AFG RESPONSE TO EC CONSULTATION ON OPERATIONS OF THE EUROPEAN SUPERVISORY AUTHORITIES
Deadline: 16 May 2017

I. TASKS AND POWERS OF THE ESAs

A. OPTIMISING EXISTING TASKS AND POWERS

1. SUPERVISORY CONVERGENCE

Questions

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

2. With respect to each of the following tools and powers at the disposal of the ESAs:

   - peer reviews (Article 30 of the ESA Regulations);
   - binding mediation and more broadly the settlement of disagreements between competent authorities in cross-border situations or cross-sectorial situations (Articles 19 and 20 of the ESA Regulations)
   - supervisory colleges (Article 21 of the ESA Regulations);

   To what extent:

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

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

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

3. To what extent should other tools be available to the ESAs to assess independently supervisory practices with the aim to ensure consistent application of EU law as

well as ensuring converging supervisory practices? Please elaborate on your response and provide examples.

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

AFG is of the view that a single rulebook has to apply in the same way in all Member States to have any significance. We therefore encourage ESAs to further develop their presence in the field of convergence and harmonisation. We insist that time has now come to **lower the pace on new regulations** after the tremendous production of new texts over the last 10 years in financial matters and to go further in depth in making sure of the consistent application of those regulations. We also believe that in their work ESAs should favour **substance over form** and follow a proportionality principle. Lastly, ESAs should always take into account the **international competitiveness** of the rulebook they are promoting.

Supervision convergence should take now the priority over the production of new rules. We think that ESAs should be empowered by the European Commission to conduct assessments and monitoring under this heading.

We believe that if ESAs have been very active in their advisory and regulatory function in producing advices and texts submitted to the legislators they have not taken the full measurement of their role as supervisors. ESAs have, probably because of their focus on legislative work, developed a culture of compromise which is not appropriate in their supervisory function. Furthermore, they should understand that they are positioned as technicians and should not indulge into politics.

Globally, while estimating that ESAs have not been fully effective in their supervisory function. However, **we consider the ESAs' mandates and the tools at their disposal in the founding Regulations as broadly adequate**, especially as some of the latter have not all been deployed and could be optimised. More specifically, **we are in favour of a greater use of the powers that the ESAs already have** (e.g no case of breach of law or binding mediation has come to conclusion since the creation of the ESAs).

With regard to **peer reviews**, we think that, as created by **article 30**, they look too much like the review of one NCA which is questioned on its activities. We consider that peer reviews would be much more efficient if they were used to exchange about best practices on a defined and limited topic. We hence urge ESAs to **develop thematic peer reviews** conducted in a more constructive spirit alongside the exhaustive review of a given NCA. The monitoring of remarks and decisions should, however, be made attentively to ensure total compliance in all Member States.

With regard to **binding mediation** by ESAs, it is a powerful tool but no case has been mediated by an ESA since establishment, even if some requests have been put forward. We recommend that a much larger attention be paid to stakeholders remarks and that a simple and rapid remarks and suggestions handling procedure be organised in ESAs without the necessity to qualify as "complaint" to be considered without delay. We believe that this remarks handling procedure would point out areas of concern that NCAs have not raised but which are of interest for stakeholders. These remarks should be able to activate the mediation process.

Finally, we see merits in **empowering ESAs with the chairmanship of Colleges of supervisors** to ensure a preservation of the EU interest in all circumstances.

When considering the tools available for ESAS to foster supervisory convergence and cooperation, we have a clear view that there should be a distinction between two different approaches. On one side, ESAs should provide a forum where to develop common thinking and culture on the basis of shared views and proper argumentation: that is a consultancy role aiming at identifying issues, sharing best practices and building a common understanding if possible. On the other side, a more constraining approach should prevail in the implementation of rules that have been clarified; it aims at imposing a proper attitude to those Member States or NCAs which do not comply. ESAs should have both roles: consultancy and action.

Furthermore, we see a real difficulty in the lack of decision power in the Management Board of ESAs and would recommend to introduce tools that would be at its hand as a way to increase the efficiency and the speed of action.

We feel that **ESAs should have full authority for arbitrage on cross-border cases** as foreseen in article 19. Their mediation power has to be effectively used and even reinforced to favour effective and final decisions. We suggest a **formal mechanism** be **inscribed in ESMA Regulation that would enable ESMA and NCAs to share a common interpretation of rules where needed**, ie on significant matters or matters subject to regulatory arbitrage (see our proposal under Question 5 below).

In our view the staff of ESAs should prepare decision that would be taken by the new Management Board /Bureau of the Board we will suggest to introduce below under Question 22 and sqq.

2. NON-BINDING MEASURES: GUIDELINES AND RECOMMENDATIONS

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

The implementation of ESAs guidelines through efficient peer reviews and their consistent application across 28 Member States is a crucial element in ensuring a successful Capital Markets Union through supervision. Standards, guidelines and recommendations issued by ESMA should contribute to the promotion of a common supervisory culture and convergence in supervisory practices.

AFG is of the view that guidelines and recommendations, as envisaged by the EU legislator when the ESAs were created, should give guidance on the interpretation of existing financial regulation at EU level with a view to ensuring "common, uniform and consistent application of Union Law".

However, **despite their stated purpose, guidelines and recommendations have in fact become quasi-legislative which have had a significant impact on national laws as well as**

operating conditions of the markets and their participants. They might not be the most efficient instrument in all cases, due to the principle of "comply or explain" which very often leads in practice to diverging national implementation. Member States may in the first place have found it difficult to reach a compromise and their NCAs may declare themselves non-compliant with all or part of a guideline, thus jeopardising a uniform implementation of the rules. As a result, guidelines might not be applied in an identical manner by supervisors in the different Member States: their implementation requires the development of national legal provisions, which might lead to additional fragmentation.

In other words, implementation arrangements in the different Member States may range from very prescriptive (some regulators, like the AMF, have systemically implemented guidelines as soon as they are published in their language, hence making them de facto binding without possibility of introducing any flexibility, even where justified) to simple references by the NCAs to some part of the guidelines as examples of best practices.

One of the problems encountered in this field is the lack of shared interpretation of texts, since the rules are now mainly harmonized throughout the EU. We should thus imagine **a formal mechanism that could be inscribed in ESMA Regulation that would enable ESMA and NCAs to share a common interpretation of rules where needed**, ie on significant matters or matters subject to regulatory arbitrage, while always favouring substance over form.

Two canals could be used:

On the one hand, when there is evidence of different interpretations between NCAs which lead to different practices, that clarifies what interpretation should apply and, after a period of time, should automatically launch a breach of law case or a binding mediation if NCAs do not comply with EU law as collectively interpreted.

