

Speech by Steven Maijoor, Chair of ESMA, at the EFAMA Investment Management Forum, 29 November 2011

Ladies and Gentlemen,

I am very pleased to have the opportunity to speak at your forum today. I would like to commend EFAMA for organising this event and offering a program with distinguished speakers and panellists providing their views on an increasingly changing regulatory environment within which the European asset management industry has to operate.

I would like to start with some **general remarks** and highlight that one of the key priorities on which I have focused since taking up my duties of Chair of ESMA is to strengthen efforts for ensuring consumer protection. This is to be combined with our common efforts to restore investor confidence which has been seriously damaged by the financial crisis affecting Europe and the rest of the world over the past years.

On ESMA's side, the task of ensuring investor protection is clearly outlined. The new powers under Article 9 of the regulations establishing the ESAs entrust us with the task of promoting transparency, simplicity and fairness in the market for consumer financial products across Europe. ESMA has been provided with several tools in that connection: these include the collection and analysis of data on consumer trends (for the purposes of which we will collect data on complaints), the monitoring of new and existing financial activities, and the possibility to adopt guidelines and recommendations for ensuring the harmonisation of regulatory practices. ESMA has also been entrusted with some more 'intrusive' powers such as the possibility to issue warnings whenever a given financial activity poses a serious threat to ESMA's objectives (one of which is investor protection) and, in certain specific situations, the power to temporarily prohibit or restrict certain financial activities.

In compliance with the requirements of the regulation establishing ESMA, and taking over the ground work done by our Article 9 Implementation Task Force, we have also recently set up a new Financial Innovation Standing Committee (FISC). FISC will assist ESMA in fulfilling its tasks and responsibilities relating to investor protection. Its main aim is to achieve a co-ordinated approach to the regulatory and supervisory treatment of new or innovative financial activities; and it will do this by facilitating the efficient co-ordination of policy-making work in the area of financial innovation within ESMA. At national level, FISC will consider the potential for 'domestic' issues and risks to apply more widely, whilst being cautious about the extent of work undertaken where issues seem capable of being best addressed by a national authority. FISC may also make proposals for the co-ordination of national responses to any issues identified in the area of financial innovation. We also expect FISC to contribute to the Joint Committee of European Supervisory Authorities' work on financial activities, financial innovation and consumer related issues (through the JC Sub-committee on Consumer Protection and Financial Innovation).

A clear link between ESMA and our stakeholders was established with the setting up last May of the Securities and Markets Stakeholders Group (SMSG). The SMSG is a new consultative body created by the regulation establishing ESMA and takes the place of the Market Participants Consultative Panel that existed under CESR. It represents not only the views of the different parts of the industry (the asset management industry being represented, among others, by EFAMA's Director General Peter De Proft, who is also one of the two vice-chairs of the SMSG), but also those of consumers and academics: and I would like to commend the recent election of Guillaume Prache – a distinguished investor representative – as first chair of the SMSG. I am sure that this will strengthen the importance of the investors' voice in our work. I



mention the SMSG since I am convinced that the SMSG's broad composition ensures that in its consultative role it will provide a very valuable input to our work. It recently did so with the advice provided to us last October in relation to the AIFMD, which we took into careful consideration when finalising our advice to the Commission.

On the industry side, the focus on investors' needs will be enhanced by the obligations imposed on investment funds by the new regulatory requirements which have been and are being introduced at the European level and on which I would now like to say a few words.

First of all, I turn to the **AIFMD** framework which introduces an entirely new regulatory landscape for managers of alternative investments. As you know very well, since the adoption of the AIFMD at the end of last year, we have been very busy finalising our advice to the Commission on the AIFMD implementing measures.

Further to the request for advice that we received from the Commission, we held a first consultation and open hearing at the end of last year, shortly after the adoption of the AIFMD. We then published two separate consultation papers this summer and held two open hearings at our premises last September. Overall, these consultations happened to be extremely successful since we received a considerable amount of responses from a wide range of stakeholders (including, of course, the valuable input received from EFAMA and those of its members who also submitted to us an individual response) and registered an impressive amount of participants for our open hearings. Notwithstanding the very tight time constraints and the significant amount of topics covered by the mandate, we successfully delivered our advice by the mid-November deadline set by the Commission.

