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Public consultation on the operations of the European Supervisory Authorities

Against the backdrop of progressing financial integration in the EU which is further facilitated by the ongoing CMU initiative, effective supervisory coordination is needed. The ESAs are an institutional cornerstone for promoting supervisory convergence and providing solutions to cross-border issues. Thus, BVI[1] welcomes the opportunity to submit comments on the operations of the ESAs in the context of the public consultation initiated by the Commission.

Executive summary:

- **Enhancement of supervisory coordination:** In our view, the current EU system of financial supervision is functioning quite effectively. Nonetheless, the possibilities of the ESAs to work towards supervisory convergence across sectors within the Joint Committee should be enhanced. While the NCAs should maintain the primary responsibility for collecting data from market participants, we also think that the ESAs should be entrusted with a coordinating role in terms of regulatory reporting in order to achieve full standardisation of data contents and formats also on international level. Moreover, we see benefits in enhancing the ESAs' role as regards equivalence assessment post-Brexit.

- **Focus on core responsibilities:** As regards investor protection, the tasks assigned to the ESAs under Article 9 of the founding regulations encompass promotion of supervisory convergence, market surveillance and issuance of warnings or prohibitions. They do not cover regulatory competences of the ESAs and thus should not be abused for enforcing political demands in relation to investor protection by means of technical advice for Level 2 measures. The ESAs have no political mandate concerning the development of normative rules for investor protection which should be the exclusive remit of the EU legislators.

- **Proper control of Level 3 measures:** Supervisory guidelines issued by the ESAs are neither subject to control or endorsement by EU institutions nor submitted to any right of appeal by the affected market participants or NCAs. This non-existence of checks and balances mechanisms is not acceptable from a governance perspective and in view of the regulatory experience up to date. **There is a clear need for a formal control and review mechanism in relation to the supervisory guidelines.** Such control could be facilitated by introducing either a right of action or a formal complaint procedure available to market participants.

- **Direct supervision only in fully harmonised market segments:** Integrated supervision at EU level should be conditional upon full harmonisation of the relevant regulatory frameworks. In relation to pan-European investment fund schemes, such full harmonisation pertains only to ELTIFs, EuSEFs and EuVECAs. The UCITS Directive, on the other hand, provides for harmonised product rules especially regarding eligible assets and investment limits, but deliberately gives some leeway to national regulators in other areas. **In view of these national divergences, bundling of**

[1] BVI represents the interests of the German investment fund and asset management industry. Its 99 members manage assets of EUR 2.9 trillion in UCITS, AIFs and discretionary mandates. As such, BVI is committed to promoting a level playing field for all investors. BVI members manage, directly or indirectly, the investments for 50 million private clients in over 21 million households. BVI's ID number in the EU Transparency Register is 96816064173-47. For more information, please visit www.bvi.de/en.

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supervisory powers over UCITS at the EU level is not appropriate. The same applies to the supervision of UCITS managers and AIFMs since their activities are neither fully harmonised nor considered systemically relevant. Furthermore, proximity of the supervisor which is indispensable for commensurate supervisory practices and effective protection of investors in the relevant marketplace would be lost in case supervisory competences were transferred to the EU level.

- **Retention of sectoral supervision: We are in favour of maintaining the current system of sector-specific supervision and do not support radical changes to the supervisory architecture.** We deem the sectorial supervision very effective, since it allows for adaptation of supervisory approaches to particular business models and other specificities of each financial sector. Specialised and skilled personnel is needed at the ESAs to handle complicated, sector specific regulation and to better understand specific concerns of different market players. A twin-peak model with one prudential supervisor and one conduct authority appears not appropriate in view of the breadth and complexity of financial markets in the EU. Further efficiency gains could however be achieved by reducing the number of ESAs' locations and by merging EIOPA and EBA into one single agency.

