



## SUMMARY OF CONCLUSIONS

### Board of Supervisors

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**Date:** 19 June 2012  
**Time:** 08:30 – 17:30h  
**Location:** Finanstilsynet, Copenhagen  
**Contact:** steven.maijoor@esma.europa.eu T: +33 1 58 36 51 12

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No Items

#### 1. Credit Rating Agencies

- Revised report on medium-term objectives for CRA supervision *BS/67 decision*
- CRAs Risk Report *Annex 1 discussion*

The Chair welcomed members to the Danish Financial Services Authority and thanked Julie Galbo for the hospitality.

The Head of the CRA Unit presented the revised report on medium-term objectives for CRA supervision and the CRA risk report. The Board discussed the reports, including:

- the adequacy of existing risk rating methodologies;
- the potential effects of rating movements in the current market conditions and the scope for country-specific impacts;
- the need for greater scrutiny of CRA rating actions;
- the importance of coordinating actions by ESMA and by national competent authorities in the respective areas of competence and ensuring that ESMA is provided with all the necessary information by NCAs so that it has an overview of national actions;
- the extent to which individual CRAs should be identified in the risk report;
- the desirability of obtaining market participant feedback on ESMA's supervisory work at appropriate intervals;

- the level of background information to provide, to explain how the risk dashboard results were derived at and the level of granularity of the outcomes;
- the extent to which the report should focus on European CRAs and on third country CRAs providing ratings in the EU in particular; and
- the inclusion of a Japanese CRA in the statistics concerning EU - CRAs. The report will further clarify this topic.

A. The Head of the CRA Unit explained the basis for the current focus on bank ratings, noting the link to sovereign ratings. The current risk dashboard was based on initial investigations and information provided by NCAs during the registration process, and the level of detail provided would increase as the Unit's assessments progress and the data availability increases (e.g. with the introduction of SOCRAT). The supervisory reporting system, SOCRAT, went live in May but would not be operational until the reporting regulatory technical standard enters into force which is expected to be on 30 November 2012.

B. **Decision:** The Board welcomed the details and structure of the report on medium-term objectives and approved it. In the upcoming year the risk dashboard and its parameters will be further developed. The risk report would be circulated on an annual basis to help inform ESMA's work programme for the coming year, with major changes to the objectives also reported during the course of the year where necessary.

## **2. Exchange of views on current developments in EU financial markets** *BS/70 discussion*

The Chair and Executive Director presented the report providing an update on actions taken by ESMA and NCAs in the context of current market developments. Kostas Botopoulos (GR) provided an update on the position in Greece.

The Board discussed:

- the UK Government's challenge to ESMA's powers under Article 28 of the Short Selling Regulation;
- the need to take the measures available to ESMA and NCAs to improve the transparency of balance sheets and ensuring correct valuations in cooperation with EBA;
- the scope for further transparency measures beyond accounting;
- the need for all relevant supervisors to be informed of decisions regarding CCP margin changes given the wider impact such changes can have, and the need for banking regulators, securities regulators and central banks to cooperate given their separate but related competencies, taking account of the limits on the ability to disclose confidential information on CCPs before EMIR enters into force;
- the need to broaden the examination of factors that can lead to destabilisation of markets, including algorithmic trading and the need to understand CDS markets better; and
- the need to use the trends, risks and vulnerabilities report to enable the Board to identify rel-

evant emerging risks.

**Conclusion:** The crisis management scenarios and responses would continue to be developed. Work would be taken forward on transparency of accounting in the banking sector in cooperation with EBA. Economic analysis work should be brought to the Board for fuller discussion. Members should provide any written comments on the framework for information sharing on changes by CCPs by close of business on Friday 22 June 2012.

