Stockholm the 23rd of January 2018

Directorate-General for Financial Stability, Financial Services and Capital Market Union

Comments on the proposal of the European Commission for a review of the ESAs' frame work, COM(2017)536 by the Swedish Securities Dealers Association (SSDA) in addition to the comments from SSDA together with Finance Denmark and The Swedish Bankers' Association.

SSDAs identification number in the European Commission Register of interest is 7777147632-40

General comments

In September 2017 the European Commission published a regulation (COM (2917) 536) amending the regulation relating to the three European Supervisory Authorities as well as several complementing proposals. The Commission has invited interested parties to give their opinion on the proposal. The Commission will present a summary of the feedback received to the Parliament and Council so that the views can be part of the legislative debate.

The Swedish Securities Dealers Association (SSDA) represents the common interest of banks and investment firms active on the Swedish securities market. The mission of the SSDA is to maintain a sustainable, strong and efficient securities market in Sweden. The SSDA promotes members' views regarding regulatory, market and infrastructure related issues. It also provides a neutral forum for discussing and exchanging views on matters which are of common interest to its members.

The SSDA has established a close cooperation with other Nordic association through the Nordic Securities Association (NSA). The SSDA is also active on the European arena via the European Banking Federation (EBF) and the European Forum of Securities Associations (EFSA) and globally through the International Committee of Securities Associations (ICSA).

Any proposal for giving ESMA more direct powers should be preceded by careful consultations and impact assessments that shows a clear benefit of such change. The most important factor must be the European financial markets' capacity to effectively finance businesses and allocate savings. In this respect, the principles of subsidiarity and proportionality should be respected. In the opinion of the SSDA, the rationale for centralizing powers should be that ESMA can solve something that the national competent authorities (NCAs) cannot solve or that ESMA can solve it more efficiently or in a more coordinated and consistent manner than the NCAs.

Effective supervision should be exercised close to the respective market, taking the national market conditions, particularities and features into account. This includes, of course, national civil law. It is important to note that national financial markets in the EU and their national supervisory structures, for good reasons, are quite different. In our opinion, the granting of new direct powers should be limited to areas where there is a proven value or the need for a European approach is justified. National regional issues must be addressed first and foremost by national supervisory authorities who have better knowledge of the local markets and the need of issuers and investors and with whom market participants are used to interacting.

Regarding the proposals on giving ESMA more direct powers, we find it very unsatisfactory that those additional powers have not been subject to any direct consultations. The consultation from the Commission on ESAs did not cover direct supervision. It should not be regarded as a good legislative praxis to exclude stakeholders from providing valuable and in many cases necessary information in a legislative project. It could also be questioned whether it is in line with the Commission's 'Better Regulation agenda' to exclude consultations.

Supervision in the EU

A well-functioning integrated supervision in the EU is a prerequisite for a stable financial market capable of effectively financing businesses and allocate savings. It is therefore important that ESMA is given the opportunity and sufficient power to coordinate and to streamline the supervision of the single market. However, even if we support an increased focus on strengthening the single market, we believe that careful consideration must precede new measures, so that well-functioning national systems and local competences are not abandoned without further analysis.

It is important that directives and regulations are interpreted in a similar way for several reasons, partly to facilitate cross-border activities, but also to avoid regulatory arbitrage and issues of interpretation. Nonetheless, financial regulations must be interpreted and applied in the context of national regulations. This applies to most companies in the single market. It seems inaccessible to believe that one authority should be able to obtain sufficient knowledge to maintain the day-to-day supervision and dialogue with the entities on national issues as well as on EU issues.

Financing

The SSDA is sceptical to introduce huge and radical changes to the current funding system.

We concur that the funding level of ESMA should be stable. The funding issue is, however, not only a matter for ESMA, but also for the Member States. The system must ensure adequate transparency and proper accountability by the Member States. A change in the division of powers between national competent authorities and ESMA in conjunction with an expanded authority for ESMA to charge the industry seems to give the national authorities

less ability to influence the work within the ESMA. Normally the supervisory fees are governed by national law. In Sweden, the Government decides on the supervisory authority´s budget; thereby also how much of the budget the industry will be responsible for.

If a dual model is introduced where both ESMA and the national authorities are funded by the industry it is of outmost importance to clearly distinguish the responsibilities of the various authorities and clarify what the industry is paying for. This is a necessary requirement to achieve cost neutrality. Without clear limits or responsibilities there is a predominant risk of a diffuse fee base which in many respects resembles a tax. The legislator (Council and European Parliament) must ensure clarity at level 1 to avoid unpredictability. An institution must as an absolute minimum be able to understand at level 1 how much the institutions should contribute. It is too unpredictable to leave such measures to level 2. The ESAs themselves should, of course, not be able to decide their own budget. A real democratic control must be introduced with a transparent procedure. Furthermore, reliable checks and balances should also be introduced. Given this, we are very hesitant about such a development without a thorough analysis of its consequences for the national authorities and the industry.