- **Need of partial financing from the EU budget:** The current funding system of the ESAs with a 60% contribution by NCAs already results in a considerable proportion of financing by the industry in those markets in which NCAs are fully or partially funded by market participants. **We do not object to moderately enhancing the share of industry contributions to the ESAs' budgets as long as a relevant stake is still covered from the EU funds.** In this respect, a shift to a fully industry-based funding would not be appropriate in view of the ESAs' work being substantially committed to preventing and mitigating financial stability risk in the EU. Moreover, in working on technical advice to delegated acts, RTS or ITS drafts the ESAs actually perform tasks that are generally assigned to the European Commission under Articles 290 and 291 of the TFEU and thus should be financed from the EU budget. By retaining the EU financing stake, the EU institutions in charge of budgetary control would have the power to prioritise ESAs tasks and to exercise influence over future activities by the ESAs. The national experience in Germany shows that a system change to full industry funding would be detrimental to the ESAs' budgetary discipline.

- **Openness for discussions:** The current opportunities for market participants to initiate exchange of views with the ESAs are fairly limited. Due to the ESAs publishing no detailed organigrams, contact persons for specific subject matters are generally unknown. Meeting requests coming from industry representatives are rarely accepted. This lacking cooperativeness on the part of the ESAs is unsatisfactory in view of their paramount importance as the standard-setters for the EU financial markets. **As an operating principle, the ESAs should thus be committed to an open exchange of view with market participants.** Such commitment would also help the ESAs to better understand complex market practices and business activities in the EU markets.

I. Tasks and powers of the ESAs

A. Optimising existing tasks and powers

I. A. 1. Supervisory convergence

Q1: 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 weakness be addressed? Please elaborate on your response and provide examples.

In terms of the work carried out by the ESAs so far, we are of the view that the ESAs are already effectively contributing to promoting a common supervisory culture and fostering supervisory convergence. On the part of ESMA, we can see an extensive use of Q&As in order to establish common understanding and uniform supervisory practices with respect of EU financial frameworks such as MiFID II or AIFMD. Therefore, we think that the pace of action applied at least by ESMA in this area is satisfactory and the tools and powers at the ESAs' disposal are both effective and sufficient.

Nonetheless, we perceive further potential for enhancing the ESAs' possibilities to effectively work towards supervisory convergence across sectors. In practice, there have been instances in which ESAs have seen merit in developing common supervisory approaches on matters relevant to all financial sectors, but felt unable to proceed with this work for formal legal reasons. This applies in particular to the ESAs' work on cross-selling for financial products where the ESAs, while agreeing on content, have not felt mandated to issue joint guidelines for all financial sectors.[2] In practice, close coordination among the three ESAs is necessary in order to ensure a level playing field for financial products and services as well as effective consumer protection throughout the EU. Furthermore, a close coordination of the ESAs with the ESRB is needed as regards matters of macro-prudential relevance which should be dealt with consistently at EU level.

Q3: 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?

We are not aware of any tasks or powers that the ESAs would currently be lacking under Article 8 of the founding regulations. Before envisaging entrusting additional competences to the ESAs, we believe the priority should be to explore the tools and the considerable powers they already have.

Q4: 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?

Cross-border issues should be primarily dealt with by aligning supervisory approaches throughout the EU and in specific cases by applying the settlement powers of the ESAs under Article 19 of the founding regulations. We are not aware of any specific problems in this regard.

[2] Cf. ESAs letter to Commissioner Hill „The cross-selling of financial products – request to the European Commission to address legislative inconsistencies between the banking, insurance and investment sectors" from 26 January 2016.

I. A. 2. Non-binding measures: guidelines and recommendations

Q5: 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?

We are particularly concerned about the extent of legal and practical implications observed in relation to supervisory guidelines issued by the ESAs under Article 16(1) of the founding regulations. Based on our experience with the work of ESMA, we would like to highlight the following shortcomings:

- In some instances, guidelines have been issued without a clear – or even without any – legal basis in EU legislation. This pertains especially to the ESMA Guidelines on ETFs and other UCITS issues which deal with significant aspects of securities lending and repo transactions even though the UCITS Directive as the EU primary law does not contain any rules for these investment techniques. Another example of such wide understanding of ESMA's competences are the ESMA Guidelines on remuneration policies and practices under MiFID. These guidelines are based on the MiFID I regime which contains no reference to individual remuneration.
- Even though guidelines are generally meant to establish consistent, efficient and effective supervisory practices in the EU, in some cases they also prompt significant interventions in established market practices. An example of such effects are the ESMA Guidelines on ETFs and other UCITS issues which stipulate that securities or cash received through repo transactions shall be treated as collateral and not used for investment purposes or in order to collateralise other transactions. Such treatment of the repo transactions has never before been practiced or even properly discussed in the EU. The ESMA Guidelines on this issue have effectively deterred UCITS from engaging in repos. Another example of measures with vast regulatory implications are the ESMA Guidelines on sound remuneration practices under the AIFMD which extend the application of the remuneration principles beyond the "categories of AIFM staff" as foreseen by the Level 1 Directive to third party personnel providing services under delegation agreements. Such extensive approach to remuneration policies is hardly feasible for globally operating fund managers who need to cooperate with local specialists outside their group structures. Lastly, the EBA Guidelines on limits on exposures to shadow banking entities define "shadow banking entities" for the first time in the EU financial services regulation even though such far-reaching decision should be clearly left to the EU legislator.
- Article 16(3) of the founding regulations requires national authorities to make every effort to comply with the guidelines. This requirement sets the "comply or explain" mechanism effectively out of force. There are very few instances in which national authorities have declared their non-compliance with ESMA guidelines, and according to our knowledge, none relating to standards adopted after controversial debates. In Germany, compliance with the ESMA Guidelines on ETFs and other UCITS issues has eventually required changes to the primary national law. **In our view, such factual binding effect combined with the practiced wide understanding of the ESAs' competences leads to a situation in which the ESAs hold quasi-legislative powers without proper democratic legitimation and on top are in the position to initiate regulation on any topic they deem relevant.**

Guidelines issued by the ESAs are neither subject to control or endorsement by EU institutions nor submitted to any right of appeal by the affected market participants or NCAs. This means that ESA guidelines, once issued, can be revised only by the decision taken by the Board of Supervisors of the relevant ESA. This non-existence of checks and balances mechanisms is not acceptable from a governance perspective. The regulatory experience so far demonstrates that there is a clear need for a

formal control and review mechanism in relation to the supervisory guidelines. Such mechanism could be facilitated by either of the following:

- **Introduction of a right of action against supervisory guidelines:** The entitlement to such right of action could be entrusted to national authorities and possibly also to individual market participants in case the latter are directly affected by the relevant guidelines. The claim should be founded upon violation of superior EU law or disregard of the ESAs' competences in relation to the guideline-setting.

- **Introduction of a complaint procedure against supervisory guidelines:** Complaints based on the reasons stipulated above could be submitted to the Board of Appeal of the ESAs the remit of which could be extended to the verification of supervisory guidelines in light of superior EU law. Alternatively, such complaints could be addressed to the EU Commission given its constitutional role as guardian of the Treaties. Market participants should be able to contact the responsible complaints body in order to report on irregularities in the ESAs' work.

I. A. 3. Consumer and investor protection

Q6: 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.

As regards investor protection, the tasks assigned to the ESAs under Article 9 of the founding regulations encompass promotion of supervisory convergence, market surveillance and issuance of warnings or prohibitions. **They do not cover regulatory competences of the ESAs and thus should not be abused for enforcing political demands in relation to investor protection by means of technical advice for Level 2 measures.** There have been instances in which the ESAs did not observe this limitation of powers implied in Article 9. With regard to MiFID II implementation, ESMA initially proposed a list of negative examples to the quality enhancement test which would have effectively resulted in a ban on commission payments to distributors, even though the EU legislators deliberately decided to allow for a competition of different distribution models under MiFID II. Similarly under MiFID II, the ESMA's decision to treat investment research as inducement and to make it conditional on a set of new rules which will dramatically change the current market practice goes beyond the pure technical implementation of the Level 1 text. For the avoidance of doubt, it should be clarified in the founding regulations that the ESAs have no political mandate concerning the development of normative rules for investor protection which should be the exclusive remit of the EU legislators.

Moreover, effective consumer protection can only be achieved if there is a level playing field in the financial regulation meaning that the same or equivalent rules apply to all financial products and sectors. Therefore, proper involvement of all three ESAs and their ability to react in a coordinated manner to consumer protection issues arising across sectors is key to achieving progress in this regard. Considerable responsibilities in the area of investor protection have already been assigned to ESMA, or will become effective in due course, including the new powers on product intervention under MiFID II. EIOPA has been entrusted with similar tasks under the PRIIPs Regulation and the IDD. We think that these powers need first to be tested in practice before thinking about extending the ESAs' mandates in this regard. Any call for additional powers should evaluate all of the existing tools in a fair and consistent manner. This also comprises a proper evaluation of tools providing equivalent investor

protection such as the powers entrusted to NCAs to intervene with the marketing of funds under both the UCITS and the AIFM Directive which have not been taken into account by ESMA in its opinion on "Impact of the exclusion of fund management companies from the scope of the MiFIR Intervention Powers" from 12 January 2017.

