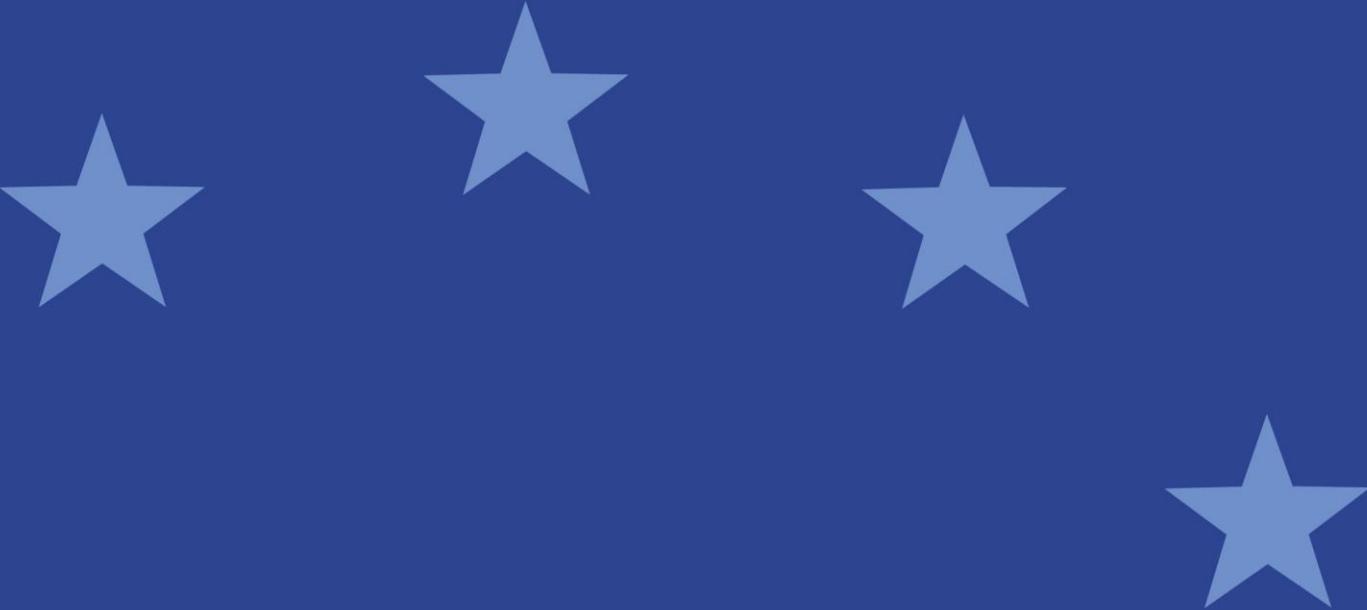


SMSG – End of Term Report



Foreword

The Securities and Markets Stakeholder Group (here called the SMSG or the Group) was first established in April 2011 under ESMA's founding Regulation to help facilitate consultation with stakeholders in all areas relevant to ESMA's tasks. It held its first meeting in July 2011.

The second mandate of the SMSG was launched in January 2014 and comes to an end in June 2016. This report summarizes the key achievements of the Group during this time. During the current mandate period, the Group produced 29 papers in the form of public opinions, advice and own initiative reports. More details on these papers are included herewith and the papers are also available on the SMSG section of the ESMA website.

The End of Term Report assesses the Group's current composition and functioning and makes a number of recommendations. We also consider our role in advising ESMA as well as the impact of our work. The report concludes with a number of considerations for the future workload of ESMA and in particular the increased focus on supervisory convergence.

This second End of Term Report was drafted in the spirit of our mandate i.e. to help facilitate consultation with stakeholders in areas relevant to the tasks of the Authority. We hope to have contributed in the most effective way in assisting ESMA in the further improvement of the regulation and the supervision of European financial markets.

Paris, 30 June 2016



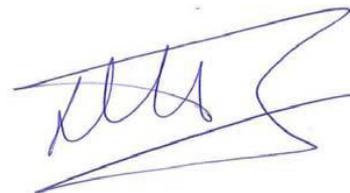
Jesper Lau Hansen

Chair



Judith Hardt

Vice-Chair



Peter De Proft

Vice-Chair



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Executive summary

This report marks the end of term of the 2nd mandate period of the Securities and Markets Stakeholder Group and covers the period from 1 January 2014 to 30 June 2016. It is divided into three sections.

- *Section I describes the institutional setting of the SMSG, i.e. its constituent members and applicable procedures.*
- *Section II is dedicated to the role of the SMSG; how we work, the lessons that we have drawn from our work and would like to share with the public with a view to enhance the functioning of the SMSG as well as the overall European System of Financial Supervision of which the SMSG is a small, but important part. The views expressed are those of the present SMSG and cannot bind subsequent mandate periods.*
- *Section III is an overview of the papers produced and initiatives taken by the SMSG during this mandate period.*
- *You will find additional information in the Annexes regarding the current members of the group, the rules of procedure as well as the results of a survey conducted on a no-names basis among the SMSG members.*

SECTION I. THE INSTITUTIONAL SETTING OF THE SMSG

1. The constituent members

Regulation 1095/2010 which establishes ESMA (the ESMA Regulation) also requires the establishment of a Securities and Markets Stakeholder Group (SMSG). Art 37 of the ESMA Regulation reads:

The Securities and Markets Stakeholder Group shall be composed of 30 members, representing in balanced proportions financial market participants operating in the Union, their employees' representatives as well as consumers, users of financial services and representatives of SMEs. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent financial market participants.

The members of the Securities and Markets Stakeholder Group shall be appointed by the Board of Supervisors, following proposals from the relevant stakeholders. In making its decision, the Board of Supervisors shall, to the extent possible, ensure an appropriate geographical and gender balance and representation of stakeholders across the Union.

The SMSG is at present comprised of 28 members representing the relevant stakeholders and academia. For a list of members, present and past, and the category they represent please see Annex 1. The members represent the following categories mentioned in Art 37(2), here provided in alphabetical order with the number of members representing each respective category:

- Academics (8)
- Consumers (4)
- Financial Institution Employees (2)
- Financial Market Participants (9)
- Small and Medium Enterprises (1)
- Users of financial Services (5)

For a presentation of the current composition of the SMSG, please see Figure 1 below. At present, 18 (64 pct.) of the members are males and 10 (36 pct.) are females.

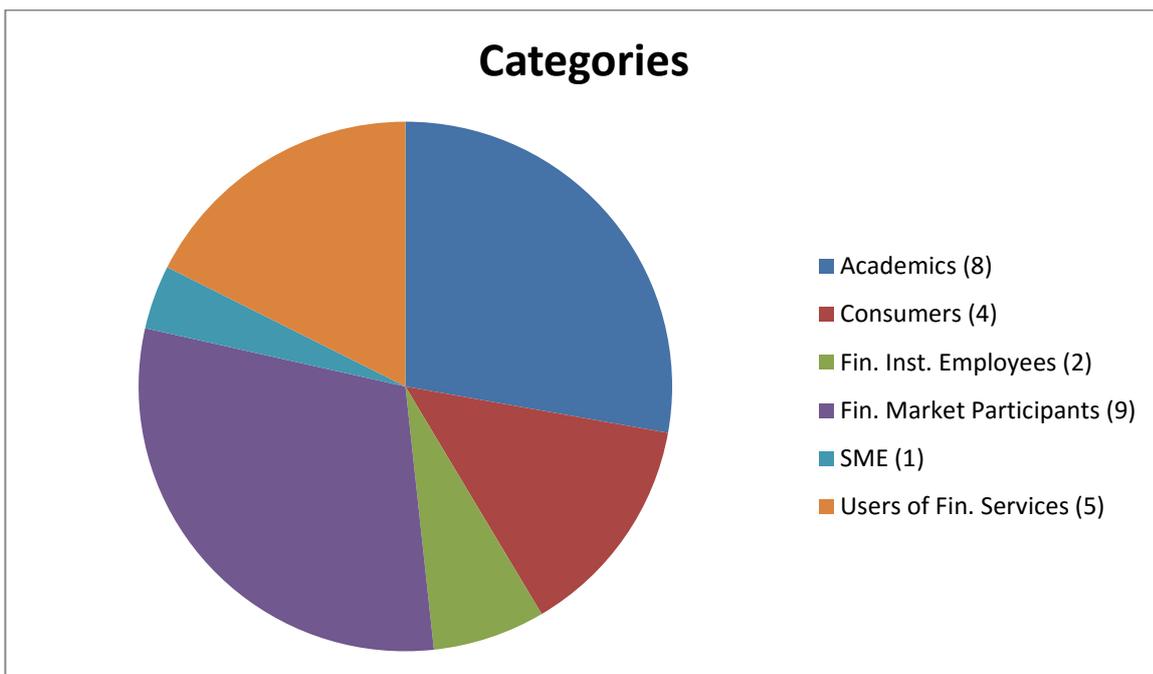


Figure 1: Present members' distribution by category.

It is important to point out that each respective category may in turn comprise very different stakeholders and the public is advised to consult Annex 1 to learn more about the individual members and their backgrounds.

Members are appointed in their personal capacity to represent a certain category and as such the personal composition of the SMSG is of importance. We believe it enhances transparency when our members are known and we are pleased that the section of the ESMA website dedicated to the SMSG shows both a photo and the list of the current members replicated in this report as Annex 1.

It is important for the sake of transparency that all members of the SMSG are known to the public. Consequently, we recommend that ESMA continues to display at the section of its website dedicated to the SMSG a list of all serving members during a given mandate period and further that this list is supplemented with information of past and newly appointed members.

A similar list of past mandate period members should also be available at all times to enable transparency on prior compositions of the Group, but naturally posted in such a way which enables access to this information without the risk of confusion as to the composition of the current SMSG.

During the 1st mandate period the SMSG adopted a set of Rules of Procedure (RoP). These RoP were slightly revised and updated at the beginning of the 2nd mandate period. For the current RoP, please see Annex 2.

According to the RoP, the SMSG appoints a chair and two vice-chairs at the beginning of its mandate period. Together, they constitute the Steering Committee which guides and oversees the work of the SMSG, prepares the agenda for meetings and generally acts as the interface between ESMA and the SMSG.

