



EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL
MARKETS UNION

Director General

Brussels,
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European Securities and Markets
Authority (ESMA)
201-203 rue de Bercy
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Subject: Formal request to ESMA for technical advice on the report to be submitted by the Commission under Article 26 of Regulation (EU) 345/2013 on European venture capital funds

Dear 

Under Article 26 of Regulation (EU) 345/2013 on European venture capital funds ('EuVECA Regulation')¹ the Commission is required to review, the functioning of the EuVECA Regulation. The review shall include a general survey of the functioning of the rules of the EuVECA Regulation and the experience acquired in applying them.

Pursuant to Article 26(3) of the EuVECA Regulation, following the review and after consulting ESMA, the Commission shall submit a report to the European Parliament and to the Council, accompanied, if appropriate, by a legislative proposal. The Commission will take that report and ESMA's analysis, data, methodology and potential assessment into account for any possible legislative action it may deem appropriate. In light of the Commission's obligation under Article 26 of the EuVECA Regulation and the abovementioned ESMA's consultation requirement, I am hereby seeking ESMA's technical advice on the elements set out in the first section below.

Given the non-exhaustive nature of factors laid down in Article 26(1) and the right of the Commission to consider other elements of the EuVECA legal framework it deems necessary to put forward purposeful legislative amendments, ESMA is hereby also invited to consider in its technical advice not only the mandatory elements indicated in the first section, but also to provide its input on the considerations specified in the second section below.

¹ Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds, as revised (OJ L 115, 25.4.2013, p. 1).

1. Advice on the mandatory elements of the review

The first paragraph of Article 26 of the EuVECA Regulation calls on the Commission to review the EuVECA legal framework. The review shall include a general survey of the functioning of the rules in the EuVECA Regulation and the experience acquired in applying them, including at least the following elements:

- (a) the extent to which the designation ‘EuVECA’ has been used by managers of qualifying venture capital funds in different Member States, whether domestically or on a cross-border basis;
- (b) the geographical and sectoral distribution of investments undertaken by qualifying venture capital funds;
- (c) the appropriateness of the information requirements under Article 13 of the EuVECA Regulation, in particular whether they are sufficient to enable investors to take an informed investment decision;
- (d) the use of the different qualifying investments by managers of qualifying venture capital funds and, in particular, whether there is a need to adjust the qualifying investments in the EuVECA Regulation;

Broad and well-tailored scope of qualifying investments is key to ensuring a broad investment mandate and flexibility of EuVECA managers in pursuing their management mandate. In this connection, the Commission services would in particular need to know whether and to what extent the scope of qualifying investments and/or qualifying portfolio undertakings could or should be broadened or tailored. This concerns, but is not limited to, the scope of the EuVECA regulatory framework and particularly the legal notions of ‘qualifying portfolio undertaking’ and ‘qualifying investments’.

- (e) the possibility of extending the marketing of qualifying venture capital funds to retail investors, including related benefits and risks thereof;

In this connection, it should be recalled that the current EuVECA Regulation permits EuVECA managers to market the units and shares of qualifying venture capital funds exclusively to investors which are considered to be professional clients in accordance with Section I of Annex II to Directive 2004/39/EC (‘MiFID’, now Directive 2014/65/EU, ‘MiFID II’) or which may, on request, be treated as professional clients in accordance with Section II of Annex II to MiFID. As such, retail investors are excluded from the scope of marketing of EuVEECAs. At the same time, venture capital funds can have a strong return potential and may provide for returns uncorrelated with the overall market and provide retail investors with an access to a new asset class. Given the potential of the EuVECA market, the Capital Markets Union (CMU) objectives and the opportunity for a wider participation of retail investors in capital markets, the Commission would appreciate ESMA’s input on whether EuVEECAs could be marketed to retail investors, and if so, based on which conditions and investor protection safeguards.

In its assessment, ESMA should give due regard to whether national competent authorities (‘NCAs’) have the necessary regulatory tools to effectively supervise the marketing of EuVEECAs to retail investors, and the effectiveness of investor protection

safeguards that can, where needed, be put in place to ensure due protection and avoid mis-selling of EuVECAs.

To that effect, ESMA is encouraged take into account the comparative approach of European national venture capital fund frameworks, in particular, where such legal frameworks exist, and the conditions under which units and shares of qualifying venture capital funds similar to EuVECAs are marketed to retail investors, including on a cross-border basis. It should also carefully consider both risks as well as benefits of such possible extension.