On the other hand, on the model of ESMA's current EECS (European Enforcers Coordination Sessions in the field of IFRS enforcement) any NCA that has a question of interpretation should report it in dedicated and regular sessions of standing committees in order to seek guidance from ESMA. This guidance would then give rise to regular peer reviews and to the use of repressive tools should Union law be breached.

In addition, whereas guidelines and recommendations are non-binding and provide for best practice, **there have been examples of the ESAs exceeding their mandates and sometimes going against the spirit of the EU legislator. Guidelines and recommendations should not seek to issue additional layers of quasi-regulation without clear mandate, impact assessment or legal basis on matters which were not previously regulated at EU level, nor should they introduce new legislative provisions which were not foreseen by European legislators**.

For example:

- **ESMA guidelines on ETFs and other UCITS issues** (initially published in December 2012 and now **ESMA/2014/937 of August 1st 2014**) amount to gold plating the UCITS Directive on the ban on re-use of collateral and transparency of benchmarks.
- The **Opinion issued by ESMA under article 29 on UCITS share classes** (**ESMA 34/43/296 on January, 30th, 2017**) heavily restricts the variety of share classes that

can be created in a UCITS, limiting them to foreign currency overlays only. Whilst the UCITS Directive left the matter open, ESMA introduces limitations which were not foreseen in the original level 1 text, thus creating law without competence to do so.

- EBA's definition of shadow banks in it its shadow bank guidelines (**guidelines on limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework under Article 395 para. 2 Regulation (EU) No. 575/2013**) is, in our view, a political decision which goes beyond the remit of guidelines as set out by Article 16 of the EBA Regulation. EBA is not empowered by CRR to define shadow banking entities. While we acknowledge a serious flaw in the CRR text which required EBA to draft guidelines without determining which entities might be subject to those guidelines, we would argue that this does not give EBA the legal power to set the rules that should have been set by democratically elected representatives.
- We were also concerned with the legal basis of **EBA's guidelines on the treatment of credit value adjustment risk** under the supervisory review and evaluation process (SREP) and the conformity of the guidelines with the ESAs' Regulations and with the legislative framework of CRR/CRD IV. EBA's guidelines are likely to impose capital requirements for credit value adjustment risk under the Pillar 2 process (ICAAP and SREP), where there is no Pillar 1 capital requirement by reason of CRR Article 382 (4). The guidelines allow Pillar 2 to eviscerate the exemptions granted by the CRR. This is objectionable on the basis that the explicit will of the co-legislators as expressed in CRR Article 382 (4) would be thwarted by supervisory action to comply with these guidelines.

In this context, it would certainly be worth **clarifying the existing legal framework for the issuance of guidelines**. For instance, it should be specified that:

- Political decisions are of the exclusive competence of the EU legislator; therefore, guidelines should not (i) anticipate the outcome of ongoing EU legislative procedures, or (ii) constitute substitute legislation, for instance by addressing areas that the EU legislator has purposefully decided not to regulate, or by replacing political compromises that have failed;
- Guidelines should not be issued in areas where the European Commission has the power to issue technical standards;
- Guidelines should not go beyond or further the binding provisions laid down in the legislation, and should not arbitrarily supplement them by means of general provisions;
- Guidelines should not favour form over substance and only be issued if it can be demonstrated, based on sufficient facts, that they are required to ensure both a "common, uniform and consistent application of Union law" and "consistent, efficient and effective supervisory practices".

We believe that a mere clarification of the ESAs' powers within the existing framework is not sufficient and that further improvements need to be made to deal with the shortcomings identified above.

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 issued under Article 16 of the ESAs Regulations**: the entitlement to such right of action could be entrusted to national authorities and also to individual market participants and their representatives in case the latter were directly affected by the relevant guidelines. The claim should be founded upon breach of EU law or disregard of the ESAs' competences in relation to the guideline-setting.

- **Introduction of a 'complaint procedure' against supervisory guidelines to be initiated by the European Commission:** given its role given by the Treaties as guardian of the Treaties, the European Commission could also be empowered to submit complaints or otherwise take action against supervisory guidelines issued by ESAs in case of potential incompatibilities with EU law. Market participants should be able to contact the Commission in order to report on irregularities in the ESAs' work.

- **Encourage review, amendments and adjustments of Guidelines as a standard and frequent process.**

More generally, we urge for a **better application of the proportionality principle**. We do not agree with the ESAs' view that proportionality should be overlooked on the basis that it is not under their remit. It should be confirmed that that ESAs have the power in all circumstances to apply proportionality, except when level 1 text clearly excludes it. This is necessary in overcoming obvious unintended consequences in the application of some texts. The burden resulting from AIFMD reporting and the application of the Budapest protocol in the framework of IORP II are two such examples.

One other area for improvement is in **the drafting and governance of Q&As**

Q&As are useful but they are no legal instruments. Moreover, the development of questions and answers is only one way. Indeed, there is no public consultation before the ESA issues the answer, so ex ante debate is not possible and when an answer is given to clarify a specific question it very often brings uncertainty to a neighbouring point which is slightly different and deserves another answer, thus prompting a new question to the Q&A. Q&As should be considered as pure illustrations of very specific cases for which a position is given that should not be extrapolated to comparable but not identical cases. More importantly, we think that stakeholders should be able to challenge answers and have a right of appeal if Q&As were to create new rules. Furthermore, given the permanent flow of new Q&A in practice it is very difficult to ensure that market participants are able to follow them on an on going basis. We believe there is a need for increased transparency, particularly in cases when a large series of Questions needs to be answered. For example, in the case of the forthcoming PRIIPs Q&As, the list of Questions has not been made available in advance. This is extremely regrettable given that this series of Q&As will be crucial for implementation of PRIIPs by market players.

When coming back to the founding Regulations, we see that Q&As are not mentioned in article 8(2) as a regulatory power given to ESAs. There is a possibility open under article 29 (2) to "develop new practical instruments and convergence tools to promote common supervisory approaches and practices". Published with reference to this article, **Q&As cannot be used to edict new rules that were not covered the level 1 or 2 texts** (e.g **forthcoming PRIIPs Q&A**) or which are contradictory to them (**AIFMD Q&A on the delegation of marketing functions**). They are purely dedicated to the development of a "common supervisory culture" among NCAs. In a nutshell, we think that ESAs should not use Q&A as a means to communicate directly to stakeholders and to create new obligations for them. It is crucial that measures likely to have structural or operational impacts be taken via guidelines rather than Q&As (for which ESMA does not trigger a public consultation nor ensure translation). Moreover, we see a strong evidence that legislators have designed powers for ESAs to implement regulations that all require a public consultation and envisioned other tools that do not create any rule of law but are illustrative to be addressed to NCAs, such are Q&As. **The review of ESA Regulation should be the occasion to introduce the possibility for ESMA to make public consultations not only on guidelines but also Q&As when needed**, for example when stakeholders ask for it.

