



## SUMMARY OF CONCLUSIONS

### Board of Supervisors

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**Date:** 20 December 2011  
**Time:** 09:00 – 17:00h  
**Location:** ESMA, 103 rue de Grenelle, 75007 Paris  
**Contact:** steven.maijoor@esma.europa.eu T: +33 1 58 36 51 12

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No Items

**1. Adoption of agenda** *BS/232 decision*

**Decision:** The agenda was adopted as proposed.

**2. Summary of conclusions of November meeting and conference call** *BS/233 decision  
BS/234*

**Decision:** The summaries of conclusions were approved.

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

The Chair reported on:

- meetings with the European Parliament, Commissioner Barnier and Jonathan Faull, noting in particular discussions on budgetary implications of new legislative proposals, moving to 100% Union and CRA funding for ESMA, and the need for reasonable timescales to be set in legislation for producing technical standards;
- the November meeting of the Securities and Markets Stakeholder Group with a joint meeting with the Board of Supervisors to be held on the morning of 15 February 2012;
- the Management Board's appointment of two alternates to the Board of Appeal: Lars Afrell and Gerard Rameix; and the inaugural meeting of the Board of Appeal which had focused on procedural issues;
- international developments regarding participation in IOSCO and the Monitoring Board;
- a meeting with Japanese, US, Singaporean, Canadian and Hong Kong authorities to look at potential regulatory gaps and overlaps in EMIR and the Dodd-Frank Act and similar legislation, focusing on regulation and recognition of CCPs, swap dealers and trade repositories; a further meeting will be held in



Toronto in February;

- the Management Board meeting of 19 December 2011; and
- the election for three Management Board vacancies to be held in the February meeting of the Board of Supervisors with a deadline of 13 January 2012 deadline for submitting indications of interest.

Emil Paulis (EC) noted the Commission's support for ESMA being able to prepare high quality technical standards, but that given current market circumstances it was necessary for work to be carried out more quickly than would normally be the case. Mr Paulis also noted that ESMA's advice was considered essential to the preparation of Commission delegated acts. The Chair noted that although the 12 month deadlines could be speeded up in crisis situations, the four months given by the Short Selling Regulation was too little.

The Executive Director reported on:

- her participation in a European Parliament hearings on MiFID/MiFIR; and
- continuing discussions regarding ESMA's participation in Council working groups as an observer.

Following a request, it was agreed to extend the deadline for approval of the 2012 work programme by one day.

- Current market developments *discussion*

The Board discussed the current market situation, including:

- the initial findings of the expanded sovereign CDS data collection exercise and AMF studies of the French CDS market;
- the operation of the CDS market and the relationship between bond and CDS prices;
- implications for crisis planning within ESMA and in national competent authorities;
- the role of securities and markets regulators in relation to closed markets, which is focused on ensuring the effective functioning of market infrastructure and ensuring transparency of information;
- the continuing short selling restrictions in certain countries; and
- the outcome of the December European summit.

**Conclusion:** The Chair supported comments regarding the seriousness of the situation, and the need to prepare for potential scenarios with a focus on practical issues, recognising the limits on what securities and markets regulators can achieve. It was agreed that the CDS data set should be expanded further to cover a wider range of Member States and a summary of messages for possible wider communication should be brought to the Board of Supervisors. Pricing issues raised in the discussion should be considered further. The relevant Standing Committees would analyse the data collected by ESMA staff, subject to further consideration of confidentiality issues.



- Letters to IOSCO and Monitoring Board *2011/410 information*  
*2011/381*
- Letter from Karl-Burkhard Caspari

**Conclusion:** The letter from Karl-Burkhard Caspari would be scheduled for discussion in the February meeting of the Board of Supervisors.

