

## SUMMARY OF CONCLUSIONS

### Board of Supervisors

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**Date:** 18 December 2018  
**Time:** 09h00 – 17h00  
**Location:** ESMA, rue de Grenelle 103, 75007 Paris, France  
**Contact:** [frederiek.vermeulen@esma.europa.eu](mailto:frederiek.vermeulen@esma.europa.eu) Tel: +33 1 58 36 43 37

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**1. Adoption of agenda** Decision

**Decision:** The agenda was adopted.

**2. Oral Report by Chair and Executive Director** Information

The Chair reported on:

- His meetings with European Commission Vice-President Jyrki Katainen to discuss the United Kingdom's (UK) withdrawal from the European Union (EU) and sustainable finance;
- His meeting with Chief Negotiator Michel Barnier to discuss the ongoing work in relation to the UK's withdrawal;
- The activities of the Joint Committee, in particular the fact that EIOPA will coordinate the Joint Committee from January 2019 onwards;
- The activities of the European Systemic Risk Board (ESRB), in particular the Board's monitoring of derivatives markets and the upcoming report on the treatment of interoperability arrangements;
- The activities of the International Organization of Securities Commissions (IOSCO), in particular the work to be conducted in relation to market fragmentation;
- The fact that ESMA will apply to become a liaison to the International Organization for Standardization (ISO);
- Waiting for feedback from the European Data Protection Board (EDPB) in order to move ahead with the draft administrative arrangement with third country competent authorities in the context of the General Data Protection Regulation (GDPR);
- The potential consequences if the equivalence decision for Switzerland on the MIFIR trading obligation of shares would not be renewed;
- The upcoming publications by the Risk Free Rate Working Group (RFR WG);
- ESMA's letter to two national competent authorities on the implementation of the reverse distribution mechanisms in the Money Market Funds Regulation (MMF);

- The December 2018 meeting of the Management Board, in particular the discussions on the 2020-2022 programming document; and
- The activities of the Securities and Markets Stakeholder Group (SMSG), in particular on the fact that the group will meet in its new composition on 5 February 2019.

The Executive Director reported on:

- The November and December 2018 meetings of the Financial Services Committee (FSC), in particular the ESMA presentations on trends, risk and vulnerabilities in EU securities markets and Fintech; and
- The fact that the Board of Appeal dismissed the suspension application requested in the context of the Appeal proceedings against Board Decisions sanctioning the violation of the CRA Regulation;

Robert Ophele informed the Board that the Post-Trading Standing Committee (PTSC) is looking at the potential timing gap between the expiration of the clearing obligation category 3 phase-in and the expected entry into force of the exemption regime for smaller financial counterparties under Refit.

### 3. Product Intervention

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| 1) Cover Note       | Discussion |
| 2) Renewal Decision | Decision   |

Merel Van Vroonhoven presented the Renewal Decision.

The Board discussed the Renewal Decision, in particular the:

- Need for national measures supplementing ESMA's decisions; and
- Fact that some market participants started developing practices circumventing the decisions.

**Decision:** The Board adopted the Renewal Decisions. Vojtěch Belling (CZ) abstained. Demetra Kalogerou (CY) supported the renewal of the measures but expressed concerns on the leverage ratio. The Chair highlighted the need to supplement ESMA's decisions by national measures.

### 4. UK's withdrawal from the European Union

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| 1) Overview of key developments and ongoing work | Discussion |
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**Conclusion:** The Executive Director presented the overview of key developments and ongoing work.

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| 2) Recognition of UK CCPs and CSDs | Discussion |
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The Head of Markets Department presented the note on the recognition of UK CCPs and CSDs.

The Board discussed the note, in particular:

- The need for having memoranda of understanding between national competent authorities, ESMA and UK authorities in place in due time; and
- Whether ESMA should publish a statement providing further information on the recognition of UK CCPs and the Central Securities Depository (CSD).

