Position Statement

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CREATING LASTING VALUE

On behalf of the Public Affairs Executive (PAE) of the
EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY

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To: European Commission,
Directorate General Internal Market and Services
Directorate G - Financial Markets
Unit G4 - Asset Management

Introduction

The European private equity and venture capital industry welcomes the European Commission's willingness to facilitate access to finance for SMEs, and in particular, to ease their access to equity.

In order that new business creation is converted into a population of robust and competitive European companies, SMEs need access to finance throughout their development.

This finance is provided by various types of small funds through the different stages of the SME's development (from seed, start-up, expansion to restructuring phases). Indeed, of the 26,000 companies in Europe backed by private equity and venture capital[1], around 24,000 are SMEs. Venture capital funds typically invest equity capital in unlisted young, entrepreneur-led, high potential companies that are typically technology enabled. Almost half of the amount of financing provided to SMEs by small funds throughout Europe, however, is invested by enterprise capital funds. These funds typically invest equity capital in unlisted companies with more established products or services that want to professionalise, internationalise or develop their existing business lines. Both, venture and enterprise capital funds[2], invest in SMEs to create long-term value. Moreover, they do not just invest capital, they also provide valuable know-how to help the SME develop. In particular, these small funds bring strategic and operative advice and specialist sector knowledge.

However, the capacity of European small funds' managers to invest in European SMEs very much depends on their ability to fundraise. Therefore, the industry very much welcomes this consultation as an opportunity to ensure that the right conditions exist for small funds in Europe to grow and expand, attracting international investors, and so be in a healthy position to continue

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[1] Whenever reference is made in this paper to the European private equity, venture and enterprise capital industry this reference should be interpreted as comprising all fund managers that are members of EVCA either directly or indirectly through a national private equity and venture capital association which is member of EVCA.

[2] Venture capital and enterprise capital funds below the EUR 500m AIFMD threshold, which almost exclusively are closed-end funds, are hereinafter jointly referred to as "small funds".

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financing thousands of European SMEs per year**.** In particular**,** the industry believes that a regulatory environment for small funds may provide certainty and transparency towards all stake holders, including investors, regulators and the portfolio companies and will thus foster further investments in European SMEs**.**

Two important introductory remarks regarding the scope and aim of this proposal:

1. *It is important to note that it is not just venture capital funds that provide finance to European SMEs but that a major part of financing provided to SMEs from our industry is provided by enterprise capital funds. Therefore the latter should also be able to subject themselves to the proposed regime.*

To ease access to equity for European SMEs efforts should be made to improve the fundraising environment for all small funds' managers. For this purpose, it is crucial to provide them with a European passport. This would allow them to raise capital freely throughout the EU from professional investors and thereby financing European SMEs across countries.

2. As improving the financing of European SMEs is the focus of this proposal, *the industry calls for an urgent clarification of the EU SME definition*[3] *in order to confirm that companies backed by funds managed by the same small funds' manager do not lose their SME status*. The industry calls for attention on the current concept of "linked enterprises" included within the EU SME definition. Consideration needs to be given to the significant problems this concept might pose for companies backed by small funds, if it were to be interpreted as if all SMEs owned by the funds managed by the same manager were aggregated so that they lose their SME status.

Box 1

Venture capital and SME

a) Do you think that encouraging Member States to a process of mutual recognition of venture capital funds, based on the direct enforcement of the Treaty freedoms, could facilitate the cross-border activity of these funds?

It should be noted that the main problem faced by small funds' managers when doing cross-border activities relates to fundraising and not to investing. This is a common issue for private equity and venture capital fund managers.

The industry advocates the mutual recognition of existing national structures to be made mandatory without any delay**.** However**,** this would not be enough**,** as not all Members States do provide efficient fund structures**.**

b) Do you believe that the main impediment preventing cross-border venture capital fundraising and investments is

- *the absence of a passport for activities under the AIFMD thresholds; or*
- *the fact that the AIFMD is not tailored to venture capital in general?*

Both. Again, these are only problems for fundraising, i.e. investment into the funds, not for investment by the funds.

[3] As provided in the Commission Recommendation of 6 May 2003, OJ L 124 of 20.5.2003, p. 36.

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The fact that the AIFMD is not tailored for small funds' managers in general is a major deterrent, as many institutional investors could well choose to exclude non-AIFMD compliant funds from their scope. This perception issue among institutional investors is key. In addition to this is the logistical and cost issue of having to raise funds country by country, without a passport, which is a further impediment.

Furthermore, the fact that European small funds' managers cannot currently benefit from a European passport to market their funds to international investors unless they opt-in to the full AIFMD, would be very harmful for them. They would have to comply with the full provisions of the directive that have not been designed to be appropriate for small venture capital and enterprise capital fund managers.

With no access to a European passport:

- Europe's small funds' managers will be excluded from the internal market, and their ability to fund raise will be put at a strong disadvantage versus large funds both from within the EU and outside of the EU, that can raise funds EU-wide thanks to the AIFMD passport.

- Europe's small funds' managers will be at a competitive disadvantage with all other fund managers, who can fundraise internationally and at the same time compete with the small funds' manager for capital commitments to the small fund on the small funds' manager's own national market.

Therefore, it is crucial to provide a proportionate regime for small funds' managers which are fully devoted to support European SMEs.

c) Is a targeted modification of AIFMD rules for venture capital or a standalone initiative in this area the more appropriate tool to increase venture capital activities? Please specify.

While the motivation of the AIFMD was to regulate all types of AIFM, the new regime is aimed specifically at improving access to finance for SMEs. Therefore, considering that not all AIFM contribute to this purpose, a stand-alone initiative for small funds' managers below the EUR 500 m AIFMD threshold investing in SMEs would be more appropriate than a modification of AIFMD rules for them.

d) From your experience, could you provide concrete examples where you encounter additional administrative or regulatory hurdles when raising or investing funds across the EU?

A distinction must be made between hurdles to raising funds and hurdles to investing across the EU.

(i) Fund raising - general remarks

In the case of raising funds the different private placement regimes in different Member States, and the absence of effective private placement regimes in certain Member States, present a real challenge for small funds' managers seeking to raise funds outside their home Member State. It means that local law advice needs to be sought in each Member State in which funds are raised. This constitutes an administrative and costs burden which discourages many small firms, who tend to have limited resources, from raising funds across the EU.

An EU-wide marketing passport which assisted with cross-border fund raising would accordingly be welcome. In view of the relatively small size and specialist nature of most venture and enterprise capital firms, the lack of systemic risk and the need to encourage, not discourage their growth, the

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costs of compliance with any regulatory requirements associated with that passport would need to be carefully calibrated. It would be important not to exceed the current costs and administrative burden of obtaining Member State by Member State legal advice on the respective national fund raising regulations. Equally any marketing regime should be voluntary so that the relevant costs of compliance would only be borne by those who wanted the relevant passport. Both these criteria would need to be satisfied for any new regime to be proportionate and thus attractive.

It should be noted that the value of the EU-wide marketing passport as proposed in the paper is very limited. In most countries which allow private placement of small funds the permitted class of potential investors is at least as wide, and generally wider, sometimes significantly so, than the class of "professional investors" as defined under MiFID. For further details on this point see comments in box 4.

(ii) Other fundraising hurdles (examples)

In addition to the above general hurdles relating to private placement regimes, there are often more specific hurdles relating to investor regulatory and/ or tax considerations with respect to the specific investors or specific fund vehicle used. National law in some Member States prohibits many pension funds and insurers to invest in un-regulated funds. As an example, it is currently practically impossible to market a German fund to institutional investors in Spain due to regulatory constraints to which Spanish pension funds and insurance companies are subject. They may basically only invest in Spanish vehicles. Also the French FCPRs seem unattractive for most non French investors.

(iii) Cross-border investments by funds

In general, there are no significant regulatory hurdles to prevent cross-border investment and the introduction of hurdles in this regard would be contrary to the concept of enhancing a "single market".

There are hurdles to cross-border investment in some jurisdictions but they are common to all investors and not small funds specific. These relate to matters such as controls on foreign ownership, taxation (e.g. imposition of withholding taxes on cross-border dividend and interest payments and application of tax treaties) and sometimes, particularly where e.g. merger or other consents are required, a lack of understanding of different types of fund structures.

e) Do you believe that an initiative on cross-border operations of venture capital could contribute to eliminating the cross-border tax problems encountered and if so, how?

As already highlighted in box 1 question d), the main problem faced by small funds' managers when doing cross-border activities relates to fundraising and not to investing.

As mentioned on the introductory remarks the main aim of providing a European passport for small funds' managers would be to allow them to raise capital freely throughout the EU from professional/expert investors and invest in innovative SMEs. Under the current AIFMD provisions, there is a risk that some institutional investors may exclude non-regulated funds from their scope. An effective new regime may help to address this issue for small funds.

However, a European passport alone would not eliminate the tax hurdles encountered by investors when investing in venture and enterprise capital funds, and private equity funds in general**.** A pan-European tax neutral vehicle would be required to eliminate the risk of double taxation for investors, as they would then be taxed only in their home country, and treated as if they were investing directly in the portfolio companies.

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Providing a European passport for small funds' managers is urgent for facilitating fundraising of small funds for financing SMEs but the tax neutrality issue (in order to avoid double taxation) is a different issue which should also be tackled by appropriate proposals to ensure that funds can fundraise, operate and invest freely in the EU and attract international investors.

f) How could a possible passport for venture capital operators facilitate targeted tax incentives in favour of cross-border venture capital investments?

The industry's support for this proposal is not driven by tax considerations but by the aim to enhance the internal market by improving cross-border fund-raising. The passport will reduce administrative burden and limit regulatory barriers, but will not solve tax issues.

The reference in the paper to taxation treatment possibly linked to an EU definition of small funds is not clear to us in the context of any marketing or other regime. Any considerations for extending tax relief due to its cost to the public purse are likely to be more substantial from those relating to lifting regulatory and related barriers to small funds' activity.

What is primarily needed to facilitate fund-raising from international investors and to make cross-border investments is removal of red tape and associated costs. In addition, there needs to be a better recognition of different fund structures across different Member States and of the related need to provide all types of investors with predictability of neutral tax-treatment of such fund structures. It is important that investors are only subject to taxation in their respective home jurisdiction, just as if they had invested directly into the underlying portfolio company.

Box 2

Voluntary registration with a competent authority

a) Do you agree with this approach? If not, what alternative approach would you suggest? Could you then briefly outline the pros and cons of such an alternative?

Yes, any EU-wide marketing regime should be based on a voluntary registration with a competent authority. Whereas many small funds' managers indeed pursue an international fundraising strategy, many other small funds are domestic and rely on national markets (45 % of all small funds raised by small funds' managers in the period 2007-2010 received capital commitments from domestic investors only). Many small funds' managers are themselves small enterprises with only limited staff and resources. Also, in larger Member States, some small funds' managers are very much dedicated to their regional communities both for fund raising and for investing. For this reason, small funds' managers should have the freedom to decide whether they want to develop a national or a European/international fundraising strategy and whether they want to use an EU-wide marketing passport or to comply with national private placement regimes. According to their activities they should be subject either to national rules or voluntarily opting-in for a European passport if they want to broaden their investor base on a uniform basis. Such voluntary regime is in particular welcomed by the industry as it may preserve and enhance investment in SME as some potential investors might abstain from investing in unregulated funds.

b) Do you consider such a voluntary regime to have any major cost implications for the key stakeholders? (Investors, competent authorities, venture capital business). Please specify.

As long as a voluntary registration regime is only there to provide small funds with a "one stop shop" for obtaining an EU-wide marketing passport to market to their investors and only entails limited filing and reporting there should be no major cost implications. It would be hoped that it would have neutral to positive cost effects in comparison to having to obtain first time or ongoing professional legal advice on a country-by-country basis of changes to the national private placement regimes in those Member States where one wants to market.

