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

21 May 2021

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

Response to European Commission Consultation on Supervisory Convergence and the Single Rulebook

---

A. QUESTIONS FOR THE ASSESSMENT OF THE EUROPEAN SUPERVISORY AUTHORITIES (ESAS) AND THE RECENT CHANGES IN THEIR FOUNDING REGULATIONS

How do you assess the impact of each ESA's activities on the aspects below? Please rate the ESAs impact on each aspect from 1 to 5, 1 standing for "less significant impact" and 5 for "most significant impact":

The financial system as a whole	3
Financial stability	3
The functioning of the internal market	4
The quality and consistency of supervision	5
The enforcement of EU rules on supervision	4
Strengthening international supervisory coordination	3
Consumer and investor protection	4
Financial innovation	3
Sustainable finance	3

In your view, do the ESA(s)' mandate(s) cover all necessary tasks and powers to contribute to the stability and to the well-functioning of the financial system? If you think that there are elements which should be added or removed from the mandate, please provide a substantiated answer.

Yes.

In your view, do the ESAs face any obstacles in delivering on their mandates? If the answer is yes, please explain what you consider to be the main obstacles.

Yes.

There are three main areas of improvements/changes we see to the ESAs functioning:

- changes to the structure of the Board of ESAs to allow them to more easily take decisions on a pan-European basis
- enhancement of the ESAs' culture of engagement with stakeholders and supervised firms
- improvement of the understanding of the specificities of specific asset classes, such as venture capital and private equity industry (this is especially true when authorities other than ESMA have the initiative on issues that will affect asset managers – such as with the recent EBA Guidelines on high risk exposures or the work of EIOPA on the treatment of long-term equity)

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

As can be seen, our view is that ESAs do not require any additional powers to deliver their mandates, but that changes to their structure and to the way they are in a position to use their powers would be sufficient for them to meet the objectives they have been given.

1. The supervisory convergence tasks of the ESAs

1.1. Common supervisory culture/supervisory convergence:

1.1.1. To what extent the ESAs do contribute to promoting a common supervisory culture and consistent supervisory practices? Please rate in a scale from 1 to 5 ("5" being the most significant contribution and "1" the less significant contribution). Please explain your answer and indicate if there are any areas for improvement.

4

As a preliminary remark, we would like to highlight that convergence is only required where pan-European issues truly exist, particularly as regards competition among players or the prevention of regulatory forum shopping. The key priority is the capacity of ecosystems and local markets to effectively finance businesses and allocate savings, in particular in a context of (post) health crisis. The principle of subsidiarity should remain central.

In our opinion, the ESAs have significantly contributed to enhancing the quality and consistency of supervision in the EU. Technical standards, guidance, recommendations and Q&As helped promote a common approach to the implementation of existing Directives and Regulations as they ensured that EU legislation was interpreted consistently across Member States and that European passports functioned properly.

However, there remain many areas where supervisory convergence could be further improved. Divergences prevail 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.

1.1.2. To what extent the following tasks undertaken by the ESA(s) have effectively contributed to building a common supervisory culture and consistent supervisory practices in the EU. Please rate each task from 1 to 5, 1 standing for "less significant contribution" and 5 for "most significant contribution":

Providing opinions to competent authorities	5
Promoting bilateral and multilateral exchanges of information between competent authorities	4
Contributing to developing high quality and uniform supervisory standards	5
Contributing to developing high quality and uniform reporting standards	4
Developing and reviewing the application of technical standards	5

Contributing to the development of sectoral legislation by providing advice to the Commission	3
Establishing (cross)sectoral training programmes	3
Producing reports relating to their field of activities	4
Conducting peer reviews between competent authorities	4
Determining new Union strategic supervisory priorities	4
Establishing coordination groups	3
Developing Union supervisory handbooks	3
Monitoring and assessing environmental, social and governance-related risks	3
Adopting measures using emergency powers	4
Investigating breaches of Union law	5
Coordinating actions of competent authorities in emergency situations (e.g. Covid-19 crisis)	4
Mediating between competent authorities	4
Monitoring the work of supervisory and resolution colleges	4
Publishing on their website information relating to their field of activities	3
Monitoring market developments	3
(Only for the EBA) Monitoring liquidity risks in financial institutions	NA
(Only the EBA) Monitoring of own funds and eligible liabilities instruments issued by institutions	NA
Initiating and coordinating Union-wide stress tests of financial institutions	NA
Developing guidelines and recommendations	5
Developing Q&As	5
Contributing to the establishment of a common Union financial data strategy	NA
Providing supervisory statements	NA
Other instruments and tools to promote supervisory convergence, please indicate	NA

1.1.4. In the framework of the 2019 ESAs review. How do you assess the new process for questions and answers (Article 16b)?

We welcome the new process introduced by Article 16b, which in particular provides for new public consultations. Q&As should be subject to an appropriate level of scrutiny and their adoption process should be fully transparent. Indeed, even if not formally binding, they are applied by most regulatory authorities as if they were. ESMA's interpretations and clarifications also have the potential to have a significant impact on the marketplace, comparable in many cases to those arising from the introduction of new primary legislation (for example, ESMA Q&As on leverage in an AIFMD context). Therefore, their effect often goes beyond a solely technical assessment and ESAs must take this into consideration when drafting them (and potentially replace them with guidance where the impact is likely to be significant).

