26 April 2023
ESMA22-106-4508

Summary of Conclusions

Joint meeting of the Board of Supervisors and the Securities and Markets Stakeholder Group

Date:	27 January 2023
Time:	9:00h – 12:30h
Location:	ESMA, 201-203 rue de Bercy, 75012 Paris
Contact:	louise.waller@esma.europa.eu T: +33 1 58 36 43 21

No Item

1. Opening remarks by the ESMA and SMSG Chairs

The ESMA Chair and the SMSG Chair welcomed the participants to the meeting. The ESMA Chair explained that ESMA had appointed new standing committee chairs in December 2022 and that some of those new Chairs were presenting today.

2. Greenwashing and Funds' Names

Adina Gurau Audibert and Urban Funered (SMSG), rapporteurs of the working group on greenwashing and funds' names, presented the Group's adopted advice on greenwashing and an overview of their upcoming advice on funds' names. With regards to greenwashing they emphasised that it is important for all market participants to avoid greenwashing and, for that, a clear definition of the term "greenwashing", or "ESG washing", is needed. They evoked the fact that asset managers are leaving article 9 funds and moving into article 8 funds. They warned about the potential for mismatch between a products' aim and investors' expectations and noted that misleading information is also captured under existing regulation. They proposed that the regulatory framework should not curb development of the ESG market and that responsibilities along the value chain should be clarified. Finally, they noted the important role that the ESAs have in clarifying concepts and terminology, in providing information on current greenwashing practices, on providing guidance, and promoting financial education.

On funds' names, they stated that, names are important but that they are part of wider material given to investors. They asked what ESMA's experience had been with misleading names and suggested that a cross-border understanding of misleading terms would be useful. They also expressed scepticism that quantitative thresholds could be used before definitions were clarified and argued against excluding Paris aligned benchmarks as they could aid transition.

Thorsten Pötzsch (ESMA) thanked the SMSG for their advice on greenwashing noting that they had provided useful input to the greenwashing work. This helps ESMA to understand and define the greenwashing phenomenon and provides input to taking stock of the sustainable finance policy implementation. He also picked up the point on the mismatch with investors' expectations. He requested further input on a holistic definition of greenwashing, on whether "greenbleaching" should be seen as a problem from a supervisory perspective, on the decrease in article 9 funds, and on the relevance of "intent" from a supervisory perspective in relation to greenwashing.

Derville Rowland (ESMA) provided some initial views on the SMSG's input to the funds' names consultation. She noted that funds' names are only one of many risks related to greenwashing but that she felt the risk was significant. She stated that quantitative thresholds have merit in enhancing trustworthiness. She asked for proposals, particularly with regards to transition funds. She requested feedback on ESMA's concrete proposals. She also noted that the decrease in article 9 funds could be a positive move.

SMSG members commented on the issues raised in the presentations, including on the importance of names to retail investors and the distinction between whether a fund is in transition or already green. On greenwashing, they commented that any definition of greenwashing should have consumers/users at its core, and the usefulness of the "engagement approach" to greenwashing. On "greenbleaching", it was noted that it could cause an issue for investors as it would artificially reduce the green investment options on the market. It was also noted that, under MiFID, and in relation to the supervision of greenwashing only the effect on the consumer was important, not the "intent" of the firm; it was also noted that the burden of proof should not be with the investor.

Members of the Board of Supervisors noted the importance of greenwashing from an investor protection viewpoint and that the expectations of the user/investor should be at the centre of any definition, in particular whether the funds are already sustainable or transitional.

The ESMA Chair thanked all speakers and noted that there was agreement that progress should be made to avoid disadvantaging investors who wished to invest sustainably, even if the regulatory framework was not yet perfect.

3. Market developments in Crypto assets

Christian Stiefmueller (SMSG) presented an overview of the crypto exchange FTX and the implications for the EU context. He noted that, while the case involved a US company, it merited EU supervisor attention for the lessons that could be drawn, including its significant potential impact on retail investors and financial stability. He highlighted issues around the "crypto-conglomerate" business model, the lack of proper governance and corporate controls, and inadequacies in financial reporting and disclosures as being areas worthy of consideration. He finished by asking whether a similar event could happen under the EU legal framework and what additional protections MiCA will provide.

