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Review of the European Supervisory Authorities

12 recommendations

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In January 2011, the European Union established three European Supervisory Authorities (ESAs) for the financial sector (EBA in London/ EIOPA in Frankfurt/ ESMA in Paris).

► So far, the ESAs have played less a supervisory role than a regulatory role, focussed more on technical measures specifying the often abstract legislation adopted by the EP and the Council.
► These measures may be binding technical standards or non-binding guidelines or recommendations. They are of great importance, both to financial and non-financial industry.
► Currently, the European Commission is reviewing the regulations governing the three ESAs and will bring forward its proposals for amendments.
► This cepInput entails 12 recommendations to policymakers for improving the ESAs' work.

Under the title "Twelve recommendations for the ESA review", an updated version of this paper has been published in the "Law and Financial Markets Review".

Recommendations

Recommendation 1:	Deadlines for ESA drafts on regulatory technical standards (RTS) and implementing technical standards (ITS) should depend on the entry into force of the basic legislative act.
Recommendation 2:	There is no need for a formal change of the ESAs' powers to issue guidelines and recommendations since the scope of the ESAs' actions is sufficiently confined and legal protection is given. We see room for discussions on the national level on whether or not to comply with those non-binding guidelines and recommendations.
Recommendation 3:	If the ESAs are to seriously detect breaches of EU-law, they must be given more staff and more data-gathering rights. Serious incentive problems, inherent to the ESAs' governance remain, however.
Recommendation 4:	The ESAs' emergency procedure should be revised. The Commission – in addition to the Council – should be granted the right to declare an emergency situation.
Recommendation 5:	Despite the revision of the EBA Regulation in July 2014, the EBA's procedures do not guarantee a steady state relation between Eurozone states and non-Eurozone states. It is hence necessary to carefully monitor whether the behaviour of national competent authorities and the European Central Bank in the EBA's Board of Supervisors endangers the internal market.
Recommendation 6:	The ESAs' competence to issue consumer warnings should be maintained.
Recommendation 7:	The ESAs' mandate to temporarily ban financial activities does not cover consumer protection purposes. This mandate should not be converted into a self-standing empowerment.
Recommendation 8:	Keep in mind that, hitherto, the ESAs' main consumer protection activities have taken place on level 2. EP and Council should formulate clearer ESA mandates.
Recommendation 9:	Where consumer protection issues are affected, facilitating the involvement of national consumer protection authorities might be useful and improve and better legitimate ESAs' work.
Recommendation 10:	The national bias in the ESAs should be downsized. This can be done by adding non-national members to the ESAs' Boards of Supervisors or by installing a European Central Bank-like permanent Executive Board of non-national members in addition to the national representatives in the Boards of Supervisors.
Recommendation 11:	ESAs' work should be financed by a mix of public and private funds.
Recommendation 12:	Thought should be spent upon granting direct bank supervision powers for the Eurozone to the EBA replacing the European Central Bank.

Empfehlungen

Empfehlung 1: Fristen für Entwürfe der technischen Regulierungsstandards und Durchführungsstandards der Europäischen Aufsichtsbehörden (European Supervisory Authorities, ESAs) sollten vom Inkrafttreten des zugrundeliegenden Gesetzgebungsakts abhängen.

Empfehlung 2: Die Befugnis der ESAs zum Erlass von Leitlinien und Empfehlungen braucht nicht geändert zu werden, da sie hinreichend bestimmt und Rechtsschutz gegeben ist. Auf nationaler Ebene sehen wir Raum für Diskussionen darüber, ob diese Leitlinien und Empfehlungen befolgt werden sollten.

Empfehlung 3: Damit die ESAs Verstöße gegen EU-Recht ernsthaft erkennen und beenden können, brauchen sie mehr Personal und mehr Informationsrechte. Die mit der ESA-Governance verbundene Anreizproblematik bleibt dadurch aber ungelöst.

Empfehlung 4: Das Verfahren der ESAs zum Erlass von Maßnahmen im Krisenfall sollte geändert werden. Die Kommission sollte zusätzlich zum Rat das Recht erhalten, einen Krisenfall festzustellen.

Empfehlung 5: Das Verhältnis zwischen Eurostaaten und Nicht-Eurostaaten in der Europäischen Bankaufsichtsbehörde (EBA) erscheint trotz Überarbeitung der EBA-Verordnung im Juli 2014 nicht stabil. Es sollte überwacht werden, ob die nationalen Aufsichtsbehörden und die Europäischen Zentralbank durch ihr Verhalten in der EBA den Binnenmarkt gefährden.

Empfehlung 6: Die Befugnis der ESAs zur Abgabe von Warnungen für Verbraucher sollte beibehalten werden.

Empfehlung 7: Die ESAs können ein vorübergehendes Verbot bestimmter Finanzaktivitäten nicht mit Verbraucherschutz begründen. Die Befugnis zum Erlass eines solchen Verbots sollte nicht in eine eigenständige Befugnis umgewandelt werden.

Empfehlung 8: Da die wichtigen ESA-Entscheidungen über Verbraucherschutz bisher auf Level 2 getroffen werden, ist es wichtig, dass Rat und EP den ESAs deutlichere Mandate aussprechen.

Empfehlung 9: Sind Verbraucherschutzfragen betroffen, wäre eine bessere Beteiligung nationaler Verbraucherschutzbehörden hilfreich und würde die Arbeit der ESAs im Verbraucherschutz verbessern und ihre Legitimation erhöhen.

Empfehlung 10: Nationale Standpunkte sollten die ESA-Arbeit weniger verzerren. Dazu könnten dem Rat der Aufseher EU-Vertreter hinzugefügt werden oder zusätzlich zum Rat der Aufseher ein Gremium mit EU-Vertretern ähnlich dem Direktorium der Europäischen Zentralbank eingeführt werden.

Empfehlung 11: Die Arbeit der ESAs sollte aus öffentlichen und privaten Mitteln zugleich finanziert werden.

Empfehlung 12: Es sollte überlegt werden, ob die EBA die Aufgaben der direkten Bankenaufsicht in der Eurozone von der Europäischen Zentralbank übernehmen sollte.

CONTENT

1 Introduction

In the light of the financial crisis since 2008, the European Union (EU) wanted to establish "a more efficient, integrated and sustainable European system of supervision"[1]. The result was a new European System of Financial Supervision (ESFS), in place since January 2011. It consists of the three European supervisory authorities (ESAs)[2], i.e. the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), working within a network of national competent authorities (NCAs), the Joint Committee of the ESAs (JC)[3] and the European Systemic Risk Board (ESRB)[4].