**Conclusion:** The Board agreed to provide further information to the relevant CCPs and to issue a Statement on ESMA's website providing further information. The Board highlighted the importance of progressing quickly in this area. It was agreed that ESMA staff together with the MoU Project Group should move ahead on the memorandum of understanding between national competent authorities and the UK authorities in the context of recognition of EU CCPs/CSDs in the UK and the need to also support information exchange between the UK and the EU regarding UK clearing members.

- 3) Access to EU by UK trading venues Discussion

**Conclusion:** The Board took note of the report on access to the EU by UK trading venues.

- 4) Approach to the systematic internaliser calculations Discussion

**Conclusion:** The Board took note of the approach to the systematic internaliser calculations.

- 5) The trading obligation for derivatives Discussion

**Conclusion:** The Board took note of the report on the trading obligation for derivatives.

- 6) High frequency trading and direct electronic access Discussion

**Conclusion:** The Board took note of the report on high frequency trading and direct electronic access.

- 7) Update on memoranda of understanding with UK Financial Conduct Authority Discussion

The Executive Director presented the update on the interactions with the UK Financial Conduct Authority on the conclusion of memoranda of understanding.

The Board discussed the update, in particular

- The concept of ‘onward sharing’ to other UK (or EEA) authorities;
- The governance framework around potential future amendments to the memorandum;
- How to ensure that all relevant national authorities enter into the memorandum;
- The interaction with the IOSCO multilateral memorandum of understanding; and
- Whether bilateral agreements can be concluded between national and UK authorities.

**Conclusion:** The Board took note of the update and asked the Executive Director to continue the discussions with the UK FCA on onward-sharing with the aim of having a memorandum of understanding to be adopted by the January 2019 Board of Supervisors. The Board also agreed that in case national competent authorities enter into bilateral agreements with UK authorities such agreements should be shared with ESMA. The Board confirmed that once the MoU is in place, ESMA will continue to coordinate potential amendments to the signed MoU which would then be submitted to the Board for approval by simple majority. It was clarified that it is ultimately up to each national competent authority to decide whether or not to sign the memorandum or any amendments thereto.

- 8) Impact on position of UK representatives and experts in ESMA’s decision making Discussion

The Executive Director presented the potential impact on the position of UK representatives and experts in ESMA’s decision-making post-withdrawal by highlighting that this will depend on whether or not the withdrawal agreement will be ratified by the EU and the UK and any further guidance to be issued by the EU Institutions in that context.

The Board discussed the position of UK representatives and experts in ESMA decision-making, in particular:

- The need to follow any potential further guidance to be issued by the EU Institutions;
- The importance of maintaining good co-operation with the UK authorities from a supervisory and regulatory perspective;
- The need to align the policies between the ESAs; and
- How national competent authorities will need to step-up their contributions to ESMA.

**Conclusion:** The Board took note of the report.

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| 9) Letter to the European Commission | Discussion |
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Elisabeth Roegele presented the proposed letter to the European Commission.

The Board discussed the letter, in particular:

- Whether there is a need for additional tools to ensure a rapid response if needed following the UK's withdrawal and to avoid regulatory or supervisory arbitrage;
- The functioning of the existing equivalence systems under EU law;
- The need for market participants to ensure the necessary preparations in relation to the UK's withdrawal from the Union; and
- The trading obligation for shares.

**Conclusion:** The Board invited the Chair to send a letter to inform the Commission on ESMA's ongoing work in relation to the UK's withdrawal.

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| 10) Statement on Information to clients of investment firms | Decision |
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**Decision:** The Board adopted the statement on information to clients of investment firms.

## 5. Crypto Assets

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| 1) Cover Note  | Discussion |
| 2) Advice on the Status of Financial Instruments and Regulation of Crypto-assets | Decision   |
| 3) Annex to advice – legal qualification of crypto-assets                        | Decision   |

Jean-Paul Servais presented the advice on the status of financial instruments and the regulation of crypto-assets.

The Board discussed the advice, in particular:

- Its interaction with existing EU law and the need for further harmonisation within the Union;
- The need for ESMA to continue promoting supervisory convergence;
- The anti-money laundering concerns surrounding crypto-assets; and
- Concerns on investment funds investing in crypto-assets.

