

SUMMARY OF CONCLUSIONS

Board of Supervisors

Date: 6 November 2012
Time: 09:00 – 17:30h
Location: Limassol, Cyprus
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No Items

1. Election of Standing Committees Chairs *BS/138 decision*

VOTING MEMBERS ONLY
Indicative timing: 09.00 -09.30

Following the outcome of the vote by secret ballot on the positions for CEMA and IMSC, electing Ronald Gerritse (NL) and Gareth Murphy (IE), the Board approved the proposal by the Chair. The new Chairs will assume responsibility as of 1 January 2013.

2. Adoption of agenda *BS/123 decision*

Decision: The agenda was adopted.

3. Summary of conclusions of September meetings *BS/124 decision*
BS/125

Decision: The Summaries of Conclusions were approved with the inclusion of comments by Laszlo Balogh (HU) on the Summary of Conclusions of 11 September regarding the Banking Union.

4. Report by Chair and Executive Director *Oral information*

The Chair reported on;

- the previous day's Management Board meeting;
- the length of the mandate of SMSG members and the activities of the SMSG in the area of SMEs;
- the level of and attendance by the 'head' of a national competent authority in the Board of Supervisors;

- the recent activities of the Joint Committee, in particular the approval of the work programme and the self-assessment of the ESAs regarding the ESFS 2013 review;
- the preparation of the ESMA Consumer Day to take place on 12 December; and
- the upcoming high-level meeting on OTC derivatives and the presence of Karl-Burkhard Caspari (DE) and Martin Wheatley (UK) in their capacity as ESMA Board members.

The Executive Director reported on:

- the activities of the CRA Unit, in particular the implementation of action plans, on-going reviews, work on the regulatory perimeter, the planning for implementation of the CRA 3 Regulation, pending and expected registration applications and the 2013 work programme;
- the upcoming activities regarding the High Frequency Trading project;
- the recent discussions within the FSB on the creation of a Legal Entity Identifier; and
- the project to extend ESMA’s premises, noting a the approval by the EU authorities, the signing of the lease and the alterations works preparation.

5. ESMA organisation

- Election of Mediation Panel members *Oral decision*

The Chair reported on the discussion in the Management Board on the composition of the Mediation Panel. It was agreed by the Management Board that the Mediation Panel will be composed of the members of the Management Board, where Kurt Pribil (AT) and Jean Guill (LU) would serve as full members.

Decision: The Board approved the proposal that the Mediation Panel will be composed of the members of the Management Board, where Kurt Pribil (AT) and Jean Guill (LU) would serve as full members.

- Audit reform and the role of ESMA *BS/126 discussion*

The Chair presented the discussion note.

The Board discussed the note, in particular;

- the appropriateness of having a discussion in the Board while the negotiations in the Council and Parliament are still on-going;
- whether further tasks relating to the regulation of auditing should be brought under the remit of ESMA;
- the limited number of members in the Board that currently have audit supervision responsibilities at national level;
- the scope and proposed role for ESMA under the current proposals and the link with ESMA’s current tasks in the area of auditing and financial reporting;

- the potential impact on ESMA’s governance, in particular regarding the composition of the Board of Supervisors, the setting up of a new Auditing Standing Committee, possible conflicts of interests; and
- The potential impact on ESMA’s organisation regarding budget and resources.

The Chair stressed the need of having an early discussion at the Board level on ESMA’s role in European audit supervision following the European Commission’s proposals, and invitations by the co-legislators to ESMA to discuss the proposals.

Conclusion: The Chair concluded that different views were expressed on the issue of ESMA getting any further role on audit matters than the existing limited involvement. Although the decision for any such reinforced role lies with the EU co-legislators, ESMA should be prepared if such a development was to happen. Would this indeed happen, most members do not seem to have major objections against setting up arrangements around a new Auditing Standing Committee composed of members from the audit oversight authorities from all EU countries. On potential changes to ESMA’s governance and the Board of Supervisors, most NCAs would prefer a delegation model to the new Auditing Standing Committee. The potential impact on ESMA’s organisation regarding conflicts of interests, budget and resources should be further explored.

- NCAs ‘best practices’ on SNE positions *BS/127 discussion*

The Executive Director presented the note and reported back on the discussion in the Management Board.

The Board discussed the note, in particular;

- noting that some NCAs offer additional arrangements to staff taking up SNE positions, such as relocation arrangements, tax advice and by making secondments part of the career development process;
- the need to have the explicit support from the NCA as a requirement for the recruitment of a national expert;
- the impact on budgets of NCAs; and
- noting that positions open to SNEs often require very technical skills limiting the number of possible interested staff at NCAs.