- (f) the effectiveness, proportionality and application of administrative penalties and other administrative measures provided for by Member States in accordance with the EuVECA Regulation;
- (g) the impact of the EuVECA Regulation on the venture capital market;

ESMA is invited to provide the Commission, to the extent possible, with up-to-date data and statistics that would allow to obtain insights into the functioning of the Union venture capital market and the role and the state-of-play of the EuVECA regulatory regime. Depending on the data and statistics available to ESMA and the NCAs, that could include, in particular, the size of the market, both in terms of net asset size or assets under management and the number of active funds, the licensing requirements of the operating funds, marketing and distribution-related data for the Union and largest markets, domiciles of the funds and their managers, investor-base, location of assets, etc., and where possible investment strategies pursued, sectoral split of investments, nature of the underlying assets, overall data on fees, performance, etc. In this regard, ESMA is requested to share with the Commission the data and the methodology used to arrive at its respective conclusions.

- (h) the possibility of allowing venture capital funds established in a third country to use the designation ‘EuVECA’, taking into account experience in applying measures intended to encourage third countries to apply minimum standards of good governance in tax matters;
- (i) the appropriateness of complementing the EuVECA Regulation with a depositary regime;
- (j) an evaluation of any barriers that may have impeded investment into funds using the designation ‘EuVECA’, including the impact on institutional investors, of other Union law of a prudential nature.

Furthermore, with reference to Article 26(4) of the EuVECA Regulation, in particular as regards sub-EUR 500 million threshold managers specified in point (b) of Article 3(2) of Directive 2011/61/EU on Alternative Investment Fund Managers (‘the AIFMD’), ESMA is invited to also analyse:

- (k) the management of qualifying venture capital funds and the appropriateness of introducing changes to the legal framework, including the option of a management passport;

ESMA is particularly invited to analyse the factual circumstances pertaining to the marketing of existing EuVECAs in the EU and, to the extent such a marketing takes place in third countries, the market and regulatory insights that could be drawn from

such an analysis, including market fragmentation, uneven distribution of funds, under-representation of certain jurisdictions, accumulation of risks, etc. In this connection, ESMA is invited to analyse the effectiveness and the proportionality of alternative regulatory approaches, including the option of a management passport, the possibility of marketing on a cross-border basis akin to that set out in the current Regulation (EU) 760/2015 (the ELTIF Regulation) without prejudice to the ongoing review of the ELTIF Regulation and/or alternative regulatory approaches or their combinations with a view to ensure a proper functioning of the EuVECA market.

Pursuant to the EuVECA Regulation, EuVECA manager may engage in pre-marketing in the Union, except under specific circumstances. In this connection, ESMA is invited to particularly analyse – to the extent permitted by the data at its disposal - the effectiveness and appropriateness of provisions of the EuVECA Regulation pertaining to pre-marketing.

There are additional provisions that set out conditions, requirements, documentation, etc. pertaining to pre-marketing. To gain a better picture of the use of this distribution/marketing mechanism, ESMA is invited to provide information on the extent and frequency of the use of pre-marketing, the effectiveness, the corresponding operational conditions and administrative burdens related to such a pre-marketing by EuVECA managers. ESMA is also invited to put forward an assessment of the current functioning of the (cross-border) distribution and pre-marketing arrangements and provide any suggestions or feedback pertaining to improved or alternative regulatory approaches linked to pre-marketing that could suggest a more effective, proportionate and less burdensome functioning of the EuVECA regime.

Pursuant to Article 26(4) of the EuVECA Regulation, ESMA is also invited to analyse:

- (l) to the extent possible, the suitability of the definition of marketing for qualifying venture capital funds and the impact that that definition and differing national interpretations thereof have on the operation and viability of qualifying venture capital funds and on the cross-border distribution of such funds.

Pursuant to Article 26(3) and (4), the Commission must consult ESMA prior to submitting its report. I am hereby seeking ESMA's contribution on this matter, so that the Commission can proceed in preparing the report accompanied, if appropriate, by a legislative proposal.

2. Advice on additional elements of the review

- (m) issues and procedures related to the authorisation of EuVECA managers and EuVECAs

In providing its technical advice, ESMA is invited to give its feedback on whether the scope, procedures and process for becoming a EuVECA manager and obtaining a separate EuVECA authorisation are appropriate. Against this background, ESMA is requested to indicate any instances of duplications, authorisation-related burdens and frictions that could potentially be eliminated, without a corresponding loss of the effectiveness of the regulatory oversight.