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If the regime is truly voluntary and limited to a registration process, then the cost implications should be limited and would be borne only by those who really need the passport. However its cost, and hence attractiveness, will depend on the level of detail required in the registration and any additional ongoing reporting requirements, and on whether there are related additional operating, conduct of business, and consent/approval requirements above those imposed on a national level. If the new regime is highly prescriptive, it will require firms who opt-in to review and align their existing procedures, processes and systems which would defeat the point of introducing a separate regime for small funds as the costs of compliance could be significant.

The costs of compliance are likely to be highest in the early years of the regime whilst any uncertainty about its application is resolved and whilst a standard market approach to complying with the new regime develops. There could thus be an additional cost burden for "early adopters". Therefore, if at first view such additional costs seem particularly high compared to the potential cost savings in the future, small funds' managers may opt not use the regime at all. For the proposed regime to be used by small funds' managers, it is thus especially important that the potential cost savings are substantial.

From the investor's perspective increased compliance cost for the managers ultimately have an adverse impact on their returns. Consequently, a costly compliance regime would not be beneficial for investors either.

For the competent authorities, such EU-wide marketing passport could avoid multiple time consuming registrations in each Member State and should thus enhance efficiency at EU level.

c) Based on your experience, could you provide qualitative and/or quantitative assessment of potential cost savings that the European 'Passport' would bring about?

The potential cost saving is difficult to quantify as it will depend on the number of countries a small funds' manager would look to market into. Some Member States are of more interest than others as they will have not only more and larger institutional investors but also investors more knowledgeable and more interested in backing small funds. This would include high net worth individuals, family offices and other angel investors, usually themselves with entrepreneurial backgrounds. It may currently also not be possible to provide an accurate quantitative assessment of cost savings in respect of many small funds' managers, since they may have refrained from a broader marketing as the costs seemed prohibitive and may thus also have incurred an opportunity loss in the form of smaller amounts raised than may otherwise have been possible based on performance and track record.

The cost implications for a small funds' manager of a survey of the different national private placement regimes are difficult to estimate. Generally, the costs of a major law firm experienced in raising funds for small funds for an update of their pre-existing documentation (i.e. where no in-depth advice is required) may amount to about EUR 500 to EUR 1,000 per jurisdiction, i.e. EUR 13,500 to EUR 27,000 for an update for the European Union. Still, these costs will be significantly higher in particular (i) if first time advice is sought from a local law firm with only limited experience in the field or (ii) if specific advice, e.g. a legal opinion, on the specific fund structure is sought or (iii) where domestic legislation has substantially changed compared to previous fund raisings.

d) What information should the manager provide to the competent authority?

The fund managers wishing to make use of the EU-wide marketing passport under the new regime should be registered with the competent authority prior to any marketing. The competent authority will thus have the information as dealt with in Box 6 below and the investment focus is already determined by the scope of the new regime.

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Further, the fund documentation of a small fund (as is the case with private equity funds in general) is normally a matter of negotiation with investors, not a matter of selling a prepared product. It is important that any registration regime for small funds recognizes this and, in particular, does not require advance filing of fund constitutional documents or terms, or advance clearance of changes to these. There needs to be scope for marketing on the basis of proposed fund terms which are negotiated with investors in the course of fund raising and a fund constitution the terms of which are only finalized by negotiation. Those final documents can be filed after completion of the marketing and negotiation, but not before. This seems proportionate keeping in mind that the proposed regime aims to facilitate the EU-wide fund raising for small funds and should thus not hamper the necessary and positive process of negotiations with investors.

e) What option would you favour: registration with the national authority or with ESMA? Alternatively, ESMA could hold a European register of venture capital managers and funds with the information provided by national authorities. Would you favour this solution?

The industry does not have a priority in this regard.

Box 3

Simple notification procedure

a) Do you agree with this approach? If not, what alternative approach would you suggest?

Yes, a simple notification procedure identifying the manager and the funds would be sufficient.

b) What should be the content and timeframe of the notification? Should the notification cover both, the places where the manager intends to invest in SMEs and the places where it intends to raise funds?

c) Do you consider such a procedure to have any major cost implications for the key stakeholders? (Investors, competent authorities, venture capital business). Please specify.

Both registration and any subsequent notifications should be given only to the small fund's manager's home competent authority so that the small fund's manager does not have additional cost and administrative obligations in filing with multiple regulators. The home competent authority should be able to communicate the information to any other relevant competent authorities.

Any filing requirements following initial registration should be to a sole regulator and kept as limited as possible, bearing in mind the reasons given in the paper regarding small funds' fund managers as not presenting systemic risk and the need to encourage the economic good of the EU. A filing of the reports the fund manager provides to its investors in the course of the year (without the regime prescribing the form of investor reporting) would probably not be overly burdensome.

While there is no particular objection to any notification being provided to any other Member State, given that a passport is not necessary to invest in SMEs and that such investment should be encouraged, the industry does not believe it appropriate to require notifications/ reporting to cover all the places where investments are made. Any requirement for a small fund to notify any authority when investing in a Member State would create an unlevel playing field to the detriment of small funds and the financing of SMEs. Consequently, the industry fails to see any regulatory necessity for such registration. Thus, notification should only relate to countries where the fund is being placed which is what the passport would be needed for.

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There would be significant cost implications for competent authorities and small funds' businesses if extensive notifications and filings were required either before commencement or on an ongoing basis. If the pre-filing requirements handicapped marketing or the negotiation of fund terms then the passport intended to increase / improve cross-border fund raising could actually reduce / worsen it. From the investor's perspective, increased costs for the small funds' managers adversely impact returns. More importantly, anything which would hamper the process of being able to negotiate the fund documentation during the marketing period would be a negative development for investors.

Box 4

Restriction for retail investors

a) Do you agree with this approach? If not, and in case you believe venture capital should be accessible to retail investors, what kind of measures would you recommend to ensure their protection?

The industry disagrees with such an approach.

The industry understands that the Commission's aim is to encourage further investment into SMEs. The starting point should be to recognise that there is currently a small fund market in the European Union with an established investor base. It is important to consider who that investor base is made up of. It is then appropriate to examine what investor protection restrictions are required in the new regime and how these can best be tailored to the risks posed to investors in this market. The benefit of any proposed restrictions needs to be weighed against the negative impact on the amounts invested in small funds (and ultimately in SMEs) which will result from restricting the investor base.

(i) Who are currently the investors?

Investors in these funds are typically institutional investors as well as family offices and certain types of individuals. Individual investors may include:

- **Entrepreneurs, family offices and other so called "angel investors"** (many of which are entrepreneurs themselves), who have traditionally constituted an important source of "intelligent capital" to the small fund sector**;**
- **Members of management teams** running companies in which the fund invests;
- **Industry sector experts** (where the fund has a sector focus)**;**
- **Venture and enterprise capital experts** which would include both venture and enterprise capital executives and other professionals connected with the industry**;**
- **Finance sector experts**; and
- **Wealthy individuals**.

In some cases, the fund might be established in a way that meets local requirements implementing the Prospectus Directive, in which case the investor pool may be wider - this is discussed further below.

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(ii) Could the MiFID definition of "professional client" work without amendment?

No. The term "professional client" as currently defined under MiFID is designed to identify individuals who regularly trade in listed securities or are experts in the trading of listed securities (and derivatives based on these securities). This only includes individuals if they meet at least two of the following criteria (roughly summarized):

- Client has entered into at least (in average) 10 transactions of substantial amount per quarter during the last year;
- Client has a portfolio of financial instruments and deposits of more than EUR 500,000; and
- Client has worked for at least one year in financial sector.

This definition would most likely exclude all the types of individual listed in (i) above for various reasons, not least of which is that the provision of capital to SMEs is about long-term investment to help the company develop. As such it is not the type of investment which is characterized by short-term, high-volume transactions - not even very active institutional investors would undertake an average of 10 investments per quarter in small funds (or any other type of private equity fund). Adopting this definition could significantly reduce the amounts invested by individuals in small funds. It would be a very strange regulatory policy if business angel investors were permitted by domestic laws to subscribe for, or to acquire, securities in companies seeking venture or enterprise capital directly, but were precluded by the "professional client" definition from participating in a venture or enterprise capital collective investment undertaking (marketed in reliance on a passport or otherwise) which is likely to bring the advantage of risk spreading.

(iii) Are there circumstances in which small funds should be made available to retail investors?

Yes. Funds which are structured as listed investments subject to the protections afforded by the issuance of a prospectus which complies with the requirements of the Prospectus Directive should be capable of being promoted in this way. This approach appears to be supported by the consultation itself, which refers to the Prospectus Directive when it reads:

"As a consequence venture capital funds covered that would operate under the proposed passport system would not be obliged to face the traditional disclosure obligations and requirements linked to investors' protection which would imply an offer to retail clients (prospectus in accordance with Prospectus Directive, etc.)…"

Some funds within the European Union currently operate on this basis, such as Venture Capital Trusts in the UK (this is discussed further in our answer to b) below).

The industry also notes that the Prospectus Directive contains "private placement" exemptions, including for example offerings with minimum subscription amounts of at least EUR 50,000 per investor. The small funds regulation should reflect the legislative idea behind the Prospectus Directive and should permit offerings of small funds which meet this criterion to both institutional and certain types of individual investors, subject to the appropriate protection (see below).

(iv) What other approaches might be used?

Whatever approach is adopted, it is important that the current permitted categories of investors listed in (i) are preserved. Private individuals that require protection when investing may be precisely defined by minimum thresholds (as provided for under the Prospectus Directive) or an assessment of their ability to appraise the risks involved in the investment (e.g. as provided for in

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the UK where the manager performs such an assessment and flawed assessments lead to invalidity of the subscription and compensation claims, see Annex for the UK on box 4, question b)).

In particular it should be stressed that such can and should be achieved without restricting the ability of the small fund's managers to structure the fund according to their needs (please see Box 7 below).

b) What are the restrictions (if any) on participation of retail investors in your country within the fund structures used for venture capital investments?

For better readability all references to national law and remarks from the perspective of a specific Member State have been compiled in separate Annexes for each Member State.

Box 5

Reporting obligations

a) Do you agree with this approach? If not, what alternative approach would you suggest?

Yes, the industry agrees with this approach.

Small funds of the type dealt with in the working paper are negotiated individually with investors. Those investors are, in general, highly sophisticated institutions or individuals and they make significant individual commitments, almost always following detailed due diligence and having taken legal and, if appropriate, other advice. The requirements for fund reporting are negotiated by investors to meet their own particular needs to monitor and report on fund performance. It is important that nothing in this regime should constrain that negotiation process by being prescriptive in the reporting requirements that funds have to adopt, or impose additional cost by requiring something to be produced for a regulator which is different to that which is produced for investors. The current industry model allows sufficient flexibility to both the investor and the fund manager to develop appropriate methods reporting in the most applicable format, and the industry agrees that any small funds regime should preserve that and should avoid creating new, unnecessary burdens.

However, it should be consider the "limited" value for a regulator in receiving this information in relation to an individual fund. The information in an annual report is important for investors, in order to be able to monitor the performance and activities of the fund, but since the funds are not themselves regulated, and do not pose any systemic risks, the industry does not anticipate that national regulators will gain any regulatory benefits from receiving this information. The industry assumes that if they receive the information they will be under an obligation to review it, which will no doubt require additional resource and associated cost, but to us it is not clear what the regulatory benefit would be of that cost.

b) Do you agree with the need to require an annual report for each fund?

Yes. It is already standard practice that small funds will produce annual reports for investors. However, those reports may vary in their form and content according to investor requirements and current industry best practices and guidelines and applicable Member State legislation according to the type and domicile of the fund. Therefore, the industry agrees that the regime should require fund managers to provide at least an annual report, but should not hinder the ability of the investor to request that the fund manager provide more frequent reporting, and should not seek to specify the form or content of such a report.

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c) Do you agree that the annual report should reflect the annual financial accounts and a report of the activities of the financial year?

Fund annual reports produced for investors will almost always include financial statements and a report on activities, although (as mentioned above) the form and content of those may vary from fund to fund to accommodate specific investor requirements. It would therefore be unnecessary, and potentially burdensome, for the regulations to be prescriptive about these accounts and for the regime to specify the accounting standards to be used, which must be a matter for the investors to agree with the fund manager.

d) Do you agree with the obligation to audit the financial information of the annual report?

