

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

15 July 2020

Fiduciary duties and sustainability in the context of private equity and venture capital

Question 91 in the European Commission's Renewed Sustainable Finance Strategy consultation asks whether it is agreed that a manager should be *under express duties* to consider and integrate into their decision-making adverse impacts on sustainability in a general sense.

As indicated in our response, Invest Europe does not see merit in adapting rules on fiduciary duties, best interests of investors/the prudent persons rule, risk management and internal structures and processes in sectorial rules to directly require them to consider and integrate adverse impacts of sustainability (negative externalities).

As a starting point, we note that the underlying intention of Question 91 is very different from whether a manager should take sustainability risk into consideration when considering whether to make an investment on behalf of its clients (i.e. as an *investment risk*). As explained in previous consultation responses on this or related topics, Invest Europe believes it is legitimate for governments and regulators to require fund managers to pursue the best interests of their investors, which does require ESG factors to be taken into account where those are *material* to the manager's view of risk or return or when investors have required that as a condition of investment, and to require disclosure to investors (and publicly) of the extent to which their decisions create negative externalities.

However, Question 91 focuses on "negative externalities" or, to use SFDR¹ terminology, "principal adverse impacts" of investment decisions on sustainability, i.e. whether and to what extent an investment strategy harms the environment or social factors. As alluded to above, this is distinct from the consideration and integration of sustainability *risks*, i.e. factors which cause a material negative impact on the financial value of the portfolio. (The distinction is between Article 2(1)(22) and Article 4 of SFDR.)

We would like to stress the importance of freedom of contract between fund managers and investors. **In the private fund world, fiduciary duties are matters to be discussed and agreed between fund managers and investors, for example in the Limited Partnership Agreement. They are not to be imposed by regulators.**

¹ Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector

Invest Europe values the flexibility currently afforded to managers and investors to agree the integration of ESG factors in investment strategies as between themselves, i.e. primacy of contract.

It would be fraught with difficulty to interfere in investment decision-making by asking managers to balance the interests of investors and society at large. If investors' interests, and the contractual commitments made to them, are no longer paramount, it will leave fund managers in a very invidious position with no apparent accountability for the decisions they make (which will necessarily involve value judgements).

Legislators and regulators should facilitate investor-determined adoption and integration of ESG externalities by improving the standardisation of, and access to, high quality data.

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 Invest Europe

Invest Europe is the association representing Europe's private equity, venture capital and infrastructure sectors, as well as their investors.

Our members take a long-term approach to investing in privately held companies, from start-ups to established firms. They inject not only capital but dynamism, innovation and expertise. This commitment helps deliver strong and sustainable growth, resulting in healthy returns for Europe's leading pension funds and insurers, to the benefit of the millions of European citizens who depend on them.

Invest Europe aims to make a constructive contribution to policy affecting private capital investment in Europe. We provide information to the public on our members' role in the economy. Our research provides the most authoritative source of data on trends and developments in our industry.

Invest Europe is the guardian of the industry's professional standards, demanding accountability, good governance and transparency from our members.

Invest Europe is a non-profit organisation with 25 employees in Brussels, Belgium.
For more information please visit www.investeurope.eu.