A more transparent production of Q&As would help ensure that smaller market participants are fully aware of any new guidance. We also welcome article 16b as an opportunity for the co-legislators to ensure that the content of the Q&As is in line with their political intention.

1.1.5. In your view, does the new process for questions and answers allow for an efficient process for answering questions and for promoting supervisory convergence?

See our response above.

1.2. No action letters

1.2.1. In the framework of the 2019 ESAs review. In your view, is the new mechanism of no action letters (Article 9a of the ESMA/EIOPA Regulations and Article 9c EBA Regulation) fit for its intended purpose? Please justify your answer.

We warmly welcome the introduction of the new mechanism of no action letters in the ESAs Regulations. Indeed, such mechanism will allow the ESAs to adjust the implementation of a rule and give comfort to market players. This will also contribute to ensuring a level playing field among the different Member States

1.2.2. In the framework of the 2019 ESAs review. How does the new mechanism, in your view, compare with "no action letters" in other jurisdictions?

N/A

1.2.3. In the framework of the 2019 ESAs review. Could you provide examples where the use of no action letters would have been useful or could be useful in the future?

No action letters could avoid imposing excessive burdens on market participants in case level 2 measures are published too close to the implementation date set out at level 1 e.g. permit market players to apply their NCAs' proposals until further clarification is reached at European level.

1.3. Peer reviews

N/A

1.4. Other tasks and powers

1.4.1. In your view, is the collection of information regime (Art 35 ESAs Regulations) effective? If you identify areas for improvement, please explain.

N/A

1.4.2. In the framework of the 2019 ESAs review, in you view, are the new Union strategic supervisory priorities an effective tool to ensure more focused convergence priorities and more coherent coordination (Article 29a ESAs Regulations)? If you identify any areas for improvement, please explain.

Although we support the principle of setting Union wide priorities, it seems too soon to assess the effectiveness of this new tool to ensure more focused convergence priorities and more coherent coordination.

1.4.3. Do you think there is the need to amend or add a tool to the toolkit of the ESAs for achieving supervisory convergence? If yes, which ones.

No.

There definitely remains some areas where the ESA's supervisory work could be improved as divergences prevail in the way fund managers are supervised. But rather than considering any new rules to add to the Single Rule Book or tasks or powers to be granted to ESMA, tools and powers should be fully used, and resources adequately assigned towards a proper enforcement of the existing European regulation. One area where further progress could be made is the facilitation of data exchange between national competent authorities.

1.4.4. Please assess in a scale from 1 to 5 the significance of the new ESAs' task of fostering and monitoring the supervisory independence of national competent authorities ("5" being the highest rate and "1" the lowest rate). Please explain.

4

1.4.5 What criteria would be the most relevant, in you view, for the ESAs to perform effectively their new task of fostering and monitoring supervisory independence of national competent authorities? Please rate the relevance of each criteria in a scale from 1 to 5 ("5" being the most relevant criteria rate and "1" less relevant criteria).

operational independence	4
financial independence	3
appointment and dismissal of governing body	4
accountability and transparency	5
adequacy of powers and ability to apply them	4
other, please specify	NA

1.4.6. What are, in your view, the main remaining obstacle(s) to allow for a more effective supervisory convergence?

In our opinion, one of the main obstacles that ESMA faces in delivering its mandate relates to the composition of its Board. The Board of ESMA should be (further) modified to ensure that it has a pan-European perspective and is able to take decisions more swiftly. It should become more independent with experts selected on their own merits, in line with the statutes of the Single Resolution Board. We believe that such a change would be much more important in strengthening the role of ESMA than any increased supervisory convergence powers (which powers would in any case risk not being used effectively if the governance arrangements are nor improved).

1.4.7. Do you consider that the ESAs ensure that enough information on their activities and on financial institutions is available? If not, what changes should be made in this area?

N/A

1.4.8. Do you consider that the purpose and outcome of inquiries under Article 22.4 is clear? If the answer is no, please indicate what role such inquiries should play.

N/A

1.4.9. In your view, is there the need to add any tools or tasks in order to enhance supervisory convergence towards digital finance? If your answer is yes, please explain.

Let us recall here that supervisory convergence at European level is relevant where rules are set at European level. Otherwise, the principle of subsidiarity should fully play its role and the competence of national authorities should be recognised.

Digital finance is a new additional area of competence for ESMA and the European body of rules is currently under progress in this domain. At this stage, we believe that there is no need to add any tools or tasks in order to enhance supervisory convergence towards digital finance.

1.5. Breach of Union law and dispute settlement

1.5.1. Do you think that the ESAs' powers in relation to breaches of Union law (Article 17 ESAs' Regulations) and binding mediation (Article 19 ESAs' Regulations) are effective? Please explain your answer.

Yes.

The ESAs' enforcement powers play an important role in ensuring high quality financial supervision across the EU and in tackling general deficiencies in national supervision. Our experience with the AIFMD and EuVECA legislation shows that improvements could be made within the existing framework. We have seen in the past 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.