In practice, most small fund's annual reports are audited and institutional investors tend to insist on this, so that such a provision will be included in the fund's rules. For small funds with only a very limited number of investors and very few investments to be made, a full audit of the financial information may not be necessary and would pose an additional financial burden on the fund and thereby harming returns to investors. Thus, the requirement to audit the financial information of the annual report should be a matter to be agreed between the investor and the fund manager and the regulatory model should allow the fund manager and the investors to negotiate what is appropriate in their particular situation.

e) What reporting requirements/obligations exist within the fund structures used in your country for the purpose of venture capital investments? Would you consider that the proposed information requirements would constitute a significant administrative burden? Please specify.

An overview of the different reporting regimes throughout the European Union would go beyond the scope of this consultation as such will differ substantially from one country to the other and within each country will depend on the legal structure that is chosen for the fund and the regulatory framework that exists and is applicable to the fund**.** However**,** the industry does not believe that the requirement to produce an annual report and accounts in a form agreed with investors would impose an additional burden on the small funds**.**

f) Do you think that more information requirements should be imposed on venture capital managers? If so, please specify.

No, no additional mandatory information requirements should be placed upon small funds. Any such rules would increase the administrative burdens on funds and detract from the core purpose of the working paper – which is to reduce the burdens on those wishing to raise and invest funds across the European Union. This does not, of course, mean that funds will not have extensive information requirements, but investors are much better placed to agree, on a bespoke basis, the specific information requirements for any particular fund and its manager. The industry (including fund managers and investors) does not believe that there is any general lack of information provided to investors. Further, given the described lack of any systemic risks posed by small funds, the industry does not see any advantage a competent authority may have from any additional information.

Disclosing any information related to portfolio companies and their strategies would also put those companies at a disadvantage to competitors. This is particularly disadvantageous for later stage venture backed businesses that very often face fierce competition from much larger rivals, capable of exploiting innovative ideas and ultimately damaging the growth of the business.

Articles 27-30 of AIFMD refer to the EU SME definition and exempts from the scope of disclosure requirements for fund managers unlisted companies when they are SMEs. However, under the

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current EU SME definition, and due to the concept of "linked enterprises", all SMEs owned by a fund might be aggregated and therefore lose their SME status.

Box 6

Operating conditions for venture capital entities

Do you think there is a need to specify any operating condition for venture capital entities? If yes, what would you consider as sufficient EU level framework for venture capital managers in this area and what level of compliance cost would this entail?

If the Commission's proposal is to find support amongst industry and its investor base, it is vital that the legislation should impose materially fewer regulatory burdens and costs on small funds' managers than is the case under AIFMD.

The documentation with investors in small funds is extensively negotiated by such investors. It is very much a long-term partnership relationship rather than that of a product simply being sold by a manager to an investor such as the case in a public offering where investors are much more passive. Small funds' managers typically are rather small and have more limited resources. It would be impossible for these teams to meet the burdensome administrative requirements under AIFMD. The team works together on all tasks the manager performs, including making investments, running the business and maintaining the relationship with investors. The business model for small funds' managers is quite simple as they do not manage several funds with the same strategy at the same time. Generally, regular contact is maintained with investors and should any issues or conflict of interests arise they will tend to be discussed directly with investors in a timely fashion. Many small funds (as is the case more generally in private equity) will have an investor advisory committee which has to be consulted should any conflict or perceived conflict arise.

In this context it should be taken into consideration that any operating conditions may as well harm this much needed flexibility in adopting the most appropriate legal form (see box 7 below). Therefore, any operating conditions should be carefully drafted to be neutral in this regard.

For those reasons, the industry considers it appropriate to apply only the very lightest of operating conditions to the small funds' manager (or the fund where self-managed), such as:

- a requirement that those who effectively conduct the business of the fund (or of its external manager where relevant) should be of good standing;
- a requirement that there should be at least one senior manager effectively directing the business of the fund or of its external manager (where relevant) at all times;
- a duty to publish the names of those who conduct the business, together with their contact details, for example on a website or public register, and to keep such information up-to-date;
- a regulatory duty separately to identify and to segregate, to the fullest extent possible in accordance with domestic laws, fund assets and monies from those of the external fund manager (if any);
- a regulatory duty to invest the small fund in accordance with its stated investment objectives and subject to its stated investment restrictions;
- a duty to be open and cooperative with the supervisory authority, and to give it access;

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- financial statements and other reports to be delivered to investors as provided for in the fund documentation (please refer to our answer to Box 5 above).

In addition, membership of the small fund's manager in EVCA (whether directly or indirectly through a national private equity and venture capital association which is member of EVCA) might help to ensure a commitment to the industry standards, in particular with respect to code of conduct and valuation policies.

Specifically, as many small funds' managers would be unable to bear the burden of the cost associated with them, the industry does not support any proposals for:

- more specific rules of conduct;
- more specific rules on separation of functions, since venture and enterprise capital fund managers may be very small;
- regulatory rules on conflicts of interest, which topic is adequately addressed by existing domestic and Community laws and the fund documentation being heavily negotiated by investors;
- more detailed requirements for human resource, since venture and enterprise capital fund managers may be very small;
- more onerous requirements for minimum capital and financial resource, which is a matter for negotiation between manager and investors;
- more onerous requirements in relation to business continuity planning;
- more onerous requirements for technical resource, since complicated technology is unlikely to be required;
- requirements in relation to electronic data, which topic is addressed adequately by existing European Union law; or
- more onerous conditions in relation to significant shareholders, such as those set out in the UCITS or AIFM Directives, which are in our view particularly burdensome and costly.

Do you think that it should be specified that venture capital entities should comply with rules of conduct when dealing with their investors? If yes, to what extent?

In addition to what has been laid out under bullet point 1, that the industry believes that it is not necessary to provide for specific rules of conduct, and the industry is not aware of any situations in the small funds' area which would support the idea that there is a need for a legislative code of conduct. Typically, the terms of small funds are extensively negotiated between the managers and investors, and address the governance issues that are important for investors. These will as a matter of fact vary from fund to fund, and require tailoring.

Do you think that it should be specified that venture capital entities should comply with specific organisational requirements? If yes, to what extent?

When considering the question whether there should be specific organisational requirements, one should above all appreciate that many small funds' managers are small organizations, with a limited number of staff. Any organisational requirements which would have an impact on the number of staff to be retained (or impose a need to employ external advisors), will not enhance the availability of finance for SMEs. Additional resources employed would be administrative and

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not directed at the investment side of the fund manager's business. The increased costs of this resource would ultimately feed through to the investors in the form of higher costs and lower returns, which would not help encourage the flow of capital to small funds and SMEs. The industry believes the general principles outlined above provide sufficient guidance, and underlines that it is not aware of facts or situations in the past which could lead to the conclusion that the variety of types of organisations used by managers would need legislative restrictions.

Do you think that it should be specified that the persons effectively conducting the business should have good repute and experience? If yes, to what extent?

While as a general matter it is important that the senior personnel effectively conducting the business should have good reputations and experience, care should be taken not to make any requirements relating to experience too detailed and prescriptive. There are many types of experience outside the financial sector which are potentially highly relevant to venture and enterprise capital investment in general, or to venture and enterprise capital investment in a particular field. It should be noted that investors in small funds in addition to negotiating the key economics and legal terms of the fund, normally conduct an in-depth due diligence of the fund manager and the persons effectively conducting its business. Those sophisticated institutional and private investors are in the best position to judge the suitability of the experience of the people conducting the business of the fund manager. If any experience requirement is proposed it should be made very clear that experience need not be in the financial sector but could be relevant business experience.

Do you think that it should be specified that the significant shareholders should be suitable? If yes, to what extent?

As is typical in many private equity funds in general, the owners of a small fund's manager entity are generally likely to be the people conducting the business of the firm too. As far as identification and approval of significant shareholders in the fund manager entity are concerned it is not clear that such a regime is essential in view of the activities being undertaken. If such a specification were introduced, it should be restricted to the basics that any investor will review in its due diligence, i.e. that such significant shareholders should be of good standing and reputation.

However, if requirements are imposed they should not be based on the Acquisitions Directive because applying those provisions, including "acting in concert" provisions, to a number of small funds' managers where the ownership may be a mixture of individuals engaged in the firm, their families and trusts and perhaps a cornerstone investor, requires a very complex legal analysis which would be a considerable cost and burden that brings no regulatory gain.

Box 7

Legal form of the venture capital funds

a) Do you agree with this approach? If not, what alternative approach would you suggest?

b) Is it convenient to specify in the legislative proposal the legal forms that the venture capital funds might adopt?

c) Is there any other aspect relating to the legal form of the venture capital entities that the proposal should take into account?

Replies to a), b) and c)

Due to the very nature of venture and enterprise capital investing – highly opportunistic with a great need to be flexible so as to adapt to the needs of SMEs, investors, entrepreneurs, co-owners,

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the nature and cross-border characteristics of the business, the need for subsequent financing rounds, primary investors leaving and next stage investors coming on board, multiple exit options and so on and so forth - there should be no restrictions whatsoever as to how a small fund should be structured, or which legal form it should have. Different structures work differently in different jurisdictions and are more or less attractive to different types of investors. Within the EU there are so many differences in legal systems, and such a broad variety of legal entities (whether with separate legal personality or not) that any harmonization on requirements for small funds seems almost impossible in the short term.

The industry also fails to recognize which interests are to be served by adopting too prescriptive an approach to which fund structures would qualify and which not.

In many EU countries venture and enterprise capital funds are typically organized as limited partnerships, but other structures are also possible. For example, in Luxembourg a venture capital fund may also be structured as a SICAR or SIF taking the legal form of a SCA (partnership in shares) or in France as an FCPR (which is a collective investment pool issuing units). As specified in the Annex relating to the United Kingdom, Box 4, UK VCTs are structured as closed-ended public limited companies that are admitted to trading on an EEA regulated market (normally the London Stock Exchange). However, this is more of a feature of the UK VCT tax regime than anything else and it would be equally appropriate in fund structuring terms for a fund investing in venture and enterprise capital to be structured using a more conventional private equity closed-end limited partnership structure.

Box 8

Investment focus on SMEs

a) What, if any, investment criteria determine your existing national fund structures used for purposes of venture capital investments?

b) Do you think it is worth specifying any investment rules for venture capital funds? If yes:

c) Do you think there is a need to define a compulsory investment percentage of assets that the venture capital fund should invest in SMEs? If yes, what compulsory investment percentage would you propose and how should it be calculated?

d) Do you agree with the need to envisage a flexible application of the principle described?

Replies to questions a) to d)

The industry does not believe that any rules or restrictions on the investments by the funds within this regime are required, without causing significant disruption to the nature of the sector. Small funds invest in individual companies based on a set of investment criteria defined by close negotiation with the fund's investors, based on a number of different factors, including specialism and experience in different sectors and stages, and with a specific risk and return target.

Often a fund will invest across several different stages, with a focus on venture or enterprise capital and investment in SMEs, but with some investments in larger businesses. In this instance, it would not be appropriate to exclude such funds from the regime, as this would stifle the amount of funds that could be raised to invest in SMEs. If the Commission wishes to incentivise investment in SMEs, then a stipulation that in order to be eligible for this regime, a small fund would have to make a minimum proportion of investments in companies that are SMEs at the time of the initial investment by the fund could be adopted – this would allow the regime to be targeted at those small and high growth potential businesses to be targeted and make sure that the fund may

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actually support such SME's growth potential without dropping out of the scope of the proposed regime.

Further, it is not only small funds directly investing in SMEs which facilitate the provision of financing to such SMEs. Funds-of-funds which are beyond the threshold to fall within the scope of AIFMD, but which directly invest in small funds investing in SMEs also, indirectly, provide financing to SMEs. The industry would thus suggest including funds that indirectly invest in SMEs in the new regime.

Box 9

Determination of the scope of the activities of venture capital funds - Description of the activity

a) How do your national rules capture (if at all) the definition of venture capital funds?

