if there is to be confidence that all financial institutions offering services cross-border are providing equal and fair treatment to all customers. It is essential that financial institutions have the right culture in place if trust and confidence are to be maintained in financial services.

The Central Bank suggests that ESAs could be mandated to conduct studies on consumer harm generated specifically by cross-border single market activity and have the capacity to set off a formal warning process to the relevant NCA if/when it sees a pattern of harm.



4 Enforcement powers – breach of EU law investigations

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

The Central Bank has not identified a need to adjust the tasks and powers of the ESAs in order to facilitate their actions as regards breach of Union law.

5 International aspects of the ESAs' work

9. Should the ESA's role in monitoring and implementation work following an equivalence decision by the Commission be strengthened and if so, how? For example, should the ESAs be empowered to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving EU NCAs and third country counterparts? Please elaborate and provide examples.

There can be misunderstanding about the meaning of “equivalence” and where equivalence decisions sit within EU financial services law. Under that law, equivalence is an assessment undertaken by the Commission to ascertain whether a non-EU supervisory or regulatory framework is equivalent to the corresponding EU framework. The purpose is to allow authorities in the EU to rely on non-EU supervised entities' compliance with the equivalent third country framework.

It has been the Central Bank's understanding that equivalence can be revoked at any time by the Commission if countries fail to adhere to the standards and rules that it based its initial decision on. However, it is unclear what the exact process for revocation would involve since the Commission has yet to revoke any equivalence decisions.

While ESAs participate in the initial assessment of a country's framework for equivalence and, where required, also assess entities who apply for recognition to benefit from this equivalence, they do not monitor or supervise the non-EU entities or their domestic regulators directly.

The Central Bank considers that the roles of the Commission and the ESAs should be clarified and made more transparent. The ESAs powers should be expanded to include monitoring the ongoing compliance of equivalence decisions in third countries or the periodic review of equivalence.

Finally, the Central Bank notes that in the recent Commission staff working document on EU equivalence decisions, the Commission staff adopted the view that the ESAs already have the mandate to engage in specific monitoring tasks on equivalence. Therefore, widening of the ESAs tasks could potentially take place without the need for an amendment to the existing legislation.



6 Access to data

10. **To what extent do you think the ESAs powers to access information have enabled them to effectively and efficiently deliver on their mandates? Please elaborate and provide examples.**

11. **Are there areas where the ESAs should be granted additional powers to require information from market participants? Please elaborate on what areas could usefully benefit from such new powers and explain what would be the advantages and disadvantages.**

The financial crisis highlighted the need for uniform and consistent collection and exchange of data between national authorities and also EU supervisory authorities. However, the way in which the various reporting requirements have been introduced have led to inconsistency of approach, overlapping requirements and requirements which are not always fit for purpose.

The Central Bank believes that there is scope for a coordinated data management strategy and that the ESAs should have a role of coordinating, rationalising and standardising cross-sectoral reporting requirements and arrangements, to a degree consistent with maintaining the quality of the data within each sector. The ESAs should have an obligation to work together and with the ESRB to this end.

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

12. **To what extent would entrusting the ESAs with a coordination role on reporting, including periodic reviews of reporting requirements, lead to reducing and streamlining of reporting requirements? Please elaborate your response and provide examples.**

See response to question 11.

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

See response to question 11. A scoping study should be done to identify these areas.



8 Financial reporting

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? Please elaborate.

See response to question 15.

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

The Central Bank does not see any grounds to justify increased powers for ESAs in relation to financial reporting and auditing. The current system under which responsibility in these areas rests with independent bodies in individual Member States with a significant degree of interaction and co-operation at a European level works well.

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

1 Approval of internal models under Solvency II

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

The Central Bank of Ireland does not support granting EIOPA powers to approve internal models of cross border groups because approval of models is integral to the authorisation and supervision of insurance companies and this is a NCA competency. We support EIOPA having continued oversight and monitoring of models.

2 Mitigating disagreements regarding own funds requirements for banks

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



The Central Bank agrees that consultation with EBA should be mandatory prior to agreement by NCAs for new types of CET1 instruments. This would in any case amount to a codification of existing practice across most Member States. NCAs are unlikely to routinely ignore significant EBA concerns without a strong legal basis for proceeding, not least because of the reputational consequences both for the individual NCA and the issuing bank. The Central Bank considers the EBA concerns should always be a factor in the NCA deliberations, notwithstanding that those concerns might not drive the end decision.

In cases of strong disagreement on the eligibility of an instrument, the EBA already has the power to deny entry for the instrument onto the CET1 list and can identify non-compliant features in its CET1 Monitoring Report. These actions, combined with the various powers available to EBA under the EBA Regulation, are sufficient to address problems that come up in cases of strong disagreement. If EBA is not successful in an individual case or cannot get agreement by the EBA Board of Supervisors to exercise its powers, it is always open to COM to take matters further, ultimately to the ECJ.

