EUROPEAN COMMISSION

Brussels, 17.8.2018
C(2018) 5581 final

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market {COM(2017) 536 final}.

The proposal forms part of the Commission's efforts to promote further financial integration of the single market for financial services and in particular the creation of a full Capital Markets Union. It is a priority for the Commission to put in place all the necessary building blocks for an integrated capital market in the European Union in order to promote jobs, growth and investments and to strengthen the Economic and Monetary Union.

Capital market integration requires an enhanced supervisory framework to be developed in parallel, because the provision of financial services across borders is more efficient, effective and provides more stability in financial markets when activities are regulated and supervised in a consistent manner in all Member States. For this reason, the review of the European System of Financial Supervision is a fundamental part of the Capital Markets Union project. Such a review is crucial to deliver on the benefits and manage the challenges associated with the new rules agreed at European level to ensure more integration of the financial markets in the Union and with current global developments.

Mr Michael MÜLLER
President of the Bundesrat
Leipziger Straße 3 - 4
D – 10117 BERLIN

To this end, the Commission proposes to strengthen the European component of the supervision system, without contesting the crucial role that national supervisors will continue to play for an effective and efficient financial supervision in the Union. The changes proposed by the Commission are targeted and do not constitute a radical overhaul of the current European System of Financial Supervision. The objectives of the proposal – deeper supervisory convergence, a more efficient governance and a sustainable funding of the European Supervisory Authorities, which are Union bodies – require action at Union level and the measures proposed are necessary to reach those objectives.

The Commission welcomes the support of the Bundesrat for the new tasks envisaged for the European Supervisory Authorities in the area of sustainable finance, financial innovation and equivalence decisions for third country jurisdictions. It shares the view of the Bundesrat that the European Supervisory Authorities should play an important role in assessing outsourcing decisions in order to ensure a level playing field throughout the Union.

In response to the more technical comments in the Opinion, the Commission would like to refer to the attached Annex.

The Bundesrat's Opinion has been made available to the Commission's representatives in the ongoing negotiations with the co-legislators.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

Tibor Navracsics
Member of the Commission

Annex

The Commission has carefully considered the issues raised by the Bundesrat in its Opinion and would like to make the following observations grouped by topic:

Convergence powers

The Strategic Supervisory Plan is intended to set pan-European supervisory goals without superseding the ability of the national competent authorities to define national priorities in order to reflect the specific needs and features of national financial markets. So more consistency can be achieved without neglecting issues that need specific attention in different Member States.

Supervisory handbooks are standard tools, which have proven to foster supervisory convergence and should therefore be introduced beyond the area of banking supervision.

Regulatory technical standards are delegated acts in the meaning of Article 290 of the Treaty on the Functioning of the European Union. The European Supervisory Authorities review is an ordinary legislative proposal and as such, must not be used to review the provisions in the Treaties about how delegated acts are prepared and checked by the co-legislators.

The founding Regulations empower the European Supervisory Authorities to issue guidelines and recommendations on their own initiative without a specific mandate in the Level 1 legislation. This allows the European Supervisory Authorities to react in a flexible way to questions and issues that might arise in practice and require clarification. Level 1 and Level 2 rules do not allow for detailed provisions that cater for all possible practical questions. Therefore, the possibility for the European Supervisory Authorities to issue guidelines and recommendations is also in the interest of national competent authorities and market participants. Since those guidelines and recommendations are, and will continue to be agreed by the Board of Supervisors which consists of representatives of the national competent authorities, the Commission believes that there are already effective safeguards in place against any unjustified 'self-mandating' with adverse effects on Level 2 mandates. Nevertheless, the Commission has responded to the concern that European Supervisory Authorities might have overstretched their mandate in certain cases in the past. This is why it proposes to introduce a formal procedure whereby the stakeholder group could oblige the Commission to check whether specific guidelines and recommendations remain within the boundaries of the European Supervisory Authorities' competences.

The Commission considers it necessary to give the European Supervisory Authorities sufficient tools to receive the information needed to fulfil their tasks. Otherwise, the effective execution of their tasks would depend on the ability and willingness of single members to contribute. Therefore, while it is the Commission's view that a direct request to market operators should not be the rule, it finds it crucial to reinforce that possibility where a request to the competent authority concerned has proven, or is deemed to be insufficient to obtain the necessary information.

In full compliance with the principle of subsidiarity, the Commission proposes direct supervision by European Supervisory Authorities only in very limited cases where this is deemed more effective. According to the proposal, the European Securities and Markets Authority will be entrusted with direct supervision of specific sectors that have major cross-border activities and are governed by fully harmonised rules. The Commission, however, takes good note of the specific concerns of the Bundesrat with regard to the proposed direct supervision of certain fund types.

Governance

The Commission finds that the decision-making of the European Supervisory Authorities needs to be improved. Many market participants and even national supervisors share this conclusion. In order to achieve this, the Commission proposes a targeted change only: while the Board of Supervisors remains the main decision-making body, a smaller body – the new Executive Board consisting of independent full-time members – is entrusted with certain decisions that will make the European Supervisory Authorities more efficient and effective.

Funding

To date, due to lack of resources, the European Supervisory Authorities have not been able to execute all their tasks to the same degree. The funding of the European Supervisory Authorities is already much stretched today and it is certainly not appropriate for the challenges ahead. Therefore, the funding of the European Supervisory Authorities should be made more sustainable including by introducing direct industry's contributions. The Commission does not share the Bundesrat's concern that the proposed new funding might have a negative impact on budgetary discipline: first, under the new system, there would still be a mandatory contribution from the European Union budget, and the budgetary authorities – the European Parliament and the Council – have the means to avoid that the budgets of the European Supervisory Authorities are exponentially increased. Furthermore, the Board of Supervisors would continue to decide on the budgetary plan. The Commission is confident that the Board will use that power to insist on budgetary discipline.