



## Summary of Conclusions

### Securities and Markets Stakeholder Group

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**Date:** 26 April 2012  
**Time:** 10:00 – 17:00h  
**Location:** ESMA, 103 rue de Grenelle, 75007 Paris  
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ESMA Chairman Steven Maijoor was unable to be present at the meeting and that ESMA was represented by its vice-Chairman Carlos Tavares, together with its Executive Director Verena Ross.

The following members of the SME were excused: Salvatore Bragantini, Lars Hille, Niamh Moloney, Carmine Di Noia, Anne Holm Rannaleet (who participated partly over phone). Other members of the SMSG not present were: Zita Ceponyte, Aleksander Chlopecki, and Tjalling Wiersma.

#### 1. Adoption of agenda

The agenda - SMSG/2012/00 - was approved without amendments.

#### 2. Summary of conclusions of February meetings

The summary of conclusions from the meetings in February – *SMSG/2012/20 and SMSG/2012/21* - was approved with the inclusion of an alternative drafting following a comment from one member specifying that the Transparency Directive is in general a minimum rather than maximum harmonisation directive.

**The follow up from the February meeting regarding the letter to the Commission on shadow banking was raised and discussed.**



The Chair mentioned that it was also an issue which could be discussed with Chairs of the Stakeholder groups of EBA and EIOPA and also mentioned the on-going consultation in the Commission on shadow banking.

Verena Ross mentioned that ESMA now has several areas in regulation which could be covered under the umbrella of shadow banking (e.g. fund regulation).

**Outcome:**

The Group concluded that Ludo Bammens and Peter De Proft together would draft a short letter on shadow banking to Commissioner Barnier suggesting the participation of ESMA and the other ESAs in a gap analysis, to be approved by the Group.

### **3. Steering Committee's report**

#### **A. Follow-up of the reply letters received from the Commissioner Michel Barnier, and Chairwoman Sharon Bowles, respectively.**

The Chair of the Securities and Market Stakeholder Group Guillaume Prache thanked the vice Chairs Judith Hardt and Peter De Proft for their work and support and reported that the steering committee had met through one physical meeting and several telephone conferences.

The SMSG has addressed Chairwoman Sharon Bowles and Commissioner Michel Barnier regarding the issue of participation of ESMA in the preparation of the technical standards. Possible follow-up on the replies received should be discussed.

Verena Ross thanked the Group for the helpful support on this issue and said that the Commission would probably move to flexible deadlines saying that a level 2 measure should be in place e.g. one year after the adoption of level 1 legislation. On the issue of giving ESMA observer status in the Council working groups ESMA has, on an ad-hoc basis, been invited to two different meetings.

**Outcome:**

The Group concluded to discuss a reply to Sharon Bowles.

#### **B. Feedback from contacts with the Chairs of EBA and EIOPA Stakeholder Groups**

The Chair reminded the Group of the decision from the February meeting, supported by the ESMA Chairman, that the SMAG should coordinate its work with the EBA and EIOPA stakeholder groups in order to identify common concerns such as SME Financing and investor protection. The Steering committee had spoken to Michaela Koller of the EIOPA insurance and reinsurance stakeholder group. Contacts had been taken also with Sony Kapoor (EBA SG) and Chris Verhaegen (EIOPA Occupational pensions SG), but discussions had not been held yet.

The Vice-Chair Judith Hardt reported on the discussion with Michaela Koller naming i.a. one item learned from the discussion which was the practice of EIOPA to provide presentations in layman terms for the more technical issues (e.g. Solvency II). PRIPS is one item that could be subject of common work



and the SGs should have a more on-going debate on what issues to bring for discussion. She also noted that EIOPA has published minority positions.

One member noted that plain English is also needed to reach a larger audience outside ESMA in order to be heard and that ESMA is more concerned with certain issues like consumer protection and perhaps leave other areas. Another member noted that ESMA should not abandon certain areas of regulation even if other organizations may be more specialised. The comment was also made that there is a need to pull together with the EBA on issues like risk mitigation.