Most of you are probably already familiar with our 500-page paper. From the feedback that we have received so far, I feel there is a general recognition of our efforts in delivering an advice which represents a reasonable balance between the need to introduce an adequate level of investor protection within the alternative investments framework and the constraints of the Level 1 Directive, on one side, and the concerns expressed by the industry, on the other.

It is worth highlighting that ESMA introduced very important clarifications on some of the core elements of the AIFMD which are linked to investor protection such as the transparency requirements, the duties of the depositary and its liability regime, and the rules applying to the delegation to third country managers and depositaries.

It is now up to the Commission's services to analyze the proposals that we made in order to assist them in developing the AIFMD Level 2 measures. But ESMA's work on the AIFMD does not stop here. Indeed, we have already determined certain areas on which it is our intention to complement our advice through the development of further guidelines (for instance, on the advanced method of calculation of leverage) and are willing to lead the negotiation of the co-operation agreements with the non-EU competent authorities which are foreseen by the AIFMD provisions on third countries. Furthermore, we are progressing with our work on the regulatory technical standards on the types of AIFM, which should be adopted in parallel with the Level 2 implementing measures, and will start working shortly on the other measures – such as the guidelines on sound remuneration policies – foreseen by the Directive.

Another important workstream on which we are currently focusing our efforts are the future guidelines on **ETFs and structured UCITS**, which will also ensure a better regulatory framework for investors.

The rationale of our action here is the well-known issue of the retailisation of complex products. Taking that into account, we are determined to introduce some new rules which will reduce risks and deliver more transparency for retail investors exposed to such products.

Our intention is to introduce certain rules which are specific to ETFs, such as a requirement for such funds to use an identifier, as well as new provisions ensuring an adequate level of protection of retail investors dealing on the secondary market. However, I know that some concerns have been expressed about the possibility that our guidelines would create an ETF-specific regime focusing on this category of product



only and not imposing equivalent requirements on other UCITS that are exposed to indices or that carry out investment activity using techniques which are very similar, if not identical, to the ones used by ETFs. On this point, I would like to reassure you that the approach that ESMA intends to follow is to identify clearly those provisions which are relevant to all UCITS funds, with only some rules being specific to ETFs and reflecting their characteristics (for example, the aforementioned issues relating to the secondary market trading).

For issues arising from securities lending activities, for instance, the approach that we intend to follow is to cover all kinds of UCITS – ETFs and non-ETFs – engaging in such activity. In particular, we aim at delivering more transparency vis-à-vis investors by requiring funds to disclose in their prospectuses the fact that they make use of securities lending, and setting out some specific rules on the disclosure of collateral and its quality.

Since the closure of our first consultation last September, we have been reviewing the extensive feedback received from respondents and plan to issue a further consultation on our proposed guidelines at the beginning of next year.

Moving to a horizontal perspective, the **PRIPs** initiative is of course a central piece of work in terms of investor protection. The range of products to be covered is quite broad and potentially includes collective investment undertakings, structured products (which may take several different forms, including structured deposits, and here there are MiFID II proposals to extend selling standards to structured deposits), insurance-based investments and derivatives.

First of all, the idea of applying consistent rules to similar investment products is good common sense. Indeed, it is essential from an investor protection perspective to ensure that similar, competing retail investment products are subject to the same requirements. The Commission clearly defined that approach in the consultation it launched last year where it proposed to apply consistent standards across the market by setting the Key Investor Information Document (KIID) as a benchmark for all PRIPs as far as the disclosure requirements are concerned, and the MiFID rules as a benchmark for all PRIPs as regards selling practices.