Q7: 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.

In terms of possible new fields of activity where involvement of the ESAs could be beneficial for consumer protection, we would support further efforts on marketing in the context of the promotion of cross-border fund distribution. Marketing practices remain extremely fragmented within different Member States and as a result increase costs for market participants. While standardisation of marketing needs to be dealt with by the legislator, we believe there is room for the ESAs to work on consistency of marketing regimes and practices within the EU at Level 3.

The ESAs could also be more active in the field of financial education. A major change in investment mentality as envisaged by the CMU cannot happen without teaching investors how to understand and take risk in a reasonable way.

I. A. 5. International aspects of the ESAs' work

Q9: 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 ESA 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?

There is currently no coherent concept of equivalence applicable under different EU financial frameworks. Given the need to develop a new relationship with the UK market in the Brexit negotiation process, we would welcome a legislative review of the current approaches with a prospect of devising a uniform and effective equivalence model for accessing the Single Market. Such a new concept should in our view not be limited to a selective appraisal of equivalence at a given point of time, but rather should encompass regular reviews of the regulatory environment. Moreover, it is important that equivalence be understood not only in terms of regulation, but assessed also with a view to effective enforcement of a given framework. Lastly, we think that reciprocity of access to a given market should be always considered an essential element and a central test point of equivalence.

Having said this, we see indeed benefits in enhancing the ESAs' role in terms of equivalence assessment post-Brexit. We believe that the ESAs are best placed in terms of practical experience and knowledge not only to provide for initial analyses of equivalence, but also to carry out regular reviews of the regulatory landscapes in third countries and to maintain close contacts to third country authorities. In this regard, the ESAs' responsibilities to monitor third-country developments should be enhanced and their mandate for providing recommendations to the Commission be widened. However, in our view, the eventual competence to grant or revoke the equivalence status to a certain jurisdiction should remain with the EU Commission.

In relation to third-country passports which are supposed to take effect under the AIFMD framework, we could envisage that ESMA acts as a single access point for third-country managers or funds willing to access the EU markets. Specifically, the authorisation of non-EU AIFM under Article 37 and the subsequent notifications under Articles 39 to 41 of AIFMD could be entrusted to ESMA and the concept of a "Member State of reference" could be abandoned. This solution would eliminate any potential for arbitrage among Member States and at the same time allow ESMA to apply its third country expertise in a practical context. We would welcome further consideration of this idea in the upcoming review of the AIFMD framework.

I. A. 6. Access to data

Q10: To what extent do you think the ESAs powers to access information have enabled them to effectively and efficiently deliver on their mandates?

It is very important that NCAs remain the first access point for market participants also in terms of regulatory reporting. Proximity of the supervisor is also indispensable in this respect in order to commensurate supervisory practices and effective protection of investors in the relevant marketplace. Therefore, we believe that the reporting chain through NCAs as for instance foreseen in the AIFMD is the correct approach.

Ultimately, the ESAs are not in a position to exploit all data being made available to them or to the NCAs which creates issues as regards the relation of costs of reporting to the associated benefits. Our suggestions how to improve the regulatory reporting system are outlined in the responses to Q12 and 13 below.

Q11: Are there areas where the ESAs should granted additional powers to require information from market participants?

In principle, authorities should strive to share information gathered from market participants before asking for the same information on multiple occasions. Therefore, while not entirely opposing to the idea of granting the ESAs additional powers to require information from market participants, we think that this should only be allowed in cases where the data is not being made available to the NCAs in the first place.

Generally, we think that information flows relating to activities not subject to direct supervision by the ESAs should be directed through the NCAs. We think that it is possible to grant ESAs a power of injunction on NCAs to transmit data. In any case, collection of new data by the ESAs must be done upon a sound legal basis.

I. A. 7. 7 Powers in relation to reporting: Streamlining requirements and improving the framework for reporting requirements

Q12: 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?

