THE VOICE OF PRIVATE CAPITAL
VENTURE CAPITAL
PRIVATE EQUITY
INFRASTRUCTURE
LONG TERM INVESTORS

16 May 2017

On behalf of the Public Affairs Executive (PAE) of the EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

Response to European Commission Consultation on the operations of the European Supervisory Authorities (ESAs)

I. Tasks and powers of the ESAs

1. Optimising existing tasks and powers

a) Supervisory convergence

1. In general, how do you assess the work carried out by the ESAs so far in promoting a common supervisory culture and fostering supervisory convergence, and how could any weaknesses be addressed? Please elaborate on your response and provide examples.

Note: The term "private equity" is used in this response to refer to all segments of the industry, including venture capital. "Venture capital" is used in specific contexts where there are issues that relate particularly to this segment.

We support the work carried out by the ESAs in promoting a common supervisory culture. The ESAs have produced a significant number of technical standards and developed tools such as guidance, recommendations and Q&As, to promote a common approach to the implementation of existing Directives and Regulations. These tools have generally been useful to ensure that EU legislation is interpreted consistently across Member States and that European passports function properly. There remain however many areas that could be further improved.

As demonstrated in our recent responses to the Call for Evidence and the Consultation on the cross-border distribution of funds, there are still divergences in the way fund managers are supervised. While our members welcome certain flexibility to reflect the diversity of local markets and conditions, supervisory divergence, such as the interpretation of key definitions or the details required to meet annual reporting demands, raise costs and thereby create barriers for fund managers seeking to operate on a cross-border basis.

We believe that the tools currently at the disposal of the ESAs, and in particular the mandate given under Article 29.2 (in the ESMA Regulation) to develop new practical instruments, have been

Place du Champ de Mars 5
B-1050 Brussels, Belgium
T +32 2 715 00 20
F +32 2 725 07 04
www.investeurope.eu
info@investeurope.eu
VAT: BE 0424.557.716
IBAN: BE33 3300 5785 0046
BIC/SWIFT: BBRUBEBB
European Transparency Register: 60975211600-74

sufficient to ensure they are allowed to act when necessary. In fact, the ESAs' supervisory convergence powers have been significantly extended in practice since their inception and the move towards a single rulebook has naturally corresponded to an increase in the importance of non-binding advice issued by the ESAs.

The ESAs' role and responsibilities, as well as their mandates to undertake specific initiatives, should always be clearly defined, either in the relevant ESA Regulation(s) or in the appropriate sectoral legislation. This is especially important when ESAs use their powers to develop new guidelines and recommendations in order to contribute to the establishment of common supervisory standards (see our response to Q. 5 for further details).

While ESAs have a key role to play in monitoring and assessing market developments, which might sometimes require them to take a proactive approach, there are questions over how far ESAs should devote their time and resources to initiatives that go beyond the specific mandate provided by co-legislators. EIOPA's work on the Holistic Balance Sheet would be one example where it can be argued that the initiative was inappropriate and not in line with the co-legislators' clear priorities.

In the same light the general principles of proportionality and subsidiarity should be observed if additional tasks and powers are to be granted to the ESAs. Some scope should remain for national authorities to issue their own guidance and recommendations taking account of national rules, issues, concerns and market practices that they face in their jurisdictions.

2.With respect to each of the following tools and powers at the disposal of the ESAs:
▫ peer reviews (Article 30 of the ESA Regulations);

▫ binding mediation and more broadly the settlement of disagreements between competent authorities in cross-border situations or cross-sectorial situations (Articles 19 and 20 of the ESA Regulations)

▫ supervisory colleges (Article 21 of the ESA Regulations);

a) to what extent have these tools and powers been effective for the ESAs to foster supervisory convergence and supervisory cooperation across borders and achieve the objective of having a level playing field in the area of supervision;

N/A

b) to what extent has a potential lack of an EU interest orientation in the decision making process in the Boards of Supervisors impacted on the ESAs use of these tools and powers?