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

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

C. Direct supervisory powers in certain segments of capital markets

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

The Central Bank supports an extension of the ESA mandates for direct supervision in a limited number of clearly determined cases. Key pan-European infrastructure providers are likely to be the best example. These would seem to be the strongest cases for direct supervision by ESAs and, based on that principle, a key activity in this regard is central clearing and possibly certain trading platforms/MTFs.

Other activities, such as the activities of data providers, could also be usefully supervised directly by ESMA, which could help contribute to data collection.

The case for direct supervision by ESAs of any investment funds or of investment banks is less clear. These should remain as sectors, which are matters for national oversight subject to appropriate convergence.

The Central Bank sees merit in exploring further the option of giving ESMA an enhanced role in coordination of a consultation process between home and host NCAs, in relation to the authorisation



of an investment fund, where its pan-European character adds to the complexity of this consultation process. This is related to our response to question 4.

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

Please elaborate on your responses to questions 19 to 21 providing specific examples.

II. Governance of the ESAs

Assessing the effectiveness of the ESAs governance

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.
23. To what extent do you think the current tasks and powers of the Management Board are appropriate and sufficient? What improvements could be made to ensure that the ESAs operate more effectively? Please elaborate.
24. To what extent would the introduction of permanent members to the ESAs' Boards further improve the work of the Boards? What would be the advantages or disadvantages of introducing such a change to the current governance set-up? Please elaborate.
25. To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be delegated powers to make certain decisions without having them subsequently approved by the Board of Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages? Please elaborate.

The Central Bank does not believe that there should be any change to the Board of Supervisors who should remain as the main decision-making body. Criticisms that the BOS focus too much on technical issues and too little on strategic and supervisory matters are not well founded. Moreover, the ESAs have very well worked out agenda management systems for working out the optimal use of Board time.

The Central Bank considers that the current arrangements in relation to the role and mandates of the Chairperson work effectively such that no change is necessary across all ESAs.

Stakeholder groups

26. To what extent are the provisions in the ESA Regulations appropriate for stakeholder groups to be effective? How could the current practices and provisions be improved to address any weaknesses? Please elaborate and provide concrete examples.

The Central Bank considers that the contributions from the Stakeholder Groups are not as useful as they might be because:

- consultation with these Groups generally results in advice which would in any case be provided to the ESAs from public consultations; and
- there can be misunderstanding, particularly by some industry representatives, as to the nature of their roles and given the value these representatives provide it is important that the mandates are clear from the outset.

The position could be improved if ESAs revised consultation practices to involve the stakeholder groups at an earlier stage in the development of Technical Standards and Guidelines or when considering some of the more complex issues in order to issue QAs. Additionally, the role of individual participants might be better defined in the Regulations.

In the case of ESMA, consultative working groups are appointed to individual standing committees. In principle this is a useful exercise but the practice could be improved through more regular engagement, including through the use of tele communications, particularly when issues are emerging and discussions are commencing at the standing committees.

III. Adapting the supervisory architecture to challenges in the market place

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



- 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?**

As set in our response to Question 6, the Central Bank advocates a cross-sectoral approach to consumer protection. The Central Bank believes that there is a need for a clearer, stronger consumer protection framework at Level 1 with common rules across all financial services sectors. This would be underpinned by a clear legal basis within which the ESAs and competent authorities can carry out their work. While each of the ESAs has a consumer/investor protection mandate the Central Bank believes that greater priority needs to be given to this mandate. Greater consolidation of the consumer protection mandates and powers, underpinned by greater cross-sectoral legislative powers could lead to better outcomes provided that the necessary resources and powers are also in place.

IV. Funding of the ESAs

- 29. The current ESAs funding arrangement is based on public contributions:**

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

Please elaborate on each of (a) and (b) and indicate the advantages and disadvantages of each option.

- 30. In your view, in case the funding would be at least partly shifted to industry contributions, what would be the most efficient system for allocating the costs of the ESA's activities:**

- a) a contribution which reflects the size of each Member State's financial industry (*i.e.*, a "Member State key"); or
- b) a contribution that is based on the size/importance of each sector and of the entities operating within each sector (*i.e.*, an "entity-based key")?

Please elaborate on (a) and (b) and specify the advantages and disadvantages involved with each option, indicating also what would be the relevant parameters under each option (*e.g.*, total market capitalisation, market share in a given sector, total assets, gross income from transactions etc.) to establish the importance/size of the contribution.



This is an important debate for all stakeholders. The Central Bank notes that any change to the current approach to funding, where Member State contributions are based on QMV, should consider concomitant changes to decision making structures so that the balance of the distributions of the financial services sector across the single market is also better mirrored in the policy making process.

- 31. Currently, many NCAs already collect fees from financial institutions and market participants; to what extent could a European system lever on that structure? What would be the advantages and disadvantages of doing so? Please elaborate.**

General question

- 32. You are invited to make additional comments on the ESAs Regulation if you consider that some areas have not been covered above. Please include examples and evidence where possible.**