**Decision:** The Board adopted the advice (and the annex) on the status of crypto-assets as financial instruments and the regulation of crypto-assets. The Board instructed the Financial Innovation Standing Committee (FISC) to come back to the Board (i) on how to promote supervisory convergence (on the assessment of crypto-assets in the current legal environment) and (ii) whether further work is needed on funds investing and trading in crypto-assets.

## 6. Cost and performance of retail investment products

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| 1) Cover Note   | Discussion |
| 2) Presentation | Discussion |
| 3) Report       | Decision   |

Carmine di Noia and the Head of Risk Analysis and Economics Department presented the report on cost and performance of retail investment products.

The Board discussed the report, in particular:

- The need to assess the policy implications of the report;
- The importance of continuing the research.

The European Commission representative informed the Board on the workshop the Commission is organising on the reports to be submitted by the European Supervisory Authorities.

**Decision:** The Board adopted the report on cost and performance of retail investment products.

## 7. Supervisory Briefing on disclosure of inside information

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| 1) Cover note  | Discussion |
| 2) Issues Note | Decision   |

Nicoletta Giusto presented the supervisory briefing on disclosure of inside information.

The Board discussed the supervisory briefing, in particular:

- Whether the supervisory briefing should be made public; and
- The most appropriate tool to promote supervisory convergence.

**Decision:** The Board adopted the supervisory briefing on disclosure of inside information and instructed the Market Integrity Standing Committee (MISC) to discuss whether the briefing should be made public, and if so, the most appropriate tool for doing so.

## 8. Accepted market practices under Article 13(10) MAR

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| 1) Cover Note                          | Discussion |
| 2) Report on Accepted Market Practices | Decision   |

Nicoletta Giusto presented the accepted market practices under Article 13(10) MAR.

The Board discussed the report on accepted market practices, in particular the concerns on the fact that the French AMF accepted market practice on liquidity contracts allows for deviations from the ESMA points for convergence.

**Decision:** The Board adopted the report on accepted market practices under Article 13(10) MAR subject to a drafting amendment. Robert Ophele (FR) disagreed.

## 9. Cum-Ex transaction for tax purposes

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| 1) Issues Note | Discussion |
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Nicoletta Giusto presented the note on the cum-ex transactions for tax purposes.

The Board discussed the note, in particular:

- To which extent the practices are harming market integrity and fairness;
- The lack of a legal basis to share data obtained from supervised entities with national tax authorities; and
- The need to analyse the schemes further to better understand the magnitude and the role of financial market participants.

**Conclusion:** The Board took note of the report and decided (i) to conduct further legal analysis on the possibility of sharing information with national tax authorities and (ii) further analyse the schemes and to promote information sharing between national competent authorities.

## 10. EU-wide CCP stress-testing approach

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| 1) Issues Note | Decision |
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Robert Ophele presented the note on the EU-wide CCP stress-testing approach.

The Board discussed the approach, in particular:

- The proposed governance, in particular whether ESMA should seek direct contacts with CCPs for the purpose of conducting the stress-test;
- Whether the liquidity elements should be removed from the test; and
- The proposal to cover concentration risk for the first time.

**Decision:** The Board agreed with the suggested approach on the EU-wide stress-testing approach by maintaining the liquidity elements and covering concentration risk. Regarding the proposed governance, the Board decided that communication to and with CCPs should take place through the national competent authorities.

## 11. CSDR internalised settlement reporting

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| 1) Issues Note                                      | Decision |
| 2) Note sent to Management Board on 6 November 2018 | Decision |
| 3) Survey responses                                 | Decision |
| 4) BaFin Proposal                                   | Decision |

The Executive Director presented the note on the possibility of a delegation project under CSDR.

The Board discussed the note, in particular:

- The implementation status of the IT-project by national competent authorities;
- The economies of scale by launching the project at EU level compared to the risks associated with such an approach;
- Whether it would be feasible to leverage on the implementation of the project by a national competent authority; and
- The scope of the data to be reported and its added value for competent authorities.