Giovanni Petrella (SMSG) presented the results of research into trading activity in crypto currencies in times of geopolitical tensions. The analysis found that crypto trading increases with geopolitical tension events and can be motivated by different factors, such as avoiding sanctions, protecting savings, or making payments. It also showed that crypto trading slowed down when crypto-related services were included in EU financial sanctions packages.

Carlo Comporti (ESMA) noted that the use of crypto currencies for criminal purposes was well evidenced, and that enforcement capacity was varied depending on location. He presented a market update that showed a downturn in the crypto market but added that he believed it would reanimate as investor attitude surveys show good appetite (although also low understanding) and the larger crypto providers will welcome regulation. He added that, as the numbers were overall still relatively small, the downturn in the crypto market was not a source of financial instability. He also provided an update on MiCA preparatory work and asked how ESMA could best establish a good dialogue with these new stakeholders.

Marie-Anne Barbat-Layani (ESMA) highlighted a number of investor protection concerns in the crypto world, among them a lack of appropriate disclosures and adequate governance frameworks, vertical integration and conflicts of interest, and loss of clients' assets. She noted that MiCA would introduce a legal framework similar to that for the traditional financial sector. It would take time for crypto actors to prepare and there would be a supervisory challenges, especially as these are global players who will need to apply European legislation.

SMSG members commented that MiCA might encourage regulated entities into the crypto market and therefore bring risks into the financial system. In terms of investor protection, there is a difference in client rights depending on whether the broker or the client holds the crypto asset. They also noted that many of the failures in the FTX case were traditional issues of governance and conflict of interest.

Members of the Board of Supervisors added that, while MiCA will be helpful to supervisors, it does not go as far as existing regulation such as MiFID and there is a risk that it legitimises an activity that is currently treated more as gambling by many investors. They also noted that the mix of an unregulated market with misleading advertising campaigns was particularly troubling for retail investor protection and that anonymity will always attract money launderers.

The ESMA Chair thanked the presenters and participants for an interesting debate and noted the consensus around getting the right regulation and supervision under MiCA. She noted that the regime is not the same as other legislation and there is a risk of giving a stamp of approval without investors understanding the risks involved.

4. Market developments in Energy Markets

Rodrigo Buenaventura (ESMA) presented the current situation in the commodity and energy markets. He noted that the market had recovered but was not back to normality. There had been a sharp increase in prices and volatility in Q2 and Q3 of 2022 but trading and clearing infrastructures had resisted well. He then outlined ESMA's work in relation to the coming Market Correction Mechanism (MCM), in particular the report published on 23 January 2023. While the report concluded that there had so far been no significant impact on energy derivative markets resulting from the approval of the MCM Regulation, he noted however that there could be future consequences of the MCM on trading behaviour, including a potential move to OTC markets.

Klaus Löber (ESMA) outlined some of the potential impacts of the MCM on CCPs. The absence of reliable sources for price data could negatively impact the CCP's ability to manage risks and have knock-on effects on the clearing ecosystem. He noted that the final impact of the MCM on CCPs will ultimately depend on the precise footprint of the MCM and the wider market conditions prevailing at the time of the activation of the mechanism, but that a potential move to OTC markets was also concerning from the CCP viewpoint.

Pieter Schuurs (SMSG) commented that overall markets had performed well and trust in regulated markets was undented. EU policy measures, particularly on minimum storage requirements, had been helpful but that price reduction measures, such as the MCM, threaten financial stability and confidence in EU energy markets. He echoed the point that the MCM might cause CCPs to limit access for customers to regulated markets resulting in fewer hedging possibilities, or customers moving to OTC markets.

Rainer Riess (SMSG) pointed out that circuit breakers had performed well, price formation had functioned, and supply and demand had been reflected. He warned, however, that circuit breakers cannot balance supply and demand under "buy at any cost" conditions. He concluded that orderly markets could be undermined by political short-sighted action.

5. Concluding remarks

The ESMA Chair concluded by thanking all presenters and speakers and by thanking the SMSG, on behalf of the Board of Supervisors, for their continued input to ESMA's work.

The SMSG Chair thanked all participants for an inspiring debate and reflected on how it was useful to the SMSG to receive feedback on their work from the Board of Supervisors; in that regard she noted that the SMSG would consider the request for further input on greenwashing.