The present SMSG appointed Jesper Lau Hansen (academic) as chair and Judith Hardt (Financial Market Participant) and Peter De Proft (Financial Market Participant) as vice-chairs.

It is the opinion of the SMSG, that it is beneficial to have two vice-chairs to assist the chair as a group of three ensures greater availability and provides a broader view within the Steering Committee, and that the composition of the Steering Committee should, as far as possible, reflect the different member categories.

Appointment of members to the SMSG is made by the Board of Supervisors of ESMA for a period of 2½ years that may be extended once upon renewed application. Of the present SMSG, 12 members are serving a second mandate period and cannot be reappointed, which includes all three members of the Steering Committee.

It is our recommendation for the future, that the Steering Committee should not comprise more than two reappointed members to allow for continuity.

Three members were replaced during the mandate period. We are given to understand that members who substitute an outgoing member will begin a new 2½ year mandate period from their appointment and thus separately of the mandate period applying to other members. We find this fair, as it will allow replacements to serve a full period and enhance continuity within the SMSG.

The SMSG recommends that the appointment period for substitutes is clearly stated by the Board of Supervisors upon appointment.

We further recommend the Board of Supervisors to make it clear also to the public that new appointments are always made for the 2½ years which are the maximum allowed by the ESMA Regulation.

New members face a steep learning curve irrespectively of when they are appointed and will benefit from experience sharing with more experienced colleagues. The outgoing members of this mandate period are of course all willing to provide information and guidance if so requested.

The SMSG recommends that existing members offer new members an introduction to enable them to function well in their new capacity. Organisation of this introduction should be the responsibility of the Steering Committee and made available as soon as possible upon appointment.

Members are appointed in their personal capacity and appointment is done by the Board of Supervisors, which shall strive to achieve a balanced composition taking into account the criteria described in Art 37 of the ESMA Regulation quoted above. While candidates have to apply for appointment and may be proposed by industry, the appointment and thereby the final composition of the SMSG is the prerogative of the Board of Supervisors.

When exercising its powers to appoint members to the SMSG, the Board of Supervisors should strive to reach a balance between the different categories mentioned in the ESMA Regulation and secure as broad and competent a Group as possible and in doing so observing that each respective category may in turn also represent many different stakeholder interests. It is particularly important to appoint members that represent stakeholder interests within the areas that are subject to direct supervision by ESMA.

Where members change their job or otherwise change their affiliation this raises the question of whether it is necessary for the Board to replace them. We are aware that this question has been a subject of interest to the EU Ombudsman. Art 37 itself does not address the question. It is our opinion, however, that the power of the Board of Supervisors to appoint members in order to achieve a balanced composition of the SMSG must include the power to replace members where this balance is disturbed.

Consequently, we believe that members are obliged to inform both ESMA and the Steering Committee when they change job or affiliation.

It is our opinion that where members change their affiliation this does not necessarily change their personal capacity to continue to serve as members of the SMSG until the end of their appointment, e.g. where they continue in a capacity that falls within the category that they represent. Their experience and personal qualifications do not change fast and our mandate periods are short.

As the categories mentioned in Art 37 are fairly broadly laid out and as new jobs or affiliations are usually in connected areas, a member will often be able to continue serving as a representative of a given category despite a change of job or affiliation. Only where members change in such a way that they can no longer fit into the category upon which they were first appointed should the Board of Supervisors consider replacement of such member.

We address this question while recognising the fact that it is the clear prerogative of the Board to appoint and replace members because we find it important for the independence of our individual members and thereby for the integrity of the SMSG that replacement of members serving their current mandate is only done in cases where there is a clear need to replace a member due to that member's change of job or affiliation.

With due respect to the fact that it is the prerogative of the Board of Supervisors to appoint members of the SMSG, we recommend that new members are appointed with a view to ensure a broad representation of the many different stakeholders that are affected by the work done by ESMA and that attention is also paid to the fact that many of the applied categories in turn cover different stakeholders with different interests. We particularly note the importance of ensuring participation from areas, where ESMA has special powers, e.g. areas of direct supervision. Where members change job or affiliation in such a way that they can no longer be seen as representing the category into which they were originally appointed and a balanced representation of the SMSG is no longer given, the Board should consider replacement.

It would enhance transparency and secure the integrity of the SMSG, if the Board of Supervisors would make public its principles for appointment, replacement and tenure in respect of the SMSG, e.g. on the part of the ESMA homepage dedicated to the SMSG.

We note from the questionnaire performed by the SMSG (appendix 3) that members are generally positive to the composition of the Group, its competences, integrity and independence.

2. Meetings

According to Art 37(1) of the ESMA Regulation, the SMSG must meet at least four times a year and according to Art 40(2) the Board of Supervisors shall meet with the SMSG at least twice a year.

In fact, our meeting schedule has comprised five meeting per year in both 2014 and 2015 of which two meetings each year have included a joint meeting with the Board of Supervisors, which normally takes place after the end of the Board's meeting. In the last ½ year of our mandate period, we have had three meetings including one joint meeting, while a further two meetings are scheduled for the last ½ year.

At the meetings, ESMA is represented by either its chair or executive director or both. The SMSG wishes to express its appreciation of this participation and the clear signal of interest and dedication that it represents. We also express our appreciation of the ESMA staff that participates at our meetings and their helpful presentation of ongoing work and readiness to answer our questions.

The SMSG also wishes to express its appreciation of the bi-annual joint meetings with the Board of Supervisors. We appreciate the attendance from many supervisors at these meetings in spite of their tight schedule and workload. We find it very important to communicate directly with the Board of Supervisors.

As an experiment, the Board of Supervisors allowed the Steering Committee to present the work done in the past year by the SMSG directly at its meeting to supplement the joint meeting which takes place after the regular meeting of the Board of Supervisors, where some supervisors may have left. We appreciate this extra opportunity to meet with the full Board of Supervisors and to the extent that the agenda of the Board of Supervisors allow, we recommend that this is continued, so that the whole Board receives an update on the work of the SMSG annually and not just as part of the final End of Term Report.

The SMSG recommends that the bi-annual meetings with the Board of Supervisors are placed to enable as many supervisors to participate as possible.

The SMSG also recommends that the Board of Supervisors continue to invite the SMSG Steering Committee annually at the end of a calendar year or mandate period to one of its meetings in order for it to present its activities and enable a direct communication to all the supervisors present.

3. Secretariat and administrative support

According to Art 37(4) ESMA shall ensure adequate secretarial support. Since the establishment of the SMSG, ESMA has assigned one individual to act as secretary and provide administrative support. This individual also serves as full time employee of ESMA with the appending workload.

The SMSG recognises the limited resources available to ESMA and the SMSG has also publicly warned that sufficient funds must be made available to ESMA if it is to fulfil the many important tasks that are placed upon it. Against this background, the SMSG recommends that ESMA continues to set aside sufficient resources to assist the SMSG and ensure its proper functioning.

It follows from Art 37(4) of the ESMA Regulation that “adequate compensation shall be provided to members of the Securities and Markets Stakeholder Group that are representing non-profit organisations, excluding industry representatives”. The funds made available for such members are modest and make it difficult to cover the costs connected with participation in the form of travel,

accommodation, etc., but the SMSG acknowledges the difficult financial situation of EU authorities in general and the need to be parsimonious.

Among the different tasks of the Steering Committee, the most time consuming and recurring has been the preparation of the agenda for five annual meetings, where the chairs usually meet in person together with the secretary to discuss and decide the content of the agenda. The chairs receive no funding for this work or for the costs incurred by travel.

Acknowledging the scarce resources available to ESMA, the SMSG recommends that the level of compensation for members is adjusted upwards and that funds are made available to cover the extra expenses incurred by the members of the Steering Committee.

SECTION II. SELF-ASSESSMENT

4. *The role of the SMSG*

The new European System of Financial Supervision (ESFS) that was established after the Financial Crisis has transferred considerable powers of financial regulation and supervision to supranational authorities, not just the bodies established by the Treaties such as the European Parliament, the Council, and the European Commission but also the new European Supervisory Authorities (ESAs). It is vital both to ensure effective regulation and to maintain legitimacy and public confidence in the ESFS that these authorities and their use of powers are subject to public transparency and that they remain accountable to the public.

Following the reform of the founding treaties, legislation at level 1 according to Article 289 of the Treaty on the Functioning of the European Union (TFEU) by the EU legislators can be supplemented by rule-making on level 2 according to Articles 290 – 291 TFEU by the European Commission that may be assisted in this task by drafts provided by one or more ESAs. The European Commission may also ask one or more ESAs for advice where the level 1 text has authorised it to adopt level 2 instruments directly. Finally, the ESAs are vested with powers to ensure a uniform application of the level 1 and 2 texts, notably by issuing their own recommendations and guidance, so-called level 3 texts.

Furthermore, the ESAs are entrusted with creating a single rulebook, not just in the form of harmonised rules across the Union, but also by ensuring supervisory convergence among the national competent authorities which prevents regulatory arbitrage. In some areas, and we expect them to grow in number and importance, the ESAs are entrusted with direct supervision.

To ensure transparency and accountability when these powers of rule-making and supervision are exercised, the ESMA Regulation calls on ESMA to »consult interested parties on regulatory or implementing technical standards, guidelines and recommendations and provide them with a reasonable opportunity to comment on proposed measures«, cf. recital 48.

Furthermore, the SMSG was established »To help facilitate consultation with stakeholders in areas relevant to [its] tasks«. Whereas consultation with the public at large cannot by practical necessity involve deeper engagement, the establishment of a body comprising a balanced proportion of »financial market participants, small and medium-sized enterprises (SMEs), academics and consumers and other retail users of financial services« ensures a more efficient engagement with stakeholders and is thus instrumental in providing the necessary transparency and accountability. The other ESAs were provided with their own stakeholder groups for the same reason, EIOPA having two such groups to reflect its binary scope of both insurance and occupational pensions.

Thus, the role intended by the EU legislators for the SMSG was to ensure public transparency and accountability by offering its opinions and advice to ESMA. The papers and opinions produced by the SMSG are made publicly available at the homepage of ESMA as are the minutes of its meetings, thereby providing valuable insight for the public and assurance that stakeholder involvement is observed.