Our assumption is that ESAs would be able to tackle these issues within their existing powers, provided the existing process is made more efficient. In our opinion, 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.

1.5.2. Do you think that the use of the breach of Union law procedure by the ESAs is adequate? Please consider both before and after the 2019 ESAs' review and explain your answer.

Before 2019 ESAs' review

Yes

After 2019 ESAs' review

Yes

1.5.3. Should there be other instruments available to the ESAs to address instances of non-application or incorrect application of Union law amounting to a breach ex-post? If the answer is yes, what would be those instruments?

No.

Our assumption is that ESAs would be able to tackle these issues within their existing powers, provided the existing process is made more efficient.

1.5.4. Do you think that the new written non-objection procedure by the BoS and the new independent panels for the decisions on breaches of Union law and dispute settlements introduced in the 2019 ESAs' review have improved these decision making processes? Please explain your answer.

N/A

1.5.5. Do you think that the ESAs have always acted, where needed, under Article 17 and Article 19 of the ESAs' Regulations? If the answer is no, please give concrete examples where you consider that the ESAs should have taken relevant action under these Articles.

No.

We have seen 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.

While some of these have since been solved, it generally took a long time for the ESAs – in this case ESMA – to intervene, in part because of the unwillingness of national competent authorities to tackle the issues. Timeliness of the response should be a key factor in future cases.

1.5.6. Could you provide concrete examples where the introduction of further binding mediation provisions in sectoral legislation would be useful?

N/A

1.5.7. Why do you think the use of these ESAs' powers has been limited? Please explain how these processes could be improved.

As mentioned above, the efficiency of ESMA's powers could be enhanced through changes to the composition of its Board of Supervisors, and by bringing more transparency to its 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.

1.6. Emergency situations and response to COVID-19 crisis

1.6.1. Please rate the impact of the ESAs' response in the context of the COVID-19 crisis from 1 to 5, 1 standing for "less significant impact" and 5 for "very significant impact". Please explain your answer.

3

1.6.2. Please rate in a scale from 1 to 5, the effectiveness of the ESAs' follow-up actions on the European Systemic Risk Board (ESRB) recommendations below in the context of the COVID-19 crisis. Please explain.

Market illiquidity and implications for asset managers and insurers	3
Impact of large scale downgrades of corporate bonds on markets and entities across the financial system	NA
System-wide restraints on dividend payments, share buybacks and other pay-outs	NA
Liquidity risks arising from margin calls	NA

1.6.3. Do you think the coordinating activities carried out by the ESAs have successfully contributed to address the challenges posed by the COVID-19 crisis? If the answer is yes, please explain. If the answer is no, please give examples.

Yes

1.6.4. Do you think that the ESAs have always acted effectively, where needed, in the context of the COVID-19 crisis? If the answer is no, please give concrete examples where you consider that the ESAs should have taken relevant action.

Yes. The ESAs have played a significant role in ensuring financial stability. For example, ESMA published opinions agreeing to the renewal of the emergency restrictions on short selling taken by some NCAs and the ESAs issued a joint risk assessment report of the financial sector since the outbreak of the COVID-19 pandemic.

Regarding valuations, AIFMs were able to take the appropriate measures in timely manner, taking into account the recommendations of their professional associations or international guidelines (IPEV), where relevant. In our opinion, market practice was efficient in dealing with the emergencies stemming from the crisis.

1.6.5. Do you think Article 18.2 of the ESAs Regulation (declaration of an emergency situation) is fit for its intended purpose? Please explain your answer. If the answer is no please suggest potential changes.

No opinion.

1.6.6. In case you identified areas for improvement in the ESAs' powers in emergency situations, do you have any suggestions on how to address them?

No opinion.

1.7. Coordination function (Art 31 ESAs' Regulations)

1.7.1 Do you think the coordination role of the ESAs is effective? If you identify areas for improvement, please explain.

Yes.

1.7.2 Do you see a need for greater coordination between the ESAs and/or with other EU and national authorities as regards developing data requirements, data collection and data sharing? If yes, please explain your answer and indicate what changes you propose.

N/A

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 standardized 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.

More generally, from a fund management perspective and in the current supervisory context, we do not believe there are areas where data should be collected directly from market participants instead of national competent authorities. In any case, if the ESAs were to be empowered to collect information directly from market participants, this should 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.

1.7.5. In your view, does the coordination function of the ESAs, ensuring that the competent authorities effectively supervise outsourcing, delegation and risk transfer arrangements in third

countries, work in a satisfactory way? Please explain your answer. If your answer is no, please indicate how the coordination function of the ESAs should be adjusted.

Yes.

Invest Europe agrees it is important to ensure that EU rules continue to be applied in a consistent manner by EU27 supervisory authorities. However, effective supervision of delegation should not decrease the incentive and ability of financial market players to expand their activities in the EU27, and should not increase costs to investors with no corresponding benefit.

In its supervision of delegation, ESMA should take into account established market practice and the specific characteristics of the private equity industry, in particular the nature and use of delegation and advisory arrangements. Such arrangements, to EU or non-EU jurisdictions, are important for the private equity industry, not least because private equity funds almost always operate on a cross-border basis. The industry needs the flexibility to structure itself in such a way that the best skills and knowhow, wherever they are based, can be used. Delegation and advisory arrangements are deployed to enable fund managers to access the skills and expertise they need in the most efficient manner possible and without having to move people unnecessarily.