We believe that the ESAs should play a crucial role in standardising regulatory reporting. Regulatory reporting is increasingly burdensome for market participants especially due to the various layers of

competing reporting requirements partially covering the same data points, but developed independently and in an inconsistent manner under different pieces of EU law.

For instance, the applicable and pending requirements for transaction-level reporting under EMIR, MiFID II/MiFIR and SFTR display considerable differences in terms of reporting details, reporting channels, data repositories and applicable IT standards. The same pertains to the regulatory reporting on positions and risks required under AIFMD, UCITS Directive and the future MMF Regulation as well as to reporting obligations for institutional investors under Solvency II/CRR which require delivery of data and further support services by asset managers. In addition, reporting is often insufficiently standardised which causes significant problems in the collection of data as currently experienced under AIFMD and EMIR.

The jumble of different data standards and formats presents a huge burden for the industry in both operational and financial terms and impedes efficient supervision concerning in particular systemic risks. Enhancing consistency of regulatory reporting on European and international level is therefore badly needed in order to enable the regulators to use the stored data for the purpose of detecting systemic risk and to keep the administrative burden for market participants at a reasonable level. Moreover, there is also an urgent need for stronger integration in technological terms. The use of common reporting channels and standardised IT formats would enable regulators to better utilise the loads of submitted information for supervisory purposes, especially for the prompt detection of systemic risk, and might entail cost savings for market participants such as fund management companies which may run into millions of Euros.

In consequence, we would welcome a stronger and efficient integration of regulatory reporting obligations relating to both transaction and position data **while retaining the NCAs' responsibility for collecting the data from market participants subject to their respective supervision**. In our view, the Commission should in the first place **develop a regulatory approach** to streamlining of the reporting requirements. In parallel to this ambitious regulatory remit, however, we think that certain **targeted improvements can be achieved by a stronger coordination at the ESA level**. This pertains in particular to the standardisation of data contents and formats in order to enable consolidation and processing of the reports at the European level with due consideration of the work on identifying potential data gaps currently conducted by IOSCO. Such a consolidated tape is in our view a necessary precondition for providing the authorities with consistent and comparable data sets which should allow them to detect potential cross-border or cross-sectoral risk in the EU financial system. Our experience shows that further standardisation efforts are especially needed in relation to the regulatory reporting under AIFMD. We would also welcome standardisation of the UCITS reporting on the use of derivatives which is currently subject to fragmented national requirements.

Q13: 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?

Full standardisation of reporting requirements is key to both improving efficiency for market participants, especially those active across border, and allowing for further use and processing of data by competent authorities. Thus, we think that a shift to a less formal regulatory approach should be appropriate in most circumstances provided that there is a common understanding among the NCAs that non-binding measures relating to regulatory reporting should be adhered to in any event.

C. Direct supervisory powers in certain segments of capital markets

Q19: 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?

We agree with the Commission that stronger European supervision can help overcome market fragmentation and is a consequent step towards a Capital Markets Union. However, the introduction of fully harmonised EU frameworks should be considered a precondition for further integration in terms of supervision. Consequently, direct supervisory powers of ESMA should be reasonably extended only to areas which are subject to fully harmonised regulatory treatment at the EU level.

In relation to pan-European investment fund schemes, such full harmonisation is pertinent to European Long-Term Investment Funds (ELTIFs), European Venture Capital Funds (EuVECAs) and European Social Entrepreneurship Funds (EuSEFs) which are based upon directly applicable EU Regulations. In our view, it would be a consequent step towards accomplishing the internal market to assign ESMA with direct supervisory powers for these vehicles. In case of UCITS, however, the situation is quite different. The UCITS Directive, while providing for harmonised product rules especially regarding eligible assets and investment limits, does not follow the principle of maximum harmonisation and thus deliberately gives some leeway to national regulators. Therefore, many aspects of the UCITS regime, especially those not subject to more detailed rules at Level 2, have been implemented differently at national level. This pertains for instance to the necessary arrangements for subscription and redemption of fund units, definition of leverage or requirements for regulatory reporting on the use of derivative instruments. Such different national solutions are generally tailored to the specificities of the local markets.