As ESMA is primarily engaged with drafting technical standards as level 2-instruments and promoting supervisory convergence among national competent authorities by issuing level 3-instruments, the role of the SMSG is primarily to provide its opinion on these matters, cf. Article 37(5). Thus, most of the work done by the SMSG is made in response to consultations by ESMA on ongoing rule-making on level 2 or 3, where we offer our advice to the drafts presented.

It does not follow, however, that the SMSG can only act in response to a consultation from ESMA and the SMSG has on several occasions provided ESMA with its opinions on various matters that are deemed important by its members, often anticipating later legislative initiatives. Also, the SMSG is expressly expected to warn ESMA of any breaches of EU law, including level 1 legislation that comes to its attention, cf. Article 17(2) of the ESMA Regulation. In certain cases, the SMSG has seen it necessary in order to fulfil its task as a stakeholder group to address other authorities or bodies than ESMA. For example, the SMSG addressed the authorities engaged in the negotiation of the budget of ESMA to express its concern that adequate funds should be made available to ensure the proper functions placed upon ESMA.

As we are the only body ensuring involvement by stakeholders into the ESFS in the area covered by ESMA, we also react on our own initiative and may issue opinion papers on issues that we deem relevant for the stakeholders concerned. Mostly, these own initiatives are addressed to ESMA, but occasionally they may also address or concern other parties, see for example the SMSG opinion paper and letter on PRIIPs adopted by the SMSG in 2016 and 2015, respectively.

Considering that it is a direct representative of the European stakeholders within this area and for the sake of the transparency and accountability which is necessary for the continuing legitimacy of the European System of Financial Supervision, it is the opinion of the SMSG, that it should continue to offer its opinion and advice on all subjects which fall within ESMA's area of responsibility and that in so doing the SMSG may address ESMA or any other relevant party, body or authority on matters that have a bearing on the proper functioning of ESMA taking into account the role intended for ESMA and the SMSG by the EU legislators. In so doing, the SMSG

also recognises that it possesses no authority or powers beyond the quality of its opinions and advice.

The first great wave of rule-making is subsiding and thus we expect that ESMA will primarily concentrate on supervisory convergence in the years to come. Likewise, we expect the role of the SMSG to shift accordingly. This will subtly change the role of the SMSG, making it more important to focus on the application of rules throughout the Union and it might create an impetus for change, which we explore in point 10 below.

With supervisory convergence as the main work field for ESMA in the years ahead, ESMA is likely to rely even more on the instrument of “Questions and Answers” (Q&As). This is an instrument whereby frequent questions are addressed and their answers provided with the intention of removing the need by practitioners to actually address ESMA on these issues. In this way, Q&As reflect the opinion of ESMA on a number of practical issues flowing from the regulation which ESMA covers. As such, Q&As have become one of the most important instruments for practitioners and national competent authorities alike who regularly see them as offering guidance almost on par with the formal guidance or recommendations adopted by ESMA according to Art 16 of the ESMA Regulation.

We have at one point asked ESMA to describe its use of Q&As and we understand that they are adopted by the Board of Supervisors reflecting the general opinion of ESMA. This only adds to their importance as informal guidance.

It is well known in EU law, as it is in most member states, that supervisory authorities rely on a host of different instruments which they may use for particular purposes. Some instruments are binding in the sense that non-observance may provoke legal consequences, e.g. liability or administrative or even criminal sanctions; other instruments are described as not binding or »soft«, because they carry less or no consequences. Generally, the stricter an instrument is, the more formal requirements must be observed by the authority in order to use it. Binding instruments can only be adopted under certain strict conditions and after observing various safeguards, e.g. consultations, which do not apply to instruments deemed less strict.

Q&As are not mentioned in the ESMA Regulation, which of course does not preclude ESMA from applying them and the SMSG consider their careful use very beneficial, especially if ESMA continuously ensures that each Q&A remains relevant and is careful in its distinction between when to address a problem by a Q&A and when to issue a guideline or recommendation according to Art 16.

We understand that input from the public, national competent authorities and citizens alike, is used when ESMA designs Q&As, which ensures their relevance. The SMSG acknowledges that ESMA is under no obligation under the ESMA Regulation to consult with it when drafting Q&As, because it is not an instrument covered by said Regulation. However, the SMSG offers its assistance, if ESMA would deem its input useful to have when assessing the relevance of the matters to be included in the Q&A and whether other issues should also be addressed. This assistance can be

offered when the Q&A is designed or at any time thereafter as part of ESMA's continuing observance of the Q&A's relevance.

At this point in the development of ESMA, the SMSG does not suggest that the use of Q&As be regulated in any greater detail, e.g. by amendment of the ESMA Regulation. We deem it important for ESMA to have this soft instrument in its toolbox and the lack of formal requirements pertaining to its use, including the lack of any obligation to consult, emphasises the soft character of this instrument. However, as mentioned above the distinction between formal guidelines according to Art 16 of the ESMA Regulation and Q&As should be examined over time to ensure the proper use of both instruments.

The SMSG offers its assistance if ESMA deems its input as useful to have when assessing the relevance of the matters to be included in the Q&A and whether other issues should also be addressed. This assistance can be offered when the Q&A is designed or at any time thereafter as part of ESMA's continuing observance of the Q&A's relevance.

The SMSG does not suggest that the use of Q&As are regulated at this point in the development of ESMA, but recommends that continuous attention is paid to how Q&As are used compared to the use of formal guidelines according to Art 16 of the ESMA Regulation.

5. How we work

The amount of consultations undertaken by ESMA and thus also referred to the SMSG has been vast almost from the very beginning. Originating in a decision made in the 1st mandate period, the SMSG does not attempt to respond to all consultations undertaken by ESMA. Nor do we see it as our task to provide highly technical advice, as this is often provided by interested parties through the public consultations. Instead, we strive to provide general policy advice on important principles where we can respond on behalf of the whole SMSG and not solely rely on the few members who may have specific knowledge of the subject matter.

We believe that our advice is most valuable to ESMA where it reflects a consensus of the different constituencies represented in the SMSG. ESMA will receive from the public consultation the partisan view of special interest groups, but the SMSG would like to offer ESMA a view of where a consensus view may be reached. For this reason, we apply the following principles:

- We generally strive to present our advice with a wording which represents a consensus view held by the various stakeholders.
- Where different opinions prevail, we generally do not number or name the members supporting the different opinions, but only note that these opinions are voiced by the members.
- Only opinions supported by three members or more are included in the SMSG advice.

The workload of the SMSG is so demanding that we have had to establish working groups (WGs) to deal with each matter, which is explicitly foreseen in Art 37(4) *in fine*. To ensure that a WG is sufficiently representative of the whole SMSG, a WG will normally only be established if at least six members volunteer to join it.

As we would like to engage the whole SMSG in all matters and avoid that certain members acquire a proprietary ownership of certain areas, we do not use permanent WGs. A WG is thus established to perform a particular task, typically to produce a certain advice, and a call to join a newly established WG is made to the whole SMSG upon every occasion. When the task is performed, the WG is terminated. However, certain areas continue to produce consultations which require WGs and the establishment of a new WG will then often consist of the same members who formed part of the latest WG covering that specific area. Consequently, although we do not have permanent WGs, some WGs do assume a more permanent character over time, but it is important to note that all members are free to join or abstain each time a WG is established.

The next SMSG should contemplate whether or not it would continue the present system, where WGs are established for a certain purpose and terminated when that purpose has been reached. In favour of the present system counts the fact that all members are regularly invited to join all WGs, which enables a more active and broadly based interest in the Group's work. In favour of permanent WGs counts that they may be able to react more quickly to new issues and may develop special competences.

Each WG is headed by a member who serves as the Rapporteur. It is the responsibility of the Rapporteur to drive the work of the WG forward and produce the intended result within the established deadline. The first presentation of the issue and the first draft of the advice are often produced by the Rapporteur. The Steering Committee is very grateful that so many members of the SMSG have taken upon themselves the demanding work of serving as Rapporteurs on the various WGs. Where necessary, a WG may require help and assistance from ESMA staff, but often their involvement is not required. The WG will discuss its work by online communication (emails) or by telephone conferences.

Once a WG has produced its draft paper, the draft is presented to the whole SMSG for adoption. Formally, adoption can be made by vote, but so far all adoptions by the SMSG have been by unanimous decision. Where the deadline for consultation allows the WG to present its draft in one of the five annual meetings, this is done to enable a discussion of the draft. However, frequently the deadline is too short to allow for this and adoption is subsequently done online by email communication, where we apply the rule that silence equals consent.

Once adopted, the final advice or opinion paper is presented using the standard template and format of the SMSG and is signed by the SMSG chair, after which it is made public on the section of the ESMA website dedicated to the SMSG.

The standard lay-out is provided by the secretary, who will also assign a serial number to each individual paper adopted by the SMSG and ensure that it is made publicly accessible on the website. The standard lay-out calls for an executive summary to introduce each paper. This summary should comprise information which enables the reader to quickly get an overview and basic understanding of the matter at hand.

The SMSG recommends that each of its papers, irrespective of its character, should include an executive summary which provides the reader with a quick overview and understanding. The summary should mention whether the paper is drafted in response to an ESMA consultation and the nature of such consultation or whether it constitutes an own initiative. It should state the most important conclusions. The summary should further be drafted in such a way that it can easily be included in future End of Term Reports, as has been done in Section III of this Report.

6. Meetings

The five annual meetings take place at ESMA's premises in Paris. One meeting each, held during the 1st and 2nd half of the year respectively, is scheduled back to back with a meeting of the Board of Supervisors allowing us to table half-yearly joint meetings with the Supervisors.

In advance of each meeting, the Steering Committee, via the secretariat, calls for input from the SMSG, especially on the permanent agenda point called Recent Developments & Supervisory Convergence. Based on input from members and input from ESMA on their ongoing work, the Steering Committee will produce a draft agenda, most often meeting in person with the secretariat to discuss the items on the agenda being contemplated. The resulting draft agenda is discussed with the ESMA Chair and Executive Director and then provided in its final form to the whole SMSG.