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| <b>3. Adoption of agenda</b>                              | <i>BS/65</i> | <i>decision</i>    |
| <b>Decision:</b> The agenda was adopted.                  |              |                    |
| <b>4. Summary of conclusions of April meeting</b>         | <i>BS/66</i> | <i>decision</i>    |
| <b>Decision:</b> The summary of conclusions was approved. |              |                    |
| <b>5. Report by Chair and Executive Director</b>          | <i>Oral</i>  | <i>information</i> |

The Chair reported on:

- a decision in the Joint Committee to ask for agreement in principle from the Commission that the ESAs should deliver technical standards on margin requirements for non-centrally cleared derivatives after the September 2012 deadline specified in EMIR in order to take account of on-going international work on this issue;
- preliminary work on the 2013 review of the European System of Financial Supervision;
- the appointment of Sir William Blair as president of the Board of Appeal;
- the meeting of the Steering Committee of the ESRB;
- the IOSCO Annual Conference in Beijing and ESMA's associate membership of IOSCO;
- bilateral visits to Ireland, Belgium, Slovenia and Poland;
- an election to the Management Board to be held at the September meeting as a result of Fernando Restoy's appointment as Deputy Governor of the Bank of Spain;
- the banking union discussions and the potential for it to impact on ESMA;
- the OTC derivatives meeting in Toronto;
- the previous day's Management Board meeting.

The Board discussed the Review Panel mandates which had been circulated for approval in written procedure, in particular the inclusion of UCITS within the peer review of MiFID suitability requirements, and the timing of the second phase of the peer review. The Board discussed the balance between on-site reviews and paper-based reviews, the scope of the mandates and the need to identify good practices. The Chair of the Review Panel confirmed that the mandates enabled on-site visits.

The Chair welcomed the use of on-site visits and noted that MiFID had been in place for some time and therefore it was important to move on to reviewing NCAs' supervisory practices.

The Executive Director reported on:

- the approval received from the Management Board of ESMA's 2011 accounts;
  - the mechanism proposed by the EC for redistributing to NCAs the relevant NCA proportion of the 2011 surplus, based on the NCA contribution to the budget, details of which would be circulated to Board members;
  - the discussion at the Management Board of the draft 2013 work programme which would now be subject to consultation with standing committees before being brought to the September meeting of the Board for approval;
  - preparations for the IMF FSAP of the European Union; and
  - preparatory work for MiFID/MiFIR.
- ESMA reaction to the European Commission Green Paper on shadow banking *BS/68 Decision*

Antoine Bouveret, Senior Officer in the Economic Research and Financial Stability Unit, presented the proposed response to the European Commission Green Paper. The Board discussed the proposed response, in particular:

- the need to be clear that the response is not intended to be comprehensive and therefore focuses on certain specific issues;
- whether the paper should also refer to: the re-emergence of SPVs as issuers; the issue of the use of constant vs. variable NAVs by money market funds; and the existence of markets that are unregulated such as stock lending and repo markets;
- the need to emphasise the role of ESMA and national securities supervisors in relation to shadow banking, and work undertaken by them and within IOSCO, which was not acknowledged in the Green Paper;
- the growth of the shadow banking industry in Europe, compared with its reduction in the US;
- on the definition of shadow banking, the response could be clearer that the key issue is the mismatch on the balance sheet: assets are less liquid than liabilities, or are different in term, leading to run risk;
- the need to emphasise the requirement for global cooperation to avoid unintended consequences through regulatory arbitrage;
- the need for greater data collection in relation to shadow banking and enhancing the ability to detect the risks arising from shadow banking;

- the need for joint work from the ESAs as shadow banking is relevant to all three ESAs.

Emil Paulis (EC) supported ESMA's desire to take a stronger role in relation to shadow banking.

**Conclusion:** Shadow banking is a strategic issue where ESMA needs to be more explicit in its role while working with insurance and banking supervisors at national, European and global levels. The document would be revised to take into account comments raised, in particular on the definition of shadow banking, the existing work of securities regulators and the need for enhanced detection of the risks associated with shadow banking. It would then be circulated for approval in written procedure.