As previously mentioned, we prefer the existing model which is simple and clear. By retaining the existing model, massive budget expansions of the ESAs are avoided.

Direct and additional competencies for ESMA

Amendments of coordinator function by ESMA in relations to order, transactions and activities with significant cross-border effects

Firstly, the background of this provision is not clear, rather the opposite. There is no evidence that ESMA can coordinate a market abuse investigation in a better manner than the NCAs. Furthermore, the text is far from clear and we are unsure which competencies are assigned to ESMA and the national supervisory authorities. In short, the value of the proposed power is not proven and the need for a European approach is not justified.

New structure of transaction reporting

According to the proposal, transaction reporting pursuant to Article 26(I) MiFIR should be direct to ESMA.

Reporting requirements currently pose a huge operational burden for our members. This burden should not be exacerbated so soon after MiFIRs reporting systems have been instituted. Our conclusion is that, for the time being, the need for a European approach is not justified.

Benchmark

The proposal to amend the Regulation (EU) No 2016/1011 on benchmarks means that ESMA should be the competent authority for all administrators of critical benchmarks (Article 40).

We considered that benchmarks that are critical in only one Member State should be authorized and supervised by the NCA because of the subsidiarity principle and the fact that the NCAs have critical local knowledge. Critical benchmarks that are of judicial importance cross-border could be under the supervision of ESMA.

Prospectuses

The Commission propose to transfer the approval of certain prospectuses from national competent authorities to ESMA, namely those regarding (I) admissions to qualified investor-only regulated markets to such specific segments thereof, (II) asset-backed securities, (III) "specialist issuers" (property, mineral, scientific research-based and shipping-companies, and (IV) non-EU third country issuers.

In the Explanatory Memorandum and the Impact Assessment accompanying the proposal, the Commission notes that ESMA´s existing convergence work has been unable to promote supervisory convergence and the landscape of prospectus approval requirements remains fragmented across the EU. Furthermore, the Commission states that there is also risk of a supervisory arbitrage as issuers might target NCAs which they consider less demanding to get an approval of the prospectuses. Another argument, from the Commission, is that many NCAs would have to hire prospectus readers with skills to deal with these relatively rare prospectuses. Finally, it is stated in the Impact Assessment accompanying the proposal that prospectuses falling in the above three categories are normally used to raise capital in several Member States, not only locally (page 177).

We find it very unsatisfactory that no consultation has preceded the proposal and that no serious analysis seems to be made of the number and type of issuers included in the proposal. According to our findings, many of the prospectuses included in the proposal are aimed for the national market without any cross-border impact or impact on small and medium sized enterprises (SME).

In our opinion, new rules should address problems that have occurred or is likely to do so. Many national regulators, among them Finansinspektionen in Sweden, have been able to build up experienced and competent teams with great experience in approving prospectuses. Those teams have knowledge of the market and relevant legislation, including company law. The local knowledge of company law is quite important as it is a non-harmonized field in the EU.

The proposal could mean that the responsibility for an important part of the Swedish capital market and the financing of companies is transferred to ESMA. An estimate is that the responsibility for approval of around 50 per cent of all prospectuses in Sweden would move to ESMA. A large part of those prospectuses is from smaller issuers and most of them are offered to the Swedish (or Nordic) market without any cross-border impact.

There are quite good possibilities even for SMEs to be listed on the Swedish market. There are marketplaces like First North, NASDAQ's European growth market, with around 260 listed companies and Aktietorget with over 160 listed companies, designed for small and growing companies. The market facilitates an efficient access to finance and funding with an exposure to the investor community. It is important to note that this is a local market with Swedish and Nordic investors. The language used is primarily Swedish and there are, as mentioned above, no real cross-border impact. For the companies listed on those marketplaces, the cost factor is extremely important as well as administrative efficiency. Some of those issues are quite small. In short, it is a delicate market that is extremely sensitive to costly and burdensome changes. We have understood that one of the Commission's priorities in the Capital Market Union is to create a friendly environment for SMEs in the EU. An environment with access to finance and to listing on marketplaces. Against this background we are quite surprised, to put it mildly, by the proposal to move the approval process to Paris (ESMA).