Verena Ross noted that it is a challenge for ESMA to speak to a wide audience and that the support that ESMA could receive through the SMSG in that work would be valuable. For cross-sector issues ESMA is aware that there is a need to look at who is best placed to take the lead on a certain topic and this is something being done together with EBA and EIOPA in the Joint Committee.

**Outcome:**

The Chair concluded that the SMSG should always ask for a statement in plain English from ESMA—especially on the more technical issues - and also as regards the output the SMSG advice should always include an executive summary. The Steering Committee will report on its upcoming contacts with the BSG and OPSG chairs.

**C. Web-site**

It was noted that the SMSG page of the ESMA web-site had been updated and enhanced and that the short biographies of the members of the SMSG were ready to be published at the right-hand margin of the website.

**Outcome:**

The item was included in the agenda for information purposes.

**D. Supervisory convergence**

The secretariat presented a table serving the purpose of being an on-going tool in order to gather information on issues of supervisory convergence which the members of the SMSG were to inform ESMA about.

Some members noted that certain problems in the market can be sensitive to share in an open manner in such a table and that there may be other means available if there is a need to report sensitive issues.

Carlos Tavares noted that it would be helpful for supervisors to note that problems can be raised first with national regulators.

Verena Ross stated that ESMA should be able to see how widespread problems might be in order to know what ESMA could concentrate on.

**Outcome:**



This item was included in the agenda for information.

#### **E. Guidelines for speaking invitations**

The SMSG discussed the Guidelines for SMSG speaking invitations expected to be followed by all SMSG members (a document – SMSG/2012/24 - presented by the Steering Committee for approval), the document had already been discussed in a previous meeting and was presented for approval.

Participants commented on the need to secure the integrity of the SMSG, not to be a group that can be lobbied, and to have named spokespersons on issues agreed. The discussion included a question on the need to have a priority in the list and to keep a certain amount of flexibility in the guidelines in order to be able to promote the work of the SMSG countries speaking languages spoken by relatively less number of persons. It was high-lighted that the Guidelines would apply only when speaking in the capacity of an SMSG member.

#### **Outcome:**

The Chair concluded that the meaning is very clear in the paper in item 3, as it states that members of the SMSG cannot speak on issues not agreed in the SMSG in advance. The Group concluded to adopt the paper.

#### **F. Working group working conditions**

Judith Hardt accounted for some difficulties in conducting work in the form of telephone conferences due to some technical limitations in system and also some organizational aspects.

It was noted that the work in the sub-groups would be helped by the application of discipline in the organisation of the call and the telephone meeting. It was also noted that the likely cause of the technical shortcomings was the telecommunication and that a network solution might ideally be better.

#### **Outcome:**

It was concluded that the calls of working groups should have an agenda, that members of working groups should register in advance of the calls, that telephone conferences would be recorded with short summary of conclusions and that it would be important to have a good meeting discipline. ESMA was asked to look into the technical issues.

### **4. SMSG advice**

#### **AIFMD – ESMA's Discussion paper on Key concepts of the AIFMD and types of AIFM**

The Rapporteur or the working group Peter De Proft introduced the paper *SMSG/2012/30* and highlighted especially the principle of proportionality and that portfolio management and risk management are able to be delegate, which is currently not the case. He would approach the group with regard to its



interest in drafting a paper on remuneration for June and he would arrange another call of the group for that. The scope of the consultation should be made more prominent in the beginning.

One member of the working group noted that the proportionality issue is an investor protection issue. Peter de Proft noted that the sub-group had decided not to respond on the issue of cooperation arrangements as it is more of an issue for regulators. The Group agreed to this assessment.

Verena Ross commented that consumer protection issues are the focus of most of ESMA's work.

**Outcome:**

The Group approved the SMSG paper.

**G. Proxy advisors – SMSG/2012/25**

The rapporteur of the working group Jesper Lau Hansen presented the paper on proxy voting advice:

The paper recommends the development a Code of Conduct supported by a large majority of the group and mentions issues on company law. The Code of Conduct should be directed to national Competent Authorities and establish minimum requirements based on a comply-or-explain procedure to ensure a harmonious development and avoid divergent national measures. Disclosure requirements are kept as minimum standards. The Code should ensure competition, in depth knowledge of laws and customs that could be helpful to as many Proxy advisors as possible. Note should be taken of entry barriers for small proxy advisors.