Until recently, the establishment of the ESAs was subject to a heated discussion, questioning their compatibility with EU law. Meanwhile, the ruling of the European Court of Justice (ECJ) on the ESMA's power to ban short selling in exceptional circumstances pursuant to Article 28 of the short selling Regulation[5] and Article 9 (5) of the ESMA Regulation has clarified the situation.[6]

The ECJ rejected all four arguments brought forward by the United Kingdom (UK) in its action. First, the UK was of the view that ESMA's intervention powers breached the ECJ's Meroni principles, according to which powers with a wide margin of discretion cannot be conferred to an entity which is not foreseen in the Treaties. The ECJ judged the ESMA's intervention powers to be sufficiently "circumscribed by various conditions and criteria which limit ESMA's discretion"[7].

Second, the UK argued that ESMA's intervention powers breached the ECJ's Romano principle, according to which an "administrative commission" may not be empowered to adopt acts having the force of law. The ECJ recalled that the TFEU institutional framework expressly permits EU bodies, offices or agencies to adopt acts of general application.

Third, the UK argued that the legal framework on delegated and implementing acts in Article 290 and Article 291 TFEU allow for the conferring of delegated and executive powers to the EU-Commission only. The ECJ pointed to the fact that a number of TFEU provisions presuppose the possibility of conferring powers on a Union body, office or agency.

Fourth, the UK considered that the short selling Regulation could not be based on the internal market competence (Article 114 TFEU) to the extent that it allowed ESMA to adopt decisions directly addressing natural or legal persons.[8] The ECJ judged that the EU legislature had discretion regarding the most appropriate method of harmonisation. It added that "measures for the

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[1] Report COM(2014) 509, p. 2.
[2] The ESAs were established by the ESAs Regulations, i.e. Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.
[3] The JC (Article 54 et seq. of ESAs Regulations) is a forum in which the ESAs cooperate regularly and ensure cross-sectoral consistency. It is composed of the Chairpersons of the ESAs and, where applicable, of the Chairpersons of any Sub-Committee to the Joint Committee.
[4] The ESRB was established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system an establishing a European Systemic Risk Board.
[5] Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.
[6] ECJ, Case no C-270/12, judgment of 22 January 2014.
[7] ECJ, Case no C-270/12, recital 45.
[8] At the time, CJE, Case no 217/04 (ENISA), judgment of 2 May 2006, recital 46 et seq. had confirmed Article 114 TFEU as appropriate legal basis only for agencies with coordinating and advisory tasks.

approximation" as a policy instrument of the EU's internal market competence[9] include the EU legislator's power to provide for individual measures relating to specific products or classes of products.[10]

All in all, the ECJ's judgement paves the way for a further development of ESA competences.

The ESAs Regulations[11] include a review clause that requires the Commission to publish a general report on the experience acquired as a result of the operation of the ESAs and their procedures by 2 January 2014 and every three years after.[12] Following a public hearing[13] in May 2013 and a public and a targeted stakeholder consultation from April to July 2013[14], the Commission published its report on the ESAs on 8 August 2014.[15]

This policy contribution identifies the potential for improvement for six aspects of the ESAs work. For each aspect, we analyse the Commission's ideas for further development and give recommendations as to the further development of the ESAs.

2 The ESAs' Regulatory Role

2.1 A Short Briefing: The ESAs' regulatory technical standards, implementing technical standards and guidelines and recommendations

The ESAs' regulatory work comes in the form of legally binding regulatory technical standards (RTS)[16], of legally binding implementing technical standards (ITS)[17] and of legally non-binding guidelines and recommendations[18].

Where the European Parliament (EP) and the Council delegate power to the Commission to adopt a **RTS** (in order to ensure consistent harmonisation) or an **ITS** (to determine conditions of application) in the field of financial market regulation[19], the competent ESA may develop the draft. It shall then submit it to the Commission, which decides upon endorsing the draft within three months. Without prior coordination with the competent ESA, the Commission may not change the content of a draft. An RTS or ITS shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based. They are adopted by the commission as delegated acts pursuant to Article 290 TFEU (for RTS) and or as implementing acts pursuant to Article 291 TFEU (for ITS) and in the form of binding regulations or decisions. In case of RTS only, the EP and the Council may hinder the entry into force by revoking the delegation or with a negative vote within a period defined by the basic legislative act.[20,21]

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[9] Article 114 TFEU.
[10] Unlike the ECJ, the Advocate General Jääskinen considered in his Opinion that the Regulation on short selling had to be based on Article 352 TFEU instead of Article 114 TFEU.
[11] See above, footnote 2.
[12] Article 81 of the ESAs Regulations.
[13] http://ec.europa.eu/internal_market/conferences/2013/0524-financial-supervision/index_en.htm.
[14] http://ec.europa.eu/internal_market/consultations/2013/esfs/index_en.htm.
[15] Report COM(2014) 509 from the Commission to the European Parliament and the Council of 8 August 2014 on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS).
[16] Article 10 of the ESAs Regulations.
[17] Article 15 of the ESAs Regulations.
[18] Article 16 of the ESAs Regulations.
[19] The scope of these ESAs' actions is confined to the pieces of legislation mentioned explicitly in Article 1 (2) of the ESAs Regulations.
[20] Article 290 (2) TFEU.
[21] Pursuant to the common understanding between the EP, the Council and the Commission, this period should in principle be of two months, extendable by two months at the initiative of the EP or the Council.

With a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of EU law, the ESAs shall issue **guidelines and recommendations** addressed to NCAs or financial institutions/financial market participants. Guidelines and recommendations are non-binding. However, the ESAs Regulations provide for a so-called comply-or-explain mechanism. The NCAs and financial institutions/financial market participants must make every effort to comply with the guidelines and recommendations. If the NCAs do not comply, they must inform the competent ESA stating its reasons within two months of the issuance of a guideline or a recommendation. The financial institutions/financial market participants must only report, in a clear and detailed way, whether they comply with that guideline or recommendation, if required by that guideline or recommendation.

Guidelines and recommendations have a large practical impact: The NCAs follow them in most cases. One reason might be that the ESAs have to publish the NCAs' non-compliance or intention not to comply with a certain guideline or recommendation.[22] Another reason, probably playing a role for financial institutions/financial market participants as well, might be that guidelines and recommendations have an indirect effect through case-law because the courts use the ESAs' guidelines and recommendations to interpret binding law.[23]

2.2 The Commission's intentions

The Commission wants to make sure that in the future, the **deadlines for** submission of **draft RTS and ITS** to the Commission by the ESAs will depend on the entry into force of the basic legislative act. Moreover, those deadlines should be appropriate by providing the ESAs with sufficient time to carry out public consultations.

Also, the Commission wants the ESAs to enhance the transparency of the regulatory process. They should ensure a high quality cost-benefit analysis including an **analysis of impacts on stakeholders and Fundamental Rights.**

The Commission pursues **no changes relating to** the ESAs **guidelines and recommendations.** It does mention "some uncertainties"[24] uttered by stakeholders concerning the scope and the nature of those guidelines and recommendations. In particular, stakeholders requested further clarity on the possibility of challenging the ESAs' guidelines and recommendations at the EU level.