Conclusion: ESMA and NCAs will look into the practical arrangements offered to SNEs. Where possible, vacancies will require less specific expertise.

6. Corporate Finance Standing Committee

- Possible use of tripartite base prospectuses *BS/128 discussion*

Ronald Gerritse (NL) presented the report and asked the Board to form a common view on how to deal with the use of tripartite base prospectuses.

The Chair indicated that the experts have found the use of a tripartite base prospectus in conformity with the Prospectus Directive and asked the Board to confirm this position. The Board should also decide if

ESMA would make its view explicit by issuing Guidelines or Q&As.

The Board discussed the note, in particular;

- whether the use of a tripartite base prospectus is allowed under the Prospectus Directive;
- the need for consistent application of the Prospectus Directive with a view at maintaining a level playing for EU firms; and
- whether multiple supervisors could be responsible for the different parts of the prospectus.

The European Commission indicated that they do not share the view that the use of a tripartite base prospectus is allowed under the Prospectus Directive. In case the Board would confirm this position, they would consider issuing a recommendation.

Decision: The Board confirmed the view that the use of a tripartite base prospectus is allowed under the Prospectus Directive. ESMA will wait with publishing a Q&A on this topic if the Commission plans to publish a formal position on the issue in the short term. Following a possible opinion from the Commission, ESMA shall reconsider the issue.

7. ESMA-Pol

- Report by Konstantinos Botopoulos *BS/129 information*

Konstantinos Botopoulos (EL) presented his report.

- Cover Note to Guidelines on market making under Short Selling Regulation *Annex 1 information*
- Guidelines on market making under Short Selling Regulation *Annex 2 decision*

Konstantinos Botopoulos (EL) presented the note and the Guidelines on market making under the Short Selling Regulation (SSR). He indicated that there were two outstanding issues on which the Board was asked for guidance, namely the membership requirement and the criteria of eligibility for the exemption.

The Board discussed the note and the Guidelines, in particular;

- the need to agree on the Guidelines in order to have a consistent approach and level playing field in the EU;
- whether to maintain the approach to the membership requirement as indicated in the consultation document or to adopt a more flexible approach clarifying that the requirement of being a “...member of a trading venue (...) where it deals as principal in a financial instrument...” has to be applicable as long as such a trading venue for that financial instrument exists in the EU, but not for those financial instruments that are not admitted to trading or traded on at least one trading venue;
- whether guidelines should only provide for high level principles or if they should also contain more detailed qualifying criteria that need to be adhered to if the firm wished for its activities to qualify for the market making exemption;

The European Commission indicated that a more flexible approach to the membership requirement other than indicated in the consultation paper would not be in conformity with the Level 1 Regulation and that they would consider issuing an interpretative recommendation.

Conclusion: The Chair concluded that diverging views remained on the two outstanding issues and asked the ESMA-Pol Task Force to work on a compromise proposal taking into account the discussion in the Board along the following lines:

- on the membership requirement, incorporate the option consisting in requiring a membership requirement where a trading venue exist for the concerned instrument highlighting that the exception only applies to instruments that are not listed/admitted to trading anywhere on a trading venue in the EU; and
- on the principles and qualifying criteria of eligibility for the exemption, maintain both the high level principles and the more detailed qualifying criteria, with slight amendments to the qualifying criteria (notably paragraph 49 and subs. of the draft guidelines) in order to take into account the specific situation of less liquid stocks, for which liquidity market making is essential.
- Procedure for emergency measures under the Short Selling Regulation as of 01/11/2012 *Annex 3 decision*
- Discussion note on Procedure for emergency measures under the Short Selling Regulation as of 01/11/2012 *Annex 4*
- Draft procedures under Art 28 *Annex 5*

The Head of the Markets Division presented the documents.

The Board discussed the documents, noting in particular the need to ensure a quorum for the Board of Supervisors in order to take decisions in emergency situations.

Decision: The Board agreed to the proposals as reflected in the discussion note on how to ensure a quorum for the Board of Supervisors in order to take decisions in emergency situations and the possibility for representatives of other designated national competent authorities to attend Board of Supervisors meetings.

The draft procedures under Art. 28 will be amended taking into account the discussion in the Board. Following any other comments by the end of the week, the procedures will be sent for approval by written procedure.

8. Investment Management Standing Committee

- Report by Giuseppe Vegas, including update on AIFMD 3rd country negotiations *BS/130 decision*
- MoU with FINMA under the AIFMD *Annex 1 decision*

Nicoletta Giusto (IT) reported on the negotiations with non-EU authorities on the Memoranda of Understanding (MoU) required by the Alternative Investment Fund Managers Directive (AIFMD) and asked the Board to approve the text that should be signed between EU competent authorities and FINMA (Switzerland).