#### 4. Crisis management

- Report by ESMA staff *BS/235 information*
- Crisis management in ESMA *Annex 1 discussion*
- Letter to the European institutions *Annex 2 decision*

The Chair and Head of the Legal, Cooperation and Convergence Unit presented the crisis management report. The Board discussed the report, in particular:

- the scope of ESMA’s powers under Article 18 of the ESMA Regulation and the nature of the change in powers in the event of an emergency situation;
- the intentions of the legislators;
- the limits on national competent authorities to share firm-specific data with ESMA when there is currently no over-arching legislation at European level, for example in relation to CCPs;
- the need to extend the analysis to cover the practical steps that ESMA would like to be able to take in emergency situations;
- the risks presented by ESMA and national competent authorities being considered by stakeholders to have more powers than they actually have; and
- the complexity of the process established in the legislation for taking measures under the emergency powers and whether to seek clarifications or amendments to the powers through the forthcoming crisis framework proposal.

Jean-Paul Servais (BE) expressed concern that discussions had taken place with other bodies before the discussion came to the Board of Supervisors. Carlos Montalvo (EIOPA) noted that while final decision-making rests within the individual ESAs, for cross-sectoral issues the Joint Committee is the appropriate forum for discussions to take place and that it is crucial for the ESAs to discuss between themselves issues that are relevant to all three to ensure that different approaches are not taken unnecessarily.

Emil Paulis (EC) noted the Commission’s full agreement with the legal analysis set out in the paper. While the Commission would like to see further powers the current powers need to be interpreted in a strict sense. Mr Paulis considered that it was not too early to express concern about a lack of competence in certain areas as it is important when the Commission is preparing the review of the ESAs, but that it was not for the legislator to interpret its own act and this was the responsibility of the Court of Justice.

**Conclusion:** The Chair noted that it is important to separate ESMA’s preferences and policy against the analysis of the existing scope of the powers. It would be very inconvenient for the ESAs to reach different

analyses of their powers, and the matter had also been discussed in the Management Board given that it is close to ESMA's day-to-day work. The legal analysis would be considered further taking account of the comments made, and ESMA's work would also look at what ESMA and national competent authorities should be able to do in different crisis scenarios. A meeting would be arranged with national legal advisers to consider whether there was scope for pushing the boundaries of the powers further, with the analysis returning for discussion to the February meeting of the Board. ESMA's strategy on further powers would be considered separately, following on from that legal analysis. The Board agreed not to send the draft letter to the European institutions.

#### 5. **Governance and chairmanship of ESMA standing committees** *BS/236 decision*

The Chair presented the proposal regarding chairmanship of ESMA standing committees. The Board discussed the proposal, in particular:

- support for aligning chairs' terms and for Board of Supervisors members being appointed as chairs where possible;
- the timing of the appointment process in 2012; and
- the scope for reshaping the current standing committees.

**Decision:** The Board agreed to extend the mandate of current standing committee chairs pending a re-appointment to be arranged in the course of 2012. A proposal would be brought to a forthcoming Board concerning the process for reappointing the chairs, with the reappointment to take place in the first half of 2012. The structure of the existing standing committees would be reconsidered as part of the process.

- ESMA groups procedures *Annex discussion*

The Executive Director presented the proposal to revise the procedures under which ESMA's groups operate. The Board discussed the proposal, in particular:

- the need for competent authorities to provide adequate support to sub-groups while facilitating consultation of smaller authorities that are unable to participate in all sub-groups;
- that sub-groups should in principle be chaired by a member of the relevant standing committee;
- external representation of ESMA and the ability of the chair of a standing committee to be present when matters falling within its remit are being discussed by ESMA with external parties;
- the respective roles of the chair, standing committee and ESMA staff;
- the size of groups and the role of expert groups;
- the need for sub-groups to be chaired by someone with appropriate expertise; and
- the need for documents to be circulated in good time before Board of Supervisors meetings.

**Conclusion:** The Chair noted that ESMA's first year of work had been conducted in good collaboration between national authorities and ESMA staff, but at the same time the issues need to be considered to ensure it is clear how ESMA operates. While it is important that ESMA and the national competent au-

thorities would continue its good cooperation, there had been changes moving from CESR to ESMA that need to be reflected in the group procedures. These changes include the role of the Chair in preparing the work of the Board of Supervisors and representing ESMA. ESMA staff should also be able to chair sub-groups, although whether they do will depend to some extent on the availability of national competent authority resources. The proposals would be revised in the light of the discussion and to make it clearer what changes are proposed from the existing CESR document guidelines. The revised proposal would be brought to the Board for decision in February. The Chair asked for written comments from members on the proposals by 3 January 2012.