- Letter to the EU institutions regarding guidelines on sanctions *BS/69 decision*

The Chair presented the proposed letter to the EU institutions. Emil Paulis (EC) noted that the Commission's proposals in relation to sanctions are on the basis of minimum harmonisation and that there would be scope for guidelines to enable further harmonisation. The Head of the Markets Division noted that different legislation contained different provisions, including some cases where guidelines were expected to specify penalties, which goes beyond the competence of many supervisors. It was noted that guidelines are not the right instrument to enhance harmonisation in this area.

**Decision:** The letter was approved, subject to noting that MAR would harmonise sanctioning regimes to a significant degree, and subject to further drafting comments received from members by close of business on Friday 22 June 2012.

## 6. Post Trading Standing Committee

- Report by Thierry Francq *BS/71 information*
- Consultation paper on draft RTS and ITS under EMIR *Annex 1 decision*

Thierry Francq presented his report.

On EMIR technical standards, the Board discussed:

- the need to consult on the draft technical standard related to contracts having a direct substantial and foreseeable effect in the EU;
- the approach adopted on the non-financials exemption, in particular on the value of the clearing thresholds;
- the requirement to be adequately licenced for clients providing indirect clearing services;
- liquidity fragmentation and CCP risks;
- the requirement for a CCP to be a separate legal entity;
- the issue of commercial bank guarantees fully backed by collateral;
- the access by prudential supervisors to TR data;

- on non-financial counterparties, the systemic relevance of a company and the relation between hedging and non-hedging activities;
- impact on collateral scarcity;

Karl-Burkhard Caspari (DE) asked for two amendments to the EMIR draft proposal:

- a reference to conflicting national law should be included in Article 3 paragraph 4 ICA (“to the extent permitted by national law”); and
- that the definition of liquidity fragmentation provided by Article 1 LF should also reflect any material negative effects on the risk management of a CCP by a further CCP accessing the same market.

The Chair of PTSC noted that:

- in relation to the thresholds set, the need to review them when EMIR will be in place and more data will be available from trade repositories;
- in relation to liquidity fragmentation, the need to ensure that liquidity fragmentation is not produced at the level of the trading venue;
- in relation to indirect clients, the need to deal with this topic in a slightly different way from how direct clients are treated under EMIR.

The Head of the Markets Division noted that:

- on the issue of liquidity fragmentation, a specific recital was added to ensure that access by a CCP does not increase the risks to which the incumbent CCP might be exposed to;
- the proposal in relation to re-hypothecation could be deleted as such requirement is not envisaged for direct clients;
- a recital clarifies that the Regulation that will contain the technical standards will prevail over conflicting national laws preventing segregation and portability.

**Decision:** The Board agreed to the publication of the consultation paper for a 6 week period;

- deleting the reference to the draft technical standards on contracts having direct substantial and foreseeable effect in the EU, in order to take into account international developments;
- deleting the reference to re-hypothecation under indirect clearing arrangements;
- keeping the reference to the need for clients to be licenced and the reference to the Chinese walls under indirect clearing arrangements;
- mentioning that consultation with the ESCB with reference to access to data is still on-going;
- accepting possible drafting changes of pure legal nature and structure to the extent that the

policy is not affected; and

- with the exception that the publication of the international part of the RTS will be delayed to evaluate the proposals to be issued by 3<sup>rd</sup> country regulators.

## 7. Investor Protection and Intermediaries Standing Committee

- Report by Jean-Paul Servais *BS/72 decision*

Jean-Paul Servais (BE) presented his report.

**Decision:** The Board approved the Q&A on automated trading.

- Final report on guidelines on suitability *Annex 1 decision*

The Board discussed the report, in particular their application to professional as well as retail clients.

**Decision:** The Board agreed to issue the guidelines subject to reviewing the extension of scope to professional clients to ensure compatibility with MiFID.

- Final report on guidelines on compliance *Annex 2 Decision*

The Board discussed the report, in particular the requirements to separate compliance and internal audit functions, and the compliance and legal functions.

**Decision:** The Board agreed to issue the guidelines subject to clarifying paragraph 22 to ensure it is clear that the compliance function can be delegated to a compliance function at group level on a case-by-case basis.