He mentioned two investor issues: on page 5 regarding the overall policy using the same Proxy advisor should not constitute acting in concert; and at the end of section 24 a duty of disclosure should not apply if only occasionally used as this could be contrary to these minimum standards. All members of the sub-group but one had expressed a preference for guidelines instead of legislation and as preferable to a Commission recommendation.

The Discussion included comments against having an obligation in place to requiring the disclosure that they have policies in place as this would be more burdensome, for the need of a European initiative framework that is constructive in its support for SMEs and to what extent a disclosure is enough, whether the quality of the advice given by the proxy advisor should be checked.

The Rapporteur noted that national regulators should report to ESMA on their use of the guidelines. It will be for national competent authorities to supervise the application of the guidelines in each of the member states. He highlighted that the working group believes that there is an argument for why ESMA has a basis for issuing guidelines in this area, as expressed in the advice in paragraph 9. One issue the sub-group places importance on is that some national regulators are now starting to regulate this issue and therefore some basic consistency of standards was helpful. It is not an entirely new topic and the working group has aimed at a very basic standards and disclosure. The paper only addresses issues in the remit of ESMA such as the advice proxy advisors give. He clarified that the paper argues for a use of guidelines to facilitate a Code of Conduct and that these should be minimum standards. The minority view should be left in the paper.

Verena Ross thanked the authors and the SMSG for a very good paper. She said that this is a relatively new topic and that the ESMA paper leaves four ways forward on the table. It could be asked what guidelines would mean in the area of disclosure. The SMSG paper could perhaps be clearer on the objective that they want to achieve through guidelines on a Code of conduct.

Carlos Tavares commented that it would be an important issue to make clear that the guidelines are addressed to national authorities. Some Supervisory authorities are already regulating and the Guidelines could introduce some harmonization between them. He took the example of the High-Frequency Trading standards where standards are guideline to supervisors. They are flexible on the issue of whether national regulators regulate in soft or hard law.

One member comments included that the paper was precise enough as regards the legal form at present and that the Group could move forward at a later stage; and also that the paper talks about min standards but that the Group also could talk about maximum standards to be allowed for the national regulators.

Finally the issue of how to account for bonds was raised and it was concluded that bonds should be included into the paper and dealt with in the same way as equities in the rest of the paper.

#### **Outcome:**

- The Chair mentioned that a Code of Conduct would be a good first step and concluded the discussion noting that the report was approved, with the addition that bonds should be included into the paper and dealt with in the same way as equities. ESMA informed that it plans to have a round table in the first half of June and to invite investment associations and individual participants.

#### **H. EMIR – SMSG/2012/29**

The Rapporteur of the working group Thomas Book presented the core messages of the advice paper and thanked Fabrizio Planta of ESMA for the assistance given in the early stages of the drafting of the advice.

He mentioned that the draft paper deals with the following key topics: Capital requirement for CCPs, risk requirements for trade repositories, and the role of ESMA in the process coordinating the transitional implementation of central clearing. The main message on page 4 is for the technical standards not to be overly prescriptive. While the working group understands that a certain level of prescriptiveness is needed some aspects of the discussion paper are at risk of going into too much detail.

Verena Ross thanked the working group for the work done, high-lighting that the topic is a priority for ESMA not only in drafting the technical standards. It is crucial to find the right balance between prescription to ensure harmonisation and a level playing field and flexibility of application.

Fabrizio Planta, ESMA, high-lighted that ESMA generally prefers a criteria-based approach that would ensure the necessary degree of flexibility to CCPs or other market participants to correctly measure and manage the risks they face. However, in certain issues either the ESMA mandate in level 1 is very pre-

scriptive or the application of a criteria-based approach would leave too much room for interpretation and not ensure the right degree of harmonisation. In these cases, a prescriptive approach will be necessary. He also clarified the date of application of the different provisions in EMIR.