In view of these national divergences, bundling of supervisory powers over UCITS at the EU level is not appropriate at this stage. ESMA is already contributing to the practical alignment of the national approaches by issuing guidelines and opinions. Under the current legal framework, this approach appears the best option to achieve an incremental convergence of the UCITS standards.

As regards AIFs, these vehicles are not subject to harmonised product rules at EU level and therefore, cannot be considered suitable for direct supervision by ESMA. The same applies to the supervision of UCITS managers and AIFMs since their activities are neither fully harmonised nor considered systemically relevant. Furthermore, proximity of the supervisor which is indispensable for commensurate supervisory practices and effective protection of investors in the relevant marketplace would be lost in case supervisory competences were transferred to the EU level.

Concerning other market segments in which direct supervision by ESMA is under consideration, we would like to observe the following:

- Data providers: We support the idea of a single consolidated tape and the aggregation of data of different trade repositories which would allow for a more comprehensive view of the markets. We believe that ESMA is best placed to organise and run such instruments and agree that CTPs, ARMs and APAs are part of the relevant chain. Therefore, we believe that direct supervision of data providers by ESMA would make sense. Moreover, commercial market data vendors should also be subject to the supervision by ESMA as there are a number of questions over their commercial practices (frequent bundling of services), their legal documentation (exemption of liability on their part), and their definition of the service provided (temporary access to data without possibility of

keeping what has been loaded when contract ends) which are in urgent need of supervisory surveillance.

- CCPs: In view of their cross-border activities as well as crucial importance in terms of financial stability, we agree that CCPs should be supervised at the European level. However, given the potential systemic relevance of CCPs and as a consequence, the strong macro-prudential dimension of CCP supervision, we would rather suggest to submit this market segment to the Single Supervisory Mechanism at the ECB. Such enhancement of the SSM role would also enable the authorities to monitor systemic risk in a multipolar manner by accounting for interconnections with clearing participants subject to SSM supervision.

Q20: For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages?

In case of UCITS, the advantage would certainly be the creation of a truly Single Market if product authorisation by ESMA would entail the right to market a fund throughout the EU. However, as explained above, this approach is in our view not workable due to the considerable differences in the national implementation of the UCITS framework. On the other hand, a clear disadvantage in terms of investor protection would be that investors and their representatives would lose a competent point of contact at national level with knowledge of the local market and accessible in local language. Direct supervision by ESMA would make it more difficult also for market participants to create awareness of their business models and other particularities evolved in the context of national jurisdictions. Furthermore, it should be clear that entrusting ESMA with direct supervision of tens of thousands of UCITS across the EU would necessitate significant expansion of ESMA's staff and resources. It is questionable whether such fundamental enlargement of ESMA would entail a relative reduction of manpower on the side of NCAs. Indeed, we fear that this solution would entail major increases in costs of supervision for fund managers and ultimately, for end-investors.

Q21: 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?

As explained above, we see currently no case for extending direct supervisory powers of ESMA to UCITS or AIFs. However, we believe it would be of merit to strengthen ESMA's role in relation of the cross-border distribution as an area directly contributing to the Single Market. In particular, ESMA could provide valuable guidance and review supervisory practice in order to ensure that NCAs do not impose additional / specific requirements in the local markets. In fact, we believe that the following measures could improve practical issues and could be implemented relatively easily:

- ESMA guidance on a common understanding of definitions such as marketing, private placement and reverse solicitation.
- ESMA guidance on a common understanding that marketing material in line with MiFID II is generally sufficient to fulfil local marketing requirements.
- Using the ESMA webpage to display certain information. This could include information on the fee structure of notification, thereby enhancing comparability between regulators.
- Encouraging NCAs to disclose information relating to their specific requirements generally and in English.

More generally, we advocate a shift to a notification system where all NCAs would have to rely on approval and information provided by the home Member State NCA. We would generally encourage this also in circumstances in which no passport is available, i.e. for distribution of AIFs to retail

investors. Often such cross-border distribution is very burdensome and any possibility for NCAs to exchange information could facilitate the process.

II. Governance of the ESAs

A. Assessing the effectiveness of the ESAs' governance

Q22: 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?

Q23: 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?

Q24: To what extent would the introduction of permanent members to the ESA's 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?

Q25: To what extent do you think would there be a 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?

