German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

ESAP

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

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Comments ESAP

General remarks

We are generally in favour of standardised, uniform and database-based reporting which is readable for both humans and machines. We also welcome the associated aims, especially that of creating comparability across businesses. However, we consider it vitally important that ESAP introduces no additional information requirements compared to the status quo. Also, the technical implementation of the ESAP must not restrict the legal possibilities provided for in current legislation: We therefore advocate, that in the further legislative process and in the development of the technical implementation standards, care must be taken to ensure that the additional efforts are as low as possible.

ESAP is to be established by 31 December 2024 and reporting obligations from a total of 37 EU legislative acts are to be introduced gradually, meaning that data and information can be transferred to the collection bodies and from there to ESAP, where it will be made accessible. In 30 of these 37 legislative acts, the European Commission or another body will be empowered to adopt implementing measures with specifications regarding the data format. We agree with the European Commission that the specification regarding a standardised format for all the information to be made available in ESAP would serve no useful purpose. Existing formats from the various regulations and directives should be retained and conversions with possible error potential are to be avoided. As things stand at present, pdfs cannot be meaningfully converted into another file format. A change in the file formats themselves would have far-reaching consequences and effects which do not justified given that there is hardly any added value associated with it.

A specific and final assessment is not possible at the present time since it is not yet known which specific data format is to be used. Against this background, we believe that the start date for ESAP in 2024 is very ambitious. Once the final implementing measures have been published, it usually takes at least two years to implement the relevant format specifications.

With this in mind, the level 2 texts would already need to be finalised if they were supposed to be implemented by the end of 2024. The focus of ESAP is clearly on the needs of users. However, we should not forget those compiling the ESAP specifications either. Whatever the specifications are, they need to be compatible with market-standard software solutions, otherwise it will be very difficult to establish ESAP.

Even if no new information has to be reported to ESAP in terms of content, the planned reporting will nevertheless require considerable additional time and effort. In future, information will have to be reported to the relevant collection body at the same time as it is published on a company's website, for example. Implementing the corresponding IT processes will be costly. Duplicate reporting of this kind should be avoided so as not to impose the cost of maintaining duplicate publication channels for preparers. This could be ensured by making it unnecessary to publish information disclosed to ESAP in any other form, for example. Disclosure obligations should therefore be dropped if the corresponding information is already subject to ESAP reporting.

Some provisions (e.g. Article 38a(1)(b)(ii) of EMIR) envisage that the information should contain the name and LEI of an entity as specified by Article 7(4) of the ESAP Regulation. It is not clear why the ESAP Regulation and its implementing technical standards would need to specify the LEI to be used. The LEI is

Comments ESAP

by now a globally familiar standardised identifier with no need to be further specified (cf. it is already used for reporting under EMIR). Most entities already have a LEI. So, depending on the design of the LEI specified under the ESAP Regulation, there is a risk of confusion with the existing LEIs used by entities.

With respect to other regulations, we have serious doubts that these and all related information would be suitable for the ESAP. This concerns especially the PRIIPs Regulation (please see our comments in the specific remarks section). For instance, we fully disagree with the idea to include the Key Information Document (KID) itself in a machine-readable form into the ESAP as this would create enormous implementation efforts by hardly any benefit on the other hand. If at all, machine-readability should be limited to necessary underlying metadata.

Also, it is not always clear, who is the addressee of the requirement, i.e. whether banks, CCPs, CSDs, trading venues or the supervisory authorities have to provide the relevant data to ESMA as the collection body (e.g. new Article 23a of MiFIR). We would welcome if the wording could be clarified in this respect.

All companies that issue securities in the EU already have to use the EU European Single Electronic Format (ESEF). The companies concerned have had to prepare their annual financial statements in XHTML format since 1 January 2020. We recommend taking into account the ESEF implementation experience. In this regard, we refer to our remarks on directive 2004/109/EC (Transparency directive) and directive 2013/34/EU on annual and consolidated accounts.