It is quite efficient for an issuer to choose (if the issuer so desires) to have the regulator in the same country as the marketplace where the issuer most frequently lists its bonds, notes or shares. This can minimize the number of comments on the submitted documents and provide for a more efficient and streamlined process and we believe this aspect is part of the issuers' decision-making process when deciding on home member state. It is our experience that those two entities can coordinate their timing, so the issuers can better plan and estimate time to market. This is very important to issuers. An issuer would lose this with a regulator in one jurisdiction and a stock exchange in another. Furthermore, through the scrutiny and approval of prospectuses, the NCAs get knowledge about the issuers in the national market. Such knowledge contributes to a well-function supervision.

An important aspect is the ability of ESMA to deliver a smooth transition to approving prospectuses at the same level of efficiency (speed, predictability and cost) as the most efficient NCA. We have severe doubts. ESMA has not had this responsibility before which would require time and resources to build the necessary expertise. Such transition would therefore involve significant budgetary and human resourcing implications, including recruiting legal, linguistic, sectoral and market experts. In our opinion the cost of bringing ESMA up to speed will surely outweigh the benefits of having ESMA in charge. It should be noted that many of those prospectuses have no cross-border impact, the prospectuses are aimed at the local market for small and medium sized firms. We believe without the knowledge of the local market, the approval process could be costly and time-consuming for those companies. One questions which lacks answer in the proposal is which language should be used. There should not be a requirement to translate prospectuses to English to be approved by ESMA if the prospectus is only offered in one Member State.

In our opinion, it would be irresponsible to move national prospectuses, with no or quiet limited cross-border connection, from the NCAs to ESMA. Such transfer could have severe

negative impact on the function of the national securities markets and the financing of SMEs. The proposals should therefore be withdrawn by the Commission. If the Commission would want the transfer of some prospectuses to ESMA, such proposal should be preceded by a reliable analysis and impact assessment and a proper consultation.

To summarize, there is no added value of the proposal and the need for a European approach is not justified.

Transparency

We strongly encourage the lawmakers to focus on how the transparency of the work of ESMA can be increased. In our opinion, more transparency would significantly increase the quality of ESMA's work and thereby be beneficial for all stakeholders.

Increased transparency should apply to all members of stakeholder groups, consultative groups, etc. It is necessary for members of those groups, tasks forces and other forms of working groups to be allowed to consult and discuss with colleagues outside those groups. That would increase the quality of the stakeholder's groups' discussions and ultimately lead to better regulatory outcomes.

ESMA should involve all interested parties more in the rulemaking process on an ongoing basis. This requires the following of ESMA, an 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 ESMA. It is also important that the NCAs should not be prohibited or limited in discussing drafts from the ESMA with interested parties, since those parties can provide necessary and valuable input to questions at stake.

A well-developed transparent rulemaking process is key as well as realistic implementation deadlines. The EU's legislators must always ensure that there is sufficient time to prepare the level 2 and 3 texts, as well as sufficient time between the finalisation of level 2 and 3 texts and the date when they enter into force. It should be considered whether dynamic implementation dates can be used that would be subject to the timing of finalising level 2 and 3 measures and their implementation. Too short implementation deadlines lead to unsatisfactory implementation processes and entail heavy and expensive administrative burdens as well as the risk of distortion of competition.

Question and Answers

The Commission's draft does not address any issues relating to ESMA's Question and Answers (Q&A). In our opinion, clarifications and improvements are urgently needed. Firstly, it should be clearly stated that Q&As are not legal binding. Furthermore, we propose a more strongly regulated process for issuing Q&As that provides the necessary transparency about the development of this vvery important instrument. It should be a more transparent procedure with the possibility for ESMA and the NCAs to discuss draft answers directly with market participants and other interested parties.

Guidelines and recommendations

The proposed scrutiny of stakeholder groups is a step in right direction, but not enough. There should be a general possibility to question guidelines and recommendations in a court to provide legal protection. Appeals should be handled by the ESA Board of Appeal instead of the Commission.

No action letters

We have several times raised the possibility to introduce a mechanism like the so-called no-action letters used by certain non-EU financial authorities, for example the US authorities. Such possibility could give financial markets in the EU some needed flexibility when financial institutions are faced with implementation challenges and will not be able to comply with the rules on the day of application. An example to support this argument is the EMIR variation margin foreign exchange requirement where the ESAs had to publish a statement inviting the national authorities to show understanding in the enforcement of a rule while highlighting that they legally cannot allow for the postponement of the enforcement. Furthermore, there is no discussion about the possibility to create so-called regulatory sandboxes for the ongoing development of financial services during a grace period. In the opinion of SSDA, the Commission should start the work on a forthcoming proposal of a European solution and it should be done without delay. SSDA gives its full support to the initiative from ISDA, AFME, EFAMA, FIA and EBF for a form of regulatory forbearance for the ESAs.

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