

SUMMARY OF CONCLUSIONS

Board of Supervisors

Date: 19 March
Time: 08:30 – 17:30h
Location: Paris
Contact: max.simonis@esma.europa.eu T: +33 1 58 36 59 46

No Items

1. Confidential items

VOTING MEMBERS & ADVISORS ONLY

2. Adoption of agenda *BS/38 decision*

Decision: The agenda was adopted.

3. Summary of conclusions of February meeting *BS/33 decision*

Decision: The summary of conclusions was approved taking into account the comments from Karl-Burkhard Caspari (DE) and Jean-Paul Servais (BE).

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

The Chair reported on;

- the letter received from the European Commission on the definition of financial instruments with regard to certain derivatives. In order to inform stakeholders, the European Commission agreed that ESMA will publish the letter. The European Commission was also asked to provide full clarity through Q&As on the concept of ‘commercial purpose’ for foreign exchange derivatives;
- the recent publication of the ‘best practice principles for shareholder voting research and analysis’ by the Best Practice Principles Group;
- meetings with Members of the European Parliament, mentioning in particular the discussions

on the ESFS review, benchmarks and EMIR implementation. For future meetings, the Board will be provided with a short written report summarising the discussions;

- the the OTC Derivatives Regulators Group;
- the IOSCO Board meeting that took place on 19-20 February;
- recent visits to Bucharest and Hong Kong for meetings with securities regulators, central bank representatives and stakeholders; and
- the Management Board meeting that took place on 18 March, mentioning in particular the discussions on the 2013 activity report, the development of conflicts of interests policies and IT.

The Executive Director reported on;

- the meeting of the Financial Services Committee that took place in Brussels on 13 March;
- the current credit rating activity work streams of the Joint Committee; and
- the first meeting of the ESMA International Network that took place in Paris on 5 February.

Konstantinos Botopoulos (EL) informed the Board on the legislative developments under the Greek Presidency of the Council.

5. MiFID II

- Explanatory note *BS/39 information*

The Executive Director presented the note, highlighting the timing of the MiFID II activities, the approach taken by ESMA and the resource implications.

The Board discussed the report, in particular;

- the resource and operational challenges in the area of IT and possible prioritisation of projects;
- the importance of having proper consultation periods; and
- to continue the close cooperation with the European Commission.

Conclusion: The Board took note of the report.

- Report by Jean-Paul Servais *Annex 1 discussion*
- IPISC draft Discussion Paper on MiFID II *Annex 2 information*
- IPISC draft Consultation Paper on MiFID II/MiFIR *Annex 3 information*

Jean-Paul Servais presented the report and the accompanying documents, highlighting the main topics currently being discussed within IPISC on which the Board's view was sought.

The Board discussed the report, in particular;

- the inducements requirements, in particular;
 - the quality enhancement criteria for the acceptance of third party inducements and the possible impact on different business models;
 - whether to specify a positive or negative list of circumstances to be considered by NCAs in determining the condition of quality enhancement; and
 - the scope and the criteria for acceptance of non-monetary financial benefits, including in particular the impact on financial analysis.
- on the requirement for the provision of investment advice on an independent basis, in particular to determine a good balance for the requirement for firms to assess a sufficient range of products and scope of advice;
- the factors and criteria for the exercise of NCA and ESMA powers to prohibit or restrict the marketing, distribution or sale of financial instruments or a type of financial activity or practice;
- the details about content and format of information to clients in relation to costs and charges, in particular to regulate the relationship with similar requirements in other EU-legislation and to allow clients to understand the overall cost as well as the cumulative effect on return of the investment;
- the measures addressing product approval and product governance that investment firms manufacturing financial instruments and investment firms offering or recommending financial instruments to clients should follow, in particular to find a balance between the proposals for manufacturers and for distributors;
- the requirements on the safeguarding of client assets, in particular the proposals on intra-group diversification of client funds and the possibility to introduce a certain flexibility regarding risk diversification; and
- the consistency of the section on complaints with the Guidelines on complaints handling as currently developed by ESMA and EBA.

Conclusion: The IPISC papers will be further developed taking into account the discussion in the Board. The final papers are planned to be submitted to the Board of Supervisors for approval at the May meeting.