Last but not least, we have a few remarks regarding the budgetary implications. The proposed regulation envisages that ESAP will be staffed with three full-time employees (FTEs). We consider it highly ambitious to operate such a substantial database with three employees only. Access to the information available on ESAP should be free of charge for users except for very large volumes of information or for frequently updated information. We expect that the financial industry will be the main user of ESAP, especially with regard to ESG information. Financial institutions and insurance companies need this information in order to fulfil regulatory requirements. For these purposes (fulfilling regulatory requirements) the information needed should be available free of charge regardless the volumes or frequency.

Specific remarks on the regulations in the scope of ESAP

1. Regulation (EC) No 1060/2009 on credit rating agencies
2. Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps

The proposed amendment would cover natural or legal persons holding short positions that exceed a certain threshold. These positions already have to be reported to the relevant national competent authority (NCA). Since the NCA is to remain the collection body for the purposes of ESAP, nothing much is likely to change for those subject to the reporting obligation. As to the data format requirements, please see our general remarks.

3. Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories

The information to be provided by clearing members concerning the level of protection and the costs associated with client clearing pursuant to Article 39(7) can be quite substantial and complex, making it difficult to process and, in particular, to compare it with the parallel information of other clearing members. In addition, the information on the level of protection is directly related to the information that has to be disclosed to clearing members and clients by CCPs pursuant to Article 38(2) of EMIR (CCP risk information). The information pursuant to Article 39(7) of EMIR to be provided by clearing members for the purposes of ESAP will therefore not – as such and by itself – be useful or be able to serve the intended purpose. Its inclusion in ESAP should consequently be dropped in the interest of avoiding confusion. In addition, we note that the provision appears to assume that the information is only provided by CCPs, since the new Article 38a(1)(b) only addresses metadata regarding CCPs (and in this context further appears to assume that CCPs frequently have more than one name [“all the names of the CCP”]). The question that arises here is to what extent the text (now in PDF form) should have to be delivered in a data extractable format. As to the data format requirements, please see our general remarks. As to the understanding that there is no intention to introduce any new/additional requirements for LEIs please also see our general remarks.

4. Regulation (EU) No 345/2013 on European venture capital funds
5. Regulation (EU) No 346/2013 on European social entrepreneurship funds
6. Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment

This amendment provides for Pillar III prudential reporting to be made accessible in ESAP from 1 January 2026. The format to be used is to be specified by the EBA in the form of an implementing technical standard (ITS). At the same time, as part of the current CRR review (legislative proposal from 27 October 2021) there is a proposal to centralise Pillar III reports in a single access point / disclosure hub at the EBA. We consider it extremely important that the content and timing of both proposals are consistent. We would like to emphasise once again how important it is to have an implementation period of at least two years (see general remarks). As part of preparations for the draft ITS, there should be sufficient opportunity to clarify procedural questions in dialogue with industry and the EBA.

7. Regulation (EU) No 537/2014 on specific requirements regarding statutory audit of public-interest entities
8. Regulation (EU) No 596/2014 on market abuse (market abuse regulation)

Comments ESAP

With regard to the proposal for reports to ESAP pursuant to Article 17(1) and 17(2) and 19(3) of MAR, we have no concerns in principle provided that the reports continue to be submitted to the national competent authority using established reporting channels and practicable reporting formats and are then forwarded to ESAP by the NCA. As to the data format requirements, please see our general remarks.

There are concerns, however, about the added value for investors and market integrity of storing these data in ESAP. The purpose of publishing ad hoc information without delay is to provide the market and investors with material information relating to the issuer at very short notice. For this purpose, the media bundle and the reporting requirements to the national competent authority have proven to be very effective. Keeping these data in ESAP as well would have no benefit for market participants.

9. Regulation (EU) No 600/2014 on markets in financial instruments

10. Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories

We believe it is open to question whether the specific information required will really help investors with their decisions since it does not normally relate to the capital market products themselves or their issuers, but to the settlement of trades and the supervision of CSDs.

In the context of the entire regulation, it should be considered whether the data to be published in ESAP will provide any added value to the user at all. Not every item of information that currently has to be published for a very specific purpose and typically for a very specific group of addressees will help the general public. This is particularly true of the data from the CSDR at issue here.