While no judgement of the European Court of Justice (ECJ) on this aspect of the ESAs Regulations exists so far, the Commission is of the view that the ESAs' guidelines and recommendations "should be subject" to an action for annulment pursuant to Article 263 (1) TFEU before the ECJ to the extent they" are intended to produce legal effects vis-à-vis third parties".[25]

The Commission notes that stakeholders and the ESAs themselves support an increased involvement of the ESAs in the preparation of level 1 financial services legislation.

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[22] See also Lehmann/Manger-Nestler, Das neue Europäische Finanzaufsichtssystem, Zeitschrift für Bankrecht und Bankwirtschaft (ZBB) 1/11, p. 2 (12).
[23] Alexander Frank, Die Rechtswirkungen der Leitlinien und Empfehlungen der Europäischen Wertpapier- und Marktaufsichtsbehörde, 1. Auflage 2012, Nomos Verlagsgesellschaft Baden-Baden, p. 171.
[24] Report COM(2014) 509., p. 5.
[25] Report COM(2014) 509, p. 5 et seq.

2.3 cep recommendations 1 – 2

Recommendation 1:	*Deadlines for ESA drafts on RTS and ITS should depend on the entry into force of the basic legislative act.*

We find it very helpful to introduce deadlines for submission by the ESA of **draft RTS and draft ITS** to the Commission that depend on the entry into force of the basic legislative act. This is all the more true as it is difficult to anticipate the duration of the legislative process concerning a specific dossier.[26] Furthermore, this would allow for sufficient time for public consultations and for preparing draft regulatory standards of a high quality.

Recommendation 2:	*There is no need for a formal change of the ESAs' powers to issue guidelines and recommendations since the scope of the ESAs' action is sufficiently confined and legal protection is given.* We see room for discussions on the national level on whether or not to comply with those non-binding guidelines and recommendations.

The ESAs' competence to issue **guidelines and recommendations** is a useful instrument. Given a correct interpretation of the ESAs Regulations and judging the degree of legal protection to be sufficient, we see no need for amendments relating to the ESAs' power to issue guidelines and recommendations.

First, given a correct interpretation of Article 16 (1) of the ESAs Regulations, the principle of legal certainty and the "essential elements principle" are respected.

The principle of legal certainty deriving from the rule of law "requires that rules imposing charges [...] must be clear and precise so that [individuals affected] may know without ambiguity what are [their] rights and obligations and may take steps accordingly.[27]

At the moment, Article 16 (1) of the ESAs Regulations is interpreted in three ways:

- First, there is the narrow interpretation that the ESAs are allowed to issue guidelines and recommendations only when the specific legislative act refers to Article 16 of the ESAs Regulations. This interpretation is invalid because it is incompatible with the wording of the law: Article 16 (1) of the ESAs Regulations obviously does not require any additional referral to itself.
- Second, there is the broader interpretation that the ESAs are allowed to issue guidelines and recommendation where these are to establish consistent, efficient and effective supervisory practices within the ESFS **or** to ensure the common, uniform and consistent application of Union law. This interpretation is unconvincing as well because the wording of Article 16 of the ESAs Regulations provides for the term "and".
- Third, there is the interpretation that the ESAs are allowed to issue guidelines and recommendations where these are to establish consistent supervisory practices in areas which are governed by EU law, i.e. that there must be a sort of general hook in the EU law for the ESAs' guidelines and recommendations.

[26] There are already proposals of the Commission that provide for such flexible deadlines, for instance Proposal COM(2012) 280 for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010.

[27] CJE, Case no 169/80 (Gondrand Frères), judgment of 9 July 1981, recital 17.

The third interpretation convinces and is compatible with the principle of legal certainty. Not only does it respect the wording of Article 16 (1) of the ESAs Regulations. It also complies with Recital 26 of the ESAs Regulations stating that the ESAs may issue guidelines and recommendations "on the application of [EU] law".

Pursuant to the third interpretation, Article 16 (1) of the ESAs Regulations states hence clearly and precisely that the ESAs may establish consistent supervisory practices only when EU law is involved.

The "essential elements principle", determining that essential elements of harmonising measures must be determined in the basic legislative act, implies that EU-rules must establish "detailed rules for making decisions at each stage of a procedure and [determine] and [circumscribe] precisely the powers of the body taking deciding".[28,29]

The CJE considers provisions as *essential* "which are intended to give concrete shape to the fundamental guidelines of Community policy".[30,31] Assuming the narrower perspective that the "essential elements principle" protects fundamental rights which might be affected in the first place by guidelines and recommendations addressed directly to financial institutions/financial market participants, the degree of detail of decision-making rules must increase with the intensity of the intervention.[32] Applying the third interpretation above, Article 16 (1) of the ESAs Regulations is compatible with the "essential elements principle" even in the narrower sense. It takes into account in a balanced way the specific nature of the ESAs' guidelines and recommendations: on the one hand, they are legally non-binding and their intensity is hence, from a formal point of view, not very high. On the other hand, they have a large practical impact. Thus, the ESAs scope of action is not unnecessarily narrowed (as by the first interpretation) and it is made sure that the ESAs cannot intervene in sectors remaining in the national competence (as by the second interpretation).

Second, the possibilities to obtain legal protection regarding the ESAs' guidelines and recommendations are sufficient: any binding decision that an NCA takes on the basis of an ESA's guideline and recommendation can be subject to judicial review at national level and the ESAs' guidelines and recommendations can be reviewed directly by the ECJ in exceptional circumstances.

On the national level, there is no doubt that financial institutions or financial market participant can challenge before national courts any binding decision that an NCA takes on the basis of an ESA's guideline or recommendation. Where necessary to give judgment, the national courts *may* or, if there is no judicial remedy under national law, *must* refer the case to the European Court of Justice (ECJ) under the preliminary ruling procedure pursuant to Article 267 TFEU.

On the EU level, the issue is more complex. The ESAs Regulations do not provide for specific remedies against the ESAs' guidelines and recommendations. The provisions on appeals and on actions

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[28] CJE, Case no C-66/04 (smoke flavourings), judgment of 6 December 2005, recital 47 et seq.
[29] It has to be noted that this case relates to implementing powers conferred on the Commission. There are different views on the question whether the ECJ's findings can be transferred to delegations of powers to agencies. Pro : Fischer-Appelt, Agenturen der Europäischen Gemeinschaft, 1999, Duncker und Humblot, Berlin, p. 114; contra: Möllers, Durchführung des Gemeinschaftsrechts – Vertragliche Dogmatik und theoretische Implikationen, Europarecht 2002, p. 483 (494 et seq.).
[30] CJE, Case no 240/90 (sheepmeat), judgment of 27 October 1992, recital 37.
[31] Fischer-Appelt, Agenturen der Europäischen Gemeinschaft, 1999, Duncker und Humblot, Berlin, p. 114, argues that this wide perspective applies only to the agricultural sector due to its particularities.
[32] Callies/Ruffert, EUV/AEUV, Kommentar, 4. Auflage 2011, Verlag C.H. Beck München, Article 52 GRCh, recital 62.

before the ECJ as foreseen in Article 60 and 61 of the ESAs Regulations only apply for the ESAs' decisions, which are legally binding.