Please elaborate on questions (a) and (b) and, importantly, explain how any weaknesses could be addressed.

See our response to Question 22 and 24.

3. To what extent should other tools be available to the ESAs to assess independently supervisory practices with the aim to ensure consistent application of EU law as well as ensuring converging supervisory practices? Please elaborate on your response and provide examples.

We are not convinced that additional tools are necessary to ensure consistent application of EU law and convergence in supervisory practices.

The ESMA latest Annual Work Programme details actions that were taken in the context of AIFMD and EuVECA to enhance supervisory convergence, including the development of common approaches to delegation and depositary functions and of a common procedure for the operation of the powers to impose leverage limits. These actions demonstrate that the existing ESA framework provides sufficient tools to promote supervisory convergence.

This does not mean however that those tools are always used in the most effective and efficient way. Before additional tools are developed we believe that a fuller assessment is required of whether all of the potential of the *current* framework has been properly developed and exploited. A compelling case that further tools are needed has yet to be made.

Where additional tools can be proven to be necessary to ensure supervisory convergence, these should be assessed and added on a case-by-case basis rather than automatically extended to all three ESAs. Different parts of the market may need different powers.

4. How do you assess the involvement of the ESAs in cross-border cases? To what extent are the current tools sufficient to deal with these cases? Please elaborate on your response and provide examples.

Private equity fund managers have especially been concerned over the past few years by fees and charges imposed by host authorities in the context of the AIFM Directive and the EuVECA Regulation. In a number of cases private equity firms are being asked to pay a fee not only in their home Member State, but also in the host jurisdiction in which they intend to market and seek to exercise their marketing passport rights.

We believe that the imposition of these fees is contrary to the letter and spirit of the existing legislation, and should in our opinion be considered as a breach of EU law. Despite the negative impact these have on the functioning of the European passport, and the speed of the industry's identification of this as an issue, ESMA was not in a position to settle these issues for more than three years. Although some progress was ultimately achieved, at least in an EuVECA context, the time and effort that was required before these issues could be addressed was significant. It discouraged fund managers from using the European passport and it called them to question the extent to which their rights under EU law were being reliably and expeditiously defended. The concern remains that if such fees or other similar barriers were to be reintroduced in future, then the ESAs would still not be in a position to act any more efficiently, thus undermining the achievement of CMU objectives.

As ESMA has, in our view, appropriate tools to prevent these practices, it seems that the difficulty the Authority faced was most likely linked to its governance and decision-making processes. We elaborate on this matter in more detail in our responses to Questions 22 and 24.

b) Non-binding measures: guidelines and recommendations

5. To what extent are the ESAs tasks and powers in relation to guidelines and recommendations sufficiently well formulated to ensure their proper application? If there are weaknesses, how could those be addressed? Please elaborate and provide examples.

At a time where more and more of the regulatory focus turns to the implementation of existing measures, it is our opinion that the ESAs' tasks and powers in relation to guidelines and recommendations are well established. For example, Article 16 of the ESMA Regulation details the process when it comes to these instruments and Recital 48 also states that "the Authority should consult interested parties on guidelines and recommendations and provide them with a reasonable opportunity to comment on proposed measures". We believe this should continue to be the case.

Unfortunately, the same cannot be said about Questions & Answers ("Q&As") that ESAs have developed over the last few years with the objective of "ensuring the consistent and effective day-to-day application of Union law". While these Q&A can be useful in terms of supervisory convergence we are concerned that they do not follow better regulation principles, including on stakeholder consultation.

We find it highly problematic that despite the significance of their impact Q&As are still not subject to an appropriate level of scrutiny and their adoption process is not fully transparent. Even if not formally binding, they are applied by most regulatory authorities as if they were. Stakeholders should therefore have more opportunities to comment and the co-legislators (and/or the Commission) should be given an appropriate role in order to ensure that the content is in line with their political intention.

The effect of Q&As often go beyond a solely technical assessment. In fact, ESMA's interpretations and clarifications, whether through guidelines or Q&As, all have the potential to produce significant impacts across the marketplace, comparable in many cases to those arising from the introduction of new primary legislation. We therefore strongly disagree with the assessment that formal consultations on draft Q&As and/or guidelines are unnecessary.