Especially when it comes to information that is made public in aggregated form on an annual basis, we would recommend dispensing with regular/monthly reporting aimed primarily at supervisors of financial market infrastructure in order to avoid information overload (e.g. Article 7(1) and (9) of the CSDR). Information aimed at ensuring the stability of CSD services (such as the measurement/monitoring/management of liquidity risks of the banking service provider pursuant to Articles 54(3), 54(4) and 59(4)) is also likely to play only a minor role when making investment decisions.

Information on CSDs or participants which are not issuers might also be superfluous (see, for example, Articles 12(2), 26(4), 27(4) – information on promoting the gender under-represented on the management body, 27(7), 28(2), 33(1) and 33(2)).

With respect to Article 38(6) of the CSDR, information from the CSD is indeed sufficient since CSDs already have to publicly disclose this information today. The question that arises here is to what extent the text (now in PDF form) should have to be delivered in a data extractable format. As to the data format requirements, please see our general remarks.

In addition, the proposed new Article 74a(3) of the CSDR envisages that the information should contain the name and LEI of the CSD as specified by Article 7(4) of the ESAP Regulation. In our view, it would only make sense to include these details as supplementary information unless the sanctions are imposed on the CSD.

Comments ESAP

And with respect to the proposed new Article 74a(1)(b) of the CSDR: (i) should read "the name of the CSD" instead of "all the names of the CSD". Furthermore, it is not clear to us what specific publication periods are meant under (v).

11. Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)

We totally disagree with the idea of including the key information document (KID) in ESAP. Article 5(1) of the PRIIPs Regulation requires the manufacturer to generally draw up a KID for each product and publish it on its website before the product is made available to retail investors. Further details on the provision of the KID are set out in Articles 13 and 14. There are no further publication requirements for the manufacturer: unlike in the area of prospectuses, there is no requirement to submit the KID to the relevant NCA for approval or to any register, for instance. We would like to point out very few member states exercise the option of requiring the ex-ante notification provided for, but not mandated, in Article 5(2). In addition, there are established and well-functioning market practices for "transporting" the KID from manufacturer to distributor. We would like to highlight that there are more than 1.5 million PRIIPs in the German market today for which KIDs would need to be submitted to the relevant collection body. And from 1 January 2023, the PRIIPs Regulation will also be generally applicable to UCITS funds.

In our opinion, any plan to include the KID in ESAP would inevitably impose new requirements and additional burdens on the manufacturer. These need to be avoided if they are not balanced by any real added value. As mentioned in our general comments above, we consider it vitally important that ESAP introduces no additional information requirements compared to the status quo. Owing to the requirements of Article 10(1) of the PRIIPs Regulation, many KIDs are currently updated very frequently in the market (often daily). As a result, there would be no added value in submitting only the KID in accordance with Article 5(1) of the PRIIPs Regulation. And submitting updated KIDs would generate an enormous amount of dynamic data that we firmly believe would not lend itself to inclusion in ESAP. In addition, and subject to the review of the general applicability for OTC derivatives in the PRIIPs regulation, we do not see any added value at all to include those respective KIDs into the ESAP.

We also see no need whatsoever for a machine-readable KID. There are established practices in the German market which use central databases to provide distributors with all necessary information for their processes. Adaptions to these practices would entail unnecessary and enormously expensive implementation efforts even though there is no demand from distributors for such changes.

12. Regulation (EU) 2015/760 on European long-term investment funds
13. Regulation (EU) 2015/2365 on transparency of securities financing transactions and of reuse
14. Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment
15. 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

When information or documents pursuant to Articles 1(4)(f) and (g), 1(5) first subparagraph (e) and (f), 8(5), 9(4), 10(2), 17(2), 21(1), 21(9) and 23(1) of the Prospectus Regulation are made public, the ESAP Regulation proposes that this information should be submitted to ESMA. Under Article 21(2) of the existing Prospectus Regulation, the information is deemed to have been made public when published in electronic form on

Comments ESAP

- the website of the issuer, the offeror or the person asking for admission to trading on a regulated market (Article 21(2)(a)),
- the website of the financial intermediaries placing or selling the securities (Article 21(2)(b)), or
- the website of the regulated market where the admission to trading is sought or the website of the operator of the MTF (Article 21(2)(c)).