For better readability all references to national law and remarks from the perspective of a specific Member State have been compiled in separate Annexes for each Member State. In many other Member States (other than those where a specific answer is given in the respective Annex to this document), particular in Sweden, venture capital funds are neither subject to registration or regulation nor are they in any way defined. In particular, there exists no tax incentive for venture capital investments.

b) Should the temporary nature of the venture capital investment activity in SMEs constitute a criterion that should be reflected?

The industry fails to see which regulatory relevance the duration of the investment might have for an EU-wide passport for the marketing of interests/units in a small fund. The fund (like any other owner of a company) should be the sole determiner of this. It should be noted that by its very nature investing in SMEs is not a short-term investment.

c) Do you think it should be specified any temporal limit (minimum and maximum) to the participation of the venture capital fund in the capital of the SME (i.e., from at least 2 to 10 years)?

No, the temporary nature of the small fund's investment activity in SMEs does not constitute a criterion that should be reflected in the definition. It is for the investors/ shareholders to decide and should have no relevance for the determination of a passport. In particular, any temporal limit of the investment period would reduce the flexibility of venture capital investments and therefore, considering the high financial risks involved in such investments, could discourage venture capital companies from investing in SMEs. This again would burden SMEs' access to finance. For instance, in some areas of SME activity – such as (without restriction) biotech and life sciences - holding periods may be significantly longer than the proposed maximum holding period.

d) Are there any other means of finance that venture capital funds provide to SMEs that should be reflected (e.g. loans)?

As the funding and financing needs of SMEs will vary over time and as the company grows there should be full flexibility allowed in the financing instruments to be used. To meet the desired objectives of a new European regime for venture capital, in particular to benefit from a European passport, there should be maximum flexibility in using such instruments. Therefore, to define the scope of application of the legislative framework any form of financing should be covered and no restriction as to the type of assets/instruments should be made. Any limitation of finance would be contrary to the great need of flexibility of investments in SMEs and will worsen SMEs' access to finance.

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In particular many small funds (and private equity funds in general) provide mezzanine capital (silent partnerships, convertible loans) to fund their portfolio companies. Currently, not all of such instruments are treated uniformly within the EU.

e) Do you think that there is a need to specify that the manager should be actively involved in the development, growth and success of the SME? Or should the passive investment in an SME also be considered by the proposal as venture capital investment?

It is generally a crucial element of the small funds' managers' role that they can be actively involved in the activities of the portfolio companies. As noted earlier in this statement, the managers of small funds bring both capital and business-building experience and skills to support SMEs. In order to define an attractive legal framework, managers need to be permitted to get actively involved in the development. This is most important as any legislative effort to define a legal framework in Germany failed because the Federal Finance Ministry excluded any active involvement in the growth and success of the portfolio company and only allows passive investment (see Annex for Germany on Box 8 question a)).

f) What other criteria would you consider appropriate to capture the venture capital activity?

The industry believes that active involvement must be addressed as an integral element of the small funds' definition.

Box 10

Determination of the scope of the activities of venture capital funds - Description of the venture capital investment strategy

A general remark on EVCA's definitions referred to in Box 10**:** It should be noted that definitions provided on the consultation document are not up to date**.** In the past**,** the venture segment was split into the 3 stages referred to in the consultation document**: "**seed**", "**start-up**"** and **"**expansion/development**".** However**,** for the purpose of facilitating access to finance of SMEs those definitions are not helpful**,** and for that purpose**,** EVCA suggests to look at the description of small funds provided in the introduction**,** referring to venture capital and enterprise capital funds**.**

a) To what extent does your national regime capture the above definitions of typical venture capital strategies?

b) Do you agree that the special rules on venture capital should only apply when funds invest in the seed, start-up and expansion stages of SMEs? If not, do you believe that SMEs in a restructuring phase should also benefit from venture capital? What other alternative approaches would you suggest?

c) Would you propose other definitions to define the permitted portfolio of venture capital funds?

d) Do you agree that venture capital funds do not/should not use leverage?

Questions a) to d)

The industry proposes that there are no limits in terms of which stages of investment can be made by small funds – the industry feels that defining permitted portfolio companies of funds under this scheme is not appropriate, and indeed could act to stifle investment into businesses with particularly high growth and employment potential. In addition, restricting those funds that do not fall within the tight definition of venture or enterprise capital will only further stifle investment in

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the very companies that this asset class seeks to promote and therefore restricting access to the market in the same way.

Small funds may invest in a number of different stages of venture or enterprise capital and a number of differently sized companies. Whilst the above definitions do adequately reflect the different stages of venture and enterprise capital that are invested in, they do not necessarily reflect individual strategies that funds may pursue - a fund may invest in several different stages of venture and enterprise capital from seed to expansion, restructuring and growth capital during its lifetime.

If, for instance, a fund's investment focus was in development capital, and the majority of their investments were made into SMEs, with a few into larger companies, then it would be desirable for them to be within the regime, both because they would be able to raise more capital to invest in SMEs, and because market distortions would be caused by disallowing them from the regime – they would be less competitive in fundraising terms than small funds investing in the same types of business.

Venture capital funds do not generally use leverage, although some portfolio companies in later stages of their development may deploy credit facilities and leverage (at their level) to fund further investment and growth. If funds with less than EUR 500mn under management are included within the scope of the regime, then it would not be appropriate to place limits on the leverage that can be used.

Box 11

Determination of the scope of the activities of venture capital funds - Definition by exclusion of certain types of investments

a) Do you agree with the list of entities described as not being proper investment targets for venture capital funds?

No. The Commission suggests that the following investment categories do not "fit into the notion of venture capital helping to develop SMEs": (i) companies traded on a secondary market, (ii) financial entities, (iii) other funds, or (iv) financial instruments. These conditions raise many issues: The concept of a "secondary market" is overly vague. In our view it would not serve the aim of facilitating financing to SMEs to prohibit the funds regulated under the regime to invest in companies listed on a regulated market because if such company otherwise qualifies as an SME and is having difficulty raising funds in the capital markets, the Commission should not deter investment in such a company through an overly restrictive definition. Further, listing portfolio companies on a stock exchange via an IPO provides an important route to exit for small funds; in such case the fund will retain certain amount of shares in the listed company that may only be sold after a certain lock-up period. Listing new shares in a portfolio company at a stock exchange can also be an instrument to secure further development and growth without constituting an exit of the fund from the relevant portfolio company. This way of growth financing is widely used in the United States. The terms "financial entities" and "financial instruments" are too vague to be useful.

b) If not, what types of companies would you specify as eligible investment targets?

The industry suggests that the passport under the proposed regime could be limited to small funds, a majority of whose investments are made in companies that at the time of the initial investment are SMEs as well as small funds-of-funds that indirectly invest in such SMEs by investing in funds, a majority of whose investments are made in companies that at the time of the initial investment are SMEs.

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c) Do you think that the EU should draw inspiration from the criteria set by the SEC to define the target companies of the venture capital funds?

The criteria proposed by the SEC in November 2010 are problematic for a number of reasons. In particular, the conditions that a target company may not borrow or issue debt obligations and has to refrain from redeeming, exchanging or repurchasing securities or making distributions to pre-existing security holders in connection with the small fund's investment would be arbitrary and counterproductive. For example, a target company may need a new equity investment precisely to permit it to raise debt financing or to repay existing debt. Further, a new equity investment in a target company may trigger repayment rights under the terms of prior financing rounds. It is important to note that the SEC's definition is the basis for a complete exemption from registration. The scope of permitted investments under the new EU proposed regime should be much broader, because such small funds will be registered and subject to (proportionate) disclosure obligations.

Box 12

Third country entities

What could be an appropriate regime for third country venture capital funds?

Taking into account that the European venture and enterprise capital industry very much relies on worldwide fund-raising and that the European economy strongly relies on attracting investments from other parts of the world (the EU received €864bn of foreign direct investments in the period 2007-2010[4]), this new proposal should apply the same regime to third country funds as the AIFMD.

In light of experience of the AIFMD, it is vital that the Commission considers the position of third country venture and enterprise capital "houses" as an integral part of the proposal. The industry uses the term "venture and enterprise capital house" to encompass the number of possible permutations for the location of the small fund, its manager, and the manager's affiliates. These permutations may be driven by taxation but, more important in the context of access to capital by SMEs, they are most likely to be driven by the sources of capital, and its associated business-building expertise, and the convenience of those with access to such capital. In today's market even investments in very early stage businesses in Europe may be funded by small funds based outside the EU – SMEs will look to obtain the capital and expertise from the best source for its particular needs, wherever that source may be located. From the investors' perspective, it is important to be able to manage an appropriately diversified portfolio of small funds (and private equity funds in general). Consequently, for investors it is important to be able to invest freely in small funds, whatever their location, as fettering investors' ability to do so makes investing in small funds far less attractive.

Other questions in the consultation document all seem to proceed from the assumption that the small funds' manager (at least) is established in one of the Member States of the European Union. This may very well not be the case. An important part of the Commission's strategy of increasing sources of stable finance for European SMEs will be lost unless barriers are also removed to cross-border investment by "venture and enterprise capital houses" whose funds and principal fund managers are established outside the EU or the EEA.

[4] Source: Eurostat, http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-27062011-AP/EN/2-27062011-AP-EN.PDF

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In our view, all of the same freedoms proposed by the Commission for EU small funds' managers should be available on the same terms, and without further material conditions to:

- EU managers of non-EU small funds;
- non-EU managers of EU small funds;
- non-EU managers of non-EU small funds; and
- affiliates established in the EU of non-EU managers of small funds wherever established.

The industry acknowledges that it should be appropriate to require such non-EU jurisdictions not to be listed as a non-cooperative country or territory (NCCT) by the Financial Action Task Force (FATF). Apart from that the industry speaks in favour of a level playing field in terms of regulations that are applied to both EU and non-EU small funds' managers.

EU business angels and other EU investors are currently able to invest in small funds established in, or with an investment focus on, the developing world, where the EU investor is based in a Member State with a private placement regime which supports this activity. The small fund model is increasingly being used in developing world regions to improve the lives of citizens. It is important that the design of the proposed regime does not prevent developing world small funds from participating through voluntary registration. It is equally important that such funds and fund managers who choose not to opt in (perhaps for cost reasons) are not prohibited by this initiative from reaching those investors in the European Union who are currently able to invest through Member States' private placement regimes.

Box 13

Impact on other pieces of EU legislation

a) Do you agree with this approach?

The European industry believes that the right approach is to exempt from the AIFMD those fund managers below the AIFMD threshold and to provide them with a proportioned regime to allow them to benefit from a European passport and therefore fundraise internationally and continue financing European SMEs.

b) Would you support the first (exemption for entities below the AIFMD threshold) or the second option (exemption independently from the threshold)? Would you suggest an alternative approach?

The exemption should apply for all entities below the AIFMD threshold, investing in SMEs.

c) Are there any particular elements from the AIFMD that in your view should also apply to the venture capital managers?

The scope of the AIFMD was very broad; therefore the provisions included were not appropriate for the business model of the private equity and venture capital industry. Therefore, it would not be appropriate to transpose elements from the AIFMD to this new regime.

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CREATING LASTING VALUE

Box 14

Supervision and sanctions

a) Do you agree with this approach? If no, what alternative approach would you suggest?

Yes, the new legislative framework for venture and enterprise capital should aim at imposing light obligations to small funds' managers.

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About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

About EVCA

The European Private Equity and Venture Capital Association is the voice of European private equity and venture capital, representing more than 1,300 members. In addition to promoting the industry among key stakeholders, such as institutional investors, entrepreneurs and employee representatives, EVCA develops professional standards, research reports and holds professional training and networking events.

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Member State Annexes

Below you will find all the references to national law and remarks from the perspective of specific Member States, compiled in separate Annexes for each Member State.

All Member State annexes have been drafted by the respective national private equity and venture capital association which represent all of the Member State's industry.

