



## ADVICE TO ESMA

### European Commission's legislative proposal following the review of the Operations of the European Supervisory Authorities COM(2017) 536 final

### SMSG comments on the proposals regarding the operation of the ESAs' Stakeholder Groups

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#### I. Executive summary

The European Commission published proposals for the reform of the ESAs on 21 September 2017. This follows its public consultation of March 2017 and the stakeholder response to this consultation. The Commission's proposals are very wide-ranging, covering a large number of proposed changes to the ESAs and to the ESRB. The changes to the ESA, inter alia, aim to intensify supervisory convergence, and also propose changes to the funding and governance model of the ESAs. There is a sub-set of proposals that focus on the role and operation of the ESAs' Stakeholder Groups, including therefore the SMSG. The SMSG considers that it is important to comment on this sub-set of issues. In general, the SMSG is supportive of the proposed changes, although some further thought may be needed to ensure that the Commission's aims in proposing these changes are fulfilled. As regards the proposed new role for the Stakeholder Groups regarding guidelines and recommendations, however, the views of the SMSG are divided as to the overall merits of this proposal.

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#### II. Introduction

On 20 September 2017 the European Commission published proposals for changes in the governance and operation of ESAs,<sup>1</sup> following the Commission's review of the operation of the ESAs earlier in the year.<sup>2</sup> The purpose of this note is to comment on a sub-set of those proposals, regarding the operation of the ESAs' Stakeholder Groups (SHGs).

In particular, four proposals to amend Regulation (EU) No 1095/2010 establishing ESMA are put forward regarding the operation of the SMSG:

1. Article 37 to be amended as follows:  
in paragraph 4 of the Article, the last sentence of the first subparagraph is replaced by the following:

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<sup>1</sup> COM(2017) 536 final, 20 September 2017.

<sup>2</sup> European Commission, Public Consultation on the Operation of the European Supervisory Authorities, 21 March 2017. For the SMSG's comments in response to this consultation see: [https://www.esma.europa.eu/sites/default/files/library/esma22-106-210\\_smsg\\_advice\\_response\\_to\\_public\\_consultation\\_on\\_the\\_esas.pdf](https://www.esma.europa.eu/sites/default/files/library/esma22-106-210_smsg_advice_response_to_public_consultation_on_the_esas.pdf)

"Members of the Securities and Markets Stakeholder Group shall serve for a period of four years, following which a new selection procedure shall take place."

2. Article 37 amended to add:

"Where members of the Securities and Markets Stakeholder Group cannot reach a common opinion or advice, the members representing one group of stakeholders shall be permitted to issue a separate opinion or separate advice."

3. Article 37 amended to add:

"The Securities and Markets Stakeholder Group, the Banking Stakeholder Group, the Insurance and Reinsurance Stakeholder Group, and the Occupational Pensions Stakeholder Group may issue joint opinions and advice on issues related to the work of the European Supervisory Authorities under Article 56 of this Regulation on joint positions and common acts."

4. Article 16 amended to add:

"Where two thirds of the members of the Securities and Markets Stakeholder Group are of the opinion that the Authority has exceeded its competence by issuing certain guidelines or recommendations, they may send a reasoned opinion to the Commission."

The Commission shall request an explanation justifying the issuance of the guidelines or recommendations concerned from the Authority. The Commission shall, on receipt of the explanation from the Authority, assess the scope of the guidelines or recommendations in view of the Authority's competence. Where the Commission considers that the Authority has exceeded its competence, and after having given the Authority the opportunity to state its views, the Commission may adopt an implementing decision requiring the Authority to withdraw the guidelines or recommendations concerned. The decision of the Commission shall be made public."

In addition, other proposed changes do not specifically reference the SHGs, but will have potential implications for the operation of the SHGs in the future and therefore require consideration. In particular, the Commission proposes a new governance structure for the ESAs including, amongst other things, the introduction of an independent Executive Board. The Commission's proposals are silent as to the relationship between this new body and the SHGs.

### **III. Comments**

#### **1. Extension of the period of service to 4 years**

This proposed amendment would extend the period of service as a member of the SMSG from 2.5 years to 4 years. It does not alter the ability of SMSG members to apply for a second term.

The SMSG has previously noted<sup>3</sup> that the term of 2.5 years is rather short for membership of this group, as it can take a period of time to become familiar with the group and its operations. There is therefore support for extending the period beyond 2.5 years, in order to enhance the effectiveness of the SMSG. If the term is lengthened it may be useful to consider staggering the entry and exit from the group (eg, half the group being changed every 2 years) as this could enhance continuity of knowledge and experience, and help with building institutional memory.

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<sup>3</sup> See SMSG contribution to the ESFS Consultation: An SMSG review of the ESAs' including a self-assessment SMSG/2013/013, 18 July 2013, pp 12 and 16.