The requirements of the ESAP Regulation would make it necessary to report this information to ESMA as well. Setting up new infrastructures and reporting lines is counterintuitive, as infrastructures established under the Prospectus Regulation should be used or further developed. To avoid an inefficient and burdensome duplication of disclosure requirements and of the time and effort involved, existing file formats shall be kept in place and unnecessary conversions of text documents shall be avoided. The same applies to any technical specifications that would negatively impact the existing processes in a timely manner. Furthermore, the reporting requirements must be designed in a document-specific manner, not only with regard to the format, but also with regard to the required metadata.

The ESAP-Regulation provides that the information shall be prepared in a data extractable or a machine-readable format. The ESMA shall draft implementing standards to specify for which information a machine-readable format is to be used. Given that prospectuses (including final terms and supplements, if any) are text-based documents, these documents are not suitable for the submission in a data machine-readable or similar data format. Please also see our general remarks.

16. Regulation (EU) 2017/1131 on money market funds
17. Regulation (EU) 2019/1238 on a pan-European Personal Pension Product (PEPP)
18. Regulation (EU) 2019/2033 on the prudential requirements of investment
19. Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector

The regulatory developments in the context of the EU Sustainable Finance agenda have created an urgent need for publicly available ESG data as well as ways to improve their sourcing. Unfortunately, the availability of quality, comparable, reliable and public ESG data is currently rather limited and insufficient to meet rising expectations and new legal requirements set to take effect soon. When data are available, it is often impossible to compare, which raises doubts about its credibility. Furthermore, ESG data from third-party suppliers is often too expensive, particularly for small financial market participants.

Investment firms/credit institutions are affected by the establishment of the ESAP both as creators and users of data. From the perspective of data use, the creation of a central European register for all data or information to be published by companies from the area of financial reporting and sustainability is to be assessed positively. This comprehensive data collection, built according to uniform technical standards, offers investment firms/credit institutions the opportunity to use publicly available data from corporate clients (e.g. from the area of financial reporting or sustainability) via a single interface.

From the perspective of data production, a differentiated assessment results with regard to the reporting channels. There is no requirement to submit the information pursuant to Article 3(1), Article 3(2), Article 4(1), Article 4(3), Article 4(5), Article 5(1) and Article 10(1) of Regulation (EU) 2019/2088 (SFDR) to a collection body/NCA or register. It is sufficient to publish it on the website of the respective financial

market participant or financial advisor. This data is now also to be reported to ESAP via the collection points in a specific format, so that new and additional reporting lines are created here.

According to the proposed Article 18a (1) (b) SFDR, the abovementioned information shall be accompanied by metadata as well (e.g. all the names of the entity submitting the information, the legal entity identifier of the financial market participants or financial advisers, where relevant, the size of the financial market participants or financial advisers, the type of information, as classified pursuant to Article 7(4) of ESAP Regulation). It is already becoming apparent that investment firms will have to incur additional efforts and costs for the provision of this information.

20. Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment

The existing interactions between different legal requirements should be carefully considered. The information according to Article 8 Taxonomy Regulation is supposed to be collected for ESAP from 1 January 2024 and there is an ESMA ITS mandate. This information is part of the non-financial statement. The non-financial statement is sometimes integrated into the financial statements and management report of companies in the scope of the Accounting Directive (no ESMA ITS mandate) which should be delivered to ESAP from 1 January 2025. There is a need for clarification about the way of proceeding the taxonomy data to ESAP for 2024 for these companies. We suggest to align the first submission dates of the Taxonomy Regulation and the Accounting Directive in ESAP.