In a more general fashion, as far as the regulatory powers of the ESAs are concerned, AFG would like to reiterate its 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. In particular, 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 organisational or technical changes.

Finally, for flexibility purposes and as recently shown in the context of the implementation of variation margins under EMIR, there would be merit in considering the **possibility of giving the European Supervisory Authorities the power to adjust the implementation of a rule through mechanisms such as no-action letters or "safe harbour rules".** These new tools should be made available to ESAs to develop a flexible and proportionate implementation of EU legislation since they would largely improve the fine tuning of regulation. The advantage of such rules is that they allow for an easy evolution of ESAs' doctrine though preserving the initial indicative guidelines.

3. CONSUMER AND INVESTOR PROTECTION

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

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

6. Regulatory consistency and level playing field is all the more important in the context of consumer and investor protection. ESMA already has considerable powers in the area of consumer and investor protection, including on product intervention, **we would therefore encourage ESMA to make full use of its existing powers in this respect, before considering being given enhanced means of action.**

We believe that **consumer and investor protection is first and foremost of the competence of NCAs**. Actually, the investor's profiles are diverse according to their financial literacy and the financial needs. Saving patterns and distribution models differ from one country to another so that often "one size fits all" rules would thus be adapted to none of the market. As a consequence, it seems to us that the NCAs are the best placed to determine the need for consumer specific protection given the proximity of NCAs with the investors whose interest they are taking care of. In accordance with the **subsidiarity principle** only, in cases where there a EU wide need of protection, there should be a level 1 text to tackle the identified risk or danger for consumer and investor. **The challenge for ESMA is now more to use its broad powers under the article 9 of the current Regulation** (data analysis, adoption of guidelines and recommendations, warnings, temporary ban) in concrete cases pertaining to retail investor protection, **rather than to extend them**.

There have been instances where we have had reservations on the role played by the ESAs in the area of investor protection. The role and functioning of the Joint Committee of the ESAs, particularly relevant for investor protection given the horizontal nature of its work, is in our view, another example where there have been shortcomings in this area. **The ESAs review is an opportunity to consider the operation of the Joint Committee to date, which has not proven fully satisfactory**.

For example, in the PRIIPs Regulation, the process was slow and confusing. The level 1 application date being set independently of the date of publication of the Delegated Act (unlike UCITS) created legal uncertainty and a lot of confusion for market participants.

The **PRIIPs RTS** is a missed opportunity to truly enhance investor protection, disclosure and financial literacy. In our view, some key elements of the KID will indeed be misleading retail investors, in particular:

- The lack of disclosure of past performance, despite consumers' associations' recommendations.;

- Performance scenarios methodology: by prolonging almost automatically bull and bear market trends, we believe this methodology could give unrealistic estimation of potential returns and no indication of potential market downturn or recovery;

- Methodology to compute transaction costs (including the "market impact") could result in inflated, false and misleading figures (i.e. negative costs);

Another example of concern can be found in the statement made by ESMA on its supervisory work on potential **closed index tracking** (**ESMA/2016/165 published on February 2nd, 2016**). We agree with ESMA, the ESAs and legislators that cost is of utmost importance to the end investor, as it directly impacts return. We welcome the overarching rationale of ESMA's work on costs and fees, to ensure the effectiveness of investor disclosure and the legitimate expectations of investors in respect of the service provided by asset managers, however we strongly disagree with ESMA passing judgement on the appropriate level of charges for funds.

When dealing with consumer protection, we would like to insist that **the ESAs should take better account of the local business models and cultures that may exist in the different Member States**. For instance, the distribution channels for investment funds are largely different in most continental Europe as compared to the rest of Europe, and these local differences should be taken on board when looking for pan-European investor protection solutions – and **avoid imposing a single solution which is not adapted to local models and cultures**.

The ESAs should elaborate - together within the Joint Committee, and subsequently individually - a structured policy and strategy that would list priorities, define their respective roles, the articulation with the NCAs that possess the best proximity with consumers of financial services and the necessary resources i.e. **the ESAs' work in the field of consumer protection should be carefully coordinated with that of the NCAs**.

7. In terms of possible fields of activity, not yet dealt with by ESAs, where their involvement could be beneficial for consumer protection, **we would support non legislative efforts to further enhance cross-border distribution of investment funds**. Despite the increase in funds distributed cross-border over the past decade, marketing and distribution practices remain fragmented within different Member States, resulting in higher costs for market participants. Enabling a wider distribution of funds outside their domicile Member State would mean a larger and more diversified choice of investment opportunities for investors, as well as more efficient allocation of resources across the EU. We believe there is room for further work on legal clarity and consistency on marketing and pre-marketing activities and to notification processes. AFG submitted its response to the European Commission consultation on remaining barriers on cross border distribution of investment funds. In our view, the priorities for addressing these barriers should be on:

- Ensuring legal clarity and transparency on the regulatory requirements for funds distributed cross-border and,
- Effectively dealing with gold-plating where additional layers of national legislation do not address specific investors' needs and rather create additional barriers for non-domestic firms.

The ESAs, and in particular ESMA, have a key role to play in achieving both objectives. The optimal way to enable full use of the Single Market for investment funds would be to **find practical solutions without imposing additional regulatory requirements**. One example would be via Guidelines or Q&As which could be developed and implemented within a much shorter period of time and therefore, bring improvements in a more timely way. **We would** also **recommend to facilitate the access to key cross-border information through a**

specific internet portal produced hosted by ESMA and fully available in a language customary in the sphere of international finance including tables updated by NCAs presenting national regulatory fees, main national tax regimes, marketing requirements.

The **ESAs could also be more active in the field of financial education**. A major change in culture as envisaged by the CMU cannot happen without teaching investors how to understand and take risk in a reasonable way. It is a long-term process and we regret that PRIIPs will be a step backward in helping the general public understand that past performances are not a proxy for future performances but rather give a fair view of the skills of the manager and allow for fruitful comparison. A more positive move would be to open education programmes and investors' guides on ESAs' website. The question of education is cross-cutting and it might be appropriate to open a large section dedicated to it at the level of the Joint Committee.

4. ENFORCEMENT POWERS – BREACH OF EU LAW INVESTIGATIONS

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

We strongly believe that the procedures on breaches of Union law and binding mediation can play a decisive role in ensuring the consistent application of EU law but also in fostering a common supervisory culture among national competent authorities.

However, no breach of Union law case has been reported so far. In some cases, the ESMA has issued opinions to individual NCAs as a preamble to a breach of Union law procedure.