**Decision:** The Board decided not to start a delegation project to ESMA under the CSDR. The Board noted that national competent authorities can enter into bilateral delegation agreements. The Board instructed the Committee on Information Technology Management and Governance (ITMG) and the Post-Trading Standing Committee (PTSC) to consider the possibility to further align the reporting start date.

## 12. Sustainable Finance

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| 1) Cover Note   | Discussion |
| 2) Presentation | Decision   |

The Head of Corporate Affairs Department presented the work ESMA is conducting in relation to sustainable finance and the papers presented for adoption.

The Board discussed the note, in particular the need to set-up a network involving the technical experts of the national competent authorities.

**Conclusion:** The Board took note of the report.

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| 3) Consultation Paper on integrating sustainability risks and factors in MIFID II | Decision |
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**Decision:** The Board adopted the consultation paper on integrating sustainability risks and factors in MIFID II.

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| 4) Consultation paper on integrating sustainability risks and factors in the UCITS Directive and AIFMD | Decision |
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**Decision:** The Board adopted the consultation paper on integrating sustainability risks and factors in the UCITS Directive and AIFMD.

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| 5) Consultation Paper on disclosure requirements applicable to credit ratings including sustainability considerations | Decision |
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**Decision:** The Board adopted the consultation paper on disclosure requirements applicable to credit ratings including sustainability considerations.

### 13. Enforcement Network

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| 1) Note on the extension of the Mandate Enforcement Network | Decision |
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**Decision:** The Board agreed with the proposed extension of the mandate of the Enforcement Network.

### 14. 2020-2022 Programming Document

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| 1) Cover Note                     | Discussion |
| 2) 2020-2022 Programming Document | Discussion |
| 3) IT Work Programme              | Discussion |

The Executive Director presented the 2020-2022 Programming Document and provided the Board with a summary of the discussions that took place during the December 2018 Management Board.

**Conclusion:** The Board endorsed the overall direction and was invited to share further comments on the proposed 2020-2022 programming document in writing. The revised Programming Document will be presented for approval to the January 2019 Board of Supervisors.

### 15. CRA Technical Committee

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| 1) CRA TC Report | Information |
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**Conclusion:** The Board took note of the CRA TC Report.

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| 2) Q&A on Errors in Methodologies | Decision |
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**Decision:** The Board adopted the Q&A on errors in methodologies.

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| 3) | Final Report on the draft Technical Standards on cooperation among competent authorities and the ESAs under the Securitisation Regulation | Decision |
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**Decision:** The Board adopted the Final Report on the draft Technical Standards on cooperation among competent authorities and the ESAs under Securitisation Regulation.

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| 4) | Terms of Reference for the Securitisation Task Force | Decision |
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**Decision:** The Board adopted the Terms of Reference for the Securitisation Task Force.

#### **16. Commodity Derivatives Task Force**

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| 1) | CDTF Report | Information |
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**Conclusion:** The Board took note of the CDTF Report.

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| 1) | Amendment to the C6/7 guidelines for MiFID II | Decision |
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**Decision:** The Board adopted the amendment to the C6/C7 Guidelines for MIFID II.

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| 2) | MIFID II Q&As | Decision |
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**Decision:** The Board adopted the Q&As.

#### **17. Investor Protection and Intermediaries Standing Committee**

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| 1) | IPISC Report | Information |
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**Conclusion:** The Board took note of the report.

#### **18. Market Integrity Standing Committee**

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| 1) | MISC Report | Information |
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**Conclusion:** The Board took note of the report.

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| 2) | Guidelines on non-significant benchmarks | Decision |
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**Decision:** The Guidelines on non-significant benchmarks were adopted.

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| 3) | BMR Q&As | Decision |
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**Decision:** The Q&As were adopted.

#### **19. Post-Trading Standing Committee**

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| 1) | PTSC Report | Information |
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**Conclusion:** The Board took note of the Report.

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| 2) | Consultation Paper on Guidelines on settlement fails reporting | Decision |
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**Decision:** The Board adopted the consultation paper on Guidelines on settlement fails.