21. Regulation (EU) 2021/23 on a framework for the recovery and resolution of central counterparties

Specific remarks on the directives in the scope of ESAP

1. Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate
2. Directive 2004/25/EC on takeover bids
3. Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

The European Singe Electronic Format (ESEF) has not, or only to a very limited degree, achieved the aims of greater comparability and of easier access. It has not led to any additional value in the information provided to users of those annual financial statements. The main reason for this is the compulsory application of a taxonomy designed for the real economy means that the special features of banking cannot be adequately represented. This problem is overcome in the ESEF with the option of using extensions. However, this does not make the reports any more comparable. The lack of informative value and usefulness of the ESEF bank balance sheets is shown, among other things, by the fact that, to our knowledge, no bank has ever received any response or other reaction to the ESEF from users.

There have also been technical problems with ESEF reporting. As far as we are aware, there are currently no software solutions on the market that can properly meet the ESEF. This also applies to the major software companies. In a webcast in spring 2021, PwC announced that around 20% of their clients in

Comments ESAP

Germany (more than 100) had to postpone their audit dates due to the ESEF. From the point of view of the software developers, the problems mainly concern the XHTML and not the iXBRL publication. It must be technically possible to implement the specifications, otherwise it makes no sense to establish an ESAP.

4. Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts
5. Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies
6. Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)
7. Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
8. Directive 2011/61/EU on Alternative Investment Fund Managers
9. Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings

We refer to our remarks above on Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (No 3). If a taxonomy is to be used at all, it should be appropriate and relevant for the respective business.

The problems with a taxonomy which is not appropriate will almost certainly get worse. From the 2023 financial year onwards, not only the core parts but also the disclosures in the notes to the financial statements will also need to be drawn up in the ESEF. It is currently unclear how this would work in practice for preparers and auditors. There are still a number of unresolved issues concerning, for example, the drawing up of parts of the financial statements that are not IFRS disclosures but are required by the German Commercial Code (Handelsgesetzbuch, HGB) or Stock Corporation Act (Aktiengesetz, AktG) or do not meet any legal standard. Another unresolved issue is the drawing up of individual notes, paragraphs or sentences which meet several IFRS requirements simultaneously. One example is the joint treatment of properties pursuant to IAS 16 and IAS 40. Experience shows that the provision of information in structured formats only makes sense if it is based on an appropriate taxonomy.

The procedure for introducing the ESEF has therefore imposed a considerable additional burden on the banking industry, which has not been offset by any benefit. So far, there have been no queries about the ESEF from users of financial statements. With this in mind, we are very sceptical about rolling out this approach on a larger scale.

10. Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms
11. Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms
12. Directive 2014/65/EU on markets in financial instruments

Article 27(6) and the associated RTS 28 require investment firms to publish annual information on the quality of the execution of client orders (quality report) and on the top five execution venues for each

Comments ESAP

class of financial instrument (Annex to MiFID II) and for securities financing transactions (SFTs) with clients. These reports are currently published on the website of the investment firm, using a specified template for information on the top five execution venues and SFTs.

(Article 4 of Commission Delegated Regulation (EU) 2017/576: "Investment firms shall publish the information required in accordance with Article 3(1) and 3(2) on their websites, by filling in the templates set out in Annex II, in a machine-readable electronic format, available for downloading by the public and the information required in accordance with Article 3(3) shall be published on their websites in an electronic format available for downloading by the public.")

The ESAP Regulation will require investment firms to submit additional reports to ESMA. A duplication of disclosure requirements and of the time and effort involved should be avoided. As to the data format requirements, please see our general remarks.

Given the lack of public interest in the quality report and in the information on the top five execution venues on the websites of investment firms, the level 1 requirement in Article 27(6) of MiFID II should also be deleted. As we see it, ESAP will do nothing to increase acceptance by clients while imposing an even greater burden on those obliged to comply with the reporting requirements.

13. Directive (EU) 2016/97 on insurance distribution
14. Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision (IORPs)
15. Directive (EU) 2019/2034 on the prudential supervision of investment firms
16. Directive (EU) 2019/2162 on the issue of covered bonds and covered bond public supervision