One member remarked that it would be welcomed if the SMSG could say a bit more on what this means to consumers and should there be a need for more supervision.

It was noted that the mandatory clearing obligation (paragraph 17 of the paper) is very difficult to correctly frame. The Group further discussed insolvency rules, the need for a more precise definition of default in the first place and the EMIR burden on CCPs to provide protection on clients which ultimately relies on nationwide insolvency regimes.

Comments of the Group included: How a CCP manages a default is not fixed and involves a growing set of interoperability issues. It was stressed how very important it is to get insolvency law rules harmonized. EMIR is to 99 per cent about systemic risk and the Commission needs to proceed to tackle insolvency regimes. It will be very important in cross border situations that everything goes to one place. In a complex cross-border group it will be the law of the country that first files that will determine the situation (like in Lehman). It was high-lighted as an important point in the paper that CCPs should have the same transparency requirements as global systemic banks.

Verena Ross mentioned that trade repositories will be under ESMA supervision, while for CCP there will be a college arrangement with ESMA as an observer.

#### **Outcome:**

- The Group agreed that insolvency risk, and differences and similarities with systemically important banks should be raised within the paper.
- The Group concluded to finalise the paper in late May as a general and more high-level paper and to come back to the issue of whether a paper should be produced in the summer as a response to the ESMA consultation. Comments would be invited by 11 May and a final draft will be ready by 25 May. EMIR will be a topic for the SMSG June agenda.

#### **I. Short selling – SMSG/2012/27b**

The Rapporteur of the working group Roland Bellegarde presented the recent work of the working group.

Different views were expressed as to the usefulness of CDS which could be seen as insurance open for investors to buy, but the view was held that if so maybe they should be covered by insurance regulation. Also the general need for a short selling regulation was discussed and the point was mentioned that there is evidence in both directions as to the possible danger benefit of shorts selling. The point was made that short selling is not a problem per se but that it needs to be regulated which is also the case for securities lending.



Verena Ross stated the importance to take into account in the technical advice to the Commission what the powers are in the different parts of the legal test.

**Outcome:**

The Group concluded to publish the short selling advice paper.

## **5. SMSG working groups**

### **A. SME financing – SMSG/2012/28**

The Rapporteur of the working group Judith Hardt reported on the work on SME Financing and asked the SMSG to approve the mandate of the group. The working Group also suggested to give the working group a permanent character to monitor the impact of EU regulation on the ability of SMEs to access funding to make sure to continue to contribute on the topics of requirements and risks as regards SMEs. Regarding the next steps the aim is to have a paper for the joint SMSG –ESMA Board of Supervisors meeting September.

On behalf of ESMA, Carlos Tavares welcomed that the SMSG has begun work on this topic also i.a. Iosco is working on this topic. It would be ok to reduce red tape where possible without reducing investor protection but not necessarily purely for SMEs.

The Rapporteur mentioned the need to define more clearly what definition of an SME the SMSG would like to cover, which is essentially a political issue. The working group will propose a mandate which will set out that the group shall look at in terms of SME aspects in relation to all SMSG work.

**Outcome:**

The Group agreed on the mandate for the SME working group to: monitor and give advice to ESMA on relevant EU regulatory proposals:

- that impact the ability of SMEs to have access to funding through private equity funds or through listing on a MTF or a Regulated Market (i.e. when financial instruments are admitted to trading on a Regulated Market this triggers a list of legal requirements such as Prospectus, Transparency and Market Abuse Directives).
- that impact investors to invest in SMEs through access to private equity funds and through shares listed on MTFs and Regulated markets (including regulations impacting institution investors such as insurance companies, pension funds, banks, etc.).

### **B. Investor protection – SMSG/2012/26**





The Chair introduced the paper pointing firstly to the issue of investor protection for which ESMA has new powers, and also to the new power that the stakeholder group has on the issue of asking ESMA to investigate potential breaches of or of non-implementation of Union law under article 17 of the ESMA Regulation, which ESMA then can take up for closer scrutiny if it finds that a breach of union law may have actually occurred.