The central issue is that an action for annulment before the ECJ according to Article 263 TFEU is only admissible if the subject matter of the action produces external binding legal effects. Despite their large practical impact the ESAs' guidelines and recommendations remain, however, formally non-binding. Both the ESAs Regulations provide for a comply-or-explain mechanism only[33] and Article 288 (5) TFEU states that recommendations "have no binding force".

The path for legal protection regarding ESA guidelines and recommendation is set out by the ECJ in its Olivieri judgement. [34] In *Olivieri*, the Commission received an opinion by an expert committee. The opinion did not bind the Commission, which according to secondary EU law[35], had the right to diverge from this opinion in its final (and binding) decision, under the condition that it gave a "detailed explanation for the reasons for the differences".

In its judgement, the ECJ made clear that an application for annulment of preparatory acts (here: the expert committee's opinion) whose purpose is to prepare for the final decision (here: of the Commission), is not admissible. Annulment may be applied only for the binding decision by the Commission.

Applying *Olivieri* to the ESAs' guidelines and recommendations,[36] these should be seen as preparatory acts preparing for the NCAs' final binding decisions only. As the Commission, the NCAs may comply or explain. Application for annulment is hence admissible only vis-à-vis the NCAs' final decisions and not against the ESAs' guidelines and recommendations.

In exceptional cases, a legal action on EU-level should be admissible, if guidelines or recommendations already provide for the final decision of the NCAs.[37,38] However, the practical relevance of this argument is not evident.

Supervisory practice shows a very low level of non-compliance by the NCAs with the ESAs' guidelines and recommendations. On occasions, this has led to criticism in the sense that these non-binding guidelines and recommendations have been given a much larger importance as – de facto – they very often become binding. We argue therefore that there is room for more discussion on the national level, following the decision-making in the ESAs on these instruments. Such national transparency would preserve the ESAs' independent character while at the same time enabling a legitimate national discussion on whether or not to convert a non-binding guideline or recommendation in binding national law.

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[33] Lehman/Manger-Nestler, Das neue Europäische Finanzaufsichtssystem, Zeitschrift für Bankrecht und Bankwirtschaft (ZBB) 1/11, p. 2 (13).
[34] General Court, Case T-326/99, Olivieri v European Commission, 18 December 2003, point 51 et seq., referring to CJE, Case C-60/81, IBM v European Commission, 11 November 1981.
[35] Article 10 (1) of the Council Regulation (EEC) No 2309/93 of 22 July 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products.
[36] Dissenting: Sasserath-Alberti, Aufgaben und Befugnisse von EIOPA: Möglichkeiten und Grenzen der Leitlinienbefugnis nach Article 16 EIOPA-Vo, in: Dreher/Wandt, Solvency II in der Rechtsanwendung 2013, 1. Auflage 2014, Verlag Versicherungswirtschaft GmbH Karlsruhe, S. 129 (143).
[37] Alexander Frank, Die Rechtswirkungen der Leitlinien und Empfehlungen der Europäischen Wertpapier- und Marktaufsichtsbehörde, 1. Auflage 2012, Nomos Verlagsgesellschaft Baden-Baden, p. 208 et seq., referring to CJE, Case C-135/92, Fiskano AB v European Commission, 29 June 1994.
[38] According to Sonder, Rechtsschutz gegen Maßnahmen der neuen europäischen Finanzaufsichtsagenturen, BKR, p. 8 (p. 11), the fundamental right of effective judicial protection might include the right to challenge measures that are legally not binding if the ESAs' guidelines or recommendations themselves cause perceptible de facto disadvantages.

3 The ESAs' Supervisory Role

3.1 A short briefing: the ESAs' powers relating to breaches of EU law[39], emergencies[40] and mediation[41]

The ESAs may investigate alleged breaches or non-applications of the provisions of a number of EU financial market rules.[42] They may then address a recommendation and eventually a formal opinion to the NCA concerned setting out the action necessary to comply with EU law. In case the NCA concerned does not comply with this formal opinion, the ESAs may, only where the relevant requirements are directly applicable, address an individual decision to a financial institution/financial market participant requiring it to take the action necessary to comply with EU law. The EBA (only) shall install a panel preparing decisions on breaches of EU law for the EBA's Board of Supervisors.[43] The panel consists of the EBA's Board of Supervisors' Chairperson and six representatives of NCAs which are not involved in the potential breaches[44]

Where the Council declares an emergency situation, the ESAs may require the NCAs to take specific actions as to ensure the orderly functioning and integrity of financial markets or the stability of the EU financial system. The scope of this ESAs' power as well is confined to a number of EU financial market rules.[45] In case the NCA concerned does not comply with the ESAs' requirement, the latter may address a decision to a financial institution/financial market participant requiring it to take the action necessary.[46]

The ESAs may act as a mediator[47] in the case of disagreements between NCAs in cross-border situations. Here as well, the scope of the ESA's mediation is confined to a number of EU financial market rules.[48] Where the NCAs do not reach an agreement in the conciliation phase, the ESAs can take a decision requiring the NCAs to settle the matter. In case the NCA concerned does not comply with the ESAs' requirement, the latter may address a decision to a financial institution/financial market participants requiring it to take action as to comply with EU law.[49] The ESAs shall install a panel preparing mediation decisions for the ESAs' Boards of Supervisors.[50]The panels consist of the ESA's Boards of Supervisors' Chairperson and six (EBA) respectively two (ESMA/EIOPA) representatives of NCAs which are not involved in the conflict.[51]

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[39] Article 17 of the ESAs Regulations.
[40] Article 18 of the ESAs Regulations.
[41] Article 19 and Article 31 lit. c of the ESAs Regulations.
[42] The scope of this ESAs' action is confined to the pieces of legislation mentioned explicitly in Article 1 (2) of the ESAs Regulations.
[43] Article 41 (3) of the EBA Regulation.
[44] Article 41 (1) of the EBA Regulation.
[45] See Footnote 44.
[46] Further preconditions are that the requirements are directly applicable upon financial institutions/financial market participants and urgent action is necessary.
[47] In addition to the binding mediation powers, the ESAs may carry out non-binding mediation as part of their coordination function pursuant to Article 31 lit. c of the ESAs Regulations.
[48] See Footnote 44.
[49] Further precondition is that the requirements are directly applicable upon financial institutions/financial market participants.
[50] See footnote 44.
[51] Article 41 ESA Regulations.