The absence of a consultation processes raises question as to the type of evidence on which ESAs draft their Q&As. A good example of this is the recent change to the AIFMD Guidelines dealing with the delegation of functions by an AIFM to AIFs or third parties (question 2 in section VIII on Delegation). The interpretation produced in the Q&A had a direct impact on certain fund structures, while it simply appeared wrong in law to treat such arrangements as a delegation by the AIFM. Unfortunately, the industry was only informed about this change at the moment that the Q&A were made public, generating significant uncertainty and the risk of significantly

increased compliance costs (given that prudent market participants will react very quickly to the publication of such a document).

In order to address this, an opportunity for stakeholders to offer input *prior* to the publication of revised Q&A documents should be guaranteed. This view was endorsed by the Securities and Markets Stakeholders Group in its End of Term Report on 30 June 2016. Further to allowing ESAs to produce better standards by at least acknowledging the views of the industry on their guidance, it would also allow market participants to plan ahead and to better manage the impacts such revised interpretations may have.

For the same reason, there should also be clarity over when the new interpretations contained in a Q&A document would become applicable (a month's notice would be an absolute minimum). The process should also become more transparent to ensure that smaller market participants are fully aware of new guidance.

While we understand that the ESAs have now put in place some new practices to deal with this issue, we do not believe they go far enough and hope the ESAs review will be seen as an opportunity to improve the existing process.

c) Consumer and investor protection

6. What is your assessment of the current tasks and powers relating to consumer and investor protection provided for in the ESA Regulations and the role played by the ESAs and their Joint Committee in the area of consumer and investor protection? If you have identified shortcomings, please specify with concrete examples how they could be addressed.

Most private equity firms do not market their funds to retail investors and our experience of the role played by ESAs in terms of investor protection rules is not extensive.

However, we are concerned that ESAs do not always fully take into account the diversity of the financial services industry while undertaking their work on investor protection. For example, the recent work of a Joint ESAs Committee on KID PRIIPS showed in some cases a lack of understanding of specific sections of the financial market.

Appropriate safeguards need to be put in place to ensure investor protection rules are drafted taking into account the specificities of the customers in each part of the financial services industry. While remaining within the remit of the Level 1 legislation, they could, for example, seek to better protect investors based on their level of sophistication and knowledge of the financial markets.

7. What are the possible fields of activity, not yet dealt with by ESAs, in which the ESA's involvement could be beneficial for consumer protection? If you identify specific areas, please list them and provide examples.

N/A

d) Enforcement powers – breach of EU law investigations

8. Is there a need to adjust the tasks and powers of the ESAs in order to facilitate their actions as regards breach of Union law by individual entities? For example, changes to the governance structure? Please elaborate and provide specific examples.

ESAs' enforcement powers play an important role in ensuring high quality financial supervision across the EU and in tackling general deficiencies in national supervision. As we explained in our response to Questions 1, 3 and 4, our experience with the AIFMD and EuVECA legislation shows that improvements could be made within the existing framework.

Invest Europe has documented several cases of what we believe were breaches of Union law by national competent authorities, in particular when these imposed additional requirements such as fees and charges on fund managers marketing their funds cross-border or forced fund managers to appoint a paying agent. These experiences only reinforce our view that the ESAs', and in particular ESMA's, enforcement powers remain highly relevant.

However, our assumption is that ESAs would be able to tackle these issues within their existing powers, provided the existing process is made more efficient. As suggested in our response to Section 3 on the ESAs governance, such efficiency could be potentially achieved, by changes to the composition of the Board of Supervisors of the ESAs, and by bringing more transparency to their decision-making process. For example, part of the peer review process could be made more open to ensure ESAs are allowed to "name and shame" competent authorities that do not appropriately implement EU law. We also support the findings of the 2014 Report that changes could be made to the existing procedures in order to ensure decisions to investigate malpractices become more transparent.

e) International aspects of the ESAs' work

9. Should the ESA's role in monitoring and implementation work following an equivalence decision by the Commission be strengthened and if so, how? For example, should the ESAs be empowered to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving EU NCAs and third country counterparts? Please elaborate and provide examples.