He mentioned that the SMSG also had provided input to the work programme of the Review Panel to look at the issue of fair, clear and transparent information under article 27 of the MiFID level 2 Directive. He also referred to the November 2011 advice paper of the SMSG on ETFs in which the SMSG already asked ESMA to investigate how to make such instruments more available to consumers.

He proposed to the Group to form a working group on investor protection issues in line with the 2012 Work Programme.

Verena Ross high-lighted the work ESMA performs in the area of investor protection which is a very important area where ESMA has been given new powers and has done a lot of work already. ESMA has e.g. set up a Financial Innovations Standing Committee. ESMA has also used the possibility to issue a financial activity warning under to Article 9 of the ESMA Regulation.

One member commented on ETFs that there is a need to make sure that such products are distributed with care and he pointed out that many ETFs of any kind - synthetic or not - are containing risks which are totally unrelated to what is announced to the public. The Chair mentioned that the issue is not about the risks involved in certain types of UCITS, but about promoting only similar products to retail investors but with up to 12 times higher commission that those charged by plain vanilla index ETFs. Another member noted as regards breach of union law that it is important that ESMA take up issues which provide strong cases.

Verena Ross agreed and emphasised the importance of ESMA taking up the right issues to look at potential Breach of Union Law cases.

### **Outcome:**

The Chair concluded that the group would come back with a more refined mandate for the June meeting. The following members noted their interest in taking part in the working group: Judith Hardt, Peter De Proft, Carlos Arenillas, Roland Bellegarde, Jean-Pierre Pinatton, Dorotea Mohn, Katerina Papageorgiou and Gabriela Zgubic and Niamh Moloney (by email).

### **6. AOB**

There was no other business.



***List of participants at the meeting on 26 April 2012***

<b>SMSG</b>	<b>Position</b>
Guillaume Prache	Managing Director of the European Federation of Financial Services Users (“EuroFinance”)
Judith Hardt	Secretary General, FESE
Peter De Proft	Director General, EFAMA
Carlos Arenillas	Chairman and CEO of Equilibria Investments SIL.
Sophia Argirova	Vice Chairperson of the Management Board of the Association of Bulgarian Investor Relations Directors /ABIRD
Ludo Bammens	Director European Corporate Affairs KKR - KOHLBERG KRAVIS ROBERTS & CO. (London)
Roland Bellegarde	Member of the Management Committee NYSE Euronext Group Executive Vice President & Head of International Listings and European Execution
Angel Berges-Lobera	Professor of Finance, Universidad Autonoma Madrid
Thomas Book	Member of the Executive Boards of Eurex Frankfurt AG, Eurex Zürich AG and Eurex Clearing AG
Pedro Braga da Cruz	Consultant of Companhia Portuguesa de Rating, S.A
Pierre-Henri Conac	Professor of Commercial and Company Law, University of Luxembourg
Hans van Damme	EFRAG Supervisory Board, Vice Chair
Sally Dewar	Managing Director - International Regulatory Risk



Jaroslaw Dominiak	President of the Management Board of the Association of Individual Investors
Anne Holm Rannaleet	Senior Adviser, IK Investment Partners Ltd.
Jesper Lau Hansen	Professor of Law, University of Copenhagen
Sari Lounasmeri	CEO, Finnish Foundation for Share Promotion
Dorothea Mohn	Policy Officer for Pension Schemes and Capital Investment, Federation of German Consumer Organization
Katerina Papageorgiou	Attorney-at-Law, Deutsche Bank AG
Jean-Pierre Pinatton	Chairman of the Supervisory Board of Oddo & Cie Group
Xavier Rolet	LSE Group Board on 16 March 2009 and became CEO on 20 May 2009
Adriana Tanasoiu	Chief Executive Officer of Depozitarul Central (Romanian Central Securities Depository)
Gabriele Zgubic	Head of Department of Consumer Policy Austrian Federal Chamber of Labour, Vienna
<b>ESMA</b>	<b>Position</b>
Carlos Tavares	ESMA Vice-Chair, Chairman of CMVM
Verena Ross	ESMA Executive Director
Stephan Karas	ESMA Head of unit
Florabela Cunha	CMVM
Jacob Lönnqvist	ESMA