According to Art 5(2) RoP, material for the meeting must be distributed to members at the earliest opportunity and no later than one week in advance, whereas in case of urgency this time limit may be reduced to 3 working days. The work pace of ESMA is such that it is not unusual that additional material is distributed even later than this, however, we generally observe a curfew so that material will not be distributed later than 24 hours before the meeting as many of our members may be travelling. All material that has not been distributed in advance of a meeting will be distributed after the meeting by the secretary. All material is subject to confidentiality, cf. Art 15 RoP. We note from the questionnaire (Appendix 3) that members are naturally keen to receive the material well in advance of our meetings.

At an SMSG meeting, each subject will be debated and ESMA staff is always present to explain the matter at hand such as work in progress or a consultation. As mentioned above, the SMSG values the participation of both the ESMA Chair and Executive Director, who are present during the entire meeting, and the various ESMA staff, as this is evidence of the importance attached to our work by ESMA.

It was probably the intention behind Article 37 of the ESMA Regulation that the SMSG should be consulted before a public consultation was initiated, but the very short deadlines applied by the

EU legislators have in most cases made such an advance briefing of the SMSG impossible. However, the SMSG highly values the opportunity to offer its advice at an as early stage as possible.

The SMSG recommends that ESMA strives to make use of the SMSG's advice at the earliest possible opportunity.

After the meeting, the secretary drafts a Summary of Conclusions (SoC) which serves as the minutes of the meeting. The draft is presented to the Steering Committee which, after possible revision, in turn presents it to the Group for final adoption, usually via email. Upon adoption, the SoC is made public on the SMSG section of the ESMA website.

The frequency of consultations and the short deadlines have shifted most of our work away from the five yearly meetings and onto online communication via email. Thus, most of our work is now done by WGs working and having their drafts adopted online in between meetings. Nevertheless, this kind of communication cannot replace the value and outcome of physical meetings, which allows for much deeper and detailed discussion.

The SMSG recommends that the SMSG continues to meet at least the four times per year as mentioned in Article 37(1) of the ESMA Regulation.

7. Work plan

In Art 4(3) RoP it was originally concluded that the SMSG should adopt a work plan linked to ESMA's work plan. However, the SMSG work plan has had little independent value compared to the ESMA work plan, probably because most of our work consists of responding to consultations from ESMA in which case the SMSG work plan just becomes a mirror. Nevertheless, the SMSG should not lose sight of the more wide-ranging and strategic issues and so, while the SMSG work plan will always mirror the ESMA work plan to a considerable extent, the SMSG should at least once annually debate which strategic issues it finds important and adopt these as part of its work plan, taking into account however, that such a work plan cannot and will not be exhaustive. Considering that the SMSG cannot and will not respond to all consultation and discussion work undertaken by ESMA, such strategic issues may help to lay down which parts of ESMA's future work the SMSG will concentrate on, as well as identify matters which are not currently part of ESMA's work plan but which may merit an own initiative by the SMSG.

The SMSG observes that while its work plan will necessarily mirror that of ESMA's, it is important for the SMSG to at least once annually discuss and decide whether to concentrate on certain parts of ESMA's future work and whether to pursue, at its own initiative other matters which are not part of ESMA's current work plan and that these strategic issues then should form part of the SMSG work plan.

8. Contact with the other Stakeholder Groups

The three ESAs are founded on vertical silo-like subject areas with considerable overlap: banking, securities, and insurance & occupational pensions. To ensure cohesion in the ESFS, the three ESAs work together in the Joint Committee and many consultations are made as joint consultations on behalf of more than one ESA.

We consider it obvious that it would be beneficial for the Stakeholder Groups of the three ESAs to cooperate and, where possible, also produce joint advice in response to joint consultations. With this in mind, the three Stakeholder Groups organised a meeting at the beginning of the 2nd mandate period in early 2014 at the premises of EBA in London. The meeting was successful and it was agreed to seek such cooperation where ever possible.

However, the consultation periods have consistently been too short to allow for such coordination and so far no joint advice has been prepared. The problem of short deadlines for adoption of texts on level 1-3 is well known and has been addressed also by us, and we can only hope that more sensible deadlines will enable cooperation among the four Stakeholder Groups, which we believe will be highly valuable for the ESAs.

The Steering Committee should ensure upon appointment that they contact the chairs of the other Stakeholder Groups and maintain connection throughout the mandate period.

Most Stakeholder Groups apply working groups and so it may be helpful to respond to a joint consultation by informing the other Stakeholder Groups of which WGs are assigned to deal with the consultation and who is in charge of each WG with a view to enable cooperation in drafting a joint response.

The SMSG recommends that the SMSG continuously keeps in mind and explores the possibility of providing joint responses by the Stakeholder Groups to joint consultations made by the ESAs and that the Stakeholder Groups maintain clear lines of communication among themselves, especially between the chairs of the Stakeholder Groups and between their working groups.

9. Impact of our work

As already observed, we are very pleased and content with the working relationship which we enjoy with ESMA and its staff. It is our impression that ESMA is genuinely interested in the feedback that it receives from us and we appreciate that ESMA frequently allows us to respond to matters even where deadlines are tight.

ESMA publishes our responses when they address the outcome of consultations and frequently follows our advice, which we believe reflects the usefulness of our consensus seeking approach, cf. point 6 above.

We appreciate the transparency that follows from ESMA's inclusion of our advice in its publications and the public access which is enabled by reserving a part of the ESMA website to the SMSG. In respect of the latter, we wish for more visibility on the website, but appreciate that the design of

the website needs to accommodate many other important sources of information in a simple and clear way.

10. Future considerations

As the SMSG anticipates that the future workload of ESMA will change from rule-making to supervisory convergence, we have debated to which extent this could also influence the role played by ESMA and the SMSG, respectively.

To explore this important question, we established a WG on supervisory convergence during the last 6 months of our mandate period. The result of the WG's work was presented to the full Group at one of our meetings and has also been subject to debate online in between meetings. The importance of the subject is reflected by the fact that all members of our Group have participated actively in this debate.

Among the issues debated by the WG was one issue which was deemed so important that it was not reasonable to let it be decided right at the end of a mandate period, when it was unknown who would form part of the next SMSG and with the certainty that almost half our members would not be able to reapply due to the restriction to two consecutive mandate periods in the ESMA Regulation.

This issue debated is whether the SMSG should be open to input from the public, so that outside parties may inform the SMSG of matters of relevance to supervisory convergence or other facts which may be of relevance to ESMA's work, i.e. a question of direct access. Each member of the SMSG serves in a personal capacity, which also applies to members representing particular organisations or institutions. Each member will bring to the SMSG his or her personal experience and knowledge of current market conditions. It may depend on coincidence whether a member becomes aware of a certain fact which may be of relevance to the SMSG. Where a member represents a certain category of stakeholders, that member is more likely to be aware of issues of interest to that category of stakeholders, but as the SMSG can only comprise 30 members, it is impossible to represent all the different interests.

In favour of opening up for the public to make such contributions directly to the SMSG is the fact that it would provide an equal and transparent way of approach the SMSG irrespectively of whether a certain stakeholder category is represented or not and it might help to ensure that the SMSG became more broadly aware of pressing problems.

However, there are also many reasons why the SMSG should not adopt such a possibility.

One concern is that the SMSG may become swamped with complaints. Even if the Steering Committee were to serve as a gatekeeper and sort the incoming matters, these may still overwhelm its capacity. It is also possible that the public would fail to understand the role of the SMSG as a body primarily engaged with issues of policy and general principles and flood it with complaints which are minor, trifle or of singular personal interest only. The SMSG cannot offer to remedy any per-

ceived wrongs but can only address their more principled aspects, which may be seen as inadequate by the public and cause frustration and resentment. This may also be the outcome, if the SMSG were to allow such direct access only to be forced to abandon it again at some point due to a lack of capacity or for other legitimate reasons. Finally, it should be observed that ESMA itself has an open and direct access for the public to bring these matters to attention and has a larger institution to cope with it.

The outgoing SMSG has decided not to make a decision on this issue, but recommends that the next SMSG takes this issue under careful consideration. Obviously, if any such decision were to be made, it would have to be carefully calibrated to avoid information overload and to manage expectations. We have full trust that the next SMSG will be able to make the right decision on their own.

The SMSG recommends that the next SMSG carefully considers the pro & cons of allowing a direct access for the public to bring forward issues of supervisory convergence or otherwise of relevance for ESMA's work to the attention of the SMSG.

SECTION III. ACTIVITY REPORT

11. *Recent Market Development and Supervisory Convergence*

Generally the SMSG meetings begin with discussions on recent market developments. Such discussions have the purpose for the SMSG to highlight to and exchange views with ESMA on topics of general interest in the securities markets and related areas.

Topics discussed during the current mandate period include among others:

- Non-Bank Systemically Important Institutions
- Gowex, the Spanish alternate market
- Discussion on the Credit Suisse / Banco Espirito Sancto case
- Financial instruments market vis-a-vis money system
- HFT
- Self-placement
- Cybersecurity
- Common methodology to assess digital platforms for retail investment products
- The FX market and retail investors
- “Shadow Banking” defined as “Money market funding of capital market lending”
- Capital Markets Union (CMU)
- Closet indexing
- Market Abuse sanctioning system
- CMU
- Risk Factors in the Financial markets
- Challenges in finalising MiFID
- China – capital market development
- MiFID II delay

- ESMA's representation in international organisations
- IFRS 9 on financial instruments
- The use of blockchain and distributed ledger technology
- Fund liquidity
- Brexit
- Robot Investment Advice

Adopted papers

In this section of our End of Term Report, we present the papers adopted by the SMSG during 2014, 2015 and 2016-1. Although all papers have applied a special ESMA format and been assigned a SMSG serial number, the composition of our papers has evolved so that they now always begin with an executive summary. As will be apparent from the presentation below, not all papers here included have such an executive summary and so some papers are presented by their conclusion while most papers are presented by their executive summary. The full advice is available on the ESMA website.

12. Papers approved by the SMSG during 2014

12.1 Credit Rating Agencies, CRA3 Implementation

Rapporteur: Lindsey Rogerson (2014-SMSG-014)

SMSG welcomes the consultation paper on CRA3 Implementation and acknowledges the pragmatic approach ESMA has taken which we believe will minimize the cost of compliance for credit rating agencies while at the same time delivering transparency to investors.