In addition to the below remarks, it should be noted that the industry already gave a comprehensive overview about the different national regimes that apply to private equity funds in general and which thus apply to small funds as well (if not otherwise specifically mentioned). This overview has been provided as Annex II of the industry's response to the European Parliament and the European Commission dated 25 February 2009, page 99 et seq. which may be accessed under

http://www.evca.eu/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=4656

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CREATING LASTING VALUE

Austria

Box 4

b) What are the restrictions (if any) on participation of retail investors in your country within the fund structures used for venture capital investments?

In Austria, retail investors rarely invest in venture capital funds as venture capital managers (and private equity managers in general) rather target institutional investors**.** The share of **"**private individuals**"** in the capital committed in 2010 was about 4 %**.**

The most relevant restrictions are set forth in the Capital Markets Act (which is the Austrian transposition of the Prospectus Directive). Unless an offer is targeted to a specific number of retail investors or the minimum investment is more than EUR 50,000, marketing interests in small funds to retail investors is almost impossible. In addition, in the past the Financial Market Authority has taken the view that if retail investors participate in a fund any investment and divestment activity may require a banking license.

Box 8

a) What, if any, investment criteria determine your existing national fund structures used for purposes of venture capital investments?

In Austria, the MiFiG 2007 (Mittelstand Financing Act 2007) foresees – among others – a maximum investment of EUR 1.5mn per year and per company and this is only possible in development areas defined by EU. This is one of the reasons, why this legal framework is not currently used at all by Austrian venture capital funds. In addition, there are specific criteria set forth in the tax code which a fund needs to comply with in order to benefit from a capital gains tax exemption.

Box 9

a) How do your national rules capture (if at all) the definition of venture capital funds?

An Investment Entities Act is currently under discussion but the most recent draft does not reflect the state of the art of the industry and is therefore rejected by the industry.

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Belgium

Box 4

b) What are the restrictions (if any) on participation of retail investors in your country within the fund structures used for venture capital investments?

Depending on the structure of the fund, the offering will be subject to the Belgian law of 16 June 2006 implementing the Prospectus Directive (the Prospectus Law) or the Belgian law of 20 July 2004 relating to collective investment undertakings (the Collective Investment Undertaking Law).

If the Prospectus Law is applicable, the fund can be privately placed if the required minimum investment is set at EUR 50,000. If the Collective Investment Undertaking Law is applicable, the fund can be privately placed if the minimum investment is set at EUR 250,000 (if the fund is open-ended) or EUR 50,000 (if the fund is closed-ended).

If the fund is not privately placed, a prospectus needs to be approved by the Belgian Financial Services and Markets Authority (FSMA) and published before any marketing can take place. In that event, all marketing materials need to be pre-approved as well.

Under certain circumstances, marketing of funds in Belgium will be considered a MiFID investment service or could fall within the scope of the Belgian rules on banking and investment services intermediation. In addition, the marketing must comply with the extensive Belgian fair trading laws (including the rules on unfair commercial practices and privacy laws).

Box 8

a) What, if any, investment criteria determine your existing national fund structures used for purposes of venture capital investments?

Belgian law currently does not provide general investment criteria to be met by private equity or venture capital funds, except for certain specific types of regulated collective investment vehicles, such as the "private privak" / "pricaf privée" (Royal Decree of 23 May 2007) or the "vastgoed-bevak" / "sicafi" (Royal Decree of 7 December 2010).

Box 9

a) How do your national rules capture (if at all) the definition of venture capital funds?

Except for certain specific types of regulated collective investment vehicles, Belgian law currently does not provide a definition of general private equity or venture capital funds.

It is important to note that Belgian company law provides a great deal of flexibility when setting up a venture capital fund. Belgian funds are typically set up as a:

(i) "naamloze vennootschap"/"société anonyme",

(ii) "coöperatieve vennootschap"/"société cooperative", or

(iii) "commanditaire vennootschap op aandelen"/"société en commandite par actions".

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Under certain circumstances, Belgian funds may also be set up in other legal forms (such as a "besloten vennootschap met beperkte aansprakelijkheid"/"société privée à responsabilité limitée") or even as a partnership without legal personality.

The choice of a particular legal form is typically determined by elements such as the need for external financing, shareholder structure, limitation of responsibility, required transparency, investment strategies, taxation, relationship with the managers, the perceived growth of the fund, etc. This flexibility allows the shareholders and managers to choose the legal form of the fund that is most appropriate and cost-effective given the size and nature of that fund.

We understand that the proposed rules would be without prejudice to the legal form chosen by a venture capital fund. For that reason, we believe that it is important to verify that the operating rules (such as rules of conduct, organizational requirements, fit and proper character of managers and shareholders) would not render certain legal forms obsolete or impractical.

In the same context, we also believe that there should be a grandfathering clause to deal with existing venture capital funds (to avoid venture capital funds having to transform into another legal form).

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CREATING LASTING VALUE

Croatia

General overview of the private equity and venture capital legal and regulatory environment

Croatian private equity and venture capital funds are currently subject to the Investment Funds Act (2005, Official Gazette 150/05) and several regulatory directives issued by the Croatian Financial Services Supervisory Agency (HANFA). Since the Investment Funds Act is a mutual funds act, it contains many provisions that are more onerous in their requirements compared to other Member States. However, this situation will soon change as from September 2011 two separate task forces are starting their operations: (i) task force in existence from 2009 (work was under freeze until AIFMD Directive came into force), specifically dedicated to private equity and venture capital funds with the objective to transpose AIFMD Directive to national legal and regulatory framework; and (ii) another task force with objective of revising or completely changing the Investment Fund Act (2005). It is expected that the private equity and venture capital funds will be excluded from the changed/new Investment Fund Act and regulated by the new legislative framework, including both AIFMD transposed into the national legislation and perhaps new smaller private equity/venture capital funds law.

In order to kick-start Croatian private equity industry, Croatian government launched Economic Cooperation Funds program (FGS) in February 2010 (Official Gazette 8/10 and 21/10). Under this initiative, the Croatian government is acting as pari passu investor contributing with 50% of the total fund size, with the balance raised from the private sector (most significant investors are Croatian pension funds). By April 2011, five new private equity/venture capital funds were launched with total fundraised commitments amounting to EUR 274 million.

Croatia currently has seven private equity funds with approximately EUR 330 million under management, out of which six are currently in the investment phase. All private equity funds are incorporated under the Croatian legal and regulatory framework and none will mandatory fall under AIFMD (assets under management from EUR 21 million to EUR 82 million per fund). It is expected that 100% or almost 100% of investments will be made to Croatian SMEs, as it was the case to-date.

Croatian private equity/venture capital (risk capital) funds are managed by the company for managing the risk capital funds established as the limited liability company (Ltd.) or the joint stock company. Private equity/venture capital funds are currently defined by the Investment Funds Act as the open-ended risk capital funds with private investors' offering and do not have legal entity. The prospectus is the only binding contract between investors in the fund and the fund managers. In practice, many provisions of the limited partnership agreements (LLPs) standard to the global industry are contained in the prospectus. The national regulator (HANFA) authorises and supervises the risk capital funds and its managers, pre-approves both the prospectus and its investors. Croatian risk capital funds are subject to quarterly reporting to HANFA.

Box 1

From your experience, could you provide concrete examples where you encounter additional the administrative or regulatory hurdles when raising or investing funds across the EU?

Croatian pension funds are providing an important source of capital for private equity and venture capital funds in Croatia, providing 25% to 33% of the private investors' total contribution to Croatian private equity funds. However, Croatian pension funds are unable to finance private

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equity and venture capital funds incorporated in other jurisdictions even if the fund investment focus is Croatia.

Box 4

b) What are the restrictions (if any) on participation of retail investors in your country within the fund structures used for venture capital investments?

In Croatia, retail investors rarely invest in venture capital funds as venture capital managers (and private equity managers in general) rather target institutional investors. The share of "private individuals" in the capital committed in 2010 and 2011 was very low (less than 5%). The most relevant restrictions are set forth in the Investment Funds Act (2005) and FGS Directive (2010). In order to be considered qualified investors for private equity/venture capital funds, retail investors should have the property of net value of more than approx. EUR 2.75 million) and be ready to invest cash ticket per fund amounting to at least approx. EUR 1.37 million.

Box 8

a) What, if any, investment criteria determine your existing national fund structures used for purposes of venture capital investments?

There is only one national fund structure in Croatia: open-ended risk capital fund with private investors' offering, but there are some further investment criteria limitations to funds that participated in the Government FGS initiative (50% of funds are provided by the Government, public investor is parri passu investor).

Investment Funds Act (2010) defines the following investment limitations:

(i) Investment limit of 33% of the fund total size to one single company;

(ii) Investment limit of 40% of the fund total size to one sector of the economy.

In addition, FGS Directive (2010) sets forth the following investment limitations for private equity/venture capital funds incorporated under FGS initiative:

i. Fund shall invest exclusively in the companies with their seat in the Republic of Croatia, which exclusively or predominantly conducts its activities on the territory of the Republic of Croatia;

ii. Fund's assets shall comprise of shareholdings and companies' shares , monetary assets and given loans;

iii. Fund may invest in all sectors of the economy;

iv. Investment categories that shall be considered by the Fund include:

   a. Recapitalization or acquisition of the existing companies in need of capital to start or expand their business.

   b. Recapitalization or acquisition of the new companies in need of restructuring and business improvement.

   c. Mergers of smaller companies in order to establish larger and more efficient companies.

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d. Associating with strategic partners in order to enable participation in transactions with larger companies.

e. Participating in the privatization.

v. Companies which are of the primary interest for investments are companies with growth and development potentials above average, with distinguished competition advantages, professional and motivated management team as well as additional required characteristics, unique potential of assets/specific products, technologies or rights to generate strong business results, including companies in early stages of doing business;

vi. As a rule, investing in a particular company shall last for the period of 3 to 5 years, while in certain specific cases investment may be either shorter or longer;

vii. Fund may temporary invest means reserved for investments pursuant to the Investment Policy of the Fund in securities in order to maintain value and secure yield;

viii. Free monetary means may be invested by the Fund in high quality monetary funds, securities or kept on bank accounts as deposit;

ix. Fund shall invest in derivatives (derivative financial instruments) in order to protect risks that may arise from certain investment or which are related to Investor's payment.

Foreign private equity/venture capital funds can invest in Croatian companies without greater tax and legal obstacles and receive the same treatment and incentives as general FDI. In fact, because of less onerous legal and regulatory requirements of incorporations in other EU jurisdictions, many regional funds targeting Croatia and other regional countries chose to get incorporated elsewhere.

Box 9

a) How do your national rules capture (if at all) the definition of venture capital funds?

Current Investment Funds Act (2005) defines both private equity and venture capital funds as open-ended risk capital funds with private investors' offering. FGS Directive (2010) further defines subset of these funds as Economic Cooperation Funds. There is no dichotomy in current Croatian legal and regulatory framework between private equity and venture capital funds. Risk capital funds are often used as local legislative term, parallel to roman languages translations (e.g. fonds de capital-risque, fondi del capital di rischio, fondos de capital de riesgo).

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CREATING LASTING VALUE

Denmark

Box 4

b) What are the restrictions (if any) on participation of retail investors in your country within the fund structures used for venture capital investments?

No specific restrictions apply as long as the number of potential investors that are approached does not exceed 100 or if certain requirements in respect of the mini-mum investment per investor are observed.

Box 9

a) How do your national rules capture (if at all) the definition of venture capital funds?