The Board discussed the report, in particular;

- whether NCAs are allowed to make amendments to the text of the MoU when negotiating with non-EU authorities; and
- whether the ‘comply or explain’ mechanism should apply to any part of a specific bilateral MoU that is outside the scope of the AIFMD (e.g. with respect to mutual assistance in situations where EU funds are marketed in a non-EU jurisdiction).

Gérard Rameix (FR) suggested that the part of the MoU that is outside the scope of the AIFMD should not be subject to the ‘comply or explain’ mechanism. The Chair stressed that the text of the MoU as it currently stands, should be the version to be concluded by NCAs with FINMA for the purposes of the AIFMD.

Decision: The Board approved the text of the MoU that should be signed between the EU competent authorities and FINMA with Karl-Burkhard Caspari (DE) abstaining. In line with the fact that the MoU took the form of Article 16 guidelines, it was confirmed that NCAs should make every effort to comply with the full text of the MoU.

The Board agreed to the general approach with regard to MoUs with CVM (Brazil), OSFI (Canadian banking authority) and SFC (Hong Kong) as outlined in the report.

- MoU with ASIC under the AIFMD *Annex 2 decision*

The item was taken off the agenda.

- Consultation paper on draft regulatory technical standards under Article 4(4) of the AIFMD *Annex 3 decision*

Nicoletta Giusto (IT) presented the consultation paper.

The European Commission objected to the approach followed by ESMA indicating that that the mandate under Article 4(4) of the AIFMD does not allow ESMA to develop the regulatory technical standards since they could limit the scope of the Level 1 text.

The Board discussed the consultation paper, in particular urging the European Commission for clarity on their position. The Chair asked the Commission to send their written objections with reasoning by the end of the week.

Conclusion: The Board agreed on the substance of the consultation paper, including an amendment to Article 3(3) of the draft RTS. After receiving the comments by the European Commission, ESMA will decide how to progress.

- Guidelines on repurchase and reverse repurchase agreements *Annex 4 decision*

Nicoletta Giusto (IT) presented the guidelines.

The Board discussed the guidelines, in particular;

- the appropriateness of considering fixed-term arrangements up to seven days as being arrangements on terms that allow the assets to be recalled at any time; and

- whether it would be sufficient to rely on a general principle with respect to a UCITS' ability to meet redemption requests.

Decision: The Board approved the guidelines with Jean Guill (LU) objecting and Marek Szuszkiewicz (PL) abstaining.

- Opinion on Article 50 (2) of the UCITS Directive *Annex 5 decision*

Nicoletta Giusto (IT) presented the opinion.

The Board discussed the opinion, in particular;

- the need to have precise alignment of the wording of the opinion with the UCITS Directive; and
- the need for a flexible timeframe for portfolio adjustments required to ensure compliance with the opinion, taking into account the best interests of unit holders.

Decision: The Board approved the opinion with Jean Guill (LU) objecting, subject to minor textual changes, amending the timeframe for portfolio adjustments to ensure compliance by including “in the best interest of investors and ultimately by the end of 2013” in paragraph 7 of the opinion.

The Executive Director stressed that non-compliance with the opinion could result in a Breach of Union Law procedure.

- Overview of money market funds initiatives and possible ESMA work *Annex 6 discussion*

Nicoletta Giusto (IT) presented the note.

The Board discussed the note, in particular;

- the timeline for launching work by ESMA on particular issues taking into account other international initiatives; and
- the need to closely cooperate with the ESRB.

Conclusion: The Board agreed that further internal thinking will be conducted on the basis of the discussion note, taking into account other international initiatives. With regard to possible work on the use of credit ratings, ESMA will wait for the outcome of the negotiations on the CRA III Regulation.

9. Post Trading Standing Committee

- Report by Thierry Francq *BS/131 discussion*

G rard Rameix (FR) presented the report.

The Board discussed the report, in particular the options for the determination of the clearing obligation following the initial notifications under Article 89.5 of EMIR.

The Head of the Markets Division indicated that the third option in the paper on the timing of notifications

under the clearing obligation procedure would be in conformity with EMIR. The European Commission confirmed this view.

Decision: The Board agreed to the third option as reflected in the report for the determination of the clearing obligation following the initial notifications under Article 89.5 of EMIR.

- Report on settlement fails *Annex 1 discussion*

Gérard Rameix (FR) presented the report, urging NCAs to submit their settlement fails reports in accordance with the agreed template.