We are obviously very supportive of the idea of creating a level playing field for all the retail investment products in terms of disclosure and selling practices rules. For selling practices in particular, we are aware of the fact that a horizontal legislative approach may raise some issues in relation to the areas of competence of securities and insurance regulators in those EU Member States where they are not integrated and that the Commission already presented a proposal for the review of the MiFID rules. Should the Commission decide not to adopt a horizontal legislative approach for the harmonisation of both disclosure rules and selling practices for PRIPs, I strongly hope that at least, in order to ensure the necessary consistency, the revised Insurance Mediation Directive (IMD) will provide that the MiFID II rules on selling practices apply to those PRIPs which are within the scope of the IMD.

Let me now say a few words on the recent **MiFID II** proposal that I have just mentioned. Focusing on investors' interests, I think it is important to highlight some provisions of the proposal which may help in restoring investors' confidence in the financial markets.

Besides the fact that the scope of the directive is going to be enlarged through the inclusion of financial products like structured deposits, the proposal also foresees some reinforced supervisory powers which, in compliance with the general powers which ESMA is already now empowered with in relation to investor protection, would allow us to temporarily ban certain products or activities considered risky from an investor protection or a financial stability perspective. Our intervention would be limited to certain specific circumstances and a condition for ESMA to step in would be that national authorities have not taken any action to address the threat. A permanent ban on a specific product or activity would remain within the remit of the national authorities, but ESMA would have to play a facilitation and coordination role and ensure that the action taken by the national authority(ies) is justified and proportionate.



On a related point, the Commission's MiFID proposal sets out possible requirements on the management body of investment firms. One element of this would require the management body to define, approve and oversee a policy for the services and products offered or provided by the firm, taking into account the risk tolerance of the firm and the characteristics and needs of the clients to whom they will be offered or provided. There would also be an obligation to carry out appropriate stress testing. This proposal moves in the direction of imposing obligations on firms at an earlier stage in the product design process; we are supportive of this move and are hopeful that such measures will be detailed further through any implementing measures.

Taken together, the two aspects of the MiFID proposal summarised above should represent a genuine shift from a reactive to a more proactive, interventionist approach to investor protection.

Furthermore, from an investor perspective, the conduct of business requirements are going to be significantly improved through the introduction of new rules on inducements. Indeed, independent advisers would have to assess a broad range of financial instruments available in the market in order to provide advice to their clients and they (as well as portfolio managers) would be prevented from making or receiving third-party payments or other monetary benefits.

Finally, I would like to mention that improved protection of retail investors would also be ensured by those MiFID II provisions which, taking into consideration the fact that certain UCITS have become increasingly complex, reclassify structured UCITS as complex instruments to which the "execution only" regime would no longer apply.

Before I come to a conclusion, let me make two remarks on generic issues relating to the capabilities of ESMA to build our organization and deliver its ambitious work programme. There are two practical issues which can make it easier for ESMA to deliver its tasks. First, while the overall level of funding of ESMA looks reasonable considering the tasks envisaged when we started this year, since then there have been many suggestions for additional tasks. It is very important that any new task for ESMA is accompanied with an assessment of additional resources required to fulfil that new task. Spreading limited resources over a larger number of tasks risks that we do not achieve our objective of high quality regulation and supervision.

Second, one of the most important new powers of ESMA is the writing of technical standards, which is important for achieving a single rule book in the EU. The quality of technical standards is crucial for the proper implementation of Directives and Standards. ESMA has made clear that on average it takes about 12 months to accomplish all steps required for good technical standards. A shorter period negatively affects, for example, the possibility to consult with stakeholders like you. In that perspective it is very unfortunate that the recently agreed Short Selling Regulation requires us to deliver technical standards by the end of March 2012.

Now let me conclude. I am fully aware that not only ESMA is facing many new tasks. The investment management industry is also facing a large number of new obligations. While you might be concerned about the short term impact of all these new obligations on your sector, I am convinced that these new obligations will help to restore confidence of investors and the wider public in the investment management industry. It goes without saying that this confidence is required for the long term viability of the investment management industry.

Thank you for your attention.