3.2 The Commission's intentions

At the time the Commission published its report, the ESAs had not issued a single recommendation or binding decision concerning breaches of law, emergency situations or mediation.[52] According to the Commission, this may in part be explicable with scarce resources on the side of the ESAs, but also with a number of shortcomings in the ESA's governance.

The Commission wants to strengthen the ESAs' mediation power by reviewing its triggers and scope. Further, the Commission intends to grant ESAs a direct access to certain data from NCAs and financial institutions[53] in order to reinforce the ESAs' ability to halt breaches of EU-law. The Commission identifies a certain resistance of the members of the Boards of Supervisors to agree on relevant data requests by the ESAs.[54] In addition, the different practices in the collection of data hamper their comparability, exchange and reliable presentation in an aggregated format.[55]

3.3 cep recommendations 3 – 5

Recommendation 3:	*If the ESAs are to seriously detect breaches of EU-law, they must be given more staff and more data-gathering rights. Serious incentive problems, inherent to the ESAs' governance remain, however.*

Breaches of EU financial market rules – especially those by financial institutions[56] – may be detected by the NCAs or not. In either case, there is a considerable likelihood, that the ESAs will not take notice of these breaches.

In cases where NCAs are unaware of breaches of EU financial market rules, the ESAs must detect the breaches by themselves (which is unlikely given few staff and little data-gathering-right) or must rely upon "whistle-blowers", informing the ESAs of an alleged breach. Those most likely to act as whistle-blower are competing financial institutions or other NCAs. However, these might not have a strong incentive to inform the ESA. Both for institutions and for the NCAs, supervision and/or work in the ESA are a "repeated game".

If the ESA's ability to detect breaches of law is to have a deterrent effect, they will need more data gathering rights and more staff to analyse this data. The problem remains however, that without whistle-blower information, the ESAs will not know what data exactly to look for.

Finding a solution for the incentive problems inherent with the ESA's governance is key to unlocking their potential to stop EU-law breaches.

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[52] Meanwhile, on 25 September 2014, the EBA opened an investigation to assess "whether measures taken in the conservatorship of the Bulgarian National Bank (BNB) constitute a possible breach of the requirements in the EU Deposit Guarantee Scheme Directive (DGSD)". The same day, the Commission opened infringement proceedings against Bulgaria for its incorrect transposition of the EU Deposit Guarantee Scheme Directive and its non-compliance with the principle of free movement of capital pursuant to Article 63 TFEU. On 20 October 2014, the EBA adopted a formal recommendation addressed to the BNB and the Bulgarian Deposit Insurance Fund notifying that they are breaching the DGSD.
[53] Article 35 of the ESAs Regulations.
[54] Commission staff working document SWD(2014) 261, p.10.
[55] Idem.
[56] Possible also are breaches of EU-Law through the (non) action of an NCA.

Recommendation 4:	*The ESAs' emergency procedure should be revised. The EU Commission – in addition to the Council – should be granted the right to declare an emergency situation.*

In times of crises, policy measures tend to be risky and/or costly. Depending on the precise case, Member States' willingness to share decision competence with others might be very small in such times. At the same time, it is beyond doubt that concerted action is important given highly connected European financial markets.

Given this, the current hurdle to enable ESA emergency action is too high. It is very unlikely that the necessary council majority will ever be reached. This problem is all the more valid for the EBA as the Eurozone – a block of 18 Member States in which concerted action is possible without EBA emergency powers – has relatively little interest in starting an emergency procedure. Enabling the Commission to declare an emergency situation may ease this problem.

This does not mean that we favour sharing public costs of crisis solving which might be the consequence of emergency action. The Member States' budgetary control remains protected: Article 38 of the ESAs Regulations prohibits impingements on the fiscal responsibilities of Member States arising from ESAs' actions in emergency situations and provides for the respective review procedures.

Recommendation 5:	*Despite the revision of the EBA Regulation in July 2014, risks are present that the EBA's procedures do not guarantee a steady state relation between Eurozone states and non-Eurozone states. It is hence necessary to carefully monitor whether the behaviour of national competent authorities and the European Central Bank in the EBA's Board of Supervisors endangers the internal market.*

The banking union poses a major challenge for the EBAs' work as the Eurozone has decided to centralise major parts of its hitherto national banking supervision processes at the European Central Bank (ECB).[57] [58] Coping with worries that the Eurozone might dominate the EBA's Board of Supervisors, the EU legislator adapted the EBA Regulation in order to ensure that important EBA decisions require a majority in both groups of Euro-ins and Euro-outs.[59]

It remains to be seen whether these changes will be the end of the line.

Especially the EBA's activities on mediation, on breaches of EU-law and on emergency situations may be subject to some challenges.

- The future role of the EBA's mediation

The EBA's mediation will become irrelevant within the Eurozone, at least for the banks under direct ECB supervision. As the ECB decides centrally on banking supervision questions for those banks, in

[57] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (SSM Regulation).
[58] Eurozone is simplifying for "participating Member State' that means a Member State whose currency is the euro or a Member State whose currency is not the euro which has established a close cooperation (Article 2 (1) of the SSM Regulation).
[59] Article 44 (1) of the EBA Regulation.

the future, mediation takes place as a voting process within the ECB.[60] This is not a problem, but a mere logical consequence of centralising banking supervision within the Eurozone.

More interesting will be conflicts regarding the supervision of major international banks which are active both within the Eurozone (with the ECB as the NCA concerned) and outside the Eurozone (with a non-Euro supervisor as the NCA concerned). In these cases, making use of the EBA mediation panel might be difficult, because at least 19 national supervisors cannot be seen as neutral (18 supervisors being involved directly in the contested ECB decision and one non-Euro supervisor challenging). Setting together a panel existing merely of non-Eurozone states as well seems rather unrealistic. Consequently, the mediation will have to take place directly in the EBA's Board of Supervisors.

There, it remains to be seen how the Eurozone's NCAs will behave.[61] Were they to be "loyal" to the ECB and decide *en bloc* as Eurozone states, EBA mediation would be rendered useless as reaching a "double" majority for the mediation decision would become impossible.

Also, the credibility of EBA mediation depends on the ECB's supervisory practice. The ECB should respect the result of a mediation between – say – Sweden and UK by applying it to comparable cases within the Eurozone. Whether the ECB actually will do so, remains to be seen. Not only may the question at hand be subject to national interests, which may be reflected in voting behaviour of the Eurozone's NCAs within the ECB. Also, at least for banks active only within the Eurozone, there is a blunt lack for non-Eurozone States to proceed against such action by the ECB as mediation does not apply in such cases (see above). The result of such behaviour would be an unlevel playing field between Eurozone banks on the one side and non-Eurozone banks on the other side.

