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Joint ESAs criteria on supervisory
independence

Joint European Supervisory Authorities' criteria on the independence of supervisory authorities

Contents

1. Introduction	4
2. Principle 1 - Operational independence	6
2.1 Absence of undue influence	6
2.2 Internal processes	7
2.3 Adequacy of legal powers and authority	7
2.4 Delegation of tasks	8
2.5 Operational and strategic planning	8
2.6 Adequacy of operational resources	8
2.7 The functioning of the governing body of supervisory authorities	9
2.8 Appeal against supervisory decisions	9
2.9 Legal actions against the supervisory authority and its staff	9
3. Principle 2 - Personal independence	10
3.1 Appointment of members of the governing body	10
3.2 Selection criteria	10
3.3 Removal of members of the governing body	11
3.4 Conflicts of interest	11
3.4.1 Forbidden conduct	11
3.4.2 Preventing conflict of interest	12
4. Principle 3 - Financial independence	14
4.1 Financing model	14
4.2 Financing process	14
4.3 Sufficiency of resources	14
5. Principle 4 - Accountability and transparency	15
5.1 Accountability	15
5.1.1 Accountability framework	15
5.1.2 Objectives and priorities	15
5.1.3 Accountability to government and/or parliament	15
5.1.4 Internal governance	15
5.1.5 Integrity	16
5.1.6 Procedural safeguards	16
5.1.7 Safeguards to prevent the inappropriate use or disclosure of confidential information	16
5.2 Transparency	16



JOINT COMMITTEE OF THE EUROPEAN
SUPERVISORY AUTHORITIES

Abbreviations

BCBS	Basel Committee on Banking Supervision
EBA	European Banking Authority
EIOPA	European Insurance and Occupational Pensions Authority
ESAs	The European Supervisory Authorities: the EBA, EIOPA and ESMA
ESFS	European System of Financial Supervision
ESMA	European Securities and Markets Authority
EU	European Union
FATF	Financial Action Task Force
IAIS	International Association of Insurance Supervisors
IADI	International Association of Deposit Insurers
IOSCO	International Organization of Securities Commissions

1. Introduction

Background

The revised ESAs Regulations¹ introduced new tasks to the three European Supervisory Authorities (ESAs) – the EBA, EIOPA and ESMA –, one of them is to foster and monitor supervisory independence. Article 8(1)(b) of the ESAs Regulations states that the ESAs shall ‘*contribute to the consistent application of legally binding union acts, in particular by a common supervisory culture [...] fostering and monitoring supervisory independence*’. Furthermore, Article 30(3) of the ESAs Regulations sets out that Peer Reviews shall be used as a tool for the assessment of ‘*the degree of independence, and governance arrangements of the competent authority [...]*’.

In this framework, the three ESAs published on 18 October 2021 their individual reports on the supervisory independence of competent authorities in their respective financial sectors. The three reports took stock of the factual situation on supervisory authorities’ independence along key angles, namely, operational, financial and personal independence as well as accountability and transparency. The reports sought to factually represent the arrangements and practices reported by supervisory authorities without assessing the independence of individual supervisory authorities.

As a next step, the ESAs are setting criteria for the independence of supervisory authorities².

The objective of independence

Independence is key to ensuring that fair, effective and transparent decisions are taken by appropriately resourced supervisory authorities. In turn, this supports the objectives of the European System of Financial Supervision (ESFS): ensuring that financial sector rules are adequately implemented, preserving financial stability, ensuring confidence in the financial system and providing effective and sufficient protection for customers and consumers of financial services.

Supervisory authorities are public bodies serving the public interest on the basis of their respective supervisory tasks. To avoid possible conflicts of interest and support objective supervision and decision-making, proper consideration should not only be given to the fulfilment of the main objectives of supervision but also to the governance around the

¹ The 3 ESAs started their operation in January 2011, following the adoption of a package of legislative acts. These comprise: [Regulation \(EU\) No 1093/2010 establishing the EBA](#), [Regulation \(EU\) No 1094/2010 establishing the EIOPA](#) and [Regulation \(EU\) No 1095/2010 establishing the ESMA \(together, the ‘ESAs Regulations’\)](#).