As the AIFMD third country passport is not in place, we do not yet have much experience of the ESAs' – and in particular ESMA's - role in monitoring and implementation work following a Commission equivalence decision. It might be sensible for ESMA to be entitled to give *ex-post* advice on the relevance of equivalence, basing itself on the work it has produced *ex-ante*.

Nonetheless, the ultimate decision to make an equivalence determination should be left to the European Commission (with the appropriate involvement of the Council and Parliament). While

ESMA could usefully be given additional monitoring powers, for example in the context of the AIFMD third country passport, these should be appropriately circumscribed to ensure that the power to revoke any equivalence decision remains at the political level. In order to provide as much regulatory certainty as possible, any general additional powers to monitor equivalence should only be exercised if they are explicitly granted in the relevant Level 1 measures. The co-legislators must be empowered to determine the extent to which they want to grant such a role to the ESAs and how it should be operated.

Further to this it is also important that ESAs should be empowered to monitor developments in international fora, in particular the work carried out by the FSB and IOSCO, to ensure their work is consistent with standards set out by such bodies. There are examples of the ESAs sometimes developing guidelines or standards without taking into account the work done by international regulators, such as the work carried out by the EBA on shadow banking, which did not take into account the definition set out at FSB level.

f) Access to data

10. To what extent do you think the ESAs powers to access information have enabled them to effectively and efficiently deliver on their mandates? Please elaborate and provide examples.

N/A

11. Are there areas where the ESAs should be granted additional powers to require information from market participants? Please elaborate on what areas could usefully benefit from such new powers and explain what would be the advantages and disadvantages.

We do not believe there are areas, from a fund management perspective and in the current supervisory context, where data should be collected directly from market participants instead of national competent authorities. If the ESAs were to be empowered to collect information directly from market participants this must not create an additional burden for market participants. For example, this should not lead to a fund manager being forced to provide similar types of information twice, both to the national authority and ESMA.

g) Powers in relation to reporting: Streamlining requirements and improving the framework for reporting requirements

12. To what extent would entrusting the ESAs with a coordination role on reporting, including periodic reviews of reporting requirements, lead to reducing and streamlining of reporting requirements? Please elaborate your response and provide examples.

As part of the AIFM Directive, our members are subject to several reporting requirements, in particular the obligation (as part of Annex IV of AIFMD), to provide documentation and information when marketing in another Member States. A better coordination role for ESMA, and the creation

of standardised templates for this information, could help alleviate the costs of producing similar but different documents across the EU. This would simplify the life of the – often small - team of fund managers that have to produce these reports and ensure home and host authorities are better able to access information. At the same time, templates should take into account as much as possible the diversity of industry practices – for example differences in size, complexity or risk of certain funds.

13. In which particular areas of reporting, benchmarking and disclosure, would there be useful scope for limiting implementing acts to main lines and to cover smaller details by guidelines and recommendations? Please elaborate and provide concrete examples.

We realise that since their establishment the ESAs have been facing a demanding and heavy regulatory agenda. While they are generally perceived as having performed well, we believe that working under a significant time pressure and to very short deadlines for submission of draft technical standards has not only been a challenge for the ESAs but also for the stakeholders and has ultimately affected the quality of the work.

Instead of shifting part of the technical work to guidelines and recommendations (and potentially Q&As), it would be more sensible to extend the time allocated for consultation periods. Too strict implementation deadlines, along with a too tight consultation processes, have a negative impact on the quality of the analysis and feedback that can be provided by stakeholders. Longer deadlines would also help ESAs to make better use of their respective working groups, especially in cases where RTS, ITS, guidelines or Q&As require input from the expertise of different ESAs.