## 6. Credit Rating Agencies

The Executive Director presented the credit rating agencies reports.

- Regulatory technical standards *BS/237 decision (QMV)*

**Decision:** The Board approved the draft regulatory technical standards for endorsement by the Commission and approved the final report for publication.

- Third country issues *BS/238 decision /discussion*
  - Extension of grace period for endorsement *Annex 1 decision*

Corinne Kaufman (EBA) explained how EBA had assessed the impact of the grace period for endorsement not being extended.

**Decision:** Having consulted the EBA and EIOPA, and taking account of the potentially significant detriment to financial market participants if the grace period for endorsement were not extended, the Board approved the extension of the grace period for endorsement by three months. A press release would be issued to communicate the decision, and indicate those countries which are being considered for potential endorsement within the extended grace period.

- Endorsement decision for Australia *Annex 2 decision*

**Decision:** The Board approved the decision to endorse Australia.

- MoU with Australia *Annex 3 decision*

**Decision:** The MoU with Australia was approved.

- Draft MoU with the US *Annex 4 discussion*

The Board discussed the draft MoU, in particular:

- the scope for using the IOSCO MoU as a basis for the MoU with the US;
- confidentiality issues arising from on-site visits being made by third country regulators;
- the extent to which the draft MoU purports to extend beyond CRAs;

- the scope to endorse the US based on the existing regulatory provisions of the US Dodd-Frank Act;
- the reciprocal nature of any ability to carry out on-site inspections in each others' territories.

**Conclusion:** ESMA staff would prepare a proposal for endorsement of the US for the February meeting of the Board of Supervisors and take forward discussions on the draft MoU taking account of the discussion in the Board.

- Recapitulation table on third-country endorsement *Annex 5 discussion*
- Supervisory work programme 2012 *BS/239 discussion*

The Board discussed the initial 2012 work programme, in particular:

- the need to ensure that smaller CRAs are supervised effectively, as well as larger ones; and
- in relation to use of delegation, the need to follow the process set out in the guidelines on delegation.

**Conclusion:** ESMA staff would bring a more detailed proposal to a future Board meeting.

## 7. Secondary Markets Standing Committee

- Report by Martin Wheatley *BS/240 information*

Martin Wheatley presented his report.

- Pre-existing pre-trade transparency waivers:
  - Proposal to finalise the review of existing pre-trade transparency waivers *Annex 1 decision*
  - List of pre-existing functionalities where some SMSC members do not agree with the view of the notifying authority that the waiver is MiFID compliant *Annex 2 information*
  - List of systems considered as MiFID compliant *Annex 3 information*

The Board discussed the proposal, in particular the process for taking a decision on those functionalities where some SMSC members do not agree with the view of the notifying authority that the waiver is MiFID compliant, and whether silence should continue to be treated as consent when voting on opinions on pre-trade transparency waivers.

**Conclusion:** The decision on those functionalities where some SMSC members do not agree with the view of the notifying authority should be taken at the February meeting of the Board of Supervisors.

**Decision:** The Board approved opinions on those waivers set out in Annex 3 to Martin Wheatley's report which had been agreed by members of the SMSC as MiFID compliant.

- Guidelines on systems and controls in a highly automated environment



- Final Report on Guidelines on systems and controls in a highly automated environment *Annex 4 decision (QMV)*
- Draft public statement *Annex 5 decision*

In response to questions, ESMA staff confirmed that the proposal was that only competent authorities are expected to report to ESMA whether they intend to comply with the guidelines, and where a Member State has more than one relevant competent authority each will need to confirm compliance to ESMA.

**Decision:** The Board approved the final report, public statement and near-final guidelines with translations of the guidelines to be finalised under the Chair's responsibility.

- Terms of reference for next phase of work on micro-structural issues *Annex 6 decision*

**Decision:** The terms of reference were approved with an update to be provided by the June meeting of the Board of Supervisors.

## **8. Investment Management Standing Committee**

- Report by Giuseppe Vegas *BS/241 decision*

Giuseppe Vegas presented his report.