- | | |
|--|----------------------------|
| – Report by Martin Wheatley & David Lawton | <i>Annex 4 discussion</i> |
| – SMSC/CDTF draft Discussion Paper on MiFID II | <i>Annex 5 information</i> |
| – SMSC/CDTF draft Consultation Paper on MiFID II | <i>Annex 6 information</i> |
| – MDRWG draft Discussion Paper on MiFID II | <i>Annex 7 information</i> |

David Lawton presented the report and the accompanying documents, in particular highlighting the main topics currently being discussed within SMSC, CDTF and MDRWG on which the Board's view was

sought.

The Board discussed the report, in particular;

- the significant impact of MiFID II on resources in the area of IT and related operational challenges;
- the aim of MiFID II to enhance transparency of markets and to take that objective into account when defining the different options in the consultation paper;
- the determination of appropriate levels for the thresholds for waivers;
- the requirement for ESMA to determine the circumstances in which a firm should enter into a market making agreement;
- the deadlines related to the trading obligation for derivatives;
- the regime for position limits and position reporting framework in the area of commodity derivatives; and
- on pre- and post-trade transparency requirements, whether there may be an added benefit in ESMA also performing the transparency calculations for the whole of the EU in terms of ensuring consistency and streamlining the process.

Conclusion: The SMSC/CDTF and MDRWG papers will be further developed taking into account the discussion in the Board. The final papers are planned to be submitted to the Board of Supervisors for approval at the May meeting.

6. ESMA Organisation

- Discussion note on confidentiality *BS/40 discussion*

The Executive Director presented the note, indicating how to handle sensitive information and reiterating the need for full confidentiality.

Conclusion: The Board took note of the report.

- Discussion note on Comply or Explain mechanism *BS/41 discussion*

The Head of the Legal, Cooperation and Convergence Unit presented the note.

The Board discussed the note, in particular;

- the need to clarify the legal nature of guidelines and recommendations and the discretion of NCAs in choosing the appropriate tools to ensure their effective application at national level;
- the need to to comply with the obligation to ‘make every effort to comply with guidelines and recommendations’;
- the need to get a better understanding and sharing of practices at NCAs in applying guidelines and recommendations;

- how best for ESMA to comply with the obligation to report annually to the EU Institutions which NCAs have not complied with guidelines and recommendations, in particular whether there is the ability for ESMA staff to seek clarification on compliance reporting;
- how to ensure a meaningful application date for guidelines and recommendations taking into account the general expectation that compliance will be reached by the application date while acknowledging the need for a reasonable timeframe for implementation;
- how to address partial compliance; and
- emphasising the need to have an agreed approach from the three ESAs on this topic.

G rard Rameix (FR) stated that guidelines constitute a common EU interpretation of legislative texts adopted at Level 1.

Conclusion: The Chair concluded that while guidelines are non-binding instruments, they should not be understood as simple “best practices”; NCAs and market participants shall make every effort to comply with them. Regarding compliance notifications received, there may be a need for clarification. . A further analysis will be done for follow-up actions after the issuance of guidelines. The note, in particular paragraphs 12 to 15, will be further developed taking into account the discussion in the Board, with ESMA’s Legal Network and in cooperation with EBA and EIOPA. The final note will be combined with the earlier discussed note on ESMA legal instruments and submitted to the Board of Supervisors for approval at the May meeting.

- Discussion note on improving the breach of Union law procedure *BS/42 decision*

The representative from the Legal, Cooperation and Convergence Unit presented the note.

The Board discussed the note, in particular;

- the need to clarify that non-application of guidance issued by ESMA can itself not be sufficient ground to trigger the breach of union law mechanism. However, ESMA guidance can help in understanding the obligations enshrined in binding legislation;
- whether ESMA can adopt a recommendation under Article 17 based on an individual case;
- that additional criteria for prioritization of treatment of the admissible cases could be considered, e.g. cross-border effect, systemic impact or whether a particular case reflects a general interpretation, practice or approach by a competent authority or not; and
- to report on BUL procedures to the Board on an annual basis.

Conclusion: The Board generally welcomed the clarification on the scope of Article 17, stating that ESMA guidelines and opinions itself are not Union law in the sense of Article 17, and in principle agreed with the recommendations as reflected in the note. The Rules of Procedure for BUL investigations will be revised taking into account the discussion in the Board and in cooperation with EBA and EIOPA. The revised rules of procedure will be submitted to the Board of Supervisors for approval at a future meeting.