The only definition applied in Danish national regulation is included in the Danish Companies Taxation Act, Section 2C (10), which has the following wording:

"Stk.10. Stk. 1-9 finder ikke anvendelse på kollektive investeringsenheder (venturefonde), der alene investerer i aktier m.v. omfattet af aktieavancebeskatningsloven med henblik på helt eller delvis at erhverve aktieselskaber og anpartsselskaber med henblik på at deltage i ledelsen og driften af disse. Det er en forudsætning, at følgende betingelser er opfyldt: 1) Venturefonden må ud over investeringstilsagn og ubehæftede kontant indestående i pengeinstitutter samt fordringer på løbende ydelser, jf. ligningslovens § 12 B, modtaget som vederlag ved salg af selskaber alene besidde aktier m.v. omfattet af aktieavancebeskatningsloven. Indeståender i et pengeinstitut kan være placeret på en spærret konto som sikkerhed mod købers eventuelle garantikrav i forbindelse med venturefondens salg af selskaber. 2) Der må alene direkte eller indirekte investeres i selskaber, der alene eller sammen med eventuelle koncernforbundne selskaber, jf. skattekontrollovens § 3 B, har under 250 beskæftigede og enten har en årlig samlet balance på under 125 mio. kr. eller en årlig omsætning på under 250 mio. kr. 3) Ingen af deltagerne må eje mere end 50 pct. af kapitalen eller besidde mere end 50 pct. af stemmerne i venturefonden. Koncernforbundne og nærstående deltagere, jf. kursgevinstlovens § 4, stk. 2, og aktieavancebeskatningslovens § 4, stk. 2, regnes i denne sammenhæng for én deltager. 4) Venturefonden skal have mindst 8 deltagere. Koncernforbundne og nærstående deltagere, jf. kursgevinstlovens § 4, stk. 2, og aktieavancebeskatningslovens § 4, stk. 2, regnes i denne sammenhæng for én deltager."

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CREATING LASTING VALUE

France

Introduction

L'AFIC salue l'initiative de la Commission qui met l'accent sur les difficultés auxquelles se trouve aujourd'hui confronté le capital-risque en Europe et, en conséquence, le financement des PME et de l'innovation.

Mais les moyens doivent être proportionnés aux enjeux :

- soit la volonté de la Commission est de prendre une initiative ambitieuse en faveur du capital-risque en Europe, dont le premier volet devrait être d'adresser la question des sources de financement de cette activité, qui est aujourd'hui la question cruciale, et alors une telle Directive pourrait également traiter des conditions réglementaires applicables à cette activité, en dérogation à la Directive AIFM, par la création d'un régime spécial au bénéfice des gestionnaires de fonds de capital-risque, quelle que soit le montant des actifs sous gestion

- soit la Commission privilégie un accommodement de la Directive AIFM au cas des gestionnaires de « petits fonds », notamment de capital-risque, en créant, au sein d'AIFM, un régime spécial permettant à ceux qui le souhaiteraient de bénéficier de dispositions allégées au cas où ils opteraient pour l'obtention du passeport européen.

Au regard des questions posées dans le cadre de la consultation en cours, nous comprenons que celle-ci se place dans cette seconde approche qui, quoique nécessaire, ne traite pas tous les freins au développement du capital-risque et du capital développement en Europe.

Enfin, et quelle que soit l'option choisie, c'est la définition large du capital-risque qu'il faut retenir et qui recouvre à la fois le capital-risque (early stage et technologique/innovation) stricto sensu et le capital développement au sens large (growth capital et enterprise capital).

Box 1

a) Do you think that encouraging Member States to a process of mutual recognition of venture capital funds, based on the direct enforcement of the Treaty freedoms, could facilitate the cross-border activity of these funds?

L'activité du capital risque est par nature internationale. Le principal frein de l'activité transfrontalière d'un fonds est le traitement fiscal des flux financiers entre sociétés financées et fonds, d'une part, et entre fonds et investisseurs d'autre part, qui donne lieu à des frottements fiscaux (double imposition, prélèvements à la source sur les montants distribués, complexité du régime déclaratif, incertitude sur la législation applicable etc…). Par conséquent, la reconnaissance mutuelle des fonds de capital risque par les etats membres de l'Union Européenne fondée sur l'application directe des Libertés fondamentales du traité est une première étape essentielle et nécessaire afin de faciliter l'activité de capital-risque, et qu'il conviendrait de compléter par la suite par des initiatives en matière fiscale. Cette problématique est commune aux fonds de capital risque ou de capital développement au sens large.

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c) Is a targeted modification of AIFMD rules for venture capital or a stand-alone initiative in this area the more appropriate tool to increase venture capital activities? Please specify.

Un régime distinct de celui instauré par la directive AIFM serait préférable dans la mesure où il permettrait l'adoption rapide d'un système plus souple, par exemple au niveau des exigences en matière de transparence et de fonds propres, et faciliter ainsi le financement des PME et de l'innovation.

d) From your experience, could you provide concrete examples where you encounter additional administrative or regulatory hurdles when raising or investing funds across the EU?

La mise en place d'un passeport et d'un régime adapté aux "petits fonds" permettrait de résoudre une première série de problèmes en lien avec les barrières administratives ou règlementaires qui compromettent gravement les possibilités de financement des PME à l'heure actuelle. En outre, une plus grande transparence fiscale serait nécessaire afin de réduire les frottements fiscaux évoqués ci-dessus; toutefois, cette question dépasse le simple cadre de cette consultation.

f) How could a possible passport for venture capital operators facilitate targeted tax incentives in favour of cross-border venture capital investments?

Le passeport est nécessaire pour réduire les barrières administratives et réglementaires à la levée de fonds transfrontalière, mais ne permet pas en soi de régler les problèmes de frottement fiscaux entre etats membres. Au-delà de cette initiative immédiate, les principales pistes d'amélioration du développement du capital risque au sein de l'Union Européenne reposent également sur :

- la reconnaissance par les etats membres des différentes structures juridiques de capital risque européen. Ainsi l'agrément national pourrait tenir lieu de passeport dans l'ensemble de l'UE et faciliter la levée de fonds de capital risque dans plusieurs etats membres de l'UE.

- la transparence fiscale de ces différents véhicules d'investissement (au besoin via la création d'un véhicule européen) permettant une seule imposition au niveau de l'investisseur et non plus au niveau du véhicule lui-même.

Box 2

a) Do you agree with this approach? If not, what alternative approach would you suggest? Could you then briefly outline the pros and cons of such an alternative?

Le passeport européen pour les fonds de capital risque doit être optionnel et utilisé par les gestionnaires de capital risque qui souhaitent par ce moyen commercialiser leurs fonds dans d'autres etats membres de l'Union Européenne.

c) Based on your experience, could you provide qualitative and/or quantitative assessment of potential cost savings that the European 'Passport' would bring about?

Les différents régimes nationaux de placement privé, avec la mise en œuvre d'AIFM, rendent la levée de fonds de capital risque dans d'autres etats membres compliquée et coûteuse (frais administratifs et juridiques).

L'intérêt du passeport européen serait alors de faciliter et d'alléger les coûts qui seront engendrés par les multiples démarches que devra effectuer la société de gestion pays par pays. Par

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conséquent, la procédure d'enregistrement auprès de l'autorité de tutelle du pays d'origine de la société de gestion ne doit pas être lourde, longue ni contraignante.

Nous ne sommes cependant pas en mesure d'évaluer précisément les économies qui pourraient être réalisées par un gestionnaire de capital risque qui opterait pour le passeport européen.

e) What option would you favour: registration with the national authority or with ESMA? Alternatively, ESMA could hold a European register of venture capital managers and funds with the information provided by national authorities. Would you favour this solution?

L'enregistrement doit relever de la seule compétence de l'autorité de tutelle nationale afin de simplifier la procédure en maintenant le lien de proximité déjà existant, dans le cas français, entre la société de gestion et son autorité de régulation, et afin d'éviter la multiplication des coûts engendrée par les multiples démarches à effectuer par le gestionnaire auprès des autres autorités de tutelle.

Box 3

c) Do you consider such a procedure to have any major cost implications for the key stakeholders? (Investors, competent authorities, venture capital business). Please specify.

Nous ne sommes pas favorables à la mise en place d'une procédure de notification d'enregistrement auprès des autres autorités de tutelle. Nous craignons que cette notification, même si elle relève de la compétence de l'autorité de tutelle nationale, oblige les sociétés de gestion à fournir à celle-ci des informations supplémentaires et inutiles. Cette notification devrait donc se fonder sur les documents déjà produits par la société de gestion à l'autorité de tutelle nationale.

En outre, s'il y a notification auprès des autorités de tutelles d'autres pays, elle ne devrait se faire qu'auprès des autorités des etats membres dans lesquels les gérants souhaitent lever des fonds et non en fonction des lieux d'investissement.

Box 4

a) Do you agree with this approach? If not, and in case you believe venture capital should be accessible to retail investors, what kind of measures would you recommend to ensure their protection?

Des restrictions au nom de la protection des épargnants sont possibles mais en aucune manière ces restrictions ne doivent permettre d'exclure des acteurs professionnels notamment en raison d'une définition trop étroite de ces acteurs.

b) What are the restrictions (if any) on participation of retail investors in your country within the fund structures used for venture capital investments?

En France, les fonds ouverts aux particuliers sont soumis à l'agrément de l'AMF et doivent respecter des ratios d'investissement et de division des risques, il s'agit des Fonds Communs de Placement à Risques « FCPR », Fonds Communs de Placement dans l'Innovation « FCPI » et des Fonds Communs de Placement de Proximité « FIP ». Ainsi, les FCPI doivent investir au moins 60% de leur actif dans des titres émis par des sociétés qui on été labellisées comme innovantes et les FIP doivent investir plus de 60% de leur actif dans des PME régionales.

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Box 5

b) Do you agree with the need to require an annual report for each fund ?

Nous sommes favorables à la production par la société de gestion d'un rapport annuel qui inclurait les comptes financiers de l'année ainsi qu'un rapport d'activité financier annuel pour chaque fonds, comme c'est déjà le cas en France. Nous sommes également favorables à ce que ces documents d'information soient mis à la disposition des investisseurs de chaque fonds.

c) Do you agree that the annual report should reflect the annual financial accounts and a report of the activities of the financial year?

Nous sommes favorables à cette proposition. Cependant, nous nous interrogeons sur sa mise en pratique au niveau européen. Le contenu de ce rapport devra respecter les règles comptables du pays dans lequel le fonds est établi.

d) Do you agree with the obligation to audit the financial information of the annual report?

Nous ne sommes pas opposés à ce que le rapport annuel fasse l'objet d'un audit. En France, les rapports semestriels et annuels des fonds de type FCPR sont déjà soumis à la certification d'un commissaire aux comptes.

e) What reporting requirements/obligations exist within the fund structures used in your country for the purpose of venture capital investments? Would you consider that the proposed information requirements would constitute a significant administrative burden? Please specify.

Les sociétés de gestion en France sont tenues de communiquer à l'AMF leurs comptes annuels. Elles doivent également produire et mettre à la disposition de l'AMF et des souscripteurs un rapport annuel pour chaque fonds et un inventaire semestriel de l'actif et de la valeur liquidative. Nous considérons que ces obligations correspondent à un minimum de transparence du gestionnaire.

Au-delà de ce minimum commun, chaque fonds précise dans son règlement les exigences de reporting (contenu, périodicité…) à l'égard de ses souscripteurs, lesquelles sont définies contractuellement entre la société de gestion et ceux-ci.

f) Do you think that more information requirements should be imposed on venture capital managers? If so, please specify

Nous estimons que les obligations d'informations et de transparence sont suffisantes. Il faut garder à l'esprit que la mise en place d'un passeport européen pour les fonds de capital risque ne doit pas être trop contraignante pour les sociétés de gestion. Et il faut laisser les souscripteurs, qui sont des investisseurs professionnels, définir librement avec les gestionnaires, et au cas par cas, le type d'informations qu'ils souhaitent recevoir.

Box 6

Do you think there is a need to specify any operating condition for venture capital entities? If yes, what would you consider as sufficient EU level framework for venture capital managers in this area and what level of compliance code would this entail?

Nous sommes favorables à un allégement des contraintes réglementaires imposées par la Directive AIFM qui ne sont pas adaptées aux gestionnaires de fonds de capital risque. En effet ces structures

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généralement de petite taille auront des difficultés à se mettre en conformité avec les exigences en matière de transparence (notamment ayant trait aux sociétés investies) et de fonds propres.

Do you think that it should be specified that venture capital entities should comply with rules of conduct when dealing with their investors? If yes, to what extend?

Nous ne sommes pas favorables à la définition de telles règles par voie législative. En France, les professionnels du capital investissement sont soumis à des codes professionnels. Les principes issus de ces codes doivent être mis en œuvre par les sociétés de gestion qui les intègrent dans leur propre règlement intérieur.

