

We support the ambition of the European Commission to move forward with the Capital Markets Union initiative and recognise the important role that the European Supervisory Authorities (ESAs) can play in that process. Furthermore, we recognise the important role the ESAs, and in particular ESMA, have played in supporting the development and growth of capital markets and their continued role in supporting deeper integration of financial markets in the EU. We believe enhancing the role of the ESAs could have many positive benefits, including helping to bring down barriers to cross-border fund distribution, ensuring consistency in the application (and legal interpretation) of EU rules and consolidating data management and reporting. Additionally, given technological advances it is becoming increasingly important that the EU regulatory framework is also able to react effectively to the growing importance of financial technology on market structure and the changing consumer experience.

Deeper integration of financial markets and greater supervisory coordination could be achieved, in the main, by building upon existing powers and mechanisms available to the ESAs, without unnecessarily altering long standing, well-functioning arrangements, particularly in the absence of any compelling evidence to the contrary. A more proportionate response would be for the ESAs and ESMA in particular, to use their existing framework of powers and mechanisms to support engagement among National Competent Authorities (NCAs) for the development of practical convergence solutions. Such consistency of supervisory approaches could be achieved through the use of opinions and other Level 3 measures which are tools to achieve the practical application and implementation of EU legislative measures. Furthermore, supervisory convergence and enforcement can be supported, for example, by the use of standard forms and templates to drive consistent supervisory outcomes.

Aspects of the proposals which can support a more integrated EU framework without potentially introducing risk to a well-functioning ecosystem are;

- Data Reporting
- Open Public Consultation on Guidelines

### **Data Reporting**

While we have seen positive advances to improve the quality and reporting of data on European financial markets from market participants to EU regulators, the reporting of data remains highly fragmented throughout the EU. The quality and availability of European market

data lags behind that which is available in the US and potentially impacts supervisory action both at the European and global levels.

We believe that ESMA has a fundamental role to play in coordinating the collection of data and notifications so that firms only have to report data needed by regulators once, for example by reflecting the direction to travel set by MiFIR. This would improve the quality and speed of data collection enhancing the ability of ESMA to identify pan-European risks while allowing NCAs to drill down to risks in their respective markets as well as sharing data needed for effective supervisory coherence.

We support the direct collection of information by ESMA as this reduces burdens on regulated entities by allowing the forwarding of data already provided to the NCA without further adjustment. More fundamentally, this would lay the foundations for a common EU data reporting hub at ESMA, feeding off data provided at national level which could be utilized by both the relevant NCA and ESMA. This would support common data standards, encourage comparability and reduce costs for market participants.

Additionally, as part of the CMU initiative, we have previously supported the development of a common European portal for cross-border passporting notifications and for ESMA to act as an information repository on the marketing requirements of individual Member States. We reiterate this request as this would assist in reducing the costs and the barriers to entry for fund managers seeking to market their funds on a cross-border basis. While this is an example where ESMA could act as a pan-European information repository we believe there are broader opportunities for ESMA in this regard. For example, given the forecast growth of the ETF market we believe ESMA could usefully contribute to and support the development of a European consolidated tape to support the pricing and liquidity of European securities.

### **Open Public Consultation on Guidelines and Recommendations**

We are supportive of the proposal for ex ante consultation on guidelines and recommendations. Furthermore, to enhance practical use of the guidance provided in ESMA Opinions and Q&As, NCAs should be able to consult with stakeholders alongside the coordination process at ESA level.

Specific aspects of the proposals which could be addressed utilising the existing legislative framework/structures are:

- Direct authorisation and supervision of ELTIF, EuVECA and EuSEF
- Delegation and outsourcing
- Governance
- Product intervention powers under MiFIR to managers of UCITS and AIFs, and
- Funding

### **Direct authorisation and supervision for ELTIF<sup>1</sup>, EuVECA<sup>2</sup> and EuSEF<sup>3</sup>**

The proposals envisage a shifting of responsibility for authorisation and supervision of ELTIFs, EuVECAs and EuSEFs structures from NCAs to ESMA. Though these fund structures originate in EU Regulation, they are subject to a manager's regulation (via AIFMD) rather than a product regulation. The proposal would set the precedent of a dual regulatory regime (e.g. ESMA for the ELTIF element and NCA for the AIFMD element) with consequent uncertainty as to which regulatory regime should prevail in the case of investor detriment. There is no clarity as to where ESMA's responsibility stops and the NCA's responsibility starts. A dual regulatory regime for these types of investment funds would undoubtedly lead to a more complex, cumbersome and expensive fund authorisation/supervision process.

