

Commissioner Mr. Valdis Dombrovskis  
Directorate-General Financial Stability, Financial Services and Capital Markets Union (DG FISMA)  
European Commission  
1049 Bruxelles/Brussel

**Submitted electronically via: <https://ec.europa.eu>**

Subject: Public consultation on the operations of the European Supervisory Authorities

16 May 2017

Dear Commissioner,

It is with great interest that the European Investors' Association IVZW (European Investors) has taken note of the European Commission's public consultation on the operations of the European supervisory authorities (ESAs). In this letter we are pleased to share our views on the future of the ESAs.

These views concern four areas: (i) supervisory architecture; (ii) governance; (iii) funding and (iv) tasks and powers of the ESAs. Where tasks and powers are concerned, European Investors focuses in its comments on the European Securities and Markets Authority (ESMA).

### **1. Adapting the supervisory architecture to challenges in the market place**

European Investors strongly supports the introduction of a 'twin peaks model' by integrating the prudential supervision of financial institutions in one supervisory authority (e.g. in Frankfurt) and the supervision on conduct of business (including markets) in another (e.g. in Paris).

Such a model is used in, for example, the Belgium, France, the Netherlands and the United Kingdom and provides a number of benefits, including:

- i. Banks and insurers in the EU are often linked through group membership, which warrants integrated prudential supervision of banking and insurance.
- ii. Prudential and conduct of business supervision require different mindsets, skills and approaches. At times, objectives can even be conflictual.
- iii. A 'twin peaks model' ensures consistency in supervision on conduct of business across the three main subsectors, i.e. banking, insurance and investment. A further enhancement of the powers of the Joint Committee of the ESAs where it concerns cross-sectoral measures in the area of conduct of business would be an alternative, but less effective, solution.

## 2. Governance of the ESAs

As a result of the composition of the Board of Supervisors as well as the Management Board, national interests tend to prevail in the ESAs decision-making processes.

European Investors advocates the establishment of an Executive Board that replaces the Management Board. Such an Executive Board could consist of independent regulatory professionals who are nominated by the Commission and appointed jointly by the European Parliament and Council on the basis of their merit.

The Executive Board, presided over by the chairperson of the ESA, should be awarded some of the powers that are currently reserved for the Board of Supervisors. One of the powers (Article 18) that should be awarded to the Executive Board is the power to investigate breaches of, or non-implementation of Union Law (see 4. Tasks and powers).

With regards to the decision-making on technical standards and Level 3 measures, an option would be to simplify the majority requirements.

### *Stakeholder groups:*

European Investors notes that not-for-profit representatives of retail investors and other financial consumers are underrepresented (vis-à-vis industry representatives) in the stakeholder groups of the ESAs and the consultative working groups of the Standing Committees. Moreover, these representatives are not as well-resourced as industry representatives. To resolve this imbalance, it might be worthy to consider introducing some form of compensation for not-for-profit representatives or to grant them additional support through the secretariat of the relevant ESA.

## 3. Funding of the ESAs

Regardless of the funding model, ESMA in particular should have more resources at its disposal to face the challenges ahead of it and to contribute to the achievement of the European Commission's ambitions in the framework of the Capital Markets Union (CMU) initiative.

European Investors fully supports the suggestion, made in the Consultation Document, to increase industry's direct contribution to the budgets of the ESAs. Financial institutions that operate cross-border reap considerable benefits from the single EU rulebook and supervisory convergence efforts.

Also, industry funding would allow for an elimination of contributions made by national competent authorities (NCAs) and thereby increase the ESAs' independence (the possibility for the ESAs to make use of non-financial resources (i.e. personnel and their expertise) provided by NCAs would of course need to remain).

The industry's contribution to the ESAs would need to be supplemented with EU funding. Aside from being in the industry's interest, adequate EU level supervision is also in the interest of the public at large. EU funding would furthermore contribute to continuity (throughout the economic cycle) of funding and alleviate some of the industry opposition to expansions of the ESAs' powers.

Industry contributions to the ESAs budget should in our view be entity-based, whereby major financial entities that benefit considerably from an integrated Europe make most of the contributions. We need to ensure that the contributions that are required from smaller entities remain proportionate, also taking into account the contribution they have to pay to their NCA.

#### 4. Tasks and powers

##### Supervisory convergence

The focus of ESMA has shifted from the single rulebook to supervisory convergence. In its supervisory convergence work, ESMA relies on a number of tools: guidelines, opinions, Q&As, peer reviews and mediation. However, these tools are all non-binding.

An example where such non-binding tools proved to be insufficient is the case of contracts for differences (CFDs) and binary options. The sale of these complex financial products to the EU retail market is concentrated in one Member State (i.e. Cyprus), where investment firms use aggressive marketing campaigns and large call centres to sell their products. Several convergence activities were undertaken, but unsuccessfully. The number of authorisations by the home regulator continue to grow.