1.8. Tasks related to consumer protection and financial activities

1.8.1 What are, in your view, the ESAs' main achievements in the consumer and investor protection area?

NA

1.8.7 What are, in your view, the main strengths and weaknesses of the current framework on consumer protection (Article 9 ESAs Regulations) and what would you suggest to address any possible shortcomings?

Overall, we believe that the activities of the ESAs have reinforced consumer and investor protection.

ESMA is playing a key role in reinforcing consumer protection, both by issuing warnings and publications for investors and by taking product intervention decisions. But it should remain careful that it is applying consumer protection rules in a way that takes into consideration the specificities of customers in each part of the financial services industry. This is especially true for an industry like private equity which offers long-term and illiquid products that are very different from daily tradable ones.

Here as well the principle of subsidiarity should continue to apply. ESAs can play an important role in setting a general direction at European level but local NCAs – and their proximity –offers an important element of granularity. Many, if not most consumer protection issues, are country-specific. For example, financial literacy, market experience, sensitivity to inflation, volatility, capital protection may vary considerably from one country to another.

1.9. International relations

1.9.1. How do you assess the role and competences of each ESA in the field of international relations? Are there additional international fora in which the ESAs should be active? Please specify.

The ESAs' work must be consistent with standards set out by international bodies such as IOSCO, the IFRS Advisory Council and the Financial Stability Board. In this context, we think it will be important to ensure a smooth articulation between the ESAs and the future authority on anti-money laundering.

While we support convergence at international level, we think that the competitiveness of the EU should not be obliviated: the openness of the EU should not lead to a misalignment of interests between the EU and third countries. Also, when required, work done at international level should be tailored to EU geographical or sectoral specificities.

1.9.2. 2019 ESAs' review. How do you assess the new ESAs' role in monitoring the regulatory and supervisory developments, enforcement practices and market developments in third countries for which equivalence decisions have been adopted by the Commission?

ESMA's international work has been particularly useful regarding equivalence assessments and the development and conclusion of cooperation agreements with third counties. We welcome the additional monitoring powers granted to ESMA in relation to equivalence assessments of third-country regulatory and supervisory frameworks (equivalence decisions remaining in the hands of the Commission).

We would however like to take this opportunity to reassert that the ultimate decision to make an equivalence determination should be left to the European Commission (with the appropriate involvement of the Council and Parliament). In particular, the power to revoke any equivalence decision should remain 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.

This being said, as the AIFMD third country passport has not been implemented yet, we do not yet have much experience of ESMA's role in monitoring and implementation work following a Commission equivalence decision.

1.9.3. Are the powers and competences in the field of international relations as set out in Article 33 of the ESAs' Regulations adequate in light of the tasks conferred on each of the ESAs? If you identify areas for improvement, please specify.

Yes

1.9.4. How do you assess the role of each ESA in the development of model administrative arrangements between national competent authorities and third-country authorities? Should this role be further specified?

We support ESMA's work on developing and concluding cooperation agreements and on equivalence assessments and welcome that ESMA was granted additional monitoring powers in this respect.

1.10. <u>The role of the ESAs as enforcement actors/enforcers.</u>

N/A

2. Governance of the ESAs.

2.1. General governance issues

2.1.1. Does the ESAs' governance allow them to ensure objectivity, independence and efficiency in their work/decision making? Please explain. If you consider that there should be differences in governance between different types of tasks, please indicate.

No.

We believe that functional independence of the ESAs is a prerequisite to their success. We agree that their governance structure could be further reformed to make them more independent of national supervisors.

In addition, we believe that the Board of ESMA should have a greater pan-European perspective and able to take decisions more swiftly. We believe that the introduction of permanent members to the Board of ESMA and that a body composed of full-time members, appointed based on their skills and their knowledge of matters relevant to financial markets, would improve the functioning of ESMA.

This would ensure that ESMA is better able to take decisions with an EU perspective, independent from the national (or self) interests naturally defended by national competent authorities. This would help contribute to the consistent application of legally binding acts and prevent regulatory arbitrage, in line with the tasks and powers ESMA has been granted.

The inclusion of independent experts (provided they are not in a position of conflict of interests, for example when providing services to clients) could be regarded as contributing to 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 ESMA, we do not believe such a change would prevent ESMA from continuing to benefit from the expertise of national regulators.

2.1.2. 2019 ESAs' review. In your view, has the new provision in Article 42 of the ESAs' Regulations according to which the Board of Supervisors members must abstain from participating in the discussion and voting in relation to any items of the agenda for which they have an interest that might be considered prejudicial to their independence, improved the decision making process? Please explain your answer.

Yes.

2.1.3. 2019 ESAs' review. Do you think the requirements in Articles 3 and 43a of the ESAs' Regulations are sufficient to ensure accountability and transparency? If you identify areas for improvement, please explain.

N/A

2.1.4. 2019 ESAs' review. To what extent the recent enhancements in the role of Chairperson improve the decision making process? Please rate each change from 1 to 5, 1 standing for "less significant improvement" and 5 for "most significant improvement". Please explain your answer.