- The future role of the EBA's proceeding against breaches of EU Law

Many of the above arguments apply equally to the EBA's proceedings against breaches of EU law. Here as well, the use of EBA panels seems impossible when examining ECB decisions, leaving a majority decision within the EBA's Board of Supervisors as only option. Whether a Eurozone's NCA will then actually decide against the common ECB decision – judging it being a breach of EU-law – remains to be seen.

- The future role of the EBA's emergency actions

Not only does the Eurozone have relatively little interest in starting an emergency procedure enabling the EBA to take common emergency actions (see recommendation 4 above). Moreover, any EBA emergency decision would need a subsequent affirmation by the ECB's supervisory board. Given the sensible nature of such decisions, it seems unrealistic for the EBA taking any emergency decision not supported by a large majority of members of the ECB's supervisory board. As six members of the latter board are not voting members of the EBA's Board of supervisors and given the likely overlap of emergency measures with monetary decisions by the ECB (for which the ECB is solely responsible), having the full ECB's supervisory board present in these cases might prove helpful.[62]

[60] The ECB's supervisory board is composed of its Chair and Vice Chair, four representatives of the ECB and one representative of the NCA in each participating Member State (Article 26 (1) of the SSM Regulation).
[61] The ECB is, however, a non-voting member of the EBA's Board of Supervisors (Article 40 EBA-Regulation).
[62] This however poses questions as to any voting rights for the six ECB representatives currently not present in the EBA.

4 The ESAs' Consumer Protection Role

4.1 A short briefing: The ESAs' mandate for consumer protection

The ESAs' mandate on consumer protection issues is a compromise resulting from intense political dispute and is rather unclear.
On the one hand, the ESAs Regulations entail an explicit mandate to "contribute to enhancing customer protection"[63] and "foster depositor and investor protection"[64]. The ESA Regulations allow the ESAs to do so concretely only by

- promoting" transparency, simplicity and fairness" for consumer financial products or services amongst others by developing training standards and contributing to the development of disclosure rules,[65]
- issuing warnings, where "a financial activity poses a serious threat" to, amongst others, consumer protection.[66]

On the other hand, consumer protection matters may be dealt with also in

- general non-binding recommendations and guidelines, given the limits discussed above on page 8, and
- general RTS and ITS, when the European legislator decided so in secondary legislation.

Hitherto, ESMA has issued three warnings on the risks of investing in complex products, on pitfalls of online investing and on trading in foreign exchange (Forex).[67] EBA issued so far one warning on virtual currencies.[68] ESMA and EBA also issued a joint warning on contracts for difference (CFDs).[69]

The ESAs also may temporarily ban or restrict financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the EU financial system.[70,71] However, the ESAs may *not* motivate such a ban or restriction with reasons of consumer protection.[72]

4.2 The Commission's intentions

The Commission regrets that the ESAs have not used their "existing" powers relating to consumer protection more often. It recognises, however, that the scope for the ESAs to ban or restrict certain financial activities is narrow and that public awareness of the ESAs' warnings concerning consumer issues is still limited.

The Commission finds that several NCAs represented in the Boards of Supervisors[73] lack the necessary expertise on consumer protection matters and tend to prioritise other issues as some of them are not competent for consumer protection at the national level.

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[63] Article 1 (5) lit. f of the ESAs Regulations.
[64] Article 8 (1) lit. h of the ESAs Regulations.
[65] Article 9 (1) of the ESAs Regulations.
[66] Article 9 (3) of the ESAs Regulations.
[67] ESMA, Investor warning 2014/154 of 07 February 2014; ESMA, Investor warning 2012/557 of 10 September 2012, ESMA, Investor warning 2011/412 of 5 December 2011.
[68] EBA/WRG/2013/01 of 12 December 2013.
[69] ESMA and EBA, Investor warning, 2013/267 of 28 February 2013.
[70] Article 9 (5) of the ESAs Regulations.
[71] The scope of this ESA action is confined to cases where the pieces of legislation mentioned explicitly in Article 1 (2) of the ESAs Regulations allow ESAs to do so and to emergency cases pursuant to Article 18 of the ESAs Regulations.
[72] The Commission treats the ESAs' power to issue a product ban under the heading of consumer protections. We see no reason to do so.

In a first step, the Commission wants the ESAs to work more on consumer/investor protection related issues including an increased visibility of that work and to make "full use of available powers". The ESAs should make "broader and more structured use" of the Joint Committee, enabling an appropriate coordination of the ESAs' activities. They should involve the national authorities competent for consumer protection which are not represented in the Board of Supervisors.

In a second step, the Commission will examine if the ESAs' power to ban certain financial activities "should be converted into a self-standing empowerment", i.e. that this power will no longer depend on additional prerequisites provided for in the legislation referred to in Article 1 (2) of the ESAs Regulations. The ESAs mandate in the area of consumer protection could be clarified and enhanced where necessary. [74]

4.3 cep recommendations 6 – 9

Recommendation 6:	*The ESAs' competence to issue consumer warnings should be maintained.*

The ESAs' consumer warnings are in principle a useful instrument especially when they serve as an early warning mechanism in circumstances that a specific problem occurs first in one or some Member States before it also hits others. However, without public awareness of the warnings they remain of limited use.

Recommendation 7:	*The ESAs' mandate to temporarily ban financial activities does not cover consumer protection purposes. This mandate should not be converted into a self-standing empowerment.*

The legal basis that allows the ESAs to temporarily ban financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the EU financial system includes no referral to consumer protections. Against the prerequisites of the principle of legal certainty (see above), the ESAs are hence *not* allowed to temporarily ban financial activities with a view to enhancing consumer protection.

Admittedly, given the horizontal nature of consumer protection, bans aimed at protecting the orderly functioning and integrity of financial markets or stabilising the EU financial system might, as a side effect, improve (or deteriorate) the consumers' situation. This does not change, however, the fact that consumer protection is no objective of Art. 9 (5) of the ESAs Regulations. If one wants the ESAs to have this mandate, the ESAs Regulations should therefore be amended accordingly.

The ESAs should not be given a self-standing power to temporarily ban certain financial activities. Bans are binding decisions. Against the prerequisites of the "essential elements principle" (see above) and in comparison to the ESAs' powers pursuant to Article 17 to 19 of the ESAs Regulations, the referral to Article 1 (2) of the ESAs Regulations should be maintained.

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[73] The Boards of Supervisors (Article 40 et seq. of ESAs Regulations) give guidance to the work of the ESAs and take their decisions. They are composed of a Chairperson, the heads of the NCAs, a representative each of the Commission, the ECB, the ESRB and the two other ESAs. Only the heads of the NCAs are voting.