- Memorandum of Understanding between the ECB and ESMA on the sharing of non-confidential statistical information *BS/43 information Annex 1*



The Chair presented the Memorandum of Understanding.

Conclusion: The Board took note of the Memorandum of Understanding between the ECB and ESMA on the sharing of non-confidential statistical information.

7. Review Panel

- Report by Jean Guill *BS/44 decision*

Jean Guill (LU) presented the report, stressing the need for Board members to provide clear, documented and comprehensive answers to the self-assessment questionnaires as insufficient responses will trigger a proposal for an on-site visit. He also reminded the Board of the importance of ensuring that their staff participating in ESMA assessment groups are available for on-site visits.

Nicoletta Giusto (IT), coordinator for the peer review on MiFID Conduct of Business, presented the outcome of the first ESMA's on-site visits.

The Board discussed the report, including the proposals for additional on-site visits;

- the purpose of the on-site visits and the reports, which can no longer be restricted to the identification of good practices following the adoption of the new Methodology for peer reviews; and
- the expectation that EEA observers would participate in peer reviews.

Decision: The Board approved the proposals for on-site visits for the three reviews. FSMA (BE) and Finanstilsynet (DK) will be removed from the list of NCAs to be visited for the Best Execution review, while FMA (AT) and Finanstilsynet (NO) will be included in the list of NCAs to be visited for the Automated Trading review.

8. Financial Innovation Standing Committee

- Report by Anneli Tuominen *BS/45 information*

Anneli Tuominen (FI) presented the report and the accompanying documents.

- Opinion on structured retail products *Annex 1 decision*

The Board discussed the report, and it was clarified that the comments from the Consultative Working Group were taken into account and no further consultation on the opinion will take place.

Decision: The Board approved the opinion on structured retail products subject to minor textual changes.

- Note on Financial Innovation Framework *Annex 2 discussion*

Anneli Tuominen (FI) gave a presentation on the progress ESMA has made in monitoring new and existing financial activities.

The Board discussed the note, in particular the difficulty to gather data on financial innovation from

NCAAs. The Chair asked the members of the Board to reassess the participation by relevant NCA staff in FISC.

Conclusion: The Board took note of the report and the Financial Innovation Framework.

9. Investment Management Standing Committee

- Report by Gareth Murphy *BS/46 information*

Gareth Murphy (IE) presented the report and the accompanying documents.

- Revision of ETF guidelines (collateral diversification) *Annex 1 decision*

Decision: The Board approved the revised ETF guidelines.

- Technical advice to the Commission on the information that competent authorities should provide to ESMA pursuant to Article 67(3) of the AIFMD *Annex 2 decision*

Decision: The Board approved the technical advice.

- AIFMD Q&A *Annex 3 decision*

Decision: The Board approved the AIFMD Q&A.

- Q&A on ETF Guidelines *Annex 4 decision*

Decision: The Board approved the Q&A on ETF Guidelines.

- Q&A on EuVECA and EuSEF *Annex 5 decision*

Decision: The Board approved the Q&A on EuVECA and EuSEF.

10. Corporate Finance Standing Committee

- Report by Gérard Rameix *BS/47 information*

- Consultation Paper on draft RTS on Transparency issues *Annex 1 decision*

- Legal analysis on Article 13(4) of the Transparency Directive *Annex 2 discussion*

Gérard Rameix presented the report and the accompanying documents.

Decision: The Board approved the Consultation Paper based on the intermediate approach set out in Annex 3 of the report by Gérard Rameix where both options are set out in the CP. ESMA staff will consider amending paragraph 100 to include “closed” volatility as a parameter in the delta calculation.

11. Post-Trading Standing Committee

- Report by Giuseppe Vegas *BS/48 information*

Giuseppe Vegas (IT) presented the report and the accompanying documents.

- Consultation Paper on draft RTS on bilateral margins *Annex 1 decision*

The Board discussed the consultation paper, in particular;

- the conditions for posting of margins by covered bond issuers and cover pools; and
- the application of the regime to 3rd country entities.

Decision: The Board approved the Consultation Paper on draft RTS on bilateral margins with Karl-Burkhard Caspari (DE) objecting.

- EMIR Q&A *Annex 2 decision*

Decision: The Board approved the EMIR Q&A, including minor technical amendments to TR Q&A 28 a) and b).