Do you think that it should be specified that venture capital entities should comply with specific organisational requirements? If yes, to what extent?

Nous ne sommes pas favorables à la mise en place de normes organisationnelles spécifiques pour les gestionnaires de fonds de capital risque. En effet, il s'agit généralement de petites structures avec un nombre limité de salariés. Les exigences doivent être proportionnées aux moyens mobilisés.

Par ailleurs, en France, une société de gestion doit déjà mettre en œuvre différents moyens humains, matériels et techniques, pour pouvoir exercer effectivement son activité, moyens dont elle doit justifier de la mise en place pour pouvoir obtenir l'agrément de l'AMF.

Do you think that it should be specified that the persons effectively conducting the business should have good repute and experience? If yes, to what extent?

Nous estimons que les dirigeants d'une société de gestion doivent posséder une honorabilité et une expérience adéquates à leur fonction. Ces conditions d'honorabilité contribuent à la bonne image de la profession et constituent déjà une obligation imposée à toute société de gestion qui souhaite obtenir l'agrément de l'AMF.

Box 7

a) Do you agree with this approach? If not, what alternative approach would you suggest?

Nous sommes favorables au principe de reconnaissance mutuelle par les etats membres des différentes formes juridiques des fonds de capital-risque dans l'Union Européenne, sans limiter les formes juridiques, qu'il s'agisse de fonds ou de sociétés.

b) Is it convenient to specify in the legislative proposal the legal forms that the venture capital funds might adopt?

Nous ne sommes pas favorables à ce que le nouveau régime liste les différentes formes juridiques que pourraient adopter un fonds de capital risque bénéficiant du passeport européen. La mise en place de ce passeport européen doit favoriser l'activité transfrontalière des fonds de capital risque, quelle que soit la forme adoptée dans le pays d'origine. Le choix de la forme doit revenir à la seule société de gestion en fonction notamment des exigences des investisseurs. Une harmonisation des différentes formes juridiques nous semble difficilement envisageable, les fondements juridiques au sein de l'Union Européenne étant trop diversifiés.

c) Is there any other aspect relating to the legal form of the venture capital entities that the proposal should take into account?

A côté des différentes formes juridiques et fiscales existantes, il pourrait être envisagé la création d'un statut de « fonds de capital risque européen » qui serait accepté par tous les etats membres.

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Box 8

a) What, if any, investment criteria determine your existing national fund structures used for purposes of venture capital investments?

En France, les Fonds Communs de Placement dans l'Innovation « FCPI », qui sont des fonds ouverts au public et soumis à un agrément de l'AMF, doivent répondre à des ratios d'investissement particuliers. Ils doivent être investis à hauteur de 60% en titres de sociétés non cotées répondant notamment à la définition des PME communautaires et justifiant d'un caractère innovant.

Il existe également des fonds commun de placement à risque (FCPR) dit « à procédure allégée ». L'actif du FCPR doit alors être constitué, pour 50% au moins, de titres participatifs ou de titres de capital de sociétés, qui ne sont pas admis aux négociations sur un marché d'instrument financier français ou étranger. Enfin, les FCPR « contractuels » constituent une autre catégorie de fonds non soumis à des quotas d'investissement.

c) Do you think there is a need to define a compulsory investment percentage of assets that the venture capital fund should invest in SMEs? If yes, what compulsory investment percentage would you propose and how should it be calculated?

Il est indispensable qu'une certaine flexibilité soit apportée dans l'application de ratios quels qu'ils soient. Un pourcentage minimum d'investissement dans les PME non cotées peut être fixé. Pour le reste et dans la mesure où il s'agit de fonds commercialisés vers une clientèle professionnelle, des quotas peuvent être fixés contractuellement entre les investisseurs et les gestionnaires de fonds, et figurer dans le règlement du fonds (dans le cadre notamment de la définition de la politique d'investissement du fonds).

Box 9

a) How do your national rules capture (if at all) the definition of venture capital funds?

Il n'existe pas de définition de fonds de capital risque en France. Comme indiqué précédemment, les fonds de capital risque adoptent généralement la forme juridique d'un FCPR agréé et particulièrement celle du FCPI qui est un fonds ouvert au public, agréé par l'AMF, et qui doit répondre à des règles d'investissement spécifiques. Il doit être investi à hauteur de 60% en titres de sociétés non cotées répondant notamment à la définition des PME communautaires et justifiant d'un caractère innovant. Les FIP sont des FCPR qui doivent investir plus de 60% de leur actif dans des PME régionales. En contrepartie, ces deux catégories de fonds font l'objet d'une incitation fiscale à l'entrée sous la forme d'une réduction d'impôt sur le revenu et sur la fortune.

Les fonds de capital risque peuvent également adopter d'autres formes juridiques plus souples, telle que le FCPR allégé qui est un fonds réservé à des investisseurs professionnels. Ces fonds sont soumis à des règles d'investissement plus flexibles, et peuvent par exemple prendre plus de 35% du capital d'une société cible, contrairement aux FCPI et aux FIP.

b) Should the temporary nature of the venture capital investment activity in SMEs constitute a criterion that should be reflected?

Nous ne souhaitons pas que le critère de durée de détention soit pris en compte pour déterminer la nature du capital investissement. En effet, si la durée de détention des actifs détenus par un fonds est généralement longue (de 8 à 10 ans), ces actifs doivent pouvoir être cédés à court terme. Cette souplesse est absolument vitale pour des PME qui peuvent avoir besoin d'un adossement industriel à tel ou tel stade de leur développement.

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c) Do you think it should be specified any temporal limit (minimum and maximum) to the participation of the venture capital fund in the capital of the SME (i.e., from at least 2 to 10 years)?

La délivrance du passeport européen pour les fonds de capital risque ne doit pas reposer sur une limite temporelle de période d'investissement dans les PME. En effet, une telle limite risquerait de réduire la flexibilité des investissements pour les gestionnaires de fonds de capital risque et de limiter l'accès au financement à certaines PME ou avoir des conséquences fortement préjudiciables pour les sociétés elle mêmes et conséquemment pour les investisseurs des fonds.

d) Are there any other means of finance that venture capital funds provide to SMEs that should be reflected (e.g. loans)?

Nous sommes favorables à une certaine flexibilité dans le choix des instruments financiers proposés dans le cadre du passeport européen des fonds de capital risque. En effet, le choix du type d'actifs utilisés doit dépendre des besoins en financement des PME. L'investissement mezzanine, couramment utilisé par la profession, est généralement structuré sous forme d'obligations convertibles en actions ou d'obligations auxquelles sont attachés des bons de souscription en actions.

e) Do you think that there is a need to specify that the manager should be actively involved in the development, growth and success of the SME? Or should the passive investment in an SME also be considered by the proposal as venture capital investment?

Au-delà de leur statut d'actionnaire majoritaire ou minoritaire, les gestionnaires de fonds peuvent être plus ou moins impliqués dans le développement des PME investies. En revanche, nous ne souhaitons pas que ce critère soit inclus dans la définition du capital risque. Cette implication plus ou moins forte du gestionnaire relève d'une politique et d'un savoir-faire propres à chaque gestionnaire, qui fait partie des critères de sélection des investisseurs. En outre, cette politique est à adapter au cas par cas en fonction des sociétés investies.

Box 10

a) To what extent does your national regime capture the above definitions of typical venture capital strategies?

En France, il n'y a pas de définition du capital risque. Le type de stratégie ne constitue donc pas un critère. Comme indiqué dans les points précédents, les FCPI sont les seuls fonds limités à investir un quota de leur actif dans des PME répondant à la définition des PME communautaires et justifiant d'un caractère innovant.

b) Do you agree that the special rules on venture capital should only apply when funds invest in the seed, start-up and expansion stages of SMEs? If not, do you believe that SMEs in a restructuring phase should also benefit from venture capital? What other alternative approaches would you suggest?

Nous sommes favorables à la définition des fonds de capital risque comme des entités investissant non seulement dans des PME en phase d'amorçage, de démarrage ou d'expansion au sens des lignes directrices communautaires concernant les aides d'etat, mais également dans des PME en phase de restructuration. Le besoin de financement des PME européennes ne s'arrête pas à leur démarrage. L'expérience montre qu'elles restent fragiles et ont besoin de capital aussi pendant leurs phases de croissance et/ou de restructuration.

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c) Would you propose other definitions to define the permitted portfolio of venture capital funds?

Nous souhaitons que la définition de capital risque soit entendue au sens large et intègre le capital développement, afin de ne pas exclure les sociétés de taille significative et matures qui souhaitent initier une nouvelle phase de développement.

d) Do you agree that venture capital funds do not/should not use leverage?

Si le recours à l'effet de levier est moins fréquemment utilisé par les fonds de capital risque, la nouvelle réglementation ne devra néanmoins pas interdire le recours à un effet de levier au niveau de la société investie qui doit conserver des capacités d'emprunt autonomes et pas nécessairement contrôlées par le gestionnaire.

Box 11

a) Do you agree with the list of entities described as not being proper investment targets for venture capital funds?

Cette liste ne nous semble pas suffisamment précise.

b) If not, what types of companies would you specify as eligible investment targets?

Il est important que la proposition de la Commission puisse couvrir également les fonds de fonds pour bénéficier du nouveau régime et ne pas les exclure. Il faut aussi apprécier la condition de PME pour l'éligibilité au nouveau dispositif au moment de la souscription.

c) Do you think that the EU should draw inspiration from the criteria set by the SEC to define the target companies of the venture capital funds?

Nous ne sommes pas favorables à l'ensemble des critères retenus par la SEC, notamment la condition b) selon laquelle la société cible ne peut pas emprunter ou émettre d'obligations. L'approche de la SEC est trop restrictive.

Box 12

What could be an appropriate regime for third country venture capital funds?

Nous estimons que le régime du passeport européen des fonds de capital risque doit inclure, au même titre que la Directive AIFM :

- tous les gestionnaires de capital risque établis dans l'UE, quels que soient :
  - la structure juridique du gestionnaire,
  - la forme juridique, le lieu d'établissement (dans ou en dehors de l'UE) et le type (ouvert/fermé) du véhicule utilisé.
- tous les gestionnaires de capital risque non établis dans l'UE, dès lors :
  - qu'ils gèrent un ou plusieurs fonds établis dans l'UE
  - qu'ils commercialisent un ou plusieurs fonds, établi(s) dans ou en dehors de l'UE, auprès d'investisseurs professionnels situés dans l'UE.

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CREATING LASTING VALUE

Box 13

a) Do you agree with this approach?

Il est indispensable de clarifier les interactions entre le nouveau régime de passeport européen pour les gestionnaires de capital risque et celui de la Directive AIFM.

b) Would you support the first (exemption for entities below the AIFMD threshold) or the second option (exemption independently from the threshold)? Would you suggest an alternative approach?

Idéalement, nous pourrions souhaiter une exemption indépendante de tout seuil. Cela serait justifié au regard du rôle de ces fonds dans le financement des PME. Néanmoins, les petits fonds, privés de passeport et incapables de supporter les contraintes de la directive ont besoin d'une réponse rapide à leurs problèmes, laquelle ne peut s'obtenir que via une proposition législative ad hoc. Nous sommes donc prêts à soutenir une proposition rapide créant un régime d'exemption applicable aux fonds de capital risque et de capital développement qui se trouvent en-deçà du seuil établi par la Directive AIFM. Le cadre réglementaire du régime de passeport européen des fonds de capital risque doit être allégé au niveau des exigences en matière de transparence et de fonds propres à la charge des gestionnaires par rapport à ceux relevant de la directive AIFM.

c) Are there any particular elements from the AIFMD that in your view should also apply to the venture capital managers?

Le cadre légal et réglementaire doit être adapté à l'activité des gestionnaires des fonds de capital-risque au sens large en favorisant leur compétitivité et leur croissance.

Box 14

a) Do you agree with this approach? If no, what alternative approach would you suggest?

Le nouveau cadre législatif doit être plus souple pour les gestionnaires de capital risque que celui proposé par la Directive AIFM.

b) What supervisory powers should be granted to the competent authorities for the supervision of venture capital funds and managers?