[74] In its Conclusions on the ESFS Review of 7 November 2014, the Council took a hesitant stance on this. In the short term, existing ESA power should remain unchanged; in medium to long term, the Council supports" *clarifying* the ESAs' *existing mandate* in the area of consumer and investor protection" (Council Document 14681/14) (emphasis added by us).

Recommendation 8:	Keep in mind that, hitherto, ESAs' main consumer protection activities have taken place on level 2. EP and Council should formulate clearer ESA mandates.

Since consumer protection is a horizontal issue, general financial market regulation (level 1) often includes provisions that have an (in)direct impact on consumer protection as well. In many cases, the ESAs are given powers by the EP and the Council to draft RTS concretising these provisions. Hence, besides their explicit competence to issue warnings for consumer protection reasons on a case by case basis, the ESAs often deal with consumer protection issues on a more general level as well. At least until today, this "general work" on level 2 has been much more important than the "case by case" work.

The critique that the ESAs "over-interpret" level 2 mandates in a way allowing too much consideration of consumer protection issues should be taken seriously. At the same time, it is also true that level 2 mandates are often political compromises between those in favour and those against the ESAs becoming active in questions of consumer protection. A certain unclarity in the formulation of level 2 mandates is hence often intrinsic. Blaming the ESAs for not staying within the boundaries of their level 2 mandate is hence not always fair. In any case, there remains the possibility for EP and Council to object to RTS allegedly leaving the scope of the ESAs' mandate.

Recommendation 9:	Where consumer protection issues are affected, facilitating the involvement of national consumer protection authorities might be useful and improve and better legitimate ESAs' work.

Where consumer protection issues are affected – be it because the legislator issues a level 2 mandate to the ESAs with a clear consumer protection reference or because the ESAs endeavour to issue a warning on the grounds of consumer protection issues –, it might be useful to formally provide for the possibility to involve the national consumer protection authorities not being represented in the ESAs' Boards of Supervisors in the ESAs consumer protection work. Until now, the question whether and to what extend the NCAs involve these national consumer protection authorities is left to national law. Article 26 (1) of the SSM Regulation might serve as a model for their involvement. It states that a member of the ECB Supervisory Board may bring a representative from the Member State's central bank, where the national authority competent for banking supervision is not a central bank. For the voting procedure, the representatives of the authorities of one Member State are considered as one member.

5 The ESAs' Governance

5.1 Short briefing: The Board of Supervisors as the ESAs' decision-making body

The ESAs' decision-making body is the respective Board of Supervisors.[75] It is composed of the Chairperson, the heads of the NCAs, one representative of the Commission, the ECB, the ESRB and one representative of each of the other two ESAs.[76] Only the heads of the NCAs are voting members.[77] Each member has one vote.[78] As a general rule, decisions of the Board of Supervisors are taken by a simple majority but deviations apply. Amongst others, RTS require a qualified majority.[79]

[75] Article 43 (1) of the ESAs Regulations.
[76] Article 40 (1) of the ESAs Regulations.
[77] Idem.
[78] Article 44 (1) of the ESAs Regulations.
[79] Idem.

Other parts of the ESAs' management are the Management Board[80], the Chairperson[81] and the Executive Director[82].

5.2 The Commission's intentions

The Commission notes that the predominant role of the heads of the NCAs in the decision-making process in the ESAs' Boards of Supervisors is criticised by some stakeholders. In particular, there is the fear, expressed by the EP for instance,[83] that national views might dominate EU-wide interests.

In this respect, the Commission thinks that the role and influence of the ESAs' staff within preparatory bodies such as chairing standing committees and working groups should be enhanced. Also, the Boards of Supervisors should reinforce the Chairpersons authority by delegating certain tasks to them[84]. The role, visibility and transparency of the Joint Committee should be improved and stakeholder groups should be more balanced.

In the longer term, the Commission will explore options on how ensure that the Boards of Supervisors' decisions are taken in the interest of the EU as a whole. It also wants to assess the option to amend the composition and mandate of the Management Board.

5.3 cep recommendation 10

Recommendation 10:	*The national bias in the ESAs should be downsized. This can be done by adding non-national members to the ESAs' Boards of Supervisors or by installing a European Central Bank-like permanent Executive Board of non-national members in addition to the national representatives in the Boards of Supervisors.*

The fact that all voting members of the Boards of Supervisors who must act "objectively in the sole interest of the Unions as a whole"[85] are at the same time the heads of the NCAs[86] can lead to conflicts of interest. It is hence consequent that the Commission wants some changes.[87]

The simplest change would be to add voting members to the ESAs' Board of Supervisors, which are not national representatives. This model has been applied in the ECB's Supervisory Board.

Going further, one could take the governance structure of the ECB's Governing Council as an example. In this case, one would supplement the ESAs' Board of Supervisors (representing national

[80] The Management Boards (Article 45 et seq.) ensure that the ESAs carry out their missions and perform their tasks. They are composed of the Chairperson and six other Members of the Boards of Supervisors, elected by and from the voting members of the Boards of Supervisors.
[81] The Chairpersons (Article 48 et seq. of ESAs Regulations) represent the ESAs, are responsible for preparing the work of the Boards of Supervisors and chair the meeting of the Boards of Supervisors and the Management Boards. They are appointed by the Boards of Supervisors. The EP may object their designation up to one month after the selection and before the taking up of the duties.
[82] The Executive Directors (Article 51 et seq.) manage the ESAs and prepare the work of the Management Board. They are appointed by the Boards of Supervisors after confirmation by the EP.
[83] European Parliament Resolution of 22 March 2014 with recommendations to the Commission on the European System of Financial Supervision (ESFS) Review, para AU.
[84] Article 41 (1) of the ESAs Regulations.
[85] Article 42 (1) of the ESAs Regulations.
[86] Article 40 (1) lit. b of the ESAs Regulations.
[87] In its Country Report No. 13/65 from March 2013, the IMF says that "consideration could be given to adding some voting members nominated on a European rather than national basis, and have these members appointed for a relatively lengthy period so as to maximize their autonomy". It thinks that "such a change would also help prevent the creation of coalitions, etc. that might block action or favor some countries over others".

representatives) with a permanent Executive Board. The Executive Board could consist of the ESA Chairperson and 5 additional Members with a mandate of four years.

The Executive Board could play an important role in the mediation activity and in investigating potential breaches of EU-law by NCAs. The Board could function as panel performing preparatory work in both cases, leading to a decision by the ESA Governing Council, consisting of both Executive Board and Board of Supervisors. Allowing the Executive Board to co-decide upon RTS and ITS seems logical, but needs a solution as to the voting weight for these members.

6 The ESAs' Financing

6.1 Short briefing: Financing of financial supervision across the EU

The ESAs' current financing is mainly based on contributions from the NCAs and the EU.[88]

The way in which national financial supervisory authorities are financed differs from one Member State to another. Whereas some favour private funding, other member states have decided for public financing or for a mix of both.