12. Task Force on the Legal Framework for Cooperation Arrangements and Information Exchange

- Cover note *BS/49 information*
- Revised Guidelines and Multilateral Memorandum of Understanding *Annex 1 decision*

The Executive Director presented the note and the accompanying documents.

Decision: The Board approved the revised Guidelines and Multilateral Memorandum of Understanding.

13. IT Management and Governance Group

- Report by Nicolas Vasse *BS/50 discussion*

Nicolas Vasse presented the report and informed the Board about the discussion of the document at the meeting of the Management Board on 18 March.

The Board discussed the report, in particular;

- to consider a top-down approach and possible prioritisation of projects taking into account the resources available;
- the need for ESMA to further enhance cooperation in the area of IT and to consider further centralisation; and
- to strengthen the cooperation on Standing Committee and NCA level between policy experts and ITMG members.

Conclusion: The Chair concluded that the Board supported the actions as proposed in the report. A strategic document will be developed for discussion at the May meeting of the Board of Supervisors taking into account the discussion in the Board.

14. Progress reports

- Report by Verena Ross (CRA TC)

BS/51 information

Conclusion: The Board took note of the report.

15. A.O.B.

16. Future meetings

- 19-20 May 2014 (Athens)
- 9 July 2014 (Paris)
10 July: joint meeting with SMSG (Paris)
- 25 September 2014 (Rome)
- 5 November: joint meeting with the SMSG (Paris)
6 November 2014 (Paris)
- 17 December 2014 (Paris)

Participants list

Voting Members

Member State	Representative	Accompanying Person
Belgium	Jean-Paul Servais	Antoine van Cauwenberge
Bulgaria	Vladimir Savov (alternate)	
Czech Republic	Pavel Hollmann	Karel Juráš
Denmark	Julie Galbo	Hanne Rae Larsen
Germany	Karl-Burkhard Caspari	Hannelore Lausch Philipp Sudeck
Estonia	Andre Nõmm	
Ireland	Cyril Roux	Gareth Murphy Oliver Gilvarry
Greece	Konstantinos Botopoulos	Eleftheria Apostolidou
Spain	Lourdes Centeno (alternate)	Antonio Mas
Croatia	Petar-Pierre Matek	
France	Gérard Rameix	Dora Blanchet
Italy	Giuseppe Vegas	Nicoletta Giusto
Cyprus	Liana Ioannidou (alternate)	
Latvia	Sandis Andersmits (alternate)	
Lithuania	Vilius Sapoka (alternate)	
Luxembourg	Jean Guill	

Hungary	Richárd Végh (alternate)	
Malta	André Camilleri	
Netherlands	Gerben Everts (alternate)	Pim de Wild
Austria	Klaus Kumpfmüller	Andrea Kuras-Goldmann
Poland	Marek Szuszkiewicz	Anna Skrzypek
Portugal	Carlos Tavares	Maria Ruiz de Velasco
Romania	Cristina Dumitrescu (alternate)	
Slovenia	Sabina Bešter (alternate)	
Slovakia	Ivan Barri	
Finland	Anneli Tuominen	Jarmo Parkkonen
Sweden	Anna Jegnell	Oskar Ode
United Kingdom	David Lawton (alternate)	Karen Northey

Non-voting members

ESMA Chair	Steven Maijoor	
European Commission	Patrick Pearson	Peter Ohrlander
ESRB	Francesco Mazzaferro	
EIOPA	Manuela Zweimüller	
EBA	Corinne Kaufman	



Observers

Iceland	Sigurveig Guomundsdottir	
Liechtenstein	Marcel Loetscher	
Norway	Anne Merethe Bellamy	Kristin Lund

ESMA

Executive Director	Verena Ross
Summary of Conclusions	Max Simonis
Head of Operations Division	Nicolas Vasse
Head of Markets Division	Rodrigo Buenaventura
Markets Division	Fabrizio Planta
Head of Investment and Reporting Division	Laurent Degabriel
Head of Credit Rating Agencies Unit	Felix Flinterman
Head of Legal, Cooperation and Convergence Unit	Sophie Vuarlot-Dignac
Legal, Cooperation and Convergence Unit	Stephan Karas

Done at Athens on 20 May 2014

Steven Maijoor
Chair
For the Board of Supervisors