Additionally, it is important to recognise the importance of European consumers being able to seek redress in their own Member State, in their own language and through the legal system with which they are most familiar. We believe ESMA could have a greater role in assisting consumers who are seeking redress on a cross border basis by ensuring greater connectivity between national regimes for redress and compensation.

Operationally there would be challenges as ESMA staff would need to appreciate and understand the different legal structures available in each Member State, so as to understand how these interact with investor protection mechanisms within the various national fund structures.

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<sup>1</sup> European Long-term Investment Fund

<sup>2</sup> European Venture Capital Fund

<sup>3</sup> European Social Entrepreneurship Fund

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15 January 2018

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The current system of supervision by NCAs is best suited to deal with the different market structures and legal regimes of Member States that is an important part of the authorisation and supervision of these structures.

### **Delegation and outsourcing**<sup>4</sup>

The efficient delivery of a wide range of regulated fund products (representing a diverse set of investment opportunities and underlying providers) has been enabled through the use of both delegation and outsourcing. These dual aspects of delegation and outsourcing enable investment managers (whose operating models, investment expertise and geographic bases of operation are not homogenous) to submit to EU regulation/authorisation and product rules in order to deliver their capabilities to customers. These structures have been key contributors to the success of UCITS<sup>5</sup>, and more recently AIFs<sup>6</sup>. Delegation has worked extremely well and has been central in making UCITS in particular, not just a European, but a truly global, success story<sup>7</sup>. It is a reliable, well-functioning and tested model, which is central to ensuring EU investors can access world leading investment expertise. The existing EU legislative framework already has robust standards in place for delegation and outsourcing, including to third countries<sup>8</sup>. We believe the proposals would lead to a more bureaucratic, costly and inefficient process regarding delegation, outsourcing and risk transfers, would unnecessarily restrict access to local expertise and reduce investor choice, ultimately having a detrimental impact on investor outcomes. The proposals would also lengthen the time to market of European fund products, contrary to the core aims of CMU. Additionally, there is less regulatory certainty under what is proposed and it sends a negative message across the globe regarding the openness of European markets at a time when the Commission's CMU initiative, which we support, is seeking to attract global capital.

ESMA already has a sufficient mandate under Article 8, 16 and 29 of Regulation 1095/2010 to support supervisory convergence in the area of delegation and outsourcing. In particular we note the ESMA Opinions<sup>9</sup> relating to Brexit and supervisory convergence which issued in July 2017 and the creation of a Supervisory Coordination Network. The NCAs participate in

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<sup>4</sup> COM(2017) 536 final: See Article 31a (page 115) for the specific text

<sup>5</sup> There were €9.3 trillion of UCITS assets at the end of July 2017. Source EFAMA ([www.efama.org](http://www.efama.org))

<sup>6</sup> Alternative Investment Funds: There were €5.8 trillion of AIF assets at end July 2017. Source EFAMA ([www.efama.org](http://www.efama.org))

<sup>7</sup> European domiciled fund assets represent 34% of world-wide assets, far outstripping the region's comparable population and GDP share. Net sales across both UCITS and AIFs for the first 7 months of 2017 exceeded €600bn.

<sup>8</sup> Both the UCITS Directive and AIFMD specifically lay down rules for investment funds and/or management companies to delegate certain functions. Both Directives also set-out rules for cooperation between home Member States and host Member States and provide for cooperation agreements between EU home Member States and third countries.

<sup>9</sup> ESMA34-45-344, ESMA35-43-762 and ESMA70-154-270 all issued on 13 July 2017

this network which augments the existing powers of the ESAs and whose stated objective is “...to promote consistency of decision-making by NCAs”<sup>10</sup>. It is therefore counter intuitive that the Commission have sought to revisit much of the same ground. We believe it far too early to question, let alone conclude, whether the Supervisory Coordination Network can achieve its objective.