As industry representatives, we do not have much insight into the functioning of the ESAs' governance structures. Nonetheless, we would like to make the following comments based on our observations from the outside:

- While the Boards of Supervisors are certainly not the most efficient decision-making bodies due to their size, they make sure that local securities markets and their specificities are represented and taken into account in the regulatory work of the ESAs. Therefore, we are reluctant to support any initiatives to change the current composition of the Boards or to limit its competence to work on technical regulatory matters. We also do not accept the argument that a supranational orientation is sometimes lacking in the Boards' decisions. In our view, in the EU of 28 (or in future 27) jurisdictions, the results of decision making with the involvement of all NCAs must be considered as forming the relevant EU view.
- Representatives of EU institutions at the Boards should not be granted voting rights, since such involvement in the decision-making process would undermine the independence of the ESAs as enshrined in Article 1(5) last subparagraph of the ESA regulations.
- We see some room for optimising the decision-making process in the Boards of Supervisors. In particular, there are instances in which decisions taken by the Board of 27 effectively impact only a few Member States in which relevant markets, market practices or participants exist. In such cases, the NCAs representing not affected Member States often lack in-depth knowledge and experience with the relevant circumstances and tend to decide on rather dogmatic reasons. **Therefore, in our view, it should be considered to amend the current "one member one vote" principle in the decision-making at the Board level and to weight voting powers in relation to the size of national financial markets.** This approach should certainly be taken into close consideration in

case the envisaged industry contributions to the ESAs' budgets were also to be linked to the size of financial sectors at the Member State level.

Moreover, there is an open issue of UK nationals currently working for the ESAs. While we appreciate that their status will form part of the Brexit negotiations and needs to be decided upon in the context of the general treatment of EU officials with UK citizenship, we are concerned about potential negative implications and conflicts of interests in case UK employees were to remain at the ESAs and could still exercise influence over EU regulation and supervision without affecting the UK market post-Brexit.

B. Stakeholder groups

Q26: 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?

According to our experience, stakeholder groups are able to provide only limited contributions to the ESAs' work due to their cumbersome rules of procedure, the lack of involvement in the ongoing work by the ESAs and diversified composition which makes it difficult to agree on common opinions. In general, stakeholder groups comprise only 30 members and hence are able to provide only for a limited representation of relevant stakeholders given the breadth and variety of financial services in the EU.

Therefore, we believe that stakeholders should be given more opportunities to interact with the ESAs and to contact their staff members on a less formal level. Currently, these opportunities are fairly confined. In particular, neither detailed organigrams nor contact persons in charge of specific issues are being disclosed by the ESAs. Stakeholders wishing to address certain issues, to initiate discussion or even to submit questions are generally not even able to identify a relevant contact point. This lacking cooperativeness on the part of the ESAs is unsatisfactory in view of their paramount importance as the standard-setters for the EU financial markets. **As an operating principle, the ESAs should thus be committed to an open exchange of view with market participants.** We firmly believe that not only stakeholders, but also ESAs' personnel would benefit from regular interchange of views given the increasing complexity of regulations for financial markets and the diversity of market activities they need to deal with.

In this regard, we highly welcome the new practice by EBA to publish any incoming questions submitted by market participants via the Q&A tool. Transparency in this regard is very helpful for assessing the relevance of the pending EBA's work at Level 3 and enables other stakeholders to feed further arguments or highlight different aspects to the debate. We would encourage ESMA and EIOPA to follow the same route and to publish any questions submitted in their areas of responsibility.

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

Q27: To what extent has the current model of sector supervision and separate seats for each of the ESAs been efficient and effective?

We think that sectorial supervision as currently executed by the ESAs is very effective, since it allows for adaptation of supervisory approaches to particular business models and other specificities of each financial sector. In this regard, the industry also benefits from sector-specific expertise present at each ESA which can be availed of also for regulatory purposes when developing technical regulatory advice or technical standards.

Q28: 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?

As explained in our reply to Q27 above, the sectorial structure of the ESAs has in our view proven effective. Building up of sector-specific expertise at each of the ESAs has allowed for the development of supervisory responses targeted at sector-specific business models which is also important for efficiency of supervision. Moreover, the collaboration within the Joint Committee enables the ESAs to coordinate common supervisory approaches to issues relevant for all financial sectors. Interactions of the ESAs within the Joint Committee have incrementally increased and cover also market intelligence projects such as the recent consultation on the use of big data by financial institutions.