- Consultation paper on guidelines on ETFs and other UCITS issues *Annex decision*

The Board discussed the proposed consultation paper, in particular:

- the scope to expand the range of questions asked, including concerning conflicts of interest;
- the need to distinguish between ETFs and some other funds which are exchange-traded;
- Commission plans to develop its own review, currently expected to take place in the course of 2012 which would take account of ESMA and other organisations' work in the area; and
- the extent of transitional provisions proposed.

**Decision:** Members were invited to submit comments in writing by 6 January 2012 with approval for publication to be agreed in written procedure.

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

- Report by Jean-Paul Servais *BS/242 information*

Jean-Paul Servais presented his report, noting that IPISC hoped to bring remuneration proposals for an initial discussion to the Board of Supervisors in February or April depending on the progress of the work.

- Consultation paper on guidelines on MiFID suitability *Annex 1 decision*
- Consultation paper on guidelines on MiFID compliance function *Annex 2 decision*



The Board discussed the proposed consultation papers, in particular the proportionality of the requirements in the guidelines in relation to smaller firms.

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

## 10. ESMA-Pol

– Report by Konstantinos Botopoulos

*BS/243 information*

Konstantinos Botopoulos presented his report and the Board discussed the proposals for reviewing the MMoU established by CESR Members and replacing it with implementing technical standards and guidelines.

**Conclusion:** The Board supported the MMoU proposals and work on the proposals should start in the second half of 2012.

– Q&A on dividend policy

*Annex 1 decision*

**Decision:** The Board approved the Q&A for publication subject to inclusion of a reference to firms' need to take care when answering queries regarding firms' dividend policies.

– Update on Short Selling Task Force

*Annex 2 information*

The Board noted the update, in particular the proposal to submit the consultation paper on technical standards for approval in written approval in the second week of January 2012, and the consultation paper on technical advice for approval in written approval by the end of that month.

**Conclusion:** It was agreed to hold conference call on the technical standards. Carlos Alves (PT) noted the interest of the Group of Economic Advisors in presenting to the Board of Supervisors concerning short-selling.

## 11. Committee for Economic and Markets Analysis

– Report by Carlos Alves

*BS/244 information*

Carlos Alves presented his report.

– Securitisation report for publication

*Annex 1 decision*

The Board discussed the report, in particular:

- scope for further development of issues concerning: static pool versus revolving pool which has a liquidity and financial stability impact, the role of the FX swap market in supporting revolving pool securitisation structure; the role of transparency and developing proposals for collation of data; and
- the need to consider the actions resulting from the report and how to take that work forward.

**Decision:** The Board approved publication of the report subject to final approval in written procedure following incorporation of written comments received by 13 January 2012. SMSC and CFSC should con-



sider the policy implications arising from the economic analysis developed by CEMA.

- Proposal of an ESMA Working Paper Series *Annex 2 decision*

The Board considered the proposal for an ESMA working paper series, including:

- resource implications and the relationship with similar proposals in EIOPA; and
- the role of the Board of Supervisors in overseeing the development of proposals.

**Decision:** The Board approved the proposal to establish an ESMA working paper series.

## 12. Review Panel

- Report by Jean Guill *BS/245 decision*

Jean Guill presented his report, noting the proposal to add three peer reviews to its work programme in the fields of market abuse; MiFID conduct of business requirements; and implementation of the money market funds guidelines.

**Decision:** The Board approved the changes to the Review Panel's work programme.

- Review Panel methodology *Annex decision*

**Decision:** The Board approved the methodology decision (ESMA/2011/BS/253).

## 13. Financial Innovation Standing Committee

- Report by Anneli Tuominen *BS/246 information*

Anneli Tuominen presented her report.

- FISC work programme for 2012 *Annex decision*

**Decision:** The Board approved the FISC work programme.

- 14. **Observership for Croatia** *BS/247 decision*

The Chair presented the proposal to invite the Croatian regulator to become an observer on the Board of Supervisors and participate in ESMA's work. The Board noted the need to take account of professional secrecy obligations.

**Decision:** The Board adopted the proposed decision (ESMA/2011/BS/254).

- 15. **2012 sectoral and cross-sectoral training programme** *BS/248 information*

The Executive Director invited Board members to indicate interest in leading training sessions.