Furthermore, we believe that convergence could be largely achieved by ESMA and the ESAs agreeing a common application form and documentation to be provided to NCAs with respect to such delegation and outsourcing activities. ESMA and representatives of NCAs could then conduct spot checks on delegation requests and oversight by individual NCAs through a supervisory working group, ensuring appropriate quality control through a risk-based and proportionate approach to monitoring.

### **Governance**

We support the desire for the ESAs to be responsive, capable of effective and efficient action and empowered to promote convergence of NCAs on an ongoing basis. However, this needs to be balanced with the ability of NCAs to actively contribute to and influence policy formation, particularly as NCAs are answerable to their national parliaments and investors. The current governance set-up of equal representation of NCAs of each Member State, reflects the specificities of the EU and the dynamics between Member States both large and small and the diversity of markets including non-Euro currencies. Given these dynamics it is important that the role of all supervisors in ESA decision-making is considered. Whilst we are supportive of further supervisory convergence, we do not support changes that would minimise the contribution of national supervisors in ESA decision-making.

Furthermore, we are concerned regarding the role a new Executive Board would play in relation to the development of a “strategic supervisory plan” which could supersede or re-prioritise work and areas of focus of NCAs, which could limit their discretion to focus on risks most relevant to their local markets. We consider it important that NCAs retain this national discretion and it is critical that the strategic supervisory plan should be agreed / ratified by the Board of Supervisors as the central decision-making body of the ESAs.

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<sup>10</sup> ESMA42-110-433: ESMA Opinion to support supervisory convergence in the area of investment management in the context of the United Kingdom withdrawing from the European Union – para 7.

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**Product intervention powers under MiFIR to managers of UCITS and AIFs**

We do not agree with the proposed extension of product intervention powers under MiFIR to managers of UCITS and AIFs. EU fund framework rules already include provision for equivalent intervention powers for ESMA and NCAs.

We believe there is already a safeguard in place that host state authorities can use<sup>11</sup>. These provide a mechanism for host state regulators that have concerns to request investigations and verifications in co-ordination with the UCITS home state. This would be in addition to the requirements relating to the routine exchange of information contained in Article 12 of Regulation 584/2010.

In addition, the AIFM Directive provides inter alia for the following powers for NCAs and ESMA:

- NCAs have all supervisory and investigatory powers that are necessary for the exercise of their functions including the right to suspend the issuance of shares/units (Art. 45 and 46)
- NCAs approve the marketing notification of AIFs (see e.g. Art. 31(3), Art. 32(3))
- ESMA has the power to request intervention by NCAs (Art. 47(4))
- ESMA has its own intervention powers (Art. 47(5)) similar to MiFIR

**Funding**<sup>12</sup>

The financial crisis and the resulting policy and regulatory responses at global, regional and national level created a renewed impetus and upscaling in regulatory and supervisory resourcing in NCAs over a number of years which both consumers and industry have funded. The Irish industry is already contributing to ESMA's budget by indirect levies paid from the budget of the Central Bank of Ireland. The proposals suggest re-creating this centrally in the ESAs with little clear justification and scant detail regarding cost. Initial indications are that the proposals will not yield a comparable reduction in (industry) funding of NCAs.

The proposals suggest altering the current funding model (40/60 split between EU budget and other sources) to a balancing contribution from the General Budget of the Union not to exceed 40% of ESMA's revenues. We believe a reduction in EU funding potentially erodes ESMA's

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<sup>11</sup> Article 101 of the UCITS Directive and level 2 measures (Articles 6 – 11) of Commission Regulation 584/2010

<sup>12</sup> Article 49a (page 70)

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accountability to the European Institutions. The current 40/60 split between EU budget and other sources is important to ensure strict budget control and oversight of the ESAs.

## **Conclusion**

The development a consistent EU supervisory culture involves building on, rather than seeking to replace and/or replicate, the NCAs' deep and extensive experience of authorisation, supervision and enforcement. Increased supervisory convergence should ensure that key issues of authorisation, supervision and enforcement are effectively addressed across the EU by NCAs with the addition of feedback loops from ESMA on matters of pan-European importance as and when they occur. This approach respects the fact that NCAs are primarily responsible for the risks that may arise in their markets and are responsible for the orderly resolution and windup of investment firms and management companies within national legal frameworks.

**15 January 2018**