We would definitely encourage ESMA to make full use of these procedures, if and when necessary, to prevent Member States from regulatory dumping or gold-plating which are detrimental to the development of the Single Market based on an effective level playing field.

We believe however that there is **room for certain adjustments to be made** with regard to breach of EU law investigations. For example, **on the activation of a procedure**, the persons/entities authorised to activate the procedure of breach of Union law according to article 17.2 of the ESAs' Regulations is, in our view, limited (i.e. NCAs, EP, Council, EC, ESAs Stakeholder Groups) and **a more transparent and open procedure should be introduced allowing for industry stakeholders to raise an issue of suspected breach of law**. Remarks, comments or complaints handling procedures should not be limited to level 1 or 2 texts as stated in article 17.1 of the ESAs' Regulations but should also apply to diverging interpretation of texts of a lower degree such as Guidelines.

Some other provisions on breach of law could be added in ESMA Regulation: (i) specifying that **any decision by ESMA not to open a breach of law case should be motivated and made public**, (ii) giving ESMA a **power of on-site inspections in NCAs** in order to find evidence in the context of its investigations on a breach of law case.

Futhermore, **on the internal organization and governance of ESAs**, we believe that **investigation of the cases submitted to the attention of one ESA should rapidly be conducted by a specialized staff of the ESA to produce a detailed report that should be made public**. On this basis, we think that ESAs should be entitled to take decisions at the level of the Management Board.

5. INTERNATIONAL ASPECTS OF THE ESAS' WORK

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

9. The role played by the ESAs when the European Commission grants equivalence decisions, as well as in the monitoring over time of the equivalence of third country regimes and in the potential sanctions resulting from any infringements to such equivalence, is critical, **even more so in a context of Brexit**.

AFG would hence be in favour of strengthening the ESAs' work in relation to monitoring regulatory, supervisory and market developments in third countries. Providing access to the EU market by third country firms via equivalence of their legal framework has become more prominent in EU legislation. We believe the ESAs have and should strengthen the practical experience and knowledge to carry out such assessment and monitoring.

In relation to third countries, a coordination of relationships at the regional level represented by ESAs is appropriate and an efficient way to have uniformity in the assessments and hence, the implementation. Third countries' passport under AIFMD could be, if done in compliance with strong principles, a good example of the potential benefits of such a centralised approach. The suggestion by ESMA to split the cost of assessment of a third country's equivalent legal framework and supervision between all trade repositories established in that third country is also an illustration of the benefits of a centralised approach at ESAs' level.

However, **the decision of equivalence should not be taken away from the hands of the European Commission**. We expect ESAs to conduct assessment and monitoring that will prepare the decision by the Commission. AFG believes that third country equivalence should be assessed text by text and not from a global perspective, and on a rule by rule equivalence assessment.

Concerning the involvement of ESMA in the equivalence process, despite the fact that Article 33 (2) of the ESMA regulation stipulates that ESMA shall assist in preparing equivalence decisions pertaining to supervisory regimes in third countries, in practice, the European Commission does not have recourse systematically to ESMA when assessing the equivalence of every third country's legislative framework. We believe that **the European**

Commission should rely on a technical advice prepared by ESMA in a systematic way when and before deciding on the equivalence of a third country's legislative framework.

Concerning the follow-up to equivalence decisions, **ESMA's role should be strengthened in the ESMA Regulation to allow it to monitor the equivalence decision on an on-going basis** so that it can ensure that such a decision is still valid in case of relevant regulatory changes in European legislation as well as in the case of changes in the legislative framework of the third country. Technically, every 3 years at least and more often in sensitive cases, ESMA should issue a report analyzing those significant changes and their impact on the equivalence decision. This obligation should be proportionate to the size of the third country's entities or activities concerned.

ESMA could also be in charge of ensuring that adequate supervision is exercised by the third-country authority in charge of the supervision of the concerned entity. This would ensure a consistent approach on a paneuropean basis.

We would like to recall that **it is essential that EU institutions always ask for real reciprocity in particular in the market access before accepting equivalence**. This point is first a political one and we expect the Commission to take it in consideration. However, it does impact the extent of the assessment that ESAs are to provide in the preliminary work before proposing equivalence.

Finally, beyond the mere Brexit issue, and considering the central issue of the competitiveness of the EU regulatory framework at global level, it is critical to ensure more generally that - as a rule - within the ESAs only staff from Member States, at any position level, work on the files, including among others on equivalence decisions for third countries

In a more general fashion, we urge for more transparency in the area of recruitment of ESMA staff. It is essential that a strict equality of treatment is applied during the recruitment process regardless of the citizenship and in particular as regards Détachés conditions.

6. ACCESS TO DATA

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

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

10. Reporting is burdensome and hence costly for market participants especially due to the **various layers of competing reporting frameworks partially covering the same scope but developed independently under specific regulation: AIFMD, MIFID/MIFIR, SFTR, EMIR, SRD etc**. The existence of six trade repositories is another obstacle to having an aggregated view, which is necessary both for regulators and participants.

Ultimately, the ESAs are not in a position to use all this data. We would refer to **ESMA's Consultation Paper on its technical advice to the Commission on fees for trade repositories under SFTR and on certain amendments to fees under EMIR (December 19, 2016) which states in paragraph 60** that there is no clear view on the number of reported and outstanding trades two years after the implementation of EMIR reporting. Market participants argue as well that there is still no consolidated tape providing a comprehensive view of transactions.

We believe that modern technology will help to ease the current problem of reporting to authorities. In this sense it would be important to build **a new architecture with one central point of collection**. This hub would receive all fields that have to be reported under one or the other regulation. Authorities, ESAs as well as NCAs and other stakeholders, would have appropriate rights to load whatever is in their own scope. Clearly the investment necessary for **this central data basis should be made at the level of ESAs to avoid duplication**.

11. We agree with the principle that authorities should strive to share information gathered from firms before asking for the same information on multiple occasions from financial market participants.

Except for activities that are directly supervised by ESMA, the local supervising body should be the unique authority entitled to ask for data from market participants. For activities supervised by NCAs, information flows have to come through NCAs. We believe that it should be possible to grant ESAs a power of injunction on NCAs for the transmission of data. In any case, requiring the collection of new data must have a legal basis. If there is a central hub where data of all contributors are collected with accesses granted to NCAs as well as ESAs, the question is a simple definition of authorisations, both direct and full or restricted and subject to validation.

7. POWERS IN RELATION TO REPORTING: STREAMLINING REQUIREMENTS AND IMPROVING THE FRAMEWORK FOR REPORTING REQUIREMENTS

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

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

AFG would see considerable merit in **further developing the Single Rule book in the area of reporting requirements**. Asset managers and investment funds face multiple and often inconsistent reporting requirements. We would be in favour of a streamlining exercise by the ESAs of reporting obligations under different pieces of legislation and believe a standardisation of formats and protocols would increase efficiency for market participants.