Conclusion: The Board took note of the consolidated ESMA report and supported the submission of settlement fails reports by each NCA.

10. Corporate Reporting Standing Committee

- Report by Julie Galbo *BS/132 information*
- Common enforcement priorities for the 2012 IFRS financial statements *Annex 1 decision*

Julie Galbo (DK) presented her report and the common enforcement priorities for the 2012 IFRS financial statements.

Decision: The Board agreed to the common enforcement priorities for the 2012 IFRS financial statements, including earlier received technical comments by the AFM.

11. Joint EBA-ESMA work on reference rates and other benchmarks-setting processes

- Progress report *BS/133 discussion*

The Executive Director presented the progress report.

The Board discussed the report, in particular;

- the need to aim for more alignment of the timeline of the Task Force's work with the activities by IOSCO; and
- stressing that ESMA has its own responsibility in this area and the work on principles/guidelines should progress quickly in order to have the principles/guidelines in place as soon as possible.

Conclusion: The Task Force will align the timeline of its activities with IOSCO's work as far as possible. A Consultation Paper will be published at latest in January 2013.

12. Progress reports

- Report by Martin Wheatley (SMSC) *BS/134 information*

The Board of Supervisors took note of the report.

- Report by Martin Wheatley (Commodity Derivatives Task Force) *BS/135 information*

The Board of Supervisors took note of the report.

- Report by Jean Guill (Review Panel)

BS/136 information

The Board of Supervisors took note of the report.

- Report by Carlos Alves (CEMA)

BS/137 information

The Board of Supervisors took note of the report.

13. A.O.B.

14. Future meetings

information

- 18 December 2012 (Paris)
- 29 January 2013
- 14 March 2013
- 22 May 2013
- 4 July 2013
- 24 September 2013
- 7 November 2013
- 17 December 2013

Participants list

Voting Members

Member State	Representative	Accompanying Person
Belgium	Antoine van Cauwenberge (alternate)	
Bulgaria	Antoniya Gineva (alternate)	
Czech Republic	Pavel Hollmann	Karel Juras
Denmark	Julie Galbo	
Germany	Karl-Burkhard Caspari	Philipp Sudeck
Estonia	Raul Malmstein	Gerle Reinumägi
Ireland	Gareth Murphy (alternate)	Oliver Gilvarry
Greece	Konstantinos Botopoulos	Eleftheria Apostolidou
Spain	Ana-Isabel Fernandez (alternate)	Antonio Mas
France	G�rard Rameix	Fran�oise Buisson Dora Blanchet
Italy	Nicoletta Giusto (alternate)	
Cyprus	Demetra Kalogerou	Andreas Andreou Liana Ioannidou
Latvia	Sandis Andersmits (alternate)	
Lithuania	-	
Luxembourg	Jean Guill	

Hungary	László Balogh (alternate)	
Malta	Mike Duignan (alternate)	
Netherlands	Ronald Gerritse	Pim De Wild
Austria	Kurt Pribil	Andrea Kuras-Goldmann
Poland	Marek Szuszkiewicz	Anna Skrzypek
Portugal	Carlos Alves (alternate)	Manuel Ribeiro da Costa
Romania	Carmen Negoita	Raluca Țariuc
Slovenia	Damjan Zugelj	Sabina Bešter
Slovakia	Ivan Barri	Slavomir Stastny
Finland	Anneli Tuominen	Jarmo Parkkonen
Sweden	Martin Andersson	Oscar Ode
United Kingdom	Martin Wheatley	Cristina Frazer

Non-voting members

ESMA Chair	Steven Maijoor	
European Commission	Nadia Calvino	Valérie Ledure
ESRB	Francesco Mazzaferro	
EIOPA	Daniela Rode	
EBA	-	

Observers

Croatia	-	
Iceland	Unnur Gunnarsdottir	
Liechtenstein	Marcel Lötscher	
Norway	Kristin Lund	

ESMA

Chair	Steven Maijoor
Executive Director	Verena Ross
Summary of Conclusions	Max Simonis
Head of Markets Division	Rodrigo Buenaventura
Head of Operations Division	Nicolas Vasse
Head of Investment and Reporting Division	Laurent Degabriel
Head of Credit Rating Agencies Unit	Felix Flinterman
Head of Legal, Cooperation and Convergence Unit	Stephan Karas
Investment and Reporting Division	Richard Stobo
Markets Division	Christophe Polisset



Done at Paris on 18 December 2012

Steven Maijoor
Chair
For the Board of Supervisors