However we feel it is important to note that the ultimate success for ESMA of delivering against the general objective “to provide enough information to enable investors to make an informed assessment” will be determined by the functionality and usability of the European Rating Platform.

If investors are to be able to carry out their own due diligence it is important that they have access to the reasoning as to why a particular rating has been changed. We believe it is also important for investors that this information is kept in one easily searchable central place. ERP must, we believe, give investors the ability to compare the rating of instruments, not only across rating agencies but also across time.

Further to this we believe it will be important that the ERP provides investors with the ability to subscribe to email alerts for specific rating actions (e.g. downgrading of an issuer). We would also suggest that including the capability to download rating actions would be of assistance in helping ESMA reduce the mechanistic reliance on ratings by fund management industry.

On fees while supportive ESMA’s proposals we have concerns that ESMA will not be able to supervise CRAs with regard to their fees unless sufficiently resourced. Without enough statisticians, to interpret the collected fee information, as well supervisors to follow up and investigate outliers, it will be difficult for ESMA to deliver on this requirement of the CRA3 Regulation.

12.2 Crowdfunding

Rapporteur : Angel Berges-Lobera (2014-SMSG-010)

SMSG welcomes the opportunity to give ESMA an opinion and advice about crowdfunding, at a time of increasing awareness on the opportunities and risks around such a finance alternative, and in the middle of a recent move towards ruling it in several European countries.

An initial challenge is the lack of a clear and uniform definition of crowdfunding, as it covers many different business models, all of them having in common an open call, through internet, to raise funds with many different objectives.

In order to guarantee the technology neutral approach of regulation, however, the basic principles on crowdfunding should be the same whether the call is made on-line or off-line (like through phone or direct marketing channels).

Among the many different types of CF currently out there, we consider that only those which offer something in return should be allowed as general norm for actual fundraising. In fact, ESMA should be concerned with pure securities-based crowdfunding, which represents a much smaller size than loan-based.

However, given that both –loan based and securities based- raise similar concerns in terms of investors protection, we consider that ESMA approach towards crowdfunding should be coordinated with EBA in order to get a common position in terms of an appropriate equilibrium between impulse to crowdfunding and consumer protection.

This common approach with EBA is especially appropriate at a time when the European Commission is taking important steps to raise awareness on crowdfunding, and keep a close monitoring on crowdfunding activity and regulatory developments, as well as considering to establish a European quality label, or specific requirements on financial crowdfunding.

In this sense, the working group considers that ESMA –with EBA- should be proactive in giving advice to the EC regarding specific regulation on crowdfunding especially on the investor or consumer protection aspects.

At a time when several European countries are producing specific regulations on crowdfunding, the working group considers that ESMA's priority should be to try to get the maximum homogenization and clarification about crowdfunding across European countries.

It would be impossible and ineffective to make amendments to the current regulatory frameworks limiting crowdfunding (Prospectus, Transparency, MAD, etc.). But some kind of unified regulation should be targeted, without necessity to change member countries' regulation on IPO.

Some countries regulate crowdfunding by defining maximum issue levels inside the 100.000 to 5 million euro range that Prospectus Directive leaves for each country to decide; as well as limits on the amount each investor can invest, either in a single project or during a one-year horizon. Other countries do not impose specific limits, but rather emphasize a disclosure approach to crowdfunding.

In both approaches, however, a key role is to be played by crowdfunding platforms, as the guarantors that investors get all the information about the projects and the risks involved, in order to make their decisions on an informed basis.

Given this pivotal role for crowdfunding platforms, the working group considers that ESMA should take the lead on setting out standards on transparency requirements and potentially, where e.g. shareholder services or market making activities are undertaken by the platform, capital requirements, to be imposed on platforms on a European wide setting.

Such a homogeneous approach towards platforms could also form the basis for a future European label to be granted to crowdfunding platforms meeting more exigent and harmonized requirements at a European level.

Some exemptions could be granted from the obligation to prepare a prospectus, independently of the limit specified in the home country, for those platforms fulfilling specific requirements in terms of: transparency towards investors; performing duties about investors awareness and/or financial sufficiency; guaranteeing platform continuity, etc.

Regarding quantitative limits to maximum individual investments in crowdfunding, the working group considers that it is not to ESMA to make these choices. Nevertheless, in the MIFID context investment products should be appropriate to the investor's profile. To the extent that more leniency would be offered in crowdfunding investments, this should be balanced by some type of limits on maximum investor amount, either in absolute or relative terms.

12.3 Major shareholdings and financial instruments subject to notification under the revised Transparency Directive

Rapporteur: Rüdiger Veil (2014-SMSG-030)

The objective of this paper is to provide advice to ESMA on the Consultation Paper on Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive.

The SMSG very much welcomes ESMA's balanced approach between strengthening disclosure of major shareholdings and avoidance of unnecessary costs for market participants.

The key messages the SMSG would like to highlight towards ESMA for consideration in its work going forward regarding finalizing regulatory technical standards and establishing an indicative list of financial instruments subject to disclosure are:

- ESMA's proposals for dealing with the exemptions from disclosure obligations provided for trading book and market maker holdings is convincing. In particular, the SMSG strongly supports ESMA's proposal introducing a rule on the aggregation of holdings in a group of companies. The SMSG also agrees with ESMA's approach exempting a parent undertaking from notification requirements provided that its subsidiaries can be considered as independent. But it will be important that national competent authorities evaluate

whether the principles of independence are fulfilled in a consistent way. The SMSG therefore urges ESMA to ensure a consistent application of the exemption in the future.

- The revised Transparency Directive will lead to more disclosure of financial instruments. The SMSG agrees with ESMA's observation that there will be a risk of a high number of irrelevant notifications. This might explain ESMA's mandate to specify certain cases in which exemptions laid down in the Transparency Directive apply to financial instruments held by a natural person or legal entity fulfilling orders received from clients. However, the level 1 text is ambiguous. The SMSG is of the opinion that the Transparency Directive does not mandate ESMA to establish a separate exemption for client serving transactions. The problem of potentially excessive and irrelevant disclosure of financial instruments has to be solved on level 1 by the Commission, European Parliament and Council.
- The revised Transparency Directive requires ESMA to establish an indicative list of financial instruments that are subject to notification requirements. Although the list will not be legally binding the SMSG believes that it will be a valuable support for investors in assessing whether financial instruments have to be disclosed or not. The SMSG observes that ESMA has examined in depth whether financial instruments should be made public under the Transparency Directive. In addition, it would be beneficial for the market to learn if financial instruments are not subject to notification requirements. The SMSG understands that the Transparency Directive does not request ESMA to establish a white list. But it would be helpful if ESMA explained its considerations for including certain instruments in the list and on this occasion explains whether comparable instruments are not covered by the Transparency Directive. ESMA Consultation Paper on CRA3 Implementation

12.4 Opinion on Discussion Paper under MAR

Rapporteur: Carmine Di Noia (2014-SMSG-011)

Opinion on ESMA's Discussion Paper – ESMA's policy orientations on possible implementing measures under the Market Abuse Regulation

The objective of this Report is to provide an opinion to ESMA on its Discussion Paper on policy orientations on possible implementing measures under the Market Abuse Regulation (hereinafter "MAR") (see ESMA/2013/1649). This opinion has been drafted after the formal end of the consultation given that the new SMSG only met for the first time after the deadline. Nevertheless, the SMSG hopes that ESMA will take into account the opinion also at this stage of its work. The SMSG will provide the other inputs requested by EU Regulation 1095/2010 and urges ESMA to have a continuous and constructive dialogue in the preparation of all secondary measures foreseen by MAR.

The SMSG very much welcomes ESMA's excellent Discussion Paper. The Discussion Paper is very detailed and will remain a reference for future interpretation.

The SMSG' opinion is focused on some specific topics which are the following: buy-back and stabilisation, market soundings, accepted market practices, public disclosure of inside information and delay, insider list, managers' transactions. There are no specific comments on investment recommendations but the SMSG thinks that their content is a very important element in order to ensure the fair and correct information provision to the client: sometimes the recommendation does not contain clear information about the interests and thus potential conflicts of interest, or it is hidden or found somewhere way back in the related documents. Increased transparency should be ensured in order to define exactly what would be the elementary sales approach when making use of the investment recommendation.

The SMSG opinion is rendered both with some general remarks and with some specific answers to the ESMA's questionnaire, following the numbering in the ESMA paper.

This opinion contains very preliminary comments, which in some cases are detailed. SMSG reserves the right to modify its comments when consulted on the concrete draft texts.

12.5 Alternative Performance Measures

Rapporteur: Krzysztof Grabowski (2014-SMSG-015)

In October 2005, the Committee of European Securities Regulators (CESR), ESMA's predecessor body, published a Recommendation on Alternative Performance Measures ("*CESR Recommendation*" CESR/05-178b). The CESR Recommendation was issued mainly in order to reinforce the objectives of Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards.

Given the CESR Recommendation has now been in force for more than 8 years, ESMA has decided to review it with the objective of strengthening the principles contained in it. ESMA now plans to re-issue the principles as ESMA [draft] guidelines under Article 16 of the ESMA Regulation in relation to the acts referred to in Article 1(2) of the ESMA Regulation, which include the Transparency Directive, thus ensuring that issuers and National Competent Authorities (NCAs) will make every effort to comply with them.

On 13 February 2014 the final version of the ESMA Consultation Paper on APM was published, with deadline for consultation set on 14 May 2014. ESMA issued this Consultation Paper (CP) to inform market participants about the background to its decision to revise the CESR Recommendation and seek their views on such revision.

SMSG welcomes ESMA's initiative to imply a common approach to be adopted by NCAs and issuers towards the use of APMs by issuing guidelines. The Transparency Directive does not request ESMA to issue respective guidelines. However, according to Art. 16 of the Regulation 1095/2010, ESMA shall, with a view to establishing consistent, efficient and effective supervisory

practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines addressed to competent authorities or financial market participants.

The ESMA [draft] guidelines are much more extensive than those specified in the CESR Recommendation that is currently in force, which applies to financial performance figures of listed companies focusing on issuers reporting under IFRS. “Listed companies” is generally understood as companies, whose shares are listed (admitted to trading) on a regulated market. The new guidelines will be applicable not only to those issuers, whose shares are listed on a regulated market, but also to issuers of other listed securities, including bonds and depository receipts. This is a right direction, and the new guidelines should also be applicable to prospectuses and other related documents.