Reporting must be fully standardised in terms of content, timing, format, transfer. We would strongly welcome the reinforcement of a consolidated tape with the objective of avoiding:

- **Multiple national data reporting to different national regulators, in different formats although on the same data**
- **Heterogeneous data reporting based on various pieces of EU legislation although on similar data**

Such a consolidated tape would not only increase operational efficiency for firms, but would also give supervisors more complete and comparable data sets, allowing them to identify and manage cross-border risks more effectively. 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 ESAs level. This would be particularly relevant for the standardisation of data contents and formats 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 project should only go ahead if and when there has been made a proper analysis, finding that it would be both realistic and cost efficient to set up such a system and the data being provided is capable of being analysed effectively.

We believe the industry has been effective in creating a tripartite template enabling asset managers and insurers to efficiently communicate data necessary for mandatory reporting under Solvency 2. This shows that it takes time to build a useful template that is satisfactory for all participants. This type of initiatives should be acknowledged by authorities and promoted as a common standard but not made mandatory.

8. FINANCIAL REPORTING

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

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

14. IFRS 9 is a striking example of the negative impact of the current process of empowerment for accounting standards.

IFRS 9 requires holders of open funds, UCITS or AIFs, to show any variation of valuation in the profit or loss account. It means that, contrary to a regularly reaffirmed principle with funds, there will be a breach of neutrality depending on the way investments are made. If through a fund, there is no choice in accounting method or if held directly the investor will have choice to prefer amortised cost for some bonds or profit and losses through Other

Comprehensive Income for some equities. This is extremely worrying, especially for all long term investors who do not want to introduce apparent volatility in their result simply because they hold their investment in a fund.

As a result, IFRS 9 will illogically force long term investors to allocate more to bonds and give up instead of equity and investments funds. When investing in a fund under IFRS 9, the unrealised gains or losses will have to be registered in the yearly income (i.e. profit or lossL), irrespective of the investment horizon. Given this discrimination of funds, long-term investors might redeem significant amounts of out of EU funds and more generally reduce their exposure to equity as, unlike bonds, direct exposure to equity does not allow to recycle profit, i.e. to have realised gains or losses added to the profit and loss account.

IFRS 9 will therefore narrow investment options for such actors and make it more difficult for them to fulfil their legal obligation. It also goes against the objectives of the Capital Markets Union, as it will discriminate indirect investment via investment funds compared to direct holding, penalise long-term investors holding equity and reinforce the debt bias in the EU.

This issue had been pointed out at the earliest stage of the process and taken into consideration by EFRAG in its report. However, it was necessary to fully endorse the obligation rather than any modifications being introduced to amend and clarify the norm. It shows that the process is not satisfactory and we believe that the intervention of ESMA, though making the process more complex, may help. The trouble with IFRS 9 is that the rationale for this absence of choice according to the type of investment held through the fund relies on the definition of equity and bonds which is not the subject of IFRS 9 but of IAS 32 which has not been modified.

15. We further think that **the role of EFRAG should be reinforced with an obligation for the Commission to address all the points and reservations raised in EFRAG's report**.

In that process, we believe that **ESMA should be asked to advise the Commission before endorsement**. The European Commission should then be given the powers to endorse partially or fully the standards, or of course reject them.

Finally, we agree that differing applications of common accounting standards lead to unlevel playing field and regulatory arbitrage that should be prevented.

B. NEW POWERS FOR SPECIFIC PRUDENTIAL TASKS IN RELATION TO INSURERS AND BANKS

1. APPROVAL OF INTERNAL MODELS UNDER SOLVENCY II

16. What would be the advantages and disadvantages of granting EIOPA powers to approve and monitor internal models of cross-border groups? Please elaborate on your views, with evidence if possible.

It does not seem appropriate.

2. MITIGATING DISAGREEMENTS REGARDING OWN FUNDS REQUIREMENTS FOR BANKS

17. To what extent could the EBA's powers be extended to address problems that come up in cases of disagreement? Should prior consultation of the EBA be mandatory for all new types of capital instruments? Should competent authorities be required to take the EBA's concerns into account? What would be the advantages and disadvantages? Please elaborate and provide examples.
N/A

3. GENERAL QUESTION ON PRUDENTIAL TASKS AND POWERS IN RELATION TO INSURERS AND BANKS

18. Are there any further areas were you would see merits in complementing the current tasks and powers of the ESAs in the areas of banking or insurance? Please elaborate and provide examples.
N/A

C. DIRECT SUPERVISORY POWERS IN CERTAIN SEGMENTS OF CAPITAL MARKETS

19. In what areas of financial services should an extension of ESMA's direct supervisory powers be considered in order to reap the full benefits of a CMU? 20. For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages? 21. For each of the areas referred to in response to question 19, to what extent would you suggest an extension to all entities or instruments in a sector or only to certain types or categories? Please elaborate on your responses to questions 19 to 21 providing specific examples.
We agree with the European Commission that stronger supervision can help overcome market fragmentation and is a natural step towards achieving a successful Capital Markets Union. However, care should be taken that any such transfer in the future be fully justified, both on a cost / benefit analysis and in terms of governance, accounting and subsidiarity. If further tasks are given to ESMA, this extension of responsibilities should be matched with adequate powers and tools to adequately conduct new supervisory tasks. **Areas of financial services where AFG could see an extension of ESMA's direct supervisory powers**: - There could be a role for ESMA in implementing a **centralised hub for regulatory reportings collected from NCAs**. Current and pending reporting requirements (data,

formats, channels) vary under EMIR, MiFID, SFTR and AIFMD. Market transactions are subject to different regulations, each of which have their own reporting. There is therefore a need for a horizontal approach in this area, and ESMA is best placed to be able to put this in place. The advantages of such a hub are two-fold. On the one hand, regulators would benefit from a pooled resource rather than having to put in place their individual national resources. On the other hands, market participants would gain in terms of IT investments as a centralised hub would simplify the task of reporting in one unique and standardised manner.

- For flexibility purposes and as recently shown in the context of the implementation of variation margins under EMIR, there would be merit in considering the **possibility of giving the European Supervisory Authorities the power to adjust the implementation of a rule through mechanisms such as "no-action letters"**.

- **ESMA could also be granted direct supervisory powers on critical benchmarks administrators, given their obvious pan-European importance**.