No opinion

2.1.5. Should the role of the Chairperson be strengthened in other areas? If so, in which areas (please substantiate).

No opinion

2.2. Decision-making bodies and preparatory bodies

2.2.1. Does the current composition of the Board of Supervisors (BoS) and of the Management Board (MB) ensure that decisions are taken efficiently and independently? If you identify areas for improvement, please explain.

The ESAs Boards should have a pan-European perspective and able to take decisions swiftly. We believe that the introduction of permanent members to the ESAs Board and that a body composed of full-time members, appointed based on their skills and their knowledge of matters relevant to the Authority, would improve the functioning of the ESAs.

2.2.2. Do the current voting modalities (e.g. simple majority, qualified majority…) of the BoS ensure efficient decision making? Please explain. If the answer is no please indicate how voting modalities could be streamlined.

N/A

2.3. Financing and resources

2.3.1. Do you consider the provisions on financing and resources for the general activities of the ESAs appropriate to ensure sufficiently funded and well-staffed ESAs taking into account budgetary constraints at both EU level and the level of Member States? Please explain your answer. If the answer is no, please indicate what other sources of finance could be considered.

Yes.

The 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.

In the absence of a direct supervision by the ESAs, we do not see any reason to change the funding arrangement to a direct contribution from the industry. Indeed, direct part- or full-funding of the ESAs by the industry would put into question the impartiality, objectivity and autonomy of the ESAs and raise conflict

of interest issues. Also, the development of a contribution key would be difficult to determine and could create significant distortions between entities and sectors.

2.3.2. Do you think that the ESAs have sufficient resources to perform their tasks? Please explain.

Yes.

2.3.3. Do you think there are enough checks and balances for how the ESAs spend their budget? Please explain.

Yes

2.4. Involvement and role of relevant stakeholders

2.4.1. In your view, are stakeholders sufficiently consulted or, on the contrary, are there too many consultations? Please explain your answer.

Stakeholders are sufficiently consulted.

From a general standpoint, we believe that ESMA should improve its culture of engagement with stakeholders and supervised firms. A continuous dialogue between supervisors and supervised entities is indeed at the core of effective and efficient supervision, as it allows supervisors to understand better the issues faced by the entities they supervise. Such interaction has been rather weak and should therefore be strengthened.

For instance, we suggest that the ESAs organize public consultations prior and after issuing Q&As which could have a disproportionate impact on the industry. ESAs could also communicate in advance on the questions they intend to address at European level. Increased transparency would be important, particularly in cases when a large series of questions needs to be answered.

Beyond the mere number of consultations, what is relevant is the issues they cover and their form. Indeed, stakeholders should be given sufficient time to reflect on key topics in order to provide meaningful contributions. Shortening consultation periods is definitely not acceptable.

The time allocated for consultation periods could also be extended. 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. Appropriately longer consultation periods would also let ESMA benefit from more comprehensive, detailed and, consequently, more helpful input. Longer deadlines would also help the 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.

2.4.2. Please assess in a scale from 1 to 5 the quality, in your view, of the consultations launched by the ESAs (5 standing for the highest quality). Please explain your answer.

General consultations launched by the ESAs	3
Specific consultations when developing data collection requirements	3

2.4.3. Are the ESAs sufficiently transparent and accessible for stakeholders to ensure effective and efficient interaction? Please explain your answer.

No.

A continuous dialogue between supervisors and supervised entities is at the core of effective and efficient supervision, as it allows supervisors to understand better the issues faced by the entities they supervise.

First, a clearer breakdown of ESMA's organigram could be presented to the public ESMA, for the level of access to ESMA staff would mirror the one that is currently in place for the European Commission and other institutions. The lack of direct contact may undermine the trust of supervised entities in their supervisors, in particular in a context of crisis.

Second, and as mentioned above, the consultation process could be improved, in particular by allowing for extended periods for feedback.

Third, transparency on the decision making of the ESAs could be enhanced. The ESAs should better explain the reasons why they decide to develop certain strategies or take certain policy orientations.

2.4.4. Please rate in a scale from 1 to 5 the impact of stakeholders groups within the ESAs on the overall work and achievements of the ESAs (1 standing for "less significant impact" and 5 for "very significant impact"). Please explain your answer.

4

We believe that a better participation of the Stakeholder Groups in the decision-making process should be ensured. This could for example be achieved by the regular attendance of the chairs and vice-chairs of the SMSG to the ESMA Board of Supervisors' meetings. Moreover, stakeholder groups should be able to ask the Commission to revoke guidelines or recommendations exceeding the powers granted to the ESAs and to give their opinion on relevant Q&As.

More generally, the ESAs should be encouraged to develop a culture of dialogue with the Stakeholder Groups and the industry in general. Indeed, a continuous dialogue between supervisors and supervised entities is at the core of effective and efficient supervision.

2.4.6. Does the composition of stakeholders groups ensure a sufficiently balanced representation of stakeholders in the relevant sectors? Please explain your answer.

No.

The appointment of the members of these groups should be more transparent and competence should be the key criterion with geographic diversity as an ancillary consideration.