² The criteria apply to competent authorities as defined in Article 4 of the ESA’s Regulations. References in these criteria to supervision should include all relevant activities of competent authorities to be carried out pursuant to the Union acts referred to in Article 1(2) of the ESAs’ Regulations.

supervisory processes and functioning of the supervisory authority through which these decisions are made. Good governance is therefore required for the way supervisors are managed, assessed and held accountable.

Furthermore, independence is a crucial tool to reduce the risk of undue influence from the supervised sector and the government.

These non-binding criteria aim at providing a framework for supervisory independence. To achieve this objective, they are expected to be practically implemented under the relevant legal framework.

Four principles with specific criteria

The supervisory independence requirements for the financial sector in EU law and international standards³ are partial and fragmented along sectoral lines, especially in relation to conduct supervision. The three ESAs have used the existing international standards and findings of their individual reports on supervisory independence to establish common EU-wide criteria for supervisory independence.

The three ESAs have used the four key elements of supervisory independence (operational, financial and personal independence as well as transparency and accountability) as the main principles. Below each principle⁴, detailed criteria are specified for the assessment of the independence of supervisory authorities with the aim to a) provide clarity for supervisory authorities on the common standards for the level of independence expected in the EU and b) have a set of criteria on the basis of which the ESAs can each perform assessments of a supervisory authority's independence. The set of criteria in this document is not intended to be a mere checklist and any reviewer will need to exercise judgement when using the criteria.

³ BCBS's Core principles on effective banking supervision (Principle 2); FATF Recommendation 26; IADI's Core principles for effective deposit insurance systems (principles 2 and 11); IAIS's Insurance Core principles (Principle 2), IOSCO Objectives and Principles of Securities Regulation (principles 1 to 8).

⁴ The principles are an instrument developed under article 29(2) of the ESAs Regulation.

2. Principle 1 - Operational independence

1. ***Supervisory authorities should have operational independence.***
2. ***All supervisors in their tasks should apply the principles of independence, transparency and accountability.***
3. ***Legislation as supplemented by relevant internal rules should assign clear and explicit mandates and objectives to supervisory authorities and prohibit any form of undue influence from the supervised sector and the government.***

2.1 Absence of undue influence

4. The supervisory authorities should operate without any form of direct or indirect undue influence from the supervised sector and the government.
5. The supervisory authority should take supervisory measures (including sanctions) and other decisions without undue influence from the supervised sector, any part of the government, including other government bodies or agencies and the legislator.
6. Staff and members⁵ of the supervisory authority's governing body should not seek or take instructions from the supervised sector representatives and any part of the government, including other government bodies or agencies, before taking their supervisory and policy decisions.
7. Supervised sector representatives, government, including other government bodies or agencies, and any other public or private body, should not be allowed to exercise undue influence on the members of the supervisory authority's governing body. Neither should they be a member of this body⁶, except for government in resolution and deposit guarantee fund functions which may have implications for public funds or financial stability⁷.

⁵ For the avoidance of doubts, references to members of the supervisory authority's governing body in this document include the head of the supervisory authority.

⁶ This should be without prejudice to the participation of supervisory authorities' or central bank representatives in the governing body of a supervisory authority which is a party to the ESFS.

⁷ In the case of the exception for resolution and deposit guarantee fund, adequate structural arrangements should be in place to ensure operational independence and avoid conflicts of interest between the supervisory function and the other functions of the relevant public body.

8. The supervisory authority should fulfil its tasks on the basis of clear objectives and mandates enacted by legislation.
9. The institutional relations between the supervisory authority and the government, including the circumstances and processes for sharing information, consultation or approval, should be clearly defined by legislation and rules. The circumstance for such relations as regards supervisory decisions should be strictly limited.
10. Day-to-day operations of the supervisory authority should not be subject to consultation with or approval by the government or any other public or private body, except in instances when supervisory competences are shared between competent authorities.
11. Without prejudice to coordination, consultation or cooperation between supervisory authorities, staff and members of the supervisory authority's governing body should respectively report and function under the remit of the supervisory authority, and not report to any other authority or body.

2.2 Internal processes

12. The supervisory authority should carry out its processes according to high governance standards which should include a clear independent and transparent decision-making process.
13. Supervisory requirements and supervisory processes should be applied consistently and equitably, and regularly assessed and reviewed by the supervisory authority.