In terms of the three examples provided in the European Commission's consultation paper:

1) **<u>Direct supervision of data providers</u>**:

We believe **ESMA should supervise data providers to the largest extent possible**. We fully 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 chain. We are also of the view that **commercial market data vendors should also be under the supervision of 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), their definition of the service provided (temporary access to data without possibility of keeping what has been loaded when contract ends).

2) **<u>Pan-European investment fund schemes</u>**:

We believe that the current architecture of European investment funds **works well**, whereby funds are distributed in the EU through passport mechanism with the home NCA agreeing and supervising and the host NCA receiving a notification and being able to ask for complementary information. While the rules of some funds such as ELTIFs and EuVECA/EuSEFs are harmonised under EU law, taxation is a matter of national competence.

We are hence firmly opposed to direct supervision of ESMA on investment.

First, even if the rules of several types of funds are harmonized by EU laws, **some large areas remain regulated by national law** such as taxation and retail investors appeal dispositions.

Second, **proximity of local NCAs is key** for better protection of retail investors as financial literacy, market experience, sensitivity to inflation, volatility, capital

protection, amongst others, can vary considerably from one country to another. The example of the UCITS Directive is instructive in this regard. While providing for harmonised product rules especially regarding eligible assets and investment limits, the UCITS Directive does not follow the principle of maximum harmonisation and thus still gives flexibility to national regulators. 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 is the case for instance for the necessary arrangements for subscription and redemption of fund units, liquidity management tools available to UCITS or requirements for regulatory reporting on the use of derivative instruments. However, we would clearly point out that any flexibility provided by the EU regulatory framework should not lead to introducing additional requirements at national level that do not appear to address specific investors' needs. For instance, rules related to offering documentation, marketing activities and discretion as to the implementation of specific rules. 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 UCITS standards** (and to pave the way for a more integrated supervision of UCITS in the long run).

Third, separating the authorization process between ESMA and NCAs could only lead to **longer delay and heavy administrative costs for the industry and for ESMA** (recruiting staff to deal with the administrative tasks and dealing in all languages in the EU for instance), which are not in the interest of European supervision.

Fourth, the need for retail products like UCITS to establish documentation in the language of the country in question is another reason why direct supervision by ESMA of pan-European investment fund schemes would be inappropriate. ESMA does not have the capacity to prepare documentation in all EU languages

Last, there is **no such thing as pan European or systemic funds as opposed to others**. Here the parallel with the banking system and the distinction between systemic and non systemic banks is not relevant. Almost all the funds are distributed to both retail customers and wholesale markets

Given the above, bundling of supervisory powers over UCITS at EU level is therefore not at all appropriate in our views.

As regards AIFs, these vehicles are not subject to harmonised product rules at EU level and therefore, cannot be considered suitable for direct supervision.

The same applies to the supervision of UCITS managers and AIFMs as their activities are neither fully harmonised nor considered systemically relevant.

3) <u>Post-trading market infrastructures</u>:

Concerning CCPs, we are convinced that their cross border activity and their extreme importance in terms of financial stability justify a reinforced supervision under ESMA. We think that the college of supervisors is an excellent way to get the position of all concerned regulators, but we agree that ESMA ought to be the head of the college and in a position to ultimately decide in close cooperation with the central bank that ensures access to liquidity. Since there will be resolution

authorities for CCPs, we further think that the articulation between ESMA and these national authorities should be clarified in the text proposed by the Commission on resolution of CCPs. Our concern extends to the capacity of € authorities to have a say on the clearing of € denominated transactions: EU lacks the instruments the US have established to gain competence over all transactions crossing their borders or using their currency.

II. GOVERNANCE OF THE ESAS

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

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

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

25. To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be delegated powers to make certain decisions without having them subsequently approved by the Board of Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages? Please elaborate.

22-24 - We concur with the opinion that the current governance of ESAs could and should be enhanced. The composition of the Board is a representation of the EU functioning with one NCA of each Member State having a seat. We believe that it is not the most efficient way for ESAs to work, if we keep in mind that they are more technical than political bodies, placed under supervision of the European Parliament and the Council (see recital 10 of the regulations establishing ESAs).

What is expected from ESAs is to act with more rapidity, pro-activeness and determination in their role to ensure converging implementation of EU regulations and to develop a common supervisory culture among Members States. A more extensive use of existing tools, the creation of new ones like no-action letters or safe harbour rules would participate to improving the current situation. A reform of the governance of ESAs is also commendable.

First and beforehand, the deadline attached to this consultation being rather short considering the issues at stake, as a first step and before taking any major institutional reform, we favour appointing a "Committee of Wisepersons" (Lamfalussy or de Larosière type) gathering independent personalities to give proper thinking to the ESA's new governance and to build up concrete proposals.

However, we are of the views that the following improvements should be **explored:**

1) **reinforcing the role of the Management Board**:

A concentrated Board with decision powers (it could be named an enhanced Management Board or a Management Committee) remaining accountable to the large Board of Supervisors, would facilitate the process for quicker and clearer positions to be taken. The other key point would be that the Management Committee would have as part of its DNA to constantly review and re-assess its positions, knowing that markets are moving fast and that peculiarities of one or another Member State must be recognised through an adjustment of the lower level rules.

How would this Management Committee be composed? To evidence its direct accountability to the existing Board of Supervisors, we think that it is for the Board to appoint the members of the Management Committee. They should not be too numerous. They should represent their NCA and we believe that a clear rule should be established that larger financial markets have a permanent seat while a majority of the seats should be attributed on a rotation basis for a period of one year to other Member States. We think that the composition should respect the representativeness of Member States that are not within the Eurozone, at least one seat being reserved in this respect. We think that the Management Committee should meet on a frequent basis, fortnightly for example, and that would make it a quasi-full time job to be a member. The members should be able to participate to meetings with the staff of the concerned ESA. However, they would not be under the supervision of the Chairperson nor the Executive Director of the ESA who would be the only members of the staff to participate to the Management Committee as members.

What about powers of the Management Committee? Compared to the existing Management Board, it would have powers extending further than budget, staff and work plan as currently defined under article 47 of the ESAs regulation. Instead of defining new specific missions for the Management Committee, we believe that the more pragmatic approach would be to start on the basis of a delegation by the Board of Supervisors and a clear definition in each field if the delegation is for action (and reporting to the Board afterwards) or for preparation and advice for a decision to be taken by the Board. Typically, we feel that peer reviews, which we recommend to be transversal and aiming at identifying and promoting good practices, could be more efficiently conducted under the supervision of the Management Committee. The follow-up of recommendations to comply with guidelines and the monitoring of deadlines for implementation of the EU single rulebook would also, in our opinion, benefit from a closer supervision that would be made by the Management Committee.