L'autorité de tutelle locale doit avoir les outils de contrôle à sa disposition lors de l'attribution du passeport européen au gestionnaire de fonds. Elle doit être en mesure également d'effectuer un contrôle régulier des activités au moyen des informations communiquées par les gestionnaires dans le cadre des obligations de reporting auxquelles ils sont soumis.

c) What type of sanctions should be envisaged?

Si les gestionnaires de fonds de capital risque bénéficient d'un passeport européen dont le cadre réglementaire est plus souple que celui de la Directive AIFM, ils pourraient être en contrepartie sanctionnés par la perte du passeport européen en cas de non-respect de la réglementation.

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CREATING LASTING VALUE

Germany

Box 4

b) What are the restrictions (if any) on participation of retail investors in your country within the fund structures used for venture capital investments?

In Germany funds publicly offered to investors are in principle subject to prospectus registration requirements unless certain exemptions apply. Depending on the fund vehicle used the offering may be subject to the German Securities Sales Prospectus Act ("**WpPG**") or the German Sales Prospectus Act ("**VerkPG**"), soon to be replaced by the new Vermögensanlagengesetz ("**Portfolio Investment Act**"). In case of such a public offering not benefitting from an exemption, the prospectus would need to be pre-approved by and registered with the German Federal Financial Authority ("**BaFin**") before any marketing can take place.

Under both acts (the WpPG and the VerkpG), Funds which are only offered to a limited number of selected investors (irrespective or institutional or individual) do not require prospectus registration with the BaFin. Also, to the extent the subscription in a fund is subject to minimum commitment requirements (EUR 200.000 in case the fund is structured as a limited partnership, in which case the VerkPG applies, and EUR 50.000 if the fund is structured as an AG (stock corporation), in which case the WpPG would apply), the offering is exempt from any prospectus registration requirements irrespective of whether the fund is being offered to institutional investors and/or individuals.

In addition, due to the pending new legislation, the Portfolio Investment Act, to be introduced shortly, there will be additional administrative and regulatory requirements applicable to funds which are publicly offered including a requirement to set up a management report (Lagebericht) and mandatory audit of annual financial statements.

Boxes 8 and 9

a) What, if any, investment criteria determine your existing national fund structures used for purposes of venture capital investments?

a) How do your national rules capture (if at all) the definition of venture capital funds?

German laws do not regulate any investment criteria for venture capital investments in principle. However, in order to be eligible for non-business treatment for tax purposes (and thus to be able to establish a tax transparent fund structure) German tax authorities' administrative pronouncement contains investment criteria related statements which include in particular the following**:**

- Average holding period of three years**,**
- no borrowing at fund level,
- no provision of guarantees,
- no reinvestment of proceeds,
- no management support (which is very problematic in practice!),
- no collateral for portfolio company indebtedness.

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Notwithstanding the foregoing, pursuant to the German Venture Capital Act (*Wagniskapital-beteiligungsgesetz* - "WKBG"), venture capital companies are defined as companies which are recognized as such by the German regulator BaFin and which are not simultaneously registered as an equity investment company pursuant to the German Act on Equity Investment Companies (*Gesetz über Unternehmensbeteiligungsgesellschaften - UBGG*). A company qualifies as a "venture capital company" under the WKBG if:

- its articles of association have as their object the acquisition, holding, management and sale of venture capital participations; 70% of the total assets managed by the venture capital company must be equity capital participations in a target company; the target company must be a corporation (e.g. German GmbH, limited, s.à r.l.) which, *inter alia*,
- must have its registered office and its management in a member state of the EEA (not necessarily in the same Member State);
- must have an equity capital of no more than EUR 20 million at the time when the participation in the target company is acquired by a venture capital company;
- must have been set up not more than 10 years before the time when the participation in the target company is acquired by the venture capital company;
- is not listed on an organized market or an equivalent market.
- it has its registered office and its management in Germany;
- its initial capital or the contributions made by its shareholders pursuant to the articles of association amount to no less than EUR 1 million;
- it has at least two managers, who must be trustworthy and suitably qualified to manage a venture capital company.

Because the scope of the regulatory framework was too limited to work for a venture capital fund no single venture capital firm elected for the application of the WKBG. In addition, the European Commission has decided on 30 September 2009 (Commission Decision 2010/13/EC) that the exemption from the liability for trade tax for venture capital companies pursuant to the WKBG is incompatible with the common market and may not be implemented. Therefore, the application of the WKBG is definitely stopped.

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Italy

Box 9

a) How do your national rules capture (if at all) the definition of venture capital funds?

Until today Italian legislation has not set a definition of venture capital funds. A measure included in the last Financial Act, recently approved by the Italian Government, foresees tax incentives for venture capital funds, which are defined as harmonized funds under the AIFMD that invest more than 75 % of their commitments in seed, start up, early stage or expansion financing in unlisted companies (target companies must be established in the EU, must have been established for less than 36 months and may have a maximum turnover of EUR 50m). The measure is yet to be implemented by an act of the Italian Ministry of Economics.

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CREATING LASTING VALUE

The Netherlands

Box 4

b) What are the restrictions (if any) on participation of retail investors in your country within the fund structures used for venture capital investments?

Assuming the venture capital fund qualifies as investment company or fund (venture capital funds may be outside the scope of Dutch law regulation all together if they qualify as an entrepreneurial undertaking rather than as a fund), it is generally prohibited to offer interests in such a fund in the Netherlands, unless the manager of the fund (or in case of self managed funds, the fund itself) is licensed to that effect pursuant to the Financial Markets Supervision Act ("*Wet op het financieel toezicht*" or the "FMSA").

Also, where the interests in a fund are offered in the Netherlands, it is generally required that a Dutch law compliant or recognised prospectus is made available in the Netherlands.

In respect of VC funds, the following exceptions or exemptions are in practice most frequently used to be exempt from the licensing requirement and/or the prospectus requirement:

(i) An exemption from the licensing requirement and prospectus requirement applies in case of an offer of interests in a fund to the extent these interests are offered for an investment amount of at least EUR 50,000 per investor. As per January 2012 the threshold amount will be increased to EUR 100,000.

(ii) An exception applies in respect of an offer of interests in a fund solely to so called qualified investors (*gekwalificeerde beleggers*), such as pension funds, banks, insurers, etc. As to angel investors or high net worth individuals it is noted that a natural person residing in the Netherlands only qualifies as a qualified investor to the extent such person is registered as such with the Dutch regulator.

For new venture capital firms, it is relevant to note that the FMSA provides for a specific exemption from the licensing requirement for venture capital funds that qualify as a (subsidised) start-up fund within the meaning of the Seed Capital Techno-Starter Regulation (*Subsidieregeling starten, groeien en overdragen van ondernemingen*).

Box 8

a) What, if any, investment criteria determine your existing national fund structures used for purposes of venture capital investments?

In the Netherlands fund structures primarily depend on the desired tax attributes (e.g. transparency) rather than on the applicable investment criteria as such. Another key criterion for determining the fund structure is that it should fit the nature of the arrangements between the manager and the investors. Venture capital funds often show relatively close involvement of investors though investor approval rights and/or advisory board seats. In view of these arrangements and depending on the investor base, venture capital funds are typically established as Dutch law limited partnerships (*commanditaire vennootschappen*), Dutch law cooperative associations (*cooperaties*) or a combination of the two (i.e. as a parallel fund). Furthermore, Dutch law limited liability companies (*besloten vennootschappen*) may be used. Where a venture capital fund has a broader investor base with relatively little involvement of the investors also mutual funds (*fondsen voor gemene rekening*) may be used.

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Box 9

a) How do your national rules capture (if at all) the definition of venture capital funds?

There is no predefined concept of venture capital funds in the Netherlands (other than for purposes of the grants for subsidy (see Box 4 above); (non-subsidised) venture capital funds are treated in the same way as collective investment schemes for other types of asset classes. See Box 4 above.

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CREATING LASTING VALUE

Sweden

Box 4

b) What are the restrictions (if any) on participation of retail investors in your country within the fund structures used for venture capital investments?

As regards to Sweden, there is no legal restriction in placing venture capital fund interests/ units to retail investors on a private placement basis. Still, due to the illiquidity of venture capital fund interests/ units and the required minimum investment amount for subscription of interests/ units in a venture capital funds, most retail investors abstain from a direct investment in such funds and rather invest in listed venture capital firms. For lager/public offerings the Prospectus Directive rules as implemented in Sweden will apply**.**

Box 8

a) What, if any, investment criteria determine your existing national fund structures used for purposes of venture capital investments?

In Sweden, no pre-defined investment criteria determining the structure used for venture capital funds exists. The structures most commonly used are local limited partnerships**,** UK, US or Channel Islands limited partnerships and Swedish limited liability companies.

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CREATING LASTING VALUE

United Kingdom

Box 4

b) What are the restrictions (if any) on participation of retail investors in your country within the fund structures used for venture capital investments?

The UK heavily restricts the promotion of investments to the retail market, in particular in relation to unregulated collective investment schemes such as most private equity funds.

However, the UK does permit individual and collective investments in unlisted companies to be promoted to business angels and other sophisticated and high net worth individuals (who do not meet the MiFID definition of a "professional client"). The promotion of such investment opportunities is strictly regulated but there is a longstanding policy (over more than 25 years) of recognising that high net worth and sophisticated individuals are important supporters of SMEs. As a result there are specific exemptions designed to permit the promotion of collective and individual investment in unlisted companies to such individuals provided they meet certain stringent conditions. If the conditions of the exemptions are not met then the promotion is unlawful and the investor has compensation rights and the right to claim that his contract is unenforceable. Such "certified high net worth individuals" or "certified sophisticated investors" (i) must have signed a certificate of a given format recently which states both (a) his/her eligibility to be treated as high net worth or sophisticated, respectively, and (b) contains a written acknowledgement of the risks and (ii) must have been given a written warning which is precisely defined in content and format. There is a similar exemption for promotions to associations whose membership is limited to, inter alia, certified high net worth and sophisticated investors, enabling companies to promote to business angel associations and for the associations to pass the promotions on to their members. In practical terms, in the experience of practitioners and advisers, these exemptions have been very useful to the SME community in raising funds from experienced individual investors and there are no reported cases of difficulties or abuses.

In addition, as touched above, an important part of the UK market comprises "true" retail funds, Venture Capital Trusts ("**VCTs**"), which are required to be traded on an EEA regulated market and are therefore subject to the requirements of the Prospectus Directive. These are a sub-set of Investment Trust Companies. Although their name uses the word "trust", they are not structured as trusts but rather established as ordinary English public limited companies. Investment in VCTs bestows certain income and capital gains tax advantages on a UK natural person tax payer (please refer to our response to Box 9 below for further details). The class of VCTs is thus defined by the conditions which must be met by the VCT to obtain the tax advantage (please refer to our response to Box 7 below). On the basis of the prospectus, retail investors can subscribe for shares in the VCT as part of a new offering or can acquire shares in the secondary market. Substantially all investors in VCTs are retail investors. As at 31 May 2011, there were 121 VCT companies with a total of GBP 2.6bn (Euro 2.9bn) under management. Anecdotally, substantially all VCT shareholders are UK tax payers, because it is they who are most interested in obtaining the tax reliefs. It is vital that any Commission legislative proposal does not restrict the ability to market VCTs to retail investors on the basis of the prospectus or otherwise in accordance with UK domestic securities marketing laws. In addition, even under this regime where the broader public may be approached the important role sophisticated private investors play in financing venture capital is acknowledged by allowing the VCT manager to re-categorise certain important investors as "elective professional clients" in order to provide them with more targeted and detailed information than the general public.

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Box 9

a) How do your national rules capture (if at all) the definition of venture capital funds?

As specified in Box 4 above, in the UK there are certain restrictions on the activities of VCTs but these are primarily a feature of the VCT tax regime and would not apply to other funds (not seeking this tax status) investing in venture and enterprise capital. Further, the UK regime recognises that not all funds investing in venture and enterprise capital will be capable of qualifying as VCTs.