## **2. Minority opinions**

The SMSG recognises the importance of ensuring that minority opinions are heard. This is something that the SMSG already facilitates. Its procedures allow a minority of three or more members who consider their views not to be adequately reflected in the opinion of the group to be entitled to include a minority opinion in the group opinion. The SMSG is of the view that this procedure works well and does not believe that change in the ESMA Regulation is required to deal with this issue.

While the overall thrust of the Commission's proposals therefore aligns with current SMSG practice, the detail of the proposals introduces some differences, specifically:

- whereas the current SMSG practice is to allow any 3 or more members to express a view, the proposal refers to "the members representing one group of stakeholders". Requiring the minority view to be drawn from one stakeholder group is potentially more restrictive than the current approach; and
- whereas the current practice is for the minority view to be incorporated within the SMSG advice, this proposal suggests that a separate opinion or advice would be issued by the minority, which may impact the visibility of the minority view.

The SMSG supports the motivation behind these proposals but is of the view that any changes of this kind must be implemented in a flexible and pragmatic manner. It would be a matter of concern if this proposal had the effect of limiting the existing SMSG competence. However, this proposal is less problematic if it continues to allow SHGs to develop their own arrangements alongside this new mechanism.

## **3. Joint opinions with other SHGs**

The SMSG welcomes this suggestion and strongly supports this proposed change. There are a number of other issues which flow from this suggestion, however, that need to be considered in order to facilitate this joint work. First, such joint work will need to be financed. In particular, if there are to be meetings between representatives of the different SHGs in order to consult on and prepare joint responses, such meetings will need to be financed by the ESAs. Second, the issues on which the SHGs are asked to consult will need to be revisited. For example, at present the SHGs are not formally invited to comment on the work of the joint committees of the ESAs.

There may be other, more practical, matters that will need to be considered, such as the length of time available for SHGs to comment on proposals, since consultation between SHGs will necessarily add to the time required to comment on proposals.

## **4. Commenting on Guidelines and Recommendations**

The SMSG agrees that increased scrutiny of guidelines and recommendations is important and supports the European Commission's desire to address this issue. However, the members of the SMSG are divided on the overall merits of the introduction of this proposed new role for the SHGs. Many members of the SMSG, while recognising the value of having effective checks and balances in the system for guidelines and recommendations, express concerns about this proposed change in the nature of the SMSG's role. This group believes these developments may not be beneficial for the perception of the SMSG, or its ability to fulfil its current role. This group raises three particular concerns:

- The SMSG acts as an advisory group to ESMA, with no role to intervene in regulatory affairs. This new power would potentially change the SMSG's role into something more supervisory, and this change could interfere with the SMSG's core function.

- The proposal may create unrealistic expectations of the ability of the SMSG to perform this new role. In part this is because the Commission's proposals seem to be predicated on a view that the SMSG scrutinises and provides views on all consultations at present, whereas this is not the case in practice. Another aspect of this concern arises from the technical legal nature of the test that the SMSG is asked to apply ("exceeded its competence"). It is not clear that the SMSG would be well placed to form the view as to whether this test had in fact been met in a given situation.
- This role might expose the SMSG to lobbying, as interest groups seek to encourage the SMSG to use this power in relation to specific provisions.

Other members of the SMSG view the Commission's proposal in a more positive light, regarding the SHGs as being well placed to perform this proposed role. This group notes, in response to potential concerns, that the proposed issuance of an opinion by SHGs is non-suspensive, that it requires a high hurdle before it is triggered by the SHGs (a super-majority) and that it is entirely discretionary. Some members of the SMSG recognise that while the SHGs may not be the ideal group to perform this role, they may nevertheless be the best option available at present to perform this role. This last group supports the development of alternative mechanisms of scrutiny, one possible option being a development of the role of the Joint Board of Appeal of the ESAs.

## **5. Relationship between the SHGs and the Executive Board**

The SMSG currently meets with the Chair and Executive Director of ESMA and with the Board of Supervisors. These relationships are crucial for the effective operation of the SMSG. The Commission's proposals envisage a number of significant changes to ESMA's governance structure, not least the deletion of the role of Executive Director, the replacement of the Management Board with an Executive Board and an enhancement of the role of the Chair. It is envisaged that the Executive Board will be independent, with full time members, and will prepare decisions to be taken by the Board of Supervisors.

It would be helpful to clarify the relationship between the SMSG and these various committees and individuals for the future. The SMSG would want to retain its close and effective relationship with the Chair and to continue to meet the Board of Supervisors at least twice a year as at present. Some mechanism for dialogue with the Executive Board would also be valuable, whether that is by way of regular meetings or some other means of effective communication.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 8 February 2018

[signed]

Rüdiger Veil

Chair  
Securities and Markets Stakeholder Group