2) **Extending the qualified majority vote to all strategic decision of the management board** which is currently limited to some decisions (adoption of technical standards, guidelines and recommendations, budget). For example for the expression of an opinion whatever its nature (letters to external parties, opinions and questions &

answers), i.e. texts which are a non-negligible part of ESMA's text production and often have a strong impact on market participants as well as on NCAs. We would support a change in the voting system to make sure that financial sector is fairly represented in accordance with its size; we would suggest to change the rule for qualified majority where one NCA vote should be balanced in accordance with the size of the market the NCA stands for.

25. Role of the Chairperson: We believe that the ESAs should remain collective bodies and the staff of the ESAs, as well as the Chair, who are technicians who prepare meetings and decisions, should not vote. We do not support the idea of mixing functions that would make the governance more opaque.

Other point: As regards the governance of the ESRB, we consider it should be rebalanced to ensure a fair balance between Central Banks/banking supervisors, insurance supervisors and securities regulators since the ESAs are currently underrepresented in the current governance set up of the ESRB.

STAKEHOLDER GROUPS

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

AFG is of the view that **the role and concrete functioning of stakeholder groups should be enhanced**. In the context of ESMA, we do not believe that the functioning of ESMA stakeholder group adequately matches ESMA's increasing powers.

We believe that, in order to be most relevant to the ESAs, the role of the stakeholders groups should not be limited to replies to consultations. Instead, stakeholders groups should preferably be involved at an earlier stage of the process with a view to providing advices to the ESAs on key topics as the policies are being formulated before they are submitted to public consultations. Stakeholders are most impacted by the decisions taken by legislators and regulators and their opinion being taken into account is necessary for good regulation. Whilst acknowledging the importance of preserving political decisions and intentions of legislators, implementation will certainly be more efficient if participants are adequately involved. Given the broad range of expertise they represent, stakeholders groups might also play a useful role in giving 'early warnings' on evolutions in the financial markets that may require action from the ESAs.

We believe it would be beneficial to have **more transparency about the criteria being used to select the members of the stakeholder groups**. In general, the current composition of the stakeholders groups ensures a relatively balanced representation of stakeholders in the relevant sectors, although it could be argued that, given its economic importance, the asset management industry in general is underrepresented within the ESMA Stakeholders Group.

There are a few suggestions in the practical organisation of the stakeholders group which we would also put forward:

- Stakeholder groups should meet more often and should receive their material well in advance.
- A "Europe category" should be available for European trade bodies in the stakeholders group. For example, a Belgian citizen working in an European trade association should be listed as "European".
- Meetings can be very large, involving the members of the Group and all national competent authorities. This does not lend itself to effective exchanges of views. Anyone attending meetings of the Groups should be expected to participate actively rather than being there "just to listen". Members of Stakeholder Groups also need to be given adequate time to consider issues which are put before them and not just be given a matter of days of consideration.
- If and when the Stakeholder Groups take a formal, public position on an issue which the ESAs do not follow, we believe it is essential for the ESAs to explain why this is the case.

On a separate but related matter, we also believe that ESAs need to be more transparent about their internal organisation, which we consider unsatisfactory. As well as the general stakeholders group, 10 different consultative working groups attached to 10 of the 14 existing standing committees have been set up in all three ESAs. In addition ESMA's organigram is, in our view, not very comprehensive (no names and contact details are available).

III. ADAPTING THE SUPERVISORY ARCHITECTURE TO CHALLENGES IN THE MARKET PLACE

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

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

27. We strongly support the current model of supervisory architecture and the separation of powers between the three authorities. We believe the current sectoral supervision of the ESAs is effective as it allows for tailored supervisory approaches to particular business models and specificities of each financial sector. In this regard, the industry also benefits from sector-specific expertise present at each ESA which can be availed also for regulatory purposes when developing technical regulatory advice or technical standards.

The Joint Committee of the ESAs is, in principle, the appropriate forum for communication between the ESAs and the mechanism by which cross-sectoral issues should be dealt with. Interactions of the ESAs within the Joint Committee have increased in the past few years, also covering market intelligence projects such as the recent consultation on the use of big data by financial institutions. As pointed out in question 6, this Joint Committee needs to work better in future on cross-sectoral issues affecting European consumers and end investors.

As representatives of the fund management industry, with a model based on agency, we have at times struggled with **inappropriate spillover effects of banking regulation** to other sectors such as investment management. It is our view that any maximising of synergies between the different authorities could exacerbate this problem and it is therefore important that the ESAs keep their sector-specific expertise.

For example, we have witnessed the EBA overstep its competences with regard to the remuneration of asset management entities. In preparing the review of the CRD/CRR package for the European Commission in the course of 2015, EBA has fundamentally challenged the proportionality principle applied to asset managers' remuneration as per the existing CRD requirements. **EBA's final guidelines on sound remuneration policies under CRD (EBA/GL/2015/22) of December 2015, accompanied by the related Opinion (EBA/Op/2015/25)**, both fail to sufficiently reflect the need for more appropriate remuneration structures in light of the unique "agency" nature of intra-group asset management activities, while grossly overstating considerations around group risk.

Moreover, the conclusions of EBA's analysis appeared to be at odds with ESMA's own previous interpretation of the sectoral AIFMD (and later UCITS) provisions applicable to the remunerations of asset managers, in their July 2013 Guidelines on sound remuneration policies under AIFMD. The different interpretations by the ESAs on some of the same remuneration principles applicable to asset managers prompted ESMA to review its 2013 Guidelines for AIFMs and prepare the respective UCITS-related ones under a compromise. Even though, ESMA's own outcome in the form of consolidated remuneration Guidelines for UCITS and AIF management companies published in March 2016 provide clarity on rules applicable to asset managers within a group context, ESMA's own interpretation, we feel, has inevitably and inappropriately been tainted by the views of bank supervisors.

28. We disagree with the suggestion of a merger between EBA and EIOPA. The three standalone authorities must remain to ensure a balance between the three sectoral authorities, the market participants of the three sectors and in order to ensure a specific knowledge of each sector by a specialised sectoral supervisor. A twin peak model as contemplated in the consultation paper with one prudential supervisor and one conduct authority would be inappropriate in view of the breadth and complexity of financial markets in the EU. There is a natural risk that such a scope of supervisory function would shift the focus to a one size fits all approach and be less flexible to act according to the specific challenges and issues arising for respective market participants.

IV. FUNDING OF THE ESAs

29. The current ESAs funding arrangement is based on public contributions:

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

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

Please elaborate on each of (a) and (b) and indicate the advantages and disadvantages of each option.