- 3) Consultation Paper on Guidelines on standardised procedures and messaging protocols Decision

**Decision:** The Board adopted the consultation paper on Guidelines on standardised procedures and messaging protocols.

- 4) Terms of Reference for Stress-test Task Force Decision

**Decision:** The Board adopted the terms of reference for the Task Force on stress-testing.

## 20. Secondary Markets Standing Committee

- 1) SMSC Report Information

**Conclusion:** The Board took note of the SMSC Report.

- 2) CFI code – MIFIR identifier mapping table Decision

**Decision:** The Board adopted the MIFIR identifier mapping table.

- 3) MIFID Q&As Decision

**Decision:** The Board adopted the Q&As.

## 21. 2019 budget

- 1) Cover Note Discussion
- 2) Revenue Decision

**Decision:** The Board adopted the 2019 revenues.

- 3) Expenditure Decision

**Decision:** The Board adopted the 2019 expenditures.

- 4) NCA's Contributions Decision

**Decision:** The Board adopted the 2019 contributions.

## 22. ESMA work on ESRB recommendations on leverage under the AIFMD

- 1) Update Decision

**Decision:** The Board took note of the update and agreed with the suggested timing.

## 23. Mandate Peer Review on Suspicious Transaction and Order Reports

- 1) Cover Note Information
- 2) Mandate Peer Review Decision

**Decision:** The Board adopted the mandate for the peer review on suspicious transaction and order reports.

**24. Publication of third-country venues under the ESMA Opinion**

1) Issues Note

Decision

**Decision:** The Board took note of the suggested approach and agreed with the proposed delay.

**25. A.O.B.**

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## Participants list

### Voting members

Member State	Representative	Accompanying Person
Belgium	Jean-Paul Servais	Antoine van Cauwenberge
Bulgaria	Mariyan Ivanov (alternate)	
Czech Republic	Vojtěch Belling	Karel Juras
Denmark	Karen Dorte Abelskov	Anne Bruun
Germany	Elisabeth Roegele	Marcus Hein
Estonia	Andre Nomm	
Ireland	Derville Rowland	Colm Kincaid Cian Murphy
Greece	Charalampos Gotsis	Vasiliki Koularmani
Spain	Sebastian Albella	Antonio Mas
France	Robert Ophele	Benoit de Juvigny Viet-Linh Nguyen
Croatia	Ante Žigman	
Italy	Carmine Di Noia (alternate)	Nicoletta Giusto
Cyprus	Demetra Kalogerou	Andreas Andreou
Latvia	Gunta Razane	

Lithuania	Vaidas Cibas (alternate)	
Luxembourg	Françoise Kauthen (alternate)	
Hungary	Gergő Szeniczey	
Malta	Marianne Scicluna	
Netherlands	Merel van Vroonhoven	Fleur de Roos
Austria	Klaus Kumpfmüller	Andrea Kuras-Goldmann
Poland	Ilona Pieczyńska-Czerny	Joanna Kott
Portugal	Gabriela Figueiredo Dias	João Gião Rita Oliveira Pinto
Romania	Florentina Boboc (alternate)	Raluca Tariuc
Slovenia	Milos Cas	Sabina Bešter
Slovakia	Tomas Ambra (alternate)	Adam Nadasky
Finland	Eeva Granskog (alternate)	
Sweden	Malin Omberg (alternate)	Fredrik Elmberg
United Kingdom	Andrew Bailey	Cristina Frazer Kevin Bridgewater

### Non-voting members

ESMA Chair	Steven Maijor	
European Commission	Ugo Bassi	Ellen Boelema
EBA	Anne Tiedemann	
EIOPA	Kai Kosik	
ESRB	Francesco Mazzaferro	
Iceland	Pall Fridriksson (alternate)	
Liechtenstein	Marcel Lötcher	
Norway	Geir Holen (alternate)	Marianne Elind Skaane
EFTA Surveillance Authority	Gunnar Thor Petursson (alternate)	

### ESMA

Executive Director	Verena Ross
Summary of Conclusions	Frederiek Vermeulen
Head of Markets Department	Fabrizio Planta
Head of Risk Analysis and Economics Department	Steffen Kern



Done at Paris on 8 February 2019

Steven Majoor

For the Board of Supervisors