Appropriately longer consultation periods would also let the ESAs benefit from more comprehensive, detailed and, consequently, more helpful input . Simply reducing the number of implementing acts and replacing them with guidance and Q&A could – given the more limited stakeholder involvement that we see in their production – limit the amount of information at the ESAs' disposal and leading to a worse outcome.

The Commission could also consider ways to make sure ESAs are more involved at the start of the legislative process. Coherence and consistency between Level 1 and Level 2 is essential but not always delivered in practice. While the Treaties rightly pose clear limits with respect to the role of supervisory authorities in the regulatory process, mechanisms could be found to improve this connection while retaining the legitimate distinction between the Level 1 and Level 2 processes and preserving the position and independence of the co-legislators. If the ESAs were well informed about Level 1 negotiations, they would have institutional understanding and memory of points that were debated by the European Commission, the European Parliament and the Council.

Appropriate arrangements could also be put in place to enable ESAs to provide an informed assessment of the timetable that should be set for the completion of Level 2 processes without endangering the basic balance between Level 1 and Level 2. That would certainly be beneficial for the ESAs work, make it more efficient and ensure that it is consistent with the intention of co-legislators.

h) Financial reporting

14. What improvements to the current organisation and operation of the various bodies do you see would contribute to enhance enforcement and supervisory convergence in the financial reporting area? How can synergies between the enforcement of accounting and audit standards be strengthened? Please elaborate.

N/A

15. How can the current endorsement process be made more effective and efficient? To what extent should ESMA's role be strengthened? Please elaborate.

N/A

2. New powers for specific prudential tasks in relation to insurers and banks

N/A

3. Direct supervisory powers in certain segments of capital markets

19. In what areas of financial services should an extension of ESMA's direct supervisory powers be considered in order to reap the full benefits of a CMU?

As we mentioned in other responses to this consultation, further improvements to the functioning of the ESAs could be made within the existing framework, with the objective of avoiding the erection of cross-border barriers, before giving direct supervisory powers to the European Supervisory Authorities.

There are of course some advantages of giving ESAs direct supervisory powers. Standardised supervisory practices would ensure fund managers do not face different requirements from country to country when marketing their funds cross-border. It could also limit the opportunity for Member States to impose fees and charges when these are related to the supervision of fund managers.

If more powers were given to the ESAs to require competent authorities to implement existing legislation consistently and to prevent regulatory arbitrage, this should not preclude the fact that in many cases the national supervisory authority is best placed to take relevant administrative measures. Where a fund operates mainly on the domestic market or on a limited geographical market (e.g. the Nordic region) the particulars of that market should be taken into account, and often the national authority would be the best placed to do so. Existing relationships between fund managers and their authorities generally work well and allow for useful discussion.

There is also a risk that direct supervisory powers would restrict fund managers from having a direct and low-barrier access to the supervisor. Communication with the local supervisor is

important as it allows for a more tailored discussion for small-scale local operators. A more distant and less accessible European supervisor could create additional administrative burdens for these smaller players and have a notable impact on their operations. Except in certain cases, a one-size-fits-all approach may then lead to unnecessarily burdensome practises for smaller market participants.

For this reason, we believe that relevant Directives or Regulations, rather than the ESAs Regulation, are the most appropriate place for these additional powers to be granted. Whether ESAs should receive additional powers or not would indeed be better assessed, both from a proportionality and subsidiarity perspective, by the co-legislators on an *ad-hoc* basis, taking account of the particular needs and conditions of the sector or product being regulated. As a result, if ESMA were to be given direct supervisory powers, it should be within limits set out in the relevant Directive and/or Regulation.

20. For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages?

See our response to Question 19.

21. For each of the areas referred to in response to question 19, to what extent would you suggest an extension to all entities or instruments in a sector or only to certain types or categories? Please elaborate on your responses to questions 19 to 21 providing specific examples.

See our response to Question 19.

II. Governance of the ESAs

22. To what extent do you consider that the current governance set-up in terms of composition of the Board of Supervisors and the Management Board, and the role of the Chairperson have allowed the ESAs to effectively fulfil their mandates? If you have identified shortcomings in specific areas please elaborate and specify how these could be mitigated.