30. In your view, in case the funding would be at least partly shifted to industry contributions, what would be the most efficient system for allocating the costs of the ESA's activities:

a) a contribution which reflects the size of each Member State's financial industry (i.e., a "Member State key"); or

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

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

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

29. AFG strongly opposes a change of financing of ESAs. We think that the current system with a 40% contribution by the general budget of the European Union and a 60% contribution by NCAs, largely funded by industry in most countries, is appropriate and in our view, should not be changed. EU institutions have to show stability to gain recognition and give evidence of good functioning. The proportionality between the number of voting rights (based on the qualifying majority rules) and the quota of the budget brings clarity, stability and consistency with EU rules.

Furthermore, **in the absence of direct supervision from ESAs, the AFG sees no reason to change the funding arrangement to a direct (full or partial) 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.

Against this background, it is important that the ESAs can show through increased convergence that they can deliver value with more efficiency and lower costs for market participants. Then a decision could be taken at a later stage when it comes to giving more powers to the ESAs with different funding arrangements.

30. The ESAs were formed mainly to assist the European Commission in strengthening and making more efficient and solid the financial sector by developing draft technical standards and issuing guidelines and recommendations. In working on regulatory technical standards or implementing technical standards the ESAs are, in fact, performing tasks that should normally be performed by the European Commission pursuant to Articles 290 and 291 of the TFEU. **This supports the argument that a significant part of the costs of the ESAs should be covered by the EU budget**.

We also believe that the current funding system is an efficient system which applies (indirectly) to market players. One may fear that any change to the funding may affect its fairness. Indeed, any change of the finding system may impact a small number of actors

which would result in impacting a few number of member states because of the high concentration of financial activities in Europe.

31. As of today, many NCAs collect fees from the supervision missions that they fulfil and from the authorisation that they grant to the market stakeholders. As a consequence, **we do not support the extension of this structure to ESAs except for critical benchmark and CPP for which ESMA should be the direct supervisory authority**. Actually, ESMA is already the competent authorities for trade repositories and rating agencies.

In the event, unwelcomed, that there would be a move to a system fully or partly funded by the industry, industry contributions to the ESAs should be deducted from their contributions to NCAs budgets when this is the case. In other words, changes to the funding model of the ESAs should not lead to an overall increase of the industry contribution to the financing of EU and national supervisory authorities. A possible reallocation of powers between NCAs and ESAs should in future be accompanied by a proportional reallocation of funding too, but again without implying a cost increase for the industry.

General question

32. You are invited to make additional comments on the ESAs Regulation if you consider that some areas have not been covered above. Please include examples and evidence where possible.

Considerable efforts have been accomplished over the last years by the European Commission and the European Securities and Markets Authority to develop a single rulebook for financial markets. Beyond convergence of the rules, efforts towards convergence of supervision have been at the core of the CMU agenda. The CMU mid-term review should be a first opportunity to reflect on changes to ESMA's mandate. We consider the following actions would help ensure smooth development of CMU by implementing the Better regulation principles:

- **Provide realistic implementation timelines (at least 18 months between the publication of level 2 and entry into application) and avoid the need for last minute (welcomed) quick fixes (i.e. MiFID 2, PRIIPS).**

- **Avoid gold plating and major changes introduced by the ESAs at level 2, 3 and 4 (PRIIPS, MIFID):** Deep changes (not foreseen at level 1) can sometimes be introduced by the ESAs at level 2, 3 or 4. One example could be the introduction of the "market impact" in the transaction costs methodology by the ESAs and the EC in the PRIIPS RTS. Although taking into account "market impact" in the transaction costs methodology was not prescribed by level 1 text on PRIIPS and clearly excluded by level 1 of IDD and MIFID, the ESAs and the EC, disregarding current market practice, legislative coherence and controversy around such methodology, have decided to introduce it.

- **Refrain from reviewing recently adopted and well working legislative framework such as UCITS and AIFMD:** As level 2 measures (ex. Commission Delegated Regulation (EU) 2016/438, Commission Delegated regulation (EU) 2015/514) have only been adopted recently, we believe it is key to have a legislative pause at this stage and to wait a few more years of implementation before asking for concrete feedback from stakeholders in order to assess the need for a revision. We believe most of the

challenges identified in the specific CMU consultation on the *Crossborder distribution of investment funds* can be tackled by ESMA via non-legislative texts.

- **Come up with pragmatic non-legislative tools to facilitate cross-border distribution of funds**, such as guidelines regarding the notion of pre-marketing.

- **Set up new tools kit such as no action letters and safe harbour rules** to better regulate financial markets. The entry into application of EMIR variation margin requirements in the EU on March 1st 2017 while the rest of the world (Hong-Kong, Singapore, Australia, U.S.) was postponing for 6 months the international commitment shows the urgent need to grant to the ESAs the power of releasing no action letters. Hence, **the introduction in the EU regulatory framework of a formal power to temporarily dis-apply directly applicable EU legal text, in a manner similar to the non-action letters that exist in some non-EU jurisdictions, is a priority**.

- **Apply more widely the proportionality principle (and not only when it is stated on level 1 Regulations).** The application of this overarching principle set out at the level of the EU Treaty would allow for a better calibration of the rules, modulation of their implementation and adaptation of the supervision according to the size of entities.

- **Reinforce the consultation process and extend the consultation period**. Public consultation should not run for a reduced period but respect the standard 3 month delay; hearings taking place in the framework of consultations should be considered as a forum where stakeholders can raise questions of interest to them by preference to organized panels where access to the microphone is more difficult for spectators; follow up meetings (or calls) with respondents to the consultations should be a common practice to improve dialogue between ESAs and participants;

- **Reinforce the dialogue with stakeholders** and not only through public consultation on a specific text; we suggest that the functioning of Stakeholders Committees and Consultative Working Groups be revisited and better organized; operational advice is what is necessary in CWG when Academic views are interesting in a high level Stakeholder Committee; gender, nationality, industry should be diversified as much as possible but should not prevent from appointing people with adequate profiles; a transparent procedure for handling of suggestions, remarks and comments should be established by ESAs;

- **Clarify the existing legal framework of Guidelines and Q&A** currently defined in the funding Regulations (article 16 and article 29.2);

- **Use omnibus legislations in order to improve consistency between sectorial regulations** since they offer an opportunity to fix a pending issue without having to review all the concerned legislation; conversely premature reviews of texts that are not completed is a non-sense that should no longer exist;

- **Include systematically reciprocity when considering equivalence** and assess it not at the level of the principles but of the operational set up and daily management;

- **Allow the use of other European languages as EU official languages** in order to decrease the amount of time necessary for the translation of Texts (which currently penalizes non-english speaking countries) and prevent interpretation issues.

- **Reinforce the accountability process of the ESAs regarding their regulatory power**. The ESAs should consider the full picture and the whole context of their regulatory power by improving impact assessment processes. Follow up studies should also be considered when a new regulation has been put in place.