The ECB's prudential supervision of credit institutions is 100% privately funded. Supervision is financed by annual fees levied on all credit institutions in the participating Member States and on branches in participating Member States of credit institutions in non-participating Member States.[89] The amount of the fee levied on a credit institution or branch shall be calculated in accordance with the arrangements established by the ECB.[90]

Germany has decided for private funding in the area of insurance and securities and for a mix of private and public funding in the area of banking supervision. The German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin), for instance, is funded mainly from the supervised undertakings.[91] The sources of the funding are primarily fees (Section 14 of the Act Establishing the federal Financial Supervisory Authority, Finanzdienstleistungsaufsichtsgesetz, FinDAG), separate reimbursements (Section 15 FinDAG) and contributions (Section 16 FinDAG).[92] State funding is added for bank supervision in that day-to-day bank supervision is conducted to a considerable extent by the German Central Bank (Bundesbank). This supervision is funded with public means and does not occur in the BaFin's budget.

Italy, in contrast, decided to publicly fund the financial supervision in total.

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[88] The current ESAs' budgets are based on 60% contribution from the NCAs, 40% contribution from the EU budget and the ESMA supervision fees owed by credit rating agencies and trade repositories. Depending on the member State, NCAs collect their contributions by either public of private means.

[89] Article 30 (1) of the Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (SSM-Regulation).

[90] Article 30 (2) of the SSM-Regulation. The public consultation on the draft ECB Regulation on supervisory fees closed on 11 July 2014.

[91] The BaFin's budget for 2014 envisages a total revenue of 224.4 mill. Euro which includes 200.8 mill. Euro of contributions.

[92] http://www.bafin.de/EN/BaFin/Organisation/Financing/financing_artikel.html, last check on 28 August 2014.

6.2 The Commission's intentions

The Commission notices that most stakeholders criticise that the ESAs' budgets does not correspond with their increasing tasks. Stakeholders are especially concerned that further increases of the ESAs' funding might diminish the NCAs' budgets.

The Commission considers therefore a revision of the existing funding model ideally abolishing EU contributions and contributions from the NCAs.

6.3 cep recommendation 11

Recommendation 11: The ESAs' work should be financed by a mix of public and private funds.

There are three reasons in favour of public funding of the financial supervisory authorities. First, it reflects the fact that a proper financial prudential supervision is in the public interest. Second, parliamentary control over the budget of authorities is also a tool to strengthen the democratic control. Third, the financing by the supervised financial undertakings constitutes a discrimination against undertaking from other sectors, the food industry for instance, whose supervisory authorities are financed by state funding which is difficult to justify.[93]

Nevertheless, against the background of the financial crisis and especially from a political point of view, pressure is high to have financial undertakings contribute to the financing of the financial supervisory authorities' activities.[94] A co-financing from public and private sources, as suggested by the Committee on Economic and Monetary Affairs (ECON) of the EP,[95] seems hence to be an acceptable compromise.

7 The ESAs' Structure

7.1 Short briefing: The ESAs' seats and the ESMA's exclusive supervisory powers

The EBA currently has its seat in London, the ESMA in Paris and the EIOPA in Frankfurt am Main.[96]

The ESMA is, until now, the only ESA that has exclusive supervisory powers: It is exclusively responsible for the registration and supervision of credit rating agencies[97] and trade repositories[98].

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[93] Lindemann, in: Boos/Fischer/Schulte-Mattler, Kreditwesengesetz, Kommentar, 4. Auflage 2012, § 51 KWG/§§ 13-16 FinDAG, Rn 123. The German Federal Constitutional, however, approved the BaFin's financing by the supervised financial undertakings, BVerfG, 2 BvR852/07 of 16 September 2009.

[94] In his Mission letter, Jean-Claude Juncker, President-elect of the European Commission, writes to Jonathan Hill, designated Commissioner for Financial Stability, Financial Services and Capital Markets Union, that the latter "should find a way to eliminate EU and national budgetary contributions to the ESAs which should be wholly financed by the sectors they supervise".

[95] In its Draft Opinion on the General budget of the European Union for the financial year 2015, the Rapporteur of the ECON Committee of the EP suggests to call on the Commission "to propose a financing system by 2017 that is solely based on the introduction of fees by market participants" because he thinks that the current financing arrangements "are inflexible, create administrative burdens and might pose a threat to [the ESAs'] independence". In its Opinion on the Council position on the draft general budget of the European Union for the financial year 2015, however, the ECON Committee of the EP calls on the Commission, "if proven by the Commission's assessment, to propose a financing system by 2017 that is solely based on the introduction of fees by market participants or combines fees by market participants with basic funding from a separate budget line in the general EU budget.

[96] Article 7 of the ESAs Regulations.

[97] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

7.2 The Commission's intentions

Since the Banking Union is still under construction, the Commission is cautious about changes of the ESAs' structure such as merging them into a single seat or introducing a twin-peaks approach[99].

The Commission remarks that various stakeholders are in favour of extending the ESAs' direct supervisory powers to critical market infrastructures.

The Commission plans to assess in the medium to long term the need for additional structural changes, including a single seat for all ESAs and the extension of direct supervision for integrated market infrastructures also by ESMA.

7.3 cep recommendation 12

Recommendation 12:	*Thought should be spent upon granting direct bank supervision powers for the Eurozone to the EBA replacing the European Central Bank.*

The ECB is not the ideal banking supervisor. Conflicts of interests within the ECB between monetary policy and banking supervision, risks for the ECB's reputation and independence as well as an insecure legal basis[100] make it necessary to think about handing over banking supervision in the Eurozone to another entity in the medium term.

Thought should be spent to extending direct bank supervision rights to the EBA, at least for the Eurozone. The EBA would be a good candidate for central Eurozone banking supervision: It would offer the advantages of centralization but prevent most of the disadvantages which result from ECB banking supervision.

In this context, a discussion on the democratic control of the banking supervisory system would be desirable. In particular, there are still controversial opinions on the question if the NCAs' national accountability covers the heads of NCAs' activities in the Boards of Supervisors.[101]

[98] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.
[99] Twin peaks approach means that one regulator has prudential tasks and another focuses on the conduct-of-business.
[100] cep**PolicyBrief** No. 2012-47 of 19 November 2012.
[101] Pro. Commission Staff Working Document SWD(2014) 261 of 8 August 2014, p. 17; Lehmann/Manger-Nestler, Die Vorschläge zur neuen Architektur der europäischen Finanzaufsicht, EuZW 2010, p. 87 (89); Contra: Häde, Jenseits der Effizienz: Wer kontrolliert die Kontrolleure?, EuZW 2011, p. 662 (664).

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