2.3 Adequacy of legal powers and authority

14. The supervisory authority should be endowed with adequate legal powers and authority, including enforcement powers which are effective, proportionate and dissuasive.
15. The supervisory authority should, within and in compliance with the applicable legal framework, have autonomy in setting technical rules and regulations and practical procedures and instructions for the sectors under its supervision, based on European standards and best practices when available.

2.4 Delegation of tasks

16. Delegation of tasks⁸ should not adversely affect the supervisor's ability to conduct effective supervision and meet its objectives.
17. Where the supervisory authority has the right to delegate supervisory activities externally, it should use delegation on a limited basis and in application of clearly defined, documented and transparent processes. The supervisory authority should retain the accountability for and the effective oversight of any delegated activities to the same degree as non-delegated activities.
18. Without prejudice to the protection of personal data and confidentiality principles, the supervisory authority should ensure public transparency on the existence and main features of external delegation of supervisory tasks.

2.5 Operational and strategic planning

19. The supervisory authority should ensure proper planning and setting of priorities and timelines considering 'operational' planning (taking into account impact/probability of risks stemming from supervised entities) and strategic priorities (taking into account overall market developments, risks and vulnerabilities at the macro level and input from other competent national and European authorities).

2.6 Adequacy of operational resources

20. The supervisory authority should have in place operational resources and processes ensuring the expertise, resources allocation and operational capacity to implement adequate supervision and oversight.
21. The supervisory authority should have access to adequate material resources such as IT (hardware and software), security standards and relevant information sources.
22. The supervisory authority should exercise its responsibilities and powers with adequate numbers of staff and financial resources to fulfil its mandate. The supervisory authority should have full discretion to allocate resources and full autonomy to recruit, retain and further develop experienced and skilled staff, including the freedom to set remuneration and contractual conditions applicable to its staff. This discretion should be recognised in legislation.
23. Staff and members of the supervisory authority's governing body should possess sufficient supervisory knowledge and skills required to fulfil their tasks.

⁸ For the avoidance of doubts, this section does not apply to delegation of tasks and responsibilities provided for in Article 28 of the ESAs regulation.

2.7 The functioning of the governing body of supervisory authorities

24. The responsibilities of the supervisory authority's governing body should be defined in legislation and internal rules.
25. A clear, transparent and independent supervisory authority's decision-making process should be set in legislation and internal rules.

2.8 Appeal against supervisory decisions

26. To ensure that the supervisory decisions are made on the basis of the relevant legislation and internal rules as consistently as possible and are well reasoned, an independent appeal process against formal supervisory decisions should be available, including before administrative courts or specialised courts. It should be timely, specific and balanced to preserve supervisory independence and effectiveness.
27. The applicable legal process to appeal against formal supervisory decisions should not unduly impede the ability of the supervisory authority to make timely interventions in order to protect customers', investors' and insurance policyholders' interests or contribute to financial stability, including where expeditious action is required.
28. Unless otherwise ordered by an appeal body or court, the supervisory decisions should remain in force until the appeal or review mechanism has produced a final decision if the suspension of its execution would compromise the effectiveness of the measure.

2.9 Legal actions against the supervisory authority and its staff

29. Legislation and rules governing the supervisory authority should provide the necessary legal protection from legal actions against individual staff members for supervisory actions, inactions and decisions taken in good faith while discharging their duties. Staff should be adequately protected against the costs of defending their actions.
30. Legislation should also protect the supervisory authority and its staff from criminal or civil liability for decisions, actions or inactions taken in good faith in the course of discharging their supervisory responsibilities.

3. Principle 2 - Personal independence

31. *The members of supervisory authority's governing body should fulfil their tasks independently and objectively.*

32. *The appointment and removal of the members of the supervisory authority's governing body should be transparent.*

3.1 Appointment of members of the governing body

33. A clear and comprehensive process for the appointment of members of the supervisory authority's governing body should be set out in legislation, be publicly available and include:

- a) the general conditions for their appointment;
- b) the appointing authority;
- c) the selection criteria for their appointment;
- d) the mechanism for their remuneration;
- e) the duration of their mandate, the term of office and the possibility of renewal if any.