As an external party, it is difficult to form a view on the internal governance of the ESAs. However, and as expressed in other parts of our response, the current governance set-up might indeed be one of the elements that prevents the ESAs from effectively fulfilling their mandates.

We agree with the European Commission that functional independence of the ESAs is a prerequisite to their success and believe that ensuring this independence, through possible changes to the current organisation of the ESAs, needs to be a key component of the review.

When an ESA is faced with an issue that impacts very directly on the national competent authorities' interests (such as the issue of host fees and charges under AIFMD and EUVECA that came before ESMA and that would impact on the national competent authorities' finances) there must be a risk that the Authority's ability to act is constrained.

As part of the future review, we believe the composition of the ESAs Board might be modified to ensure that relevant ESAs Boards have a pan-European perspective and are able to take decisions more swiftly. We believe this change would be much more important in further strengthening the role of the ESAs than any increased supervisory convergence powers (which powers would in any case risk not being used effectively if the governance arrangements are nor improved). The Board of the ESAs could become more independent with experts selected on their own merits, in line with the statutes of the Single Resolution Board.

23. To what extent do you think the current tasks and powers of the Management Board are appropriate and sufficient? What improvements could be made to ensure that the ESAs operate more effectively? Please elaborate.

N/A

24. To what extent would the introduction of permanent members to the ESAs' Boards further improve the work of the Boards? What would be the advantages or disadvantages of introducing such a change to the current governance set-up? Please elaborate.

As we noted in other parts of this response, we believe that the introduction of permanent members to the ESAs Board and the replacement of the current Board of Supervisors by a body composed of full-time members, appointed based on their skills and their knowledge of matters relevant to the Authority, could improve the functioning of the ESAs.

While national competent authorities should obviously continue having a role in the way ESAs function, introducing permanent members to the ESAs Board might in our opinion ensure that they are better able to take decisions with a EU perspective, independent from the national (or self) interests naturally defended by national competent authorities. This should help contribute to the consistent application of legally binding acts and prevent regulatory arbitrage, in line with the tasks and powers the ESAs have been given. The inclusion of independent experts could also be regarded as a basic requirement of good governance in any board structure. In order to ensure they are performing their duties well, these experts' appointments could be independently reviewed after a defined time period.

Nominating permanent Board members would also allow the Board to more effectively settle disagreements between competent authorities, without forcing national competent authorities to be both judge and jury in these cases.

As national competent authorities will remain closely involved in the functioning of the ESAs, we do not believe such a change would prevent ESAs from continuing to benefit from the expertise of national regulators.

25. To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be

delegated powers to make certain decisions without having them subsequently approved by the Board of Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages? Please elaborate.

N/A

26. To what extent are the provisions in the ESA Regulations appropriate for stakeholder groups to be effective? How could the current practices and provisions be improved to address any weaknesses? Please elaborate and provide concrete examples.

We believe that, at least from an ESMA perspective, stakeholders groups have worked well since their inception. We agree with the views shared in the End of Term Report of the ESMA SMSG that early engagement of the stakeholder groups would be beneficial. The earlier the SMSG could be consulted, the earlier ESAs could indeed benefit from more balanced input and have an idea of the overall impact of the rules on markets in general and on SMEs and consumers in particular. As many areas are cross-sectorial, more efforts could also be done in the future to ensure SMSGs are in a position to talk to one another.

III. Adapting the supervisory architecture to challenges in the market place

27. To what extent has the current model of sector supervision and separate seats for each of the ESAs been efficient and effective? Please elaborate and provide examples.

While we do not deny it has advantages, the current model of supervision can also reveal itself to be problematic when one ESA is given the responsibility to draft standards or guidelines for entities which are regulated under legislation that has not empowered it. This situation is exacerbated when it comes to very specific sectors of the market, such as private equity, whose business model is very different from entities that are usually supervised respectively by EBA and EIOPA.