The SMSG agrees with ESMA that the additional cost for issuers will be rather marginal, so the benefits will be much higher than costs. It should also be stressed that issuers will use APMs only if they so wish, and if they think that the benefits will outweigh the related costs. What is the most important, the users should understand well what issuers are telling them, so if an issuer wants to use APM's, it should explain them clearly.

12.6 Investor Protection Aspects - MiFID II and MiFIR

Rapporteur: Pierre-Henri Conac (2014-SMSG-035)

The MiFID II and MiFIR constitute a real improvement in the protection of investors, with significant changes, as well as new powers granted to national competent authorities (NCAs) and to ESMA.

As part of its preparations for advising the European Commission on how to implement this legislation, ESMA has provided only limited time (two months and one week) for the public consultation. Therefore, the SMSG decided to only provide advice on selected key issues of importance for retail investor protection while raising also some more general concerns. In general, the SMSG would like to stress that there is a need to think about the combined effect of all the potential changes, rather than just looking at each proposal in isolation. The SMSG is also concerned by the fact that the Technical Advice in some parts is written in a very detailed and technical language which makes it challenging for both investors as well as professionals to assess what the final law would really entail. The SMSG thus calls for more clarity.

On the issue of enforcement, the SMSG would like to remind that strong enforcement of the rules is just as important as having the best rules. The financial crisis was due at least, as much, if not even more, to weak enforcement of existing rules as to insufficient rules per se. The SMSG considers that the power to remove physical persons from the industry is an essential power in order to protect investors from mis-selling and other abuses and should be strongly enforced by NCAs. The SMSG also calls on ESMA to, at a later stage, undertake a mapping exercise on national civil liability regimes in relation to the new MiFID-regime.

On the issue of underwriting and placing, conflicts of interest and provision of information to clients, the SMSG notes with great satisfaction that the issue of self-placement, which it raised with ESMA in 2012 and 2013 with a view to the case of the Participaciones preferentes in Spain, is being singled out in the Consultation Paper. The SMSG advises an even stronger wording of the Technical Advice and also that ESMA use the approach developed in Spain by the CNMV as a model and also considers developing a specific Guideline on this issue. In the meantime, the SMSG supports and invites ESMA to exercise strongly its powers in terms of supervisory convergence, especially in relation with the Asset Quality Review (AQR) of the EBA and the stress test of the ECB that will be completed in November 2014.

The SMSG is very concerned with the risk of a reduction of the “open architecture” model in Continental Europe. Therefore, in general, the SMSG requests that ESMA adopt an approach of the regime of inducements for non-independent financial advisers aimed at minimising the risk of negative impact on the current “open architecture” system which provides benefits to retail investors. Open architecture benefits investors as, to take just one example, independent manufacturers of investment products, which do not have their own distribution channel, have typically, and also logically, shown better performance, as they cannot rely on a “captive” group of customers but must prove their competence or disappear. The SMSG also wants to underline that the political compromise at Level 1 did not imply a de facto ban on inducements in the context of non-independent advice. The SMSG understands that this is also the view of ESMA, but this is not so clear from the Technical Advice. Therefore, the SMSG requests that the definition of instances when the “quality enhancement” test is not met in Points 10-11 (p. 124) be redrafted in order to make it easier to understand for those concerned and also ensure that the model of “open architecture” is preserved.

Closely linked to this issue, the SMSG notes the risk of a shrinkage of the availability of advice for retail investors. The experience in the UK gained through the Retail Distribution Review (RDR), although still at an early stage and evolving advises cautions. It appears particularly that middle income savers now have great difficulty in finding decent advice on their savings needs, even as their need for guidance increases the more this could lead to a two-tier system where an increasing proportion of advice is focused on higher income target groups.

On the same issue of avoiding unintended adverse consequences, the SMSG considers a major issue that ESMA labels investment research as an inducement as this will lead to a de facto ban. This could have adverse severe consequences on research on SMEs which MiFID II aims at the same time rightfully to support. We strongly advise ESMA to reconsider their stance by deleting the paragraph relating to investment research.

The SMSG is also concerned that due to various own initiatives from national competent authorities (NCAs) in order to protect investors, a fragmentation of the single market might occur. This fragmentation already existed under the MiFID I regime, but it is made much more problematic now by the significant extension of the scope of MiFID II and MiFIR as well as by the granting of new powers to regulators.

On the issue of disclosure of costs, the SMSG supports the approach of the Consultation paper but also calls for the adoption of an easy to read summary table of costs and performance to be provided annually to the investor. The SMSG has included in its advice a model for such a table.

On the issue of suitability and costs, the SMSG believes that the assessment to be made whether there is an alternative instrument with lower costs is crucial and congratulates ESMA for including this requirement in its draft Technical Advice. The SMSG strongly advises that the assessment be provided in the suitability report regardless of the lower cost alternative instruments being part of the investment firm's offering or not. However, some members of the SMSG believe that these requirements are simply contradicting the suitability assessment which is meant to provide investors with the best possible and best suitable advice. The SMSG suggests a consensual alternative drafting of the advice on this issue.

As to the new powers, both the NCAs as well as ESMA can now exercise product intervention powers. With this in view, the relevant criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern would need to be simplified and clarified. Also, the SMSG notes that the draft Technical Advice tends to describe the NCA's intervention powers as a complementing measure whereas it is a mere subsidiary instrument. However, some members of the SMSG are of a different view and consider that the deterrent dynamic of these powers is potentially significant and to have this useful effect, the product intervention power needs to be characterized as a complementary and operational (albeit certainly radical in nature) power to be activated when necessary

Finally, the SMSG wants to stress that the combined effects of different regulations need to be considered to ensure a clear alignment and consistency with relevant product directives as well as with PRIIPs and IMD 2. Therefore the SMSG calls for those legislations to be aligned as this would be in the best interests of investors.

12.7 Trading Venues Aspects - MiFID II and MiFIR

Rapporteur: Alexander Justham (2014-SMSG-036)

MiFID II and MiFIR will contribute to improve efficiency, transparency, integrity, and orderly functioning of financial markets. Towards this end, ESMA is expected to provide a sound, effective and consistent level of regulation and supervision, and to prevent regulatory arbitrage and promote equal conditions of competition among trading venues.

Given the short timeframe available to provide advice to ESMA on the Trading Venues aspects included in the Consultation Paper (section 6), the SMSG has decided not to go through all the questions included in the section. Instead, the SMSG concentrates on what it considers to be the most relevant issues: firstly, the definition of SME Growth Markets; secondly, the suspension or

removal from trading when it affects different markets; and finally, the concept of substantial importance in relation to trading venues as a necessary trigger for cooperation agreements among national competent authorities.

One of the aims of MiFID II is to facilitate access to capital for SMEs. To that end a regime is envisaged for the registration of MTFs offering facilities to SMEs as SME growth markets (SME-GM). The objective is to raise the visibility and profile of specialized SME markets and to establish common European standards, while at the same time providing flexibility to incorporate existing SME markets within the newly created label.

In the context of these objectives the SMSG supports all ESMA proposals included in the CP regarding requirements to be considered an SME-GM. The majority (over 50%) of SMEs in a market should be measured in terms of number of listed companies; and sufficient flexibility, up to three years, should be given before a market is deprived of the SME-GM label. For non-equity issuers to count as SMEs where their debt is traded on such market, a similar approach as the one applied for equities is supported.

In terms of the operating model for SME-GM, as well as admission and disclosure requirements, sufficient flexibility should be given to market operators, under the supervision of corresponding NCAs. Flexibility should also be given regarding the detailed disclosures required for an SME-GM admission document, so long as it meets the general principle of containing sufficient information for an investor to make an informed assessment of the financial position and prospects of the issuer.

In order to achieve the right balance between appropriate investor protection and not overly burdensome obligations on issuers, the SMSG believes that issuers in SME-GM should be required to publish annual and half yearly reports, with six and four month deadlines respectively. While the natural place to publish these reports is considered to be the issuer's website, a market operator website could provide a better homogeneity in presentation of such reporting wherefore the two should be linked. Additionally, acknowledging the international nature of many new SMEs (markets, products/services, customers, composition of board, management and key personnel as well as potential investor base) and hence their choice of English as working language, the use of English language is encouraged, alongside local language, in the admission documents as well as on-going reporting.

Regarding trading suspension or removals, and the chain effect on other trading venues, the SMSG recommends to differentiate between causes related to the issue/issuer and those related to a specific market - the former being a cause for automatic suspension. The group supports taking into consideration, when contemplating a suspension or removal, the potential knock-on effects on instruments serving as underlying or constituent of derivatives, indices or benchmarks.

An issue that is of growing importance, in terms of achieving a consistent level of supervision and preventing regulatory arbitrage, relates to the trading venue in a Host Country State, and in particular the trigger of cooperation agreements among NCAs. In order not to cause an excessive regulatory burden on small trading venues, the SMSG supports ESMA's view that the trigger

should apply only when trading venues are significant (over 10% market share), and always when it relates to an SME-GM.

12.8 Transparency and trading obligations (equities) aspects of the - MiFID II/MiFIR

Rapporteur: Krzysztof Grabowski (2014-SMSG 037)

The MiFIR and MiFID II constitute a significant step on the road to creating a standardised and unified capital market across the European Union, with improved integrity and transparency. To achieve those goals, ESMA has been mandated to draft both Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) as part of assisting the European Commission with its advice.

One of the main tasks of the SMSG is to provide a high level advice to ESMA, facilitating the preparation of all standards and proposals of delegated acts. Taking that into account and also a short timeframe, the SMSG decided to skip all detailed and technical questions, and to limit itself to principle-based ones only.

While preparing answers for the questions selected under the above conditions, the SMSG took a special care to ensure appropriate regulation with the aim of achieving efficiently and orderly functioning financial markets, preventing regulatory arbitrage and promoting a level playing field for all market participants, including investors.