It is important for ESAs to sufficiently take into consideration the different market segments when determining who is sitting in their stakeholder groups and consultative Working Groups. ESMA should in particular take particularly good care that all sectors of capital markets are represented in the SMSG.

As a specific asset class, of a relatively modest size, part of the alternative investment space, private equity has often had no representative in the groups, which led these to give advice that was not always taking into consideration the specificities of all market segments.

2.4.7. In your experience, are the ESAs' stakeholders groups sufficiently accessible and transparent in their work? If the answer is no, please indicate the areas where the transparency could be improved.

No.

2.5. Joint bodies of the ESAs

N/A

3. Direct supervisory powers

3.3. How do you envisage the future scope of direct supervisory powers of ESMA or any other ESA? What principles should govern the decision to grant direct supervision to the ESAs? If you see room for improvement, please provide evidence where you see weaknesses of the current set-up.

We believe that, in line with the subsidiarity principle, asset managers and fund structures should continue to be supervised by NCAs, i.e. the authorities which are closer to the supervised entities and their activities.

We appreciate that, as the current AIFMD framework contemplates situations where supervisory powers are shared between the NCAs of the home jurisdiction and the host jurisdiction(s) of an AIFM (article 45 of the AIFMD), the ensuing need of co-operation between different authorities could be reduced by transferring supervisory powers to ESMA with respect to AIFMs which, due to their size, investment strategies and other circumstances, are more exposed to cross-border activities.

However, we believe that the benefits of subsidiarity fairly exceed its implied costs where there is sufficient alignment between the NCAs' supervisory practices. In this context, ESMA should preferably act as facilitator of co-ordination with the powers to settle disagreements provided by the AIFMD and the ESMA regulation.

In any case, we recommend **against a direct supervision by ESMA of EUVECAs, EUSEFs and ELTIFs**: we believe that such a move would be well too premature and that for now NCAs should continue to supervise the investment funds and their management companies which are established in their jurisdiction.

First, from a legal standpoint, even if these types of funds are regulated by EU regulations, some large areas currently remain regulated by national law such as taxation, marketing rules and retail investors appeal dispositions and several key legal issues would still have to be addressed at national level.

Second, proximity of local NCAs is key for a better protection of investors as financial literacy, market experience, sensitivity to inflation, volatility, capital protection, amongst others, may vary considerably from one country to another. ESMA already contributes to the practical alignment of the national approaches by issuing guidelines and opinions. Under the current legal framework, this approach appears to be the best option for achieving an incremental convergence of funds standards.

Third, separating the authorization process between ESMA and the NCAs could lead to longer delays and heavy administrative costs for the industry and for ESMA, which are not in the interest of European supervision. In particular, the recruitment by ESMA of additional staff, skilled and competent, knowledgeable in highly innovative and specialised sectors such as venture capital and capable of dealing in all languages in the EU, would lead to an immediate and significant increase in ESMA's budget.

More specifically, direct supervision of special passports may create issues for fund managers, which are generally also marketing funds under other passports – that would remain regulated at national level. Direct supervision of EuVECAs by ESMA is a good example of this. Considering that a fund manager may market both EuVECA and non-EuVECA funds, its activities may therefore be supervised by:

1) *ESMA*: when it comes to EU-related requirements in respect of its EuVECA fund
2) *its national competent authority*: for requirements in respect to:
    a. its fund management activities
    b. its non-EUVECA funds
    c. all other national laws applying to the fund

We believe this approach creates a great amount of uncertainty for the fund manager, in particular if it markets two types of funds, and could lead to additional costs.

3.4. Have you identified any areas where supervision at EU level should be considered? If your answer is yes, please explain.

No.

4. The role of the ESAs as regards systemic risk

4.1. Please assess the aspects described below regarding the role of each ESA as regards systemic risk in a scale of 1 to 5 (1 lowest rate, 5 highest rate). If you identify room for improvement, please specify how this could be addressed.

The quality of the analysis of market developments	NA
The quality of the stress test and transparency exercises that were initiated and coordinated by the ESAs	NA
The interaction between the ESRB and ESAs on the development of a common set of quantitative and qualitative indicators to identify and measure systemic risk	NA
The cooperation within the European System of Financial Supervision (ESFS) to monitor the interconnectedness of the various subsectors of the financial system they are overseeing	NA
The broader cooperation between the ESRB and the ESAs within the ESFS	NA
The contribution of the ESAs to facilitating the dialogue between micro- and macro-supervisors	NA

B. SINGLE RULEBOOK

5. The ESAs work towards achieving a rulebook

5.1. Do you consider that the technical standards and guidelines/recommendations developed by each ESA have contributed sufficiently to further harmonise a core set of standards (the single rulebook)?

Yes.

5.2. Do you assess the procedure for the development of draft technical standards as foreseen in the ESAs Regulations effective and efficient in view of the objective to ensure high quality and timely deliverables? Please explain your answer. If you identify areas for improvement, please indicate.

No.

We believe that the development of draft technical standards is not efficient in view of the objective to ensure timely deliverables. For example, Level 1 of the Disclosure Regulation became applicable despite Level 2 not being finalized. This creates a high level of uncertainty for market players.

In addition, the Commission should 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.