It was clarified that the guidelines on suitability and on compliance will have to be applied 60 days after the two months period for the notification of compliance by national competent authorities.

- Letter to EU Commission – MiFID passporting *Annex 3 decision*

**Decision:** The Board approved the letter.

## 8. Investment Management Standing Committee

- Report by Giuseppe Vegas *BS/73 Information*

Nicoletta Giusto (IT) presented the report, noting that the Finnish representative in IMSC had dissented from the proposals for harmonised AIFMD reporting but that the burden imposed by non-harmonised reporting would be undue and the proposals concerned only the IT reporting system, not the contents of reports which was the subject of earlier technical advice to the EC and would be harmonised by the forthcoming AIFMD Level 2 Regulation.

- Final report on guidelines on ETFs and other UCITS issues *Annex 1 Decision*

The Board discussed the report, in particular:

- the need for the ETF identifier to be in the fund rules and instrument of incorporation;
- the proposed extension of the guidelines beyond strategy indices;
- stronger cross-reference between paragraphs 44 and 45 regarding the role of stress testing in the determination of haircuts;
- provisions of German law which conflict with the proposed guidelines on recallability;
- the justification for repos and securities lending being subject to different sets of rules, leading to a tendency to use repos rather than securities lending which may not be the most appropriate in the circumstances;
- the use of listing and market-making as criteria for defining UCITS ETFs;
- provisions on efficient portfolio management techniques and on management of collateral.

Nicoletta Giusto (IT) noted that the definition of ETFs had been refined as far as possible without creating scope for regulatory arbitrage. The purpose of the ETF identifier being in the fund rules is to ensure that the position is clear for investors, extra time was proposed to enable existing UCITS to adapt. Similarly the extension of the scope of the guidelines beyond strategy indices was necessary to prevent regulatory arbitrage.

**Decision:** The document should be adjusted to reflect the discussion, in particular regarding the link between stress testing and determination of haircuts and the amendment to existing CESR guidelines. The definition of ETFs and the proposal on the ETF identifier should remain as proposed. On collateral diversification, the approach based on a 20% limit per issuer was chosen. IMSC and ESMA staff should identify a compromise solution on the treatment of repo and reverse repo arrangements and then the guidelines would be circulated for adoption by written procedure before the summer.

- Consultation paper on draft guidelines on remuneration under the AIFMD *Annex 2 Decision*

**Decision:** The Board approved the consultation paper for publication.

## 9. Committee for Economic and Markets Analysis

- Report by Carlos Alves *BS/74 information*  
Carlos Alves presented his report.
- Cover note to Retailisation report *BS/83 information*
- Retailisation report *Annex 1 decision*
- Companion paper on structured products *Annex 2 information*
- Companion paper on Alternative UCITS *Annex 3 information*



The Board discussed the report, in particular:

- the content of the database used;
- the need to look at improving costs disclosure;
- the need for information on the identity of the products analysed;
- the extent to which the report reflected the strength of the quantitative evidence cited in the report;
- whether the products set out in the report belong on the retail market and the options for taking such a conclusion forward.

The Chair noted the Board’s concern about the effectiveness of the products covered by the report. Further work would be needed following feedback from the Stakeholder Group, other targeted market participants and relevant standing committees before deciding what ESMA should publish.

**Decision:** The Board agreed to share the report for feedback from the Securities and Markets Stakeholder Group and relevant standing committees.

- Cover note to Feasibility study HFT *BS/84 information*
- Feasibility study HFT *Annex 1 decision*

The Board discussed the report, in particular:

- the ability to share data received from market participants with national competent authorities;
- the challenges of matching high frequency orders across trading venues;
- the need to ensure the full range of high frequency traders are covered by any study;
- the limited independent research into high frequency trading and mixed outcomes of existing studies;
- the need to take account of the quantity of data likely to be produced and to ensure confidentiality of the data;
- the resourcing implications for national competent authorities in collecting the data and providing it to ESMA.

It was noted that the paper indicated that competent authorities could work on the data provided that they have legal access to it.