3.2 Selection criteria

34. The members of the supervisory authority's governing body should possess high integrity and individually relevant qualifications, skills, knowledge and experience that enable the governing body as a whole and in balance to oversee the activities of the supervisory authority.

35. Selection criteria should ensure that each member of the supervisory authority's governing body has a level of education which corresponds to completed university studies attested by a diploma, high reputation, and no prior criminal conviction. In addition, all together members of the supervisory authority's governing body should have thorough knowledge of the financial sectors of relevance for the activities of the supervisory authority at national and European level including of the legal and

regulatory framework and experience in managing an organisation with significant tasks and objectives and steering that organisation to the achievement of its objectives.

36. The appointment process of members of the governing body should be transparent and the profile of the appointed candidate should be publicly disclosed.
37. The members of the supervisory authority's governing body responsible for the international cooperation with other EU and third-country supervisory authorities should have a proficient level of English.

3.3 Removal of members of the governing body

38. The process for the removal of members of the supervisory authority's governing body and the reasons for which they can be dismissed before the end of their term should be set out in legislation. It should ensure the right to be heard of the relevant member in advance of the removal decision, and the ability to challenge the decision before a court.
39. The composition of the supervisory authority's governing body should not be adapted due to changes in government administration or other political reasons.

3.4 Conflicts of interest

3.4.1 Forbidden conduct

40. The supervisory authority's staff and members of its governing body should not be permitted to hold any consultancies, directorships or financial interests, nor expect any future benefit from, or be involved in any capacity in the entities supervised by the authority, other than as a consumer of retail services. They should not accept gifts or hospitality from these entities in excess of a low monetary value.
41. The supervisory authority may allow staff and members of the governing body already holding financial interests when joining the authority to keep their holding subject to prior assessment and management of any relevant conflict of interest. The supervisory authority should have processes in place to that end and be able to require the sale or disposal of those financial interests or to make such disposal subject to the supervisory authority's prior authorisation.
42. The supervisory authority should prohibit close relationships with the supervised sector, the government or any government body or agency and lobbyists. For the avoidance of doubt, institutional relations between the supervisory authority and the government referred to in paragraph 9 do not constitute 'close relationships'.

3.4.2 Preventing conflict of interest

43. The composition of the supervisory authority's governing body should avoid any real, potential or perceived conflict of interest.
44. The members of the supervisory authority's staff and governing body should be subject to high ethical standards to mitigate the risk of real, potential or perceived conflicts of interest. For this purpose, the supervisory authority should have in place policies and processes or a code of conduct to avoid, identify and manage real, potential or perceived conflicts of interests.
45. Effective and commensurate sanctions should be put in place for not complying with the rules concerning conflict of interest. For this purpose, the supervisory authority should put in place an appropriate internal and/or external whistleblowing mechanism that could eventually result in the opening of an investigation. For this mechanism to be effective, a framework to ensure confidentiality and protect the whistle-blower against retaliation should be set up.
46. The members of the supervisory authority's staff and governing body should be required to declare any interest that may affect their independence and objectivity in carrying out their duties and responsibilities.
47. The members of the supervisory authority's staff and its governing body should declare possible ad-hoc conflicts of interest where necessary and they should refrain from participating in the decision-making process where a conflict of interest situation occurs.
48. The supervisory authority should have in place an independent function to monitor the implementation of the conflict of interest processes and review the conflict of interest declarations.
49. The declaration of interests submitted by each member of the supervisory authority's governing body should be publicly available.
50. The supervisory authority should ensure that the integrity of its staff and members of its governing body is subject to internal audit arrangements.
51. The supervisory authority should have in place specific measures to avoid conflict of interest during the notice period.
52. The obligation of confidentiality and professional secrecy should continue after the end of service.

53. Cooling-off periods intended as temporary restrictions on the activities of leaving supervisory authority's staff or members of its governing body and other measures should be considered with proportionate, fair and reasonable time lengths, tailoring their duration and scope of application to the type of function and level of seniority.

4. Principle 3 - Financial independence

54. ***Supervisory authorities should have access to sufficient financial resources to fulfil their mandates.***

4.1 Financing model

55. A wide variety of financing models may exist, such as public financing, levies imposed on supervised entities and combinations thereof.