In our view, this system is functioning quite efficiently. Therefore, we are in favour of maintaining the current system of sector-specific supervision and do not support radical changes to the supervisory architecture. A twin-peak model as contemplated in the consultation paper with one prudential supervisor and one conduct authority appears not appropriate in view of the breadth and complexity of financial markets in the EU. There is the natural risk that such universally responsible authorities will be less flexible to react in a properly differentiated manner to the challenges and issues arising in each financial sector and will more commonly adopt "one size fits all" approaches. As representatives of the fund management industry which is characterised by the fiduciary nature of the business relationship to clients, we have made the experience on many occasions that prudential authorities are not familiar with our business model and generally struggle to find an appropriate supervisory response to its particularities.

Nonetheless, against the background of the pending relocation of the EBA, we agree that further efficiency gains could be achieved by reducing the number of seats for the ESAs and possibly by merging EIOPA and EBA into one single agency. This move would at least allow for the use of single business premises and infrastructure for both authorities.

IV. Funding of the ESAs

Q29: The current ESAs funding arrangement is based on public contributions:

a) should they be changed to a system fully funded by the industry?

☐ Yes
☒ No
☐ Don't know / no opinion / not relevant

What are the advantages and disadvantages of option a)?

Our experience at national level has shown that a change in the funding system to full financing by the industry makes adherence to a strict budgetary discipline more difficult. While in general financing stakeholders should be represented in the authority or body in charge of the budgetary control, it proves intrinsically difficult for market participants to control the budget of authorities responsible for their supervision. On the other hand, EU institutions will have no genuine interest in enforcing budgetary discipline upon the ESAs if there is no financial contribution from the EU

budget, i.e. if the entire financing burden is placed upon market participants. In Germany, the BaFin's budget literally exploded after the change to full industry funding was put into place in 2002. Since then, the budget of the agency has risen by a whopping 300 percent, from approximately 90 million to currently 285 million Euro. The additional tasks assigned to BaFin in the meantime can certainly not explain such massive budget increase.

b) should they be changed to a system partly funded by industry?

☒ Yes
☐ No
☐ Don't know / no opinion / not relevant

What are the advantages and disadvantages of option b)?

The current funding system with a 40% contribution from the EU budget and a 60% contribution by NCAs already results in a considerable proportion of financing by the industry in those markets in which NCAs are fully or partially funded by market participants. As regards further evolvement of this system, we do not object to moderately enhancing the share of industry contributions to the ESAs' budgets as long as a relevant stake is still covered from the EU funds. In this respect, we agree with the Commission's appraisal that a shift to a fully industry-based funding might not be appropriate in view of the ESAs' work being substantially committed to preventing and mitigating financial stability risk in the EU. Moreover, in working on technical advice to delegated acts, RTS or ITS drafts the ESAs actually perform tasks that are generally assigned to the European Commission under Articles 290 and 291 of the TFEU and thus should be financed from the EU budget. By retaining the EU financing stake as well as its approval by the EU Parliament and the Council, the EU institutions would have the power to prioritise the ESAs' tasks in relation to macro-economic supervision and to exercise influence over future activities by the ESAs. Partial EU funding would thus help to ensure that national interests do not prevail over the ESAs' commitment to European interests and furthering the Single Market. Moreover, as explained above, we fear that a system change to full industry funding would be detrimental to the ESAs' budgetary discipline.

Q30: 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")

☐ 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")

We do not have a firm view on either option for allocating the costs of supervision to the industry. However, should contributions at the Member State level be adjusted to reflect the size of the national financial industry, we believe that this should be also mirrored in the allocation of voting rights in the ESAs' Boards of Supervisors. In other words, in case Member States with strong financial sectors had to provide substantial contributions to the ESAs' budgets, they should be assigned accordingly strong voting powers in the decision-making process.

Q31: 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 or disadvantages of doing so?

In our opinion, industry contributions to the ESAs' budgets should be collected via the NCAs at least as regards areas of the financial markets not subject to direct supervision by the ESAs. Without direct supervisory powers, the ESAs will not be in possession of registers of market participants or further information necessary for determining individual contributions. Routing collection of payments via NCAs will also allow to take avail of the existing structures for contribution payments.