- (n) issues pertaining to the eligibility of investment assets, calibration of thresholds, operating conditions and removal of certain requirements

The Commission would appreciate if ESMA could provide its feedback on the following:

- the appropriateness of any qualifying investment assets and qualifying portfolio undertakings that could or should be included, whether directly or indirectly, within the scope of investment assets in which EuVECAs can invest (notable examples could be investments in SMEs at equity, quasi-equity or debt level or otherwise; investments in any particular types or forms of enterprises that do not meet the definition of “SMEs” at equity, quasi-equity or debt level or otherwise; investments in loans granted to qualifying portfolio undertakings or otherwise; crowdfunding projects; crypto-assets and crypto-projects; any particular types of speculative assets, such as fine art items; intellectual property rights, such as trademarks and patents; digital assets; real assets; rights related to real assets; transport, social and energy infrastructure projects; private public partnerships (PPP), etc. and if so, why);
- the appropriateness and the calibration of the requirement to invest at least 70% of aggregate capital contributions and uncalled committed capital in assets that are qualifying investments (Article 3(b)(i) of the EuVECA Regulation);
- the appropriateness and the calibration of the limitation not to use more than 30% of aggregate capital contributions and uncalled committed capital for the acquisition of assets other than qualifying investments (Article 3(b)(ii) of the EuVECA Regulation);
- the appropriateness of limitations and thresholds with which qualifying portfolio undertakings must comply and other limitations in the product design, such as exclusion of financial undertakings from the scope of qualifying portfolio undertakings, linkage to the SME definition, including the requirement of being an undertaking that is not admitted to trading on a trading venue and employing up to 499 persons, requirement of being majority-owned, 30% borrowing threshold; etc.;
- investments in debt instruments or loans, whether secured or unsecured, and appropriate conditions and limitations therefor;
- restrictions on the borrowing, issuing debt obligations or providing guarantees at the level of the qualifying venture capital fund, including the way in which the operation of the EuVECA market can be facilitated by use of additional or better tailored amounts or modalities of the recourse to leverage, as well as additional safeguards, if any, that could be warranted where borrowing of cash would exceed a certain threshold;
- the appropriateness of the use of and investments in derivatives, and if so, under which conditions;
- the effectiveness and the functioning of the conflicts of interest provisions of the EuVECA Regulation, including the advantages and disadvantages of aligning the conflicts of interest provisions of the EuVECA Regulation to those set out in Directive 2011/61/EU (the AIFMD)
- the necessity and the appropriateness of any the additional product rules on the portfolio composition, diversification and concentration;
- the introduction of a redemptions regime specific to the EuVECA legal framework and the extent to which such redemptions regime could increase the attractiveness of EuVECAs

- other provisions and limitations on the functioning of the EuVECA managers and EuVECAs.

3. Guiding principles

In carrying out its analysis of the elements covered by the mandate and set out in sections 1 and 2, ESMA is invited to take into account the following principles:

- Contribution of the EuVECAs to the CMU objectives, including the potential role of EuVECAs in channelling financing to companies and projects at early, mid- and late stages of their development.
- Effective investor protection, market transparency and cost-effectiveness of investor protection safeguards.
- The proper functioning of the Single Market and the conditions to improve its functioning, in particular with regard to the financial markets, which are among the objectives of this Regulation.
- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objectives of the Regulation and should not lead to undue burdens.
- ESMA is requested to take into account the existing EU acquis (including the requirements of the MiFID II and the PRIIPs Regulation pertaining to the marketing of complex financial products) and the preservation of a level playing field in the marketing, distribution and product design of substantially similar financial products.
- While preparing and delivering its advice, ESMA should seek and ensure the coherence within the regulatory framework of the Union.
- ESMA will determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different work streams pursued by ESMA.
- ESMA is invited to conduct a survey and seek input from market participants and stakeholders on issues pertaining to the functioning of the EuVECA market. When doing so, ESMA's advice should take account of different opinions expressed by the market participants and stakeholders.
- The technical advice should contain sufficient and detailed explanations of the assessment done, and be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level.
- ESMA is invited to provide sufficient empirical evidence and factual data backing its analyses.
- Throughout its technical advice, and especially in those instances where ESMA recommends any particular policy action or policy alternative, ESMA should include information on costs and benefits of such respective policy choices.

- To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data gathered during the assessment.
- ESMA should provide a comprehensive technical analysis on the subject matters included in this mandate.

4. Timeline and final provisions

ESMA is requested to provide its contribution by no later than **15 December 2023**.

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final policy decision.

The Commission services reserve the right to carry out an additional consultation of market participants to cover any additional elements or market research to support the review of the EuVECA legal framework.

This request for technical advice will be made available on DG FISMA's website once it has been sent to ESMA.

I look forward to receiving ESMA's input and remain at your disposal for any questions.

Yours sincerely,

Electronically signed

John BERRIGAN

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