## 16. Corporate Finance

- Report by René Maatman (CFSC) *BS/249 information /decision*

Laurent Degabriel presented René Maatman's report.

**Decision:** The Board agreed that ESMA should issue an open letter to cement companies regarding disclosures required under ESMA recommendations issued earlier this year. The Board agreed to the interim solution regarding ESMA's obligation to publish information on prospectuses on its website.

- Proxy Advisors *Annex discussion*

**Conclusion:** It was agreed to develop the proposals on proxy advisers for discussion in the February meeting of the Board of Supervisors.

## 17. Progress reports

- Report by Arja Voipio (ITMG) *BS/250 information*

The Executive Director noted the need for ESMA to launch the project concerning implementation of the Omnibus I Directive's requirements for fourteen online registers. Information regarding the Short Selling Regulation and AIFMD IT projects would be provided to the relevant standing committees to ensure national competent authorities are kept up-to-date on progress.

- Report by Jean-Pierre Jouyet (PTSC) *BS/251 information*

## 18. AOB

There was no additional business.

## 19. Future meetings

*information*

- 14 February 2012 (Paris)
- 15 February 2012 (Paris) – Joint meeting with SMSG, 09:30h – 13:00h
- 17 April 2012 (Paris)
- 19 June 2012 (Copenhagen)
- 11 September 2012 (Paris)
- 12 September 2012 (Paris) – Joint meeting with SMSG, 09:30h – 13:00h
- 6 November 2012 (tbd)
- 18 December 2012 (tbd)



Steven Maijoor  
Chair



## **PARTICIPANT LIST**

### **Voting Members**

<b>Member State</b>	<b>Representative</b>	<b>Accompanying Person</b>
Belgium	Jean-Paul Servais	Antoine van Cauwenberge
Bulgaria	Antoniya Gineva (alternate)	
Czech Republic	Pavel Hollman	
Denmark	Julie Galbo	Hanne R�e Larsen
Germany	Karl-Burkhard Caspari	Philipp Sudeck
Estonia	Gerle Reinum�gi (observer)	
Ireland	Matthew Elderfield	Gareth Murphy
Greece	Konstantinos Botopoulos	Eleftheria Apostolidou
Spain	Fernando Restoy	Antonio Mas
France	Thierry Francq (alternate)	Fran�oise Buisson Thierry Courret
Italy	Giuseppe Vegas	Nicoletta Giusto
Cyprus	Demetra Kalogerou Antoniadou	
Latvia	Sandis Andersmits (alternate)	
Lithuania	Vaidas Cibas (alternate)	
Luxembourg	Jean Guill	
Hungary	L�szl� Balogh (alternate)	
Malta	Andr� Camilleri	
Netherlands	Ronald Gerritse	Gert Luiting Mir�l Ter Braak
Austria	Kurt Pribil	Andrea Kuras-Goldmann
Poland	Ilona Pieczy�nska-Czerny (alternate)	Bartosz Bacia
Portugal	Carlos Alves (alternate)	Manuel Costa



Romania	Gabriela-Victoria Anghelache	Carmen Negoită Raluca Țariuc
Slovenia	Damjan Žugelj	Sabina Bešter
Slovakia	Ivan Barri	Slavomir Stastný
Finland	Anneli Tuominen	Ville Kajala
Sweden	Anna Jegnell (alternate)	Ulle Jakobson
United Kingdom	Martin Wheatley	David Lawton Cristina Frazer

#### **Non-voting members**

European Commission	Emil Paulis	Emiliano Tornese
ESRB	Francesco Mazzaferro	Fabio Recine
EIOPA	Carlos Montalvo	
EBA	Corinne Kaufmann	

#### **Observers**

Iceland	Gunnar Andersen	
Liechtenstein	Markus Wagner	
Norway	Eirik Bunæs	Kristin Lund

#### **ESMA**

ESMA Chair	Steven Maijoor
Executive Director	Verena Ross
Head of Markets Division	Rodrigo Buenaventura
Head of Investor Protection and Reporting Division	Laurent Degabriel
Head of Legal, Cooperation and Convergence Unit	Stephan Karas
Minutes	Jonathan Overett Somnier