5.3. When several ESAs need to amend joint technical standards (e.g. PRIIPs RTS) and there is a blocking minority at the Board of Supervisors of one of the ESAs, what would you propose as solution to ensure that the amendment process runs smoothly?

N/A

5.4. In particular, are stakeholders sufficiently consulted and any potential impacts sufficiently assessed? Please explain your answer. If you identify areas for improvement, please indicate.

No.

We realize 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.

Appropriately longer consultation periods would 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.

5.5. Can you provide examples where guidelines and recommendations issued by the ESAs have particularly contributed to the establishment of consistent, converging, efficient and effective supervisory practices and to ensuring the common, uniform and consistent application of Union law?

N/A

5.6. Would you consider it useful if the ESAs could adopt guidelines in areas that do not fall under the scope of legislation listed in Article 1 (2) of the ESAs founding Regulations and are not necessary to ensure the effective and consistent application of that legislation?

N/A

5.7. Do you think that the role of ESMA with regard to Directive 2004/109/EC (Transparency Directive) could be strengthened? For example, by including a mandate for ESMA to draft RTS in order to further harmonize enforcement of financial (and non-financial) information.

N/A

5.8. Do you think that Directive 2004/109/EC (Transparency Directive) should require ESMA to annually report on the supervision and enforcement of financial and non-financial information in the EU on the basis of data provided by the national competent authorities regarding their supervisory and enforcement activities? Please explain your answer.

N/A

5.10. What is your assessment of the work undertaken by each ESA regarding opinions and technical advice?

The work undertaken by ESMA regarding opinions and technical advice is extremely valuable. In our view, 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.

6. General questions on the single rulebook

6.1. Which are the areas where you would consider maximum harmonisation desirable or a higher degree of harmonisation than presently (rather than minimum harmonisation)?

None.

6.2. Which are the areas where you consider that national rules going beyond the minimum requirements of a Directive (known as "gold-plating") are particularly detrimental to a Single Market? Please identify the relevant sectoral legislation, examples of gold plating and give reasons for each.

Field: Asset Management

Relevant legislation: AIFMD, EuVECA

Example of goldplating and explanation: Private equity and venture capital fund managers have especially been concerned 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 and venture capital firms were 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.

Field: Asset Management

Relevant legislation: AIFMD, EuVECA

Example of goldplating and explanation: The provisions of the EuVECA Regulation have been *de facto* gold-plated in Italy by the requirement that all sub-threshold managers be authorized by the Bank of Italy[1]. We believe that ESMA should provide guidance clarifying that the rules Member States are allowed to introduce under Article 3(3) of the AIFMD may not have the effect of requiring EuVECA fund managers to satisfy conditions not contemplated by the EuVECA Regulation, thereby delaying their time to market and/or imposing additional regulatory burdens on them.

6.3. Do you consider that the single rulebook needs to be further enhanced to reach the uniform application of Union law or rules implementing Union law and efficient convergent supervisory outcomes? Please explain your choice. Where appropriate, please support your response with examples.

No.

From a general standpoint, and as explained above, we believe that, rather than considering any new rules to add to the Single Rule Book or tasks or powers to be granted to ESMA, tools and powers should be fully used, and resources adequately assigned towards a proper enforcement of the existing European regulation.

As regards the AIFM regulatory framework, we believe that there is no need for a re-opening of the Directive in the context of the ongoing review. Level 1 rules aim at setting high level principles and are not meant to be too detailed. In our opinion, existing rules should be properly implemented and enforced by Member States.

[1] Please refer to Invest Europe's response to question 18 of the EC consultation on the AIFMD review for further details.

In any case, the level of granularity of the rules should be carefully assessed, as it will have direct - and potentially significant - impacts on IT costs (e.g. rules on non-financial disclosure). The level of detail should not be excessive and should not be counterproductive (e.g. PRIIPs).

Last, it should be taken into account the fact that some rules may prove overly cumbersome when applied in a dematerialized context. For instance, handwritten statements should no longer be required, as they are not adapted to remote relationships.

6.4. Questions regarding the appropriate level of regulation.

6.4.1. In your view, are there circumstances in existing EU legislation where level 1 is too granular, or for other reasons, would rather be preferable to have a mandate for level 2, or guidance at level 3? Please specify the area (and if possible, specific piece of legislation) and explain why (e.g. in order to have appropriate flexibility to adapt the specifics of the regulation in case of change of circumstances)?

No.

6.4.2. On the other hand, in your view, could reducing divergences in rules at level 1 (legislation agreed by the co-legislators), as well as rules regarding delegated acts (regulatory technical standards) or implementation at level 2, (implementing acts and implementing technical standards) and/or level 3 ('comply or explain guidance' by ESAs) further enhance the single rulebook?

Yes.

We support the ability for the Commission to withdraw guidelines or recommendations which exceed the ESAs' remit. Indeed, guidelines should be consistent with level 1 provisions and should not stand as substitute legislation: it is fundamental to avoid any blurring of the supervisory and regulatory boundaries and to maintain a clear distinction between what is technical and what is political. We believe that the opinion of two thirds of the members of the Stakeholder Groups is not the appropriate trigger for such a withdrawal process. Rather, in our opinion, a simple majority vote would be more appropriate.