**Decision:** The Board agreed that further work should be carried out on the proposal with a view to it coming to the Management Board for prioritisation against other projects.

## 10. ESMA organisation

### a. Standing Committees structure and election of Chairs *BS/75 discussion*

The Chair presented the proposals on changes to the structure of standing committees and on the election of standing committee chairs, noting the Management Board's preference for a single chair of the ITMG.

The Board discussed the proposals, in particular the appropriate structure for dealing with cross-cutting and sectoral-specific cooperation issues and the nomination process for standing committee chairs.

**Conclusion:** The proposal on ESMA-Pol should be developed further to separate out operational cooperation, sectoral policy on cooperation, and horizontal cooperation issues, and to reconsider the nomination process for standing committee chairs. As regards to the ITMG, the Board expressed a preference for a single chair from ESMA staff. The proposal will be discussed in September, and the election of standing committee chairs would be postponed until November.

### b. Rules of Procedure

- Election of Management Board Members *BS/76 decision*

**Decision:** The Board approved the rules (Decision ESMA/2012/BS/89), Petr Stanek (CZ) objecting.

Proposals for procedures agreed in the Joint Committee: *BS/77 information*

- Cover note *Annex 1 decision*
- Rules of Procedure Board of Supervisors *Annex 2 decision*

The Board discussed the process for preparing common positions through the Joint Committee, in particular the extent to which the Board of Supervisors should provide input prior to discussions between ESA staff. The Executive Director explained that the ESAs have implemented a cooperation process for the purpose of producing common documents for efficiency purposes, whilst ensuring early input from the three Board of Supervisors. Staff will initiate the discussions, then get input from their respective Boards and then try and find common agreement through the Joint Committee, while the final decision-making remains at the Board of Supervisors. A note would be circulated to the Board on the process followed.

The Board discussed whether to provide for a periodic review of the rules of procedure and the scope for silence to mean consent in votes taken by written procedure.

**Decision:** The Board approved the revised rules of procedure (Decision ESMA/2012/BS/88), Petr Stanek (CZ) and Karl-Burkhard Caspari (DE) objecting. The latter opposed the fact that 3 members are necessary to appeal silence means consent. The rules would be reviewed in the future should the Board decide to do so.

- Mediation rules of procedure *Annex 3 decision*

The Board discussed the proposed decision. One member asked for the Board to be provided with information on cases as soon as possible in order to understand the issues that may need to be decided upon.

**Decision:** The mediation rules of procedure were approved (Decision ESMA/2012/BS/86).

– Breach of Union Law *Annex 4 decision*

The Board discussed the proposed decision, in particular the role of the Management Board in advising the Chair in the case of disagreement between the Chair and Vice-Chair. Karl-Burkhard Caspari (DE) indicated that the role of the Management Board in the Breach of Union Law Process does not correlate to its role under the ESMA regulation. He further indicated that the suggestion to involve and inform the Board of Supervisors at an early stage of the process should have been considered.

**Decision:** The breach of Union law rules of procedure were approved (Decision ESMA/2012/BS/87).

**11. IT – exchange of views on coordination by ESMA** *BS/78 discussion*

**Conclusion:** The discussion was postponed to the 11 September Board meeting.

**12. Corporate Reporting Standing Committee**

– Report by Julie Galbo *BS/79 information*

– IFRS activity report *Annex 1 decision*

**Decision:** The IFRS activity report was approved.

– Mandate for the review of the accounting practices on IAS 36 – Impairment of Assets *Annex 2 decision*

**Decision:** The mandate was approved.

**13. Corporate Finance Standing Committee**

– Report by Ronald Gerritse *BS/80 information*

– Q&As on Prospectus Directive *Annex 1 decision*

**Decision:** The Q&As were approved.

– Feedback statement on Empty Voting *Annex 2 decision*

**Decision:** The feedback statement was approved.

– Consultation Paper on Convertible Bonds *Annex 3 decision*

**Decision:** The consultation paper was approved for publication.

#### 14. ESMA-Pol

- Report by Konstantinos Botopoulos *BS/81 information*
- Task Force on market making under Short Selling Regulation - Terms of Reference *Annex 1 decision*

**Decision:** The terms of reference were approved.

- Methodology on transaction reporting consistency test *Annex 2 decision*

Kostas Botopoulos (GR) noted that if approved, each national competent authority would need to run the tests for the first time already in 2012.