Although the SMSG supports almost all of ESMA's proposals, the SMSG has tried to highlight the areas where different interpretations could result from the current wording of those proposals, with the aim of helping to achieve better clarity of wording. In some cases the SMSG proposes small modifications or even alternative solutions with the aim of building a strong and unified market, with the highest possible level of protection of both consumers and other market participants.

It is important that the definition of a "liquid market" is used properly and consistently, as it is important not only for systematic internalisers (SI), but also for transparency of all trading venues, including the regulated markets. There is also a link between the MiFIR definition of a liquid market, and the use of the same definition in the CSD-Regulation (CSD-R), so an impact analysis is required to determine whether the specific thresholds would also be appropriate for use in calibrating the CSD-R settlement discipline regime. Also a question of the free float should be considered, as there are several cases when large block of shares, even if admitted to trading on a trading venue, are being held by long term investors in custody accounts without being traded, and this happens often with shares held by the State or other significant shareholders. Definitely these shares should not constitute part of the free float.

The SMSG is of the opinion that similar thresholds should be used for all equity-like instruments, however their individual specificity should be taken into account. Also the discretion permitted

currently to Member States to specify additional instruments up to a limit as being liquid should be retained, as markets size, liquidity, complexity etc.) and variety of financial instruments differ considerably between more and less mature markets in the European Union.

The SMSG supports the proposal for a non-exhaustive list of exceptional market circumstances under which a SI should be allowed to withdraw or update quotes, however some conditions should be revisited, to fit them better to the specifics of SI's *modus operandi*, taking also into account the necessity of equal treatment of all investors. The similar consideration should be put to the question whether any price within the bid and offer spread quoted by the SI would fall within a public range close to market conditions, as in some specific situations the “public range” may differ essentially from “market” conditions.

There is no simple answer to the proposed shortening of the maximum permissible delay of publication of the post-trade information, from 3 minutes to 1 minutes. For fully electronic systems it should be no problem at all, but other trading facilities should also be taken into account that need some manual input. Therefore ESMA may need to investigate whether in certain circumstances a longer delay would be appropriate. Even more difficult is a problem with the deferred publication regime, as the SMSG agrees with ESMA's explanation why such a deferral should not be applied to some transactions between specific parties, but on the other side it looks like inconsistent with MiFIR, which may lead to the conclusion that a deferral may be based only on classes of financial instruments or their liquidity profile, and not on the different types of investors being part of the transaction.

Yet another question about the deferral periods for large in scale transactions, as the proposed shortening of all deferral periods may not work adequately for shares of less-liquid/SME companies, for which three-day deferred publication could be justifiable. Therefore some SMSG members believe that longer delays should be preserved for such shares, to prevent a potential increase in the cost of capital for issuers and transaction costs for investors.

As a side-note, the SMSG would also like to point out a necessity of defining what constitutes an “internal matching system”, since this is a key element of the trading obligation, but is not defined in MiFIR. If MiFIR is not clear, there is a risk, for example, that back-to-back trading would be allowed in bilateral systems. Therefore ESMA could consider issuing some guidelines to provide clarity on what is an internal matching system, or provide advice to the Commission on its own initiative.

12.9 Transparency for the trading of non-equity instruments

Rapporteur: Stavros Thomadakis (2014-SMSG-038)

The advice is based on Consultation and Discussion papers published by ESMA and finds these in line with the requirements of European legislation at Level 1. Recognising that this is new ground for regulation, we point out areas where special care must be exercised in specifying Regulatory

Technical Standards (RTS). It is pointed out that mistakes in specifying thresholds may prove costly and regulatory flexibility must be enhanced, at the level of the legislative process itself. It is also pointed out that where markets have already specified transparency requirements, ESMA's RTS must ensure that the level of transparency is improved. A final general point is that transparency and liquidity must reinforce each other in the long-run and not damage each other in the short-run. Several more technical points are adduced including differences in liquidity over the life-cycle of non-equity instruments, differences between bonds and bond-like instruments from derivative contracts that imply different treatments, and the need for more stringent rules for post- as compared to pre-trade transparency.

12.10 ESMA's draft technical advice on possible delegated acts concerning the MAR

Rapporteur: Rüdiger Veil (2014-SMSG-047)

The Market Abuse Regulation (MAR) establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets. To achieve those goals, ESMA has been mandated to draft Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS). Furthermore the European Commission has requested ESMA for technical advice on implementing acts. To this end ESMA has published a Consultation Paper on Draft Technical Standards on the Market Abuse Regulation and a Consultation Paper on draft technical advice on possible delegated acts concerning the Market Abuse Regulation.

One of the main tasks of the Securities Markets Stakeholder Group (SMSG) is to provide a high level advice to ESMA on the preparation of RTS and ITS and proposals of delegated acts. The SMSG therefore has focused on ESMA's approach building a single rulebook on market abuse. In addition the SMSG has prepared answers for selected questions which are relevant for the aim of the MAR to avoid potential regulatory arbitrage and to provide more legal certainty and less regulatory complexity for market participants.

ESMA has made great efforts in developing a level 2-regime in line with the purpose of the MAR. With respect to the many informational elements of ESMA's proposals, the SMSG recognizes a welcome emphasis on the role transparency plays in mitigating the risk of market abuse but also on the need for related mandatory disclosure to be readable and understandable. Furthermore the SMSG agrees with ESMA's general concern that enforcement be supported.

The SMSG provides advice on nine topics ESMA's Consultation Papers are dealing with. Market soundings, insider lists, investment recommendations and manager transactions are key issues. The SMSG has the following position on these topics:

- Market soundings are important for the proper functioning of financial markets. The SMSG welcomes that the MAR provides an exemption from the prohibition of market abuse provided that certain conditions are met. ESMA's approach determining appropriate arrangements, procedures and record keeping requirements principally seems flexible and practical. In particular the SMSG strongly supports ESMA's emphasis on the need to protect market soundings as a means of managing relations between the issuer and investors. However some processes proposed by ESMA seem to be too complex. As a result market sounding might be discouraged.
- Insider lists are an important tool for competent authorities when investigation market abuse. The SMSG therefore welcomes the harmonisation of insider lists. But the Group is concerned about the extensive information ESMA intends to be provided by insiders.
- With respect to investment recommendations, the SMSG observes that the current regime under the Market Abuse Directive and Directive 2003/125/EC principally has worked well. But given the developments in other areas of European capital markets law, it is reasonable tightening some rules. In particular, the SMSG generally agrees with ESMA's approach to provide stricter rules for qualified persons, such as the disclosure of financial interests and conflicts of interest.
- Disclosure of manager transactions is an important part of the MAR and plays a great role in practice. However the SMSG is concerned about ESMA's proposal defining the respective obligations in a broad way, which is not in line with the purpose of the law. A further concern relates to ESMA's advice how to interpret the closed period for managers. In fact the closed period is a complementary instrument aimed at preventing the abuse of inside information but it does not follow a transparency purpose. This should be taken into account when defining the circumstances under which a manager can be permitted to trade during a closed period.

12.11 Data Publication

Rapporteur: Jean-Pierre Pinatton (2014-SMSG-042)

Conclusions: This is a very complex issue, which will need a combination of measures to resolve. The process of developing raw electronic messages into high-quality data is a costly activity for trading venues and it is not possible to separate the trading process from the core data creation process, and therefore the costs of both activities are linked.

The Long Run Incremental Costs plus (LRIC+) model advocated by ESMA does not appear to be feasible, as the disadvantages clearly outweigh the benefits, including the need for national competent authorities (NCAs) to become competition authorities. It is intrusive and will create additional regulatory responsibility for the national and international competent authorities to oversee, which will ultimately add to the overall cost of data. The LRIC+ model would also create additional

costs for the information sources and for regulators, without addressing the 85-92% value of the cost chain, which as shown in the Oxera Report, is not made of trading venue data fees, but vendor charges.

As stated above, the market sees a need for disaggregation, which will allow for charging on a 'per user basis' and we support this. This would be a better pricing method for end users, as it would avoid duplication of charging, which users see as inappropriate.

To ensure that data is made available to end users on a 'reasonable commercial basis' Data vendors should be subject to the same regulatory requirements as venues and other data service providers. In addition, ESMA should:

- encourage more transparency of pricing so that, venues' data subscription pricing is made available publicly (either on the venue's public website and/or on a central ESMA website);
- ensure that all changes to pricing and policies governing such data subscriptions are published no less than 3 months in advance and made available immediately on venues' public websites and the ESMA website

The combination of these new standards will ensure that data users can identify the content they receive and use some key quantitative indicators to understand the breadth of content within the commercial data package. It will go some way to ensuring that data users' commercial needs are met, and that transparency of pricing, and pricing competition are both enhanced.

12.12 European Social Entrepreneurship Funds (EuSEF) and European Venture Capital Funds (EuVECA)

Rapporteur: Anne Holm Rannaleet (2014-SMSG-051)

The objective of this paper is to provide high level advice to ESMA on the Consultation Paper – Draft Technical Advice on the implementing measures of the Regulations 346/2013 on European Social Entrepreneurship Funds (EuSEF) and 345/2013 on European Venture Capital Funds (EuVECA). ESMA is required to provide such technical advice by 30 April 2015 to the European Commission as per their request on 27 May 2014.

The SMSG very much appreciates the opportunity to comment on this consultation paper. While the four areas of advice specifically addressed by the consultation paper are in themselves relatively straightforward and largely uncontroversial the SMSG would like to call ESMA's attention to the following general key considerations when finalizing its advice:

- While both the EuVECA and EuSEF regulations and hence registrations are voluntary and not mandatory they in many cases provide the only opportunity for EU-based smaller

managers of qualifying venture capital and/or social entrepreneurship funds to market these funds cross-border to European professional and semi-professional investors.