56. The financing of the supervisory work should be organised in such a manner that:

- a) the supervisory authority's independence is not compromised,
- b) the method of financing is stable, predictable and transparent,
- c) undue influence from the funding source is excluded.

4.2 Financing process

57. The method under which the supervisory authority is financed should be stable, predictable and transparent and not undermine the authority's independence.

58. The conditions for access to and allocation of these resources, including in terms of competence for the approval of the supervisory authority's budget, should not be compromised with undue influence from the government, a government body or agency, the parliament or the supervised sector.

4.3 Sufficiency of resources

59. The supervisory authority should have access to sufficient financial resources to fulfil its mandate and carry out its tasks considering the size, complexity and type of markets and entities it oversees or supervises, and its need.

5. Principle 4 - Accountability and transparency

60. *The Supervisory authorities should conduct their tasks in a transparent and accountable manner. Transparency reinforces accountability of supervisory authorities.*

5.1 Accountability

5.1.1 Accountability framework

61. The accountability framework should be clearly defined in legislation.

5.1.2 Objectives and priorities

62. The supervisory authority should clearly set out its objectives and priorities for the supervised sector and be accountable for the discharge of its duties in relation to those objectives and priorities.

63. The supervisory authority should report on the implementation of its objectives and priorities in its annual report.

5.1.3 Accountability to government and/or parliament

64. Clear accountability mechanisms of the supervisory body should be set in legislation.

65. The supervisory authority's annual report should be submitted to the government, a government agency or the parliament.

5.1.4 Internal governance

66. The supervisory authority should have a well-defined internal governance structure and strong internal governance processes to support its accountability and integrity and covering its organisational structure and management arrangements, lines of responsibility and systems of risk management and internal controls.

67. The responsibilities of the governing body and senior management should be documented including for reporting lines, decision-making powers and delegation, to facilitate internal controls including for proper authorisation of actions taken by or on behalf of the supervisory authority.

68. Reporting lines should be well-defined to ensure prompt escalation of significant issues to appropriate levels within the supervisory authority.
69. Individuals or group of individuals responsible for the implementation and review of the internal governance arrangements should be clearly identified.
70. The internal governance processes and procedures should be subject to regular independent review, for example by an internal audit function or independent external auditor and annual accounts should be subject to review by an independent external auditor.

5.1.5 Integrity

71. The supervisory authority should act with probity, respectability and lawfulness, and within the bounds of its delegated authority.

5.1.6 Procedural safeguards

72. Standard procedural safeguards should include the supervisory authority's duty to state written reasons for its decisions, the right of the directly adversely affected person to be informed of the content of the decision, to be heard, to access the relevant documents supporting the decision and to appeal the sanction decision.

5.1.7 Safeguards to prevent the inappropriate use or disclosure of confidential information

73. The supervisory authority should ensure that appropriate safeguards are in place to prevent the inappropriate use or disclosure of confidential information in accordance with applicable legislation. In particular, the supervisory authority should ensure that persons having access to the information are subject to applicable professional secrecy requirements.

5.2 Transparency

74. ***Supervisory requirements as well as information about the supervisor's responsibilities should be publicly disclosed to support the accountability of the authority.***
75. The supervisory authority should publicly report at least annually on its objectives, priorities and performance against its strategy and work plan, including the use of its financial resources, ensuring transparency on the activities carried out, key supervisory measures (including corrective measures and sanctions subject to considerations on the confidentiality and effectiveness of its supervisory work), annual budget and

audited accounts, available resources and salaries (in aggregated and anonymous terms) to enhance confidence in its independent status.

76. To further promote transparency and accountability on its decisions, supervisory authorities should ensure transparency on their supervisory priorities and activities:

- a) laws, regulations, administrative rules, decisions of general character, administrative practice and general guidance in the field of sectorial regulation;
- b) public consultations and the analysis of the results;
- c) general criteria and methods for supervision;
- d) aggregate statistics on key aspects of the application of the supervisory framework.

77. The information referred to in paragraphs 75 and 76 should be disclosed via the website of the supervisory authority in the official language or languages of the Member State concerned and in English. However, if it is not possible to publish in English information referred to in paragraph 76, a short description in English should be available as far as possible⁹. The information disclosed should allow comparability and be updated at least annually.

⁹ Unless translation is legally required.