**Decision:** The methodology was approved.

#### 15. Secondary Markets Standing Committee

- Report by Martin Wheatley (SMSC) *BS/82 information*

David Lawton (UK) presented the report.

- Micro-structural issues: progress report and proposal for a way forward on mechanisms to manage volatility, co-location, fee structures and tick sizes *Annex 1 decision*

**Decision:** The progress report and proposal were approved, Vittorio Conti (IT) dissenting.

- Revised protocol on the operation of notifications of MiFID Article 41 suspensions and removals of financial instruments from trading *Annex 2 decision & 3*

**Decision:** The revised protocol was approved.

#### 16. A.O.B.

#### 17. Future meetings *information*

- 11 September 2012 (Paris)
- 12 September 2012 (Paris) – Joint meeting with SMSG, 09:30h – 13:00h
- 24 September 2012 (Paris)
- 6 November 2012 (Nicosia, Cyprus)
- 18 December 2012 (Paris)

## Participants list

### Voting Members

Member State	Representative	Accompanying Person
Belgium	Jean-Paul Servais	Antoine van Cauwenberge
Bulgaria	Antoniya Gineva (alternate)	
Czech Republic	Petr Stanek	
Denmark	Julie Galbo	Hanne Råe Larsen
Germany	Karl-Burkhard Caspari	Philipp Sudeck
Estonia	Raul Malmstein	Gerle Reinumägi
Ireland	Gareth Murphy (alternate)	Brian Friel
Greece	Konstantinos Botopoulos	Eleftheria Apostolidou
Spain	Ana-Isabel Fernandez (alternate)	Antonio Mas
France	Thierry Francq	Françoise Buisson
Italy	Vittorio Conti (alternate)	Nicoletta Giusto
Cyprus	Liana Ioannidou (alternate)	
Latvia	Kristaps Zakulis	Sandis Andersmits
Lithuania	Vilius Sapoka (alternate)	
Luxembourg	Jean Guill	
Hungary	László Balogh (alternate)	

Malta	Mike Duignan (alternate)	
Netherlands	Ronald Gerritse	Pim De Wild
Austria	Kurt Pribil	Andrea Kuras-Goldmann
Poland	Iлона Pieczynska-Czerny (alternate)	Anna Skrzypek
Portugal	Carlos Tavares	- Carlos Alves - Manuel Ribeiro da Costa
Romania	Gabriela-Victoria Anghelache	- Carmen Negoita - Raluca Țariuc
Slovenia	Sabina Bešter (alternate)	
Slovakia	Slavomir Stastny (alternate)	
Finland	Anneli Tuominen	Ville Kajala
Sweden	Martin Andersson	Anna Jegnell
United Kingdom	David Lawton (alternate)	Cristina Frazer

### Non-voting members

ESMA Chair	Steven Maijoor	
European Commission	Emil Paulis	Emiliano Tornese
ESRB	Francesco Mazzaferro	Fabio Recine
EIOPA	Patrick Hoedjes	
EBA	Patricia Juanes-Burgos	



## Observers

Croatia	Silvana Bozic	
Iceland	Sigurveig Gudmundsdottir	
Liechtenstein	Marcel Lötscher	
Norway	Anne Merethe Bellamy	Kristin Lund

## ESMA

Chair	Steven Maijor
Executive Director	Verena Ross
Summary of Conclusions	Jonathan Overett-Somnier
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
Markets Division	Fabrizio Planta
Investment and Reporting Division	Richard Stobo Vicki Erfurt Larsen
Credit Rating Agencies Unit	Cristina Iudice



Economic Research and Financial Stability Unit	Antoine Bouveret
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Steven Maijoor  
Chair