A further improvement we would like to propose is to grant a 'right of action' against supervisory guidelines to national authorities as well as to individual market participants and their representatives in case the relevant guidelines directly impact the latter. Such claims should be founded upon breach of EU law or disregard of the ESAs' competences in relation to the guideline setting. We would also like to encourage the review, amendment and adjustment of guidelines as a standard and timely process.

6.4.3. Which of the three levels and/or a combination thereof are more effective in building the single rulebook? (multiple choices allowed)

N/A

6.5. Generally speaking, which level of regulation should be enhanced/tightened in order to ensure uniform application of the single rulebook? (multiple choices allowed). Please explain and substantiate with examples, where possible.

As explained previously, we do not see any need to further enhance or tighten the Single Rule Book, except for streamlining it or taking into account some specific market evolutions (e.g. regarding sustainable or

digital finance). Rather, we believe that focus should be placed on the implementation and enforcement of the existing rules.

6.6. In your view, what, if anything and considering legal limitations, should be improved in terms of determining application dates and sequencing of level 1, level 2 and level 3? Please explain

Regulators should better take into consideration when drafting legal proposals of the constraints put on the ESAs to prepare technical standards. The appropriate timing of any new set of rules should be ensured. We call for realistic timelines to be established for setting technical standards and revising adopted legislation. Preparing proportionate and appropriate responses to often highly complex questions, including consultation with financial services stakeholders, rightly takes time. In addition, measures must be given time to take effect before assessing their impact with a view to a potential revision. Last, the application of level 1 legislation – Regulations and Directives – should only be possible if the level 2 acts – required delegated and implementing acts – have been adopted and are readily applicable. Moreover, level 2 provisions should provide for a certain transition period (i.e. at least 18 months) if they require market participants to proceed with significant organizational or technical changes.

6.7. Please indicate whether the following factors should be considered when deciding on the need for further harmonisation in rules (attribute 1 to 5 to each factor, 1 being the least important and 5 being the most important):

Strong interlinkages with areas of law which remain non-harmonised (e.g. CRIM-MAD and national criminal law)	NA
Broad discretion left to national authorities and frequent use of that discretion by these national authorities	4
High level of gold plating by national rules	4
High degree to which supervision of the same type of actors and/or activities render divergent outcomes across Member States	3
All of the above	NA
None of the above	NA
Other aspects, if so which ones: Please provide concrete examples	NA

6.8. As part of the Commission's work on enhancing the single rulebook under the Capital Markets Union project, do you consider that certain EU legislative acts (level 1) should, in the course of a review, become more detailed and contain a higher degree of harmonisation? Would any of those legal frameworks currently contained in Directives, or any part therein, benefit from being directly applicable in Member States instead of requiring national transposition?

No.

Please specify which Directives you have in mind and explain your answers:

AIFMD

Fund industries and investment cultures can be specific to each Member State – from that perspective, we do not believe that turning the legislation into a Regulation would have a significant added benefit.

6.9. Do you consider that on the basis of existing mandates, additional/more detailed rules at level 2 should be introduced to provide the supervised entities and their supervisors with more detailed and clearer guidance?

No.

6.10. Against the objective of establishing the single rulebook for financial services, how would you increase the degree of harmonisation of EU financial legislation?

We are very much opposed to further harmonisation of EU financial legislation, and in particular when it comes to asset management. From our experience, further harmonisation has often led to situations where specific market players with specific business models have become subject to rules that are not appropriate to them.

The case of AIFMD – which covers private equity funds among other alternatives structures - and UCITS is a relevant example.

Further to the diversity within the AIF/AIFM world, there are fundamental differences between the AIFMD and UCITS frameworks (regarding target audience, business models, investment strategies and intended type of investor).

As AIFMD was created using the UCITS framework as a starting point, various rules designed for UCITS were copied into AIFMD. However, AIFs constitute a diverse category of funds used for a variety of purposes, with a very different market context and investor focus to UCITS. As a result, applying the same regulatory regime to UCITS and AIFs has not always been appropriate and resulted in unnecessary cost and complexity, since it sought to impose a level of investor protection proportionate for UCITS funds aimed at retail investors but disproportionate in the AIF context. In particular, the following should be noted:

- UCITS funds target retail investors and invest most of their capital in transferrable securities (i.e. liquid assets).
- PE/VC funds are mostly aimed at professional / sophisticated investors, which do not need the same type of protections as retail investors. These investors complete extensive due diligence before investing in a PE/VC fund.
- Unlike UCITS funds, PE/VC funds invest long term mostly in illiquid assets held for several years, investors have no redemption rights and transfers of investor interests typically require the consent of the AIFM (and the secondary market is limited). Little or no cash is held in fund accounts and NAV calculations (to the extent possible in a non-unitised fund) are largely irrelevant until underlying assets or investor interests are disposed of. At those points, assets are generally valued externally by both buyer and seller during a comparatively lengthy disposal process.

While many of these differences are accounted for today, through various rules, they are a good example of why harmonisation – between sectors, as opposed to between countries – is not the panacea that it has often been described to be.

Contact

For further information, please contact Martin Bresson (martin.bresson@investeurope.eu) and 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.