A first example of this is the work currently carried out by the EBA on the prudential regime of investment firms. In its Discussion Paper published in November 2016, the EBA did not make any distinction between investment firms based on the type of activities they carry out and the type of clients they have. Although the EBA is the relevant body to draft such proposals, we believe that because the Authority is used to deal with banking entities, and is therefore less familiar with the specificities and the diversity of investment firms, it took an approach which did not take account of the specificities of certain parts of the asset management world.

The EBA work on the definition of shadow banking entities can be given as another example. In its consultation on "guidelines on exposures to shadow banking entities" drafted in March 2015, the EBA specified that AIFs should, *prima facie*, be in the scope of the definition of a "shadow banking entity". This did not take into account that AIFs were regulated under the AIFMD, which may again

have resulted from the fact that the EBA is not involved in the supervision of AIFMs and was therefore less well-informed of the conditions the relevant sectoral legislation imposes on these funds.

These examples demonstrate that the current split of roles can create situations where the ESAs are required to make decisions that impact entities and sectors they do not normally oversee and whose characteristics they might not, as a result, understand as well. The Joint Committee has not, in our experience, proved to be an adequate response to this risk. We therefore invite the Commission to consider ways to make appropriate changes to the ESAs model that could effectively address this issue.

28. Would there be merit in maximising synergies (both from an efficiency and effectiveness perspective) between the EBA and EIOPA while possibly consolidating certain consumer protection powers within ESMA in addition to the ESMA's current responsibilities? Or should EBA and EIOPA remain as standalone authorities?

It is important to remember that the work carried out by one of the ESAs might have an impact and set precedents for the work of the other ESAs on similar topics. For example:

(a) the remuneration provisions of the AIFMD were lifted from CRDIII and ESMA was required to work closely with the EBA in preparing its guidelines on sound remuneration policies under the AIFMD; and
(b) the definition of fixed overheads for the purposes of the own funds requirements applicable to alternative investment fund managers under the AIFMD is by cross-reference to CRDIV.

In light of this, there is much to gain from increasing synergies between the different authorities, in order to ensure that rules which are drafted by one ESA are appropriately taken into account by others.

IV. Funding of the ESAs

29. The current ESAs funding arrangement is based on public contributions: a) should they be changed to a system fully funded by the industry; b) should they be changed to a system partly funded by industry? Please elaborate on each of (a) and (b) and indicate the advantages and disadvantages of each option.

We do not support the suggestion that ESAs should in the future be funded by the industry. We believe both options (a) and (b) would present significant disadvantages and risk imposing high fees that may not be proportionate to the supervisory tasks that the ESAs would perform.

ESAs do need appropriate levels and types of resource and expertise to be able to properly perform their functions and to cope with the increasing number of their duties, such as drafting significant numbers of technical standards, providing technical input to the Commission, or monitoring and ensuring both consistency in implementation and enforcement across the EU. However, the best way to achieve this outcome remains for the ESAs to be funded through an independent budget line in the General Budget of the EU.

Any new funding arrangement based on industry's contributions risks being significantly more complex than the current approach for little or no obvious gain. The development of a contribution key would be difficult to determine and could create significant distortions between entities and sectors.

As pointed out in the consultation paper, a system fully funded by the industry would also risk endangering the ability of the ESAs to act in situations of stress. Any system of industry contributions could only be put in place once sufficient transparency and oversight of the ESAs costs and expenditures is in place, alongside benchmarking of costs/expenditures against other regulators, to ensure that ESAs are using the funding they received appropriately.

30. In your view, in case the funding would be at least partly shifted to industry contributions, what would be the most efficient system for allocating the costs of the ESA's activities:
a) a contribution which reflects the size of each Member State's financial industry (*i.e.*, a "Member State key"); or

b) a contribution that is based on the size/importance of each sector and of the entities operating within each sector (i.e., an "entity-based key")?

Please elaborate on (a) and (b) and specify the advantages and disadvantages involved with each option, indicating also what would be the relevant parameters under each option (e.g., total market capitalisation, market share in a given sector, total assets, gross income from transactions etc.) to establish the importance/size of the contribution.