Apart from more general powers in relation to supervisory convergence, legislation specific convergence powers would also be welcomed, e.g. in the field of asset management.

##### *Peer reviews:*

One of the most promising tools for supervisory convergence is peer reviews, which can result in findings of potential breaches of EU law, to be dealt with according to the provisions of the ESMA Regulation, and findings of incomplete implementation of non-binding soft law (e.g. guidelines and recommendations). However, improvements can be made, for example:

- i. Mandatory peer reviews could be introduced more widely. Currently, such a mandatory peer review only exists under the European Markets Infrastructure Regulation (on the authorisation and supervision of central clearing parties).
- ii. The methodology could be adjusted in a way that moves the peer review away from peer/NCA assessment and towards independent assessment by ESMA and removes the risk that NCA interest could distort the outcomes peer review and dilute its effectiveness.

##### Non-binding measures: guidelines and recommendations

Guidelines and recommendations are important in ensuring a level playing field and preventing regulatory arbitrage. Although these Level 3 measures are non-binding, Article 16 of the ESMA Regulation clearly states that the NCAs and financial market participants 'shall make every effort to comply with guidelines and recommendations'.

As highlighted by the compliance tables published on ESMA's website and the results of peer reviews, non-compliance by NCAs is often the result of not having sufficient staff or financial means. This is an issue that needs to be tackled. NCAs in the EU need to have adequate means at their disposal.

In terms of substance, it is true that guidelines and recommendations go beyond their originally intended function. This is not desirable. Aside from the legal uncertainty it creates, it means that the Commission and co-legislators cannot exercise the scrutiny that they normally exercise in case of technical standards.

### Consumer and investor protection

In accordance with Article 9(1) of the ESMA Regulation, ESMA shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market. Its efforts to this end, however, seem to have been very limited.

Illustrative in this regard are ESMA's seemingly limited efforts in relation to the (transparency on) fees and performance of investment funds and the related issue of 'closet indexing'.

ESMA should also make more active use of the direct measures it can take in the area of consumer and investor protection. Since its founding, ESMA has issued only a handful of warnings (focusing on the sale of complex products like CFDs and contingent convertibles) and has not made use of its power to temporarily prohibit and restrict certain financial activities.

We hope MiFID II will bring change<sup>1</sup>. However, we prefer enhanced powers through the ESMA Regulation rather than through product-specific legislation.

### Enforcement powers – breach of EU law investigations

ESMA have made no use of their enforcement powers where EU law is breached. This might be the result from the composition of the Board of Supervisors. European Investors therefore suggests to confer the powers of the Board of Supervisors in relation to breaches of EU law upon an Executive Board consisting of regulators that are independent from the NCAs (see 2. Governance of the ESAs).

Furthermore, European Investors very much supports the suggestion to make the current procedure more transparent on the requests to ESMA to investigate alleged breaches of law and on the justification for not opening an investigation or launching a procedure.

Finally, we would like to express its view that the power of ESMA, in cases where a breach of Union law is proven and the NCA concerned does not take the necessary action, to address market participants directly should also relate to those provisions of Directives that establish unconditional obligations that are sufficiently clear and precise to be directly effective.

### Access to data

European Investors is of the opinion that ESMA should be empowered to obtain information directly from market participation without first having to exhaust every other means of getting information which is currently the case according to the ESMA Regulation. Such an empowerment could indeed

---

<sup>1</sup> As of 3 January 2018, ESMA will have the power to temporarily prohibit or restrict investment firm's marketing, distribution or sale of (i) units or shares in UCITS and Alternative Investment Funds and (ii) financial instruments with certain specified features as well as to prohibit MiFID financial activities or practices which poses risks to investors, market integrity, and financial stability in the EU.

improve ESMA's ability to better perform their tasks (e.g. in relation to supervisory convergence and consumer and investor protection).

### Direct supervisory powers in certain segments of capital markets

In the framework of the European Commission's CMU ambitions, European Investors would support direct supervisory powers for ESMA in certain segments of capital markets. Market segments in which there is a strong rationale for more centralisation of supervision are the following:

- Passporting of pan-European investment funds
- Supervision of audit firms and enforcement of International Financial Reporting Standards.
- Approval of prospectuses for EU-wide issuances
- Authorisation of significant investment intermediaries under MiFID II
- Registration, supervision and resolution of CCPs

### **5. In conclusion**

European Investors always welcomes the opportunity to respond to public consultations of the European Commission on matters that affect (retail) investors.

Should you require any further clarification to the comments made in this response, please do not hesitate to contact us.

\*\*\*