As the Commission rightly pointed out in the consultation document, there is a wide variety of market participants, which are currently subject to different fees structures. If it was decided that ESAs should be fully/partially funded by the industry, then several additional conditions would need to be attached to any shift to an industry fee based system.

As mentioned in our response to Question 29, we are strongly opposed to any funding mechanism that would have the effect of discriminating based on the location of the firms. The funding burden should be fairly distributed between relevant market participants and properly balanced with the contribution that they are already paying to their national supervisors (off-setting reductions in national fees). It is very unclear how this could be achieved at the moment under the two options proposed by the Commission.

Any new regime would have to ensure there a level playing field between, for example, a venture capital manager based in one country and venture capital managers based in all other EU jurisdictions.

Option (a) would not achieve the intended objective as fee structures would then differ from Member State to Member State for the *same EU-level service*. A venture capital fund manager based in Germany could be subject to much higher fees than one in Estonia simply because it is located in a Member State with a larger financial services (or even just venture capital) sector.

Option (b), on the other hand, poses significant practical questions as it would require the development of appropriate criteria to determine the type of contribution each sector and/or entity would have to pay. This would inevitably have distributional impacts and would risk preferring one part of the financial services industry over another. It is hard to imagine how this process could be managed in a fair and transparent manner.

For all the reasons expressed above, the Commission should be extremely careful to ensure that any new approach would not simply create (new) disparities in the treatment of different parts of the financial services industry. Even if there are legitimate arguments for reform and for the industry to contribute more directly (it should not be forgotten that indirectly the industry already contributes) to its EU-level supervision it must be demonstrated that any new system is an improvement on the status quo, does not generate new distortions and does not simply lead to additional costs being imposed.

An independent line in the EU budget remains in our view the fairest and most appropriate funding mechanism.

31. Currently, many NCAs already collect fees from financial institutions and market participants; to what extent could a European system lever on that structure? What would be the advantages and disadvantages of doing so? Please elaborate.

As expressed in our response to Question 29, we do not favour a system where fees are collected from market participants. Our experience is that the imposition of such fees in Member States led to high costs for industry participants without creating any specific advantages.

General questions

32. Any other comments

We believe there is a need for a more appropriate and transparent process in cases where the European Commission does not accept the work undertaken by the ESAs. In order to ensure consistency in the process, the Commission should provide a clear and full explanation of the reasons for its decision not to endorse or accept the output of the ESAs work, with appropriate analysis and evidence.

The Commission should also show similar commitment towards stakeholders and ensure that whenever it decides not to accept the ESAs drafts enough time is foreseen for further consultations with relevant stakeholders. The recent rejection of KID-PRIIPS technical standards provided limited possibilities for the industry to comment on changes made by the Commission at that stage of the process. While it is understandable that the time available to comment on redrafted technical standards and/or delegated acts may need to be shortened it is nonetheless important that financial market participants impacted by the rules are able to voice their views (which will often include the practical consequences of proposed regulation on the ultimate investors and customers) formally.

Contact

For further information, please contact Christophe Verboomen (christophe.verboomen@investeurope.eu) at Invest Europe.

About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

About Invest Europe

Invest Europe is the association representing Europe's private equity, venture capital and infrastructure sectors, as well as their investors.

Our members take a long-term approach to investing in privately held companies, from start-ups to established firms. They inject not only capital but dynamism, innovation and expertise. This commitment helps deliver strong and sustainable growth, resulting in healthy returns for Europe's leading pension funds and insurers, to the benefit of the millions of European citizens who depend on them.

Invest Europe aims to make a constructive contribution to policy affecting private capital investment in Europe. We provide information to the public on our members' role in the economy. Our research provides the most authoritative source of data on trends and developments in our industry.

Invest Europe is the guardian of the industry's professional standards, demanding accountability, good governance and transparency from our members.

Invest Europe is a non-profit organisation with 25 employees in Brussels, Belgium.

For more information please visit www.investeurope.eu.