- One of the main sources of equity financing for EU SMEs in their early stages of development, i.e. before becoming eligible for listing on an SME growth market or other trading venue, but after they have outgrown the friends and family stage of financing (but without yet being “bankable” as they do not generate revenue) are managers of smaller private equity and venture capital funds as well as, more recently, social impact investment funds. These managers raise funds from insurance companies, pension funds, family offices, foundations etc. across Europe, in some cases also globally, and channel these funds as equity or shareholder loans into SMEs. In parallel these managers also provide the active ownership which these young companies need in order to develop from “garage-stage” to a more professional and investable company (better governance, stronger management, stronger operations, better processes), but which operational ownership service most institutional investors are typically not themselves staffed to provide.
- The sector for social investment is still emerging in Europe and lags some 30 years behind the venture capital sector in development, depth, width and maturity. Hence the importance of the Level II rules being supportive and sufficiently flexible as the sector develops, adapts and grows while catering to the EU Social Business Agenda for inclusive growth.
- As mentioned also by ESMA in its advice proportionality is important. For an absolute majority of these managers it is not an option to opt into the full AIFMD authorization in order to obtain the EU-marketing passport due to the resources required and costs involved.
- As underlined also by the current push to a Capital Markets Union and focus on encouraging market (i.e. equity) financing it is imperative to get the regimes for these new labelled vehicles right. Hence the SMSG strongly advocates a principle based approach for these Level II implementing measures. Examples provided should be viewed only as examples, ideally Annexed for ease of ongoing update, leaving sufficient flexibility and proportionality for the market to find its “level” in terms of how these funds are constituted and how they constitute their portfolios.
- As some managers have already been registered under the EuVECA and EuSEF labels and are operating in accordance with their respective current parameters, the SMSG advises ESMA to put in place so called grandfathering provisions for such registered managers.

13. Papers approved by the SMSG during 2015

13.1 Prospectus

Rapporteur: Krzysztof Grabowski (2015-SMSG-003)

The Omnibus II Directive introduced some important changes to the Prospectus Directive (PD) with the aim of further harmonisation in relation to prospectuses, their approval and publication, and to dissemination of advertisements. To achieve those goals, ESMA has been mandated to draft Regulatory Technical Standards (RTS) as part of assisting the European Commission with its advice. To this end ESMA has published a Consultation Paper on Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive.

One of the main tasks of the Securities Markets Stakeholder Group (SMSG) is to provide high level advice to ESMA, facilitating the preparation of all standards and proposals of delegated acts. The SMSG therefore has focused on ESMA's approach of building a harmonised rulebook on prospectuses. In addition the SMSG has prepared answers for a few selected questions which can influence high-level matters.

While preparing answers for the questions selected under the above conditions, the SMSG took special care to ensure appropriate regulation with the aim of achieving an efficient and orderly functioning of the financial markets, with equilibrium sought between investor protection and more stringent requirements levied on issuers.

Although the SMSG in principle supports almost all of ESMA's proposals, the SMSG has tried to highlight those areas where different interpretations could result from the current wording of such proposals, with the aim of helping to achieve better clarity of wording. In some cases the SMSG proposes smaller modifications and/or alternative wordings with the aim of building a strong and unified market across the EU, with the highest possible level of protection of both issuers and investors.

The SMSG points out the importance of a transparent and predictable process in getting the prospectus approved within an envisaged time-frame (and cost), and proposes that a draft RTS could be prepared on a time adjustment when answers to some additional questions are required by the NCA from the issuers, as in such a case an uncertainty about the real time limits may arise. Such a clear regulation in the RTS would result in a more disciplined procedure of applying time limits specified in the PD.

An extensive discussion is presented to the draft RTS on incorporation by reference, as this is a very useful tool both for issuers and investors, but several aspects of the detailed conditions should be carefully examined.

The SMSG is of an opinion that not all advertisements that contain inaccurate or misleading information should be amended in the manner by ESMA, but only material inaccuracies or mistake should be under such a requirement – as it is regulated for prospectuses in the PD. As for investor

access to information disclosed outside of the prospectus, the SMGS believes that there is no real ground in the level 1 regulation to require issuers to be obliged to provide the investor with the information disclosed in durable format, free of charge, upon his request. Moreover it would be too burdensome and costly for issuers, as in practice every investor would be authorized to require issuer to send him a durable copy of all the information disclosed in all the advertisements and their amendments.

13.2 PRIIPS – discussion paper

Rapporteur: Chris Vervliet (2015-SMSG-005)

The Regulation on key information documents for packaged retail and insurance-based investment products (PRIIPS) empowers the European Supervisory Authorities (ESAs) to draft regulatory technical standards on different aspects of the Key Information Document (KID). A joint Discussion Paper was published by the ESAs on 17 November 2014.

Taking into account the importance of this matter for enhancing consumer protection, the SMSG wants to comment on this Discussion Paper, with particular focus on content and presentation of the KID.

As a general remark, the SMSG confirms the need for the KID to be easy to use and easy to understand. Partly related to this, the SMSG also points at the need for the different parts of the KID to be coherent. This holds in particular for the description of the investment objectives, the cost structure, the performance scenarios, the recommended holding period and the type of investor for whom the product is designed. Also, the SMSG points at the need to align, to the maximum possible degree, the KID with other pieces of legislation.

With regard to the presentation of risk and reward, the SMSG suggests that ways are explored to integrate historic performance, where applicable with benchmark, with forward-looking performance scenarios. The SMSG would also prefer that an indication of likelihood be presented with the forward-looking scenarios. However, there should be guidance of the ESAs how to derive these probabilities. The SMSG also believes that the risk indicator should not only point one-dimensionally at risk as a negative attribute, but should also visualize the trade-off risk-potential return (as was conceptualized in the SRRI, 'synthetic risk and return indicator'). On the other hand, it should be equally clear that high risk does not by definition mean high return. The SMSG suggests that this be indicated clearly to the investor by adding a phrase, which indicates that no investment is riskless and that, hence, the potential return cannot be taken for granted. As a final remark related to the concept of risk, the SMSG expresses its doubts about integrating different kinds of risks into a single indicator.

The SMSG points at the relevance of the cost section to enable the investor to assess the impact of costs on performance. This implies clarity of definitions and also the inclusion of costs and commission on the underlying products. A key concern is that the investor is not lost in the details. The key is to come up with a total number in percentage and also in a euro example. While the

SMSG believes that the performance scenarios should be presented net of costs (i.e. after reduction of costs), there were different views on whether and how one-off costs should be taken into account as well to achieve this goal. Finally, the SMSG points at the importance of PRIIPS Regulation, art 8 (3f), to bring clarity on whether or not additional costs may be asked at the level of distribution.

With regard to the heading “how long should I hold it and can I take out my money early”, the SMSG believes that this actually consists of two separate questions that should be considered separately. On the one hand, there is the set of contractual obligations that determine whether or not money can be taken out early. On the other hand, there is the concept of recommended holding period, which should be aligned with the investment horizon of the investor for whom the product is intended, the risk profile of the product and the performance scenarios. The SMSG suggests visualising the impact of holding period over predefined time ranges. These would typically include 1, 3, 5, 10 years’ horizon and/or where relevant product lifetime.

Finally, the SMSG points at the need for consumer-testing to assess the impact of different alternatives. In this respect, it would be useful that different alternatives are also tested among bank personnel, in particular with regard to the ability to convey to retail investors the information contained in the KID.

13.3 PRIIPS – consultation paper

Rapporteur: Guillaume Prache (2015-SMSG-023)

The SMSG is aware of the time constraints imposed on the ESAs, but it believes that the format of this very important consultation is not optimal as:

- it occurs in a short time frame (less than 2 months) and in the middle of Summer when many SMSG expert members are on holidays;
- it is very technical and very long (127 pages).
- It does not contain user-friendly summaries of the key points of the consultation
- It is available only in English.

The short consultation time is all the more a problem as this consultation is of significant importance for retail investors and consumers of financial products and their representative bodies whose resources are limited. The Group strongly urges that the important consumer testing of the document will be carried out in a significantly more user-friendly way, and use a number of different options so that an effective dataset on the consumer experience is gathered]

A good practice – as done by other Public Authorities – would also be to estimate and disclose the level of expertise and the amount of time (which we believe is considerable - even for industry experts) required to fill this questionnaire.

The Securities and Markets Stakeholder Group (SMSG) advises ESMA on all regulatory and supervision matters. PRIIPs are at the core of the retail investment market. They cover a range of investment products that are marketed to retail investors which, taken together, make up a market in Europe worth up to €10 trillion. As PRIIPs cover a wide range of – per definition – structured products which can take a variety of legal forms that might involve multiple charges and which include different risk profiles, The SMSG stresses the strong need for a simple and short pre-contractual information on objective costs and charges as well as historical real returns that enables retail investors to reach well-informed investment decisions by enabling them

- to understand the product features, including its risks, rewards and the effects of costs/charges
- to easily compare it to other products and
- to assess whether a certain product represents ‘value for money’.

In that respect there is a need to benefit from all the experience accumulated on the work done for the KID for investment funds (UCITS IV Directive), and for its subsequent implementation by the industry.

The SMSG therefore very much welcomes the approach taken by the Joint Committee starting the debate and collecting views on the possible methodologies to determine and display risks, performance and costs in the Key Information Document (KID) for PRIIPs.

Standardization, if appropriately used, is not only a strong and efficient tool to ensure comparability but can also be a strong means for ensuring regulatory consistency. Furthermore, applying consistent and transparent approach towards displaying returns, risks and charges will enable consumers and retail investors not only to compare the products but to determine the real added value of products.

The SMSG therefore calls on the ESAs to ensure that the KID becomes an EU-wide harmonized document which contains meaningful and all necessary information on returns, risks and charges, which is understandable by all retail investors.

To achieve this objective the SMSG supports using tools and techniques that takes into account as much historical data on performance and costs as possible.

The SMSG is concerned that standardized, easily comparable data on historical performance (of both the product and of its benchmark) would be eliminated under the PRIIPs Regulation. There had been a lot of work done for many years to achieve this major improvement in the KID for investment funds (UCITS). With the PRIIPs Regulation as it stands, we are very concerned that even UCITS funds will have to eliminate this key information from their KID within the next 5 years.

Certain organizations (including the ESAs) are already struggling to get clear and comparable data on the past performance of retail investment products. This may be a huge step backward if no solution would be found at level 2. Of course, The SMSG acknowledges that past performance is not a reliable predictor of future performance, and also understands that ESMA must work with the Level 1 text. However, without any information on past performance (including compared to benchmarks), EU citizens will not even know:

- if the product has generated any positive performance in the past or - on the contrary - has destroyed the value of their savings
- if the product has met or exceeded its stated investment objective
- if the product has matched or not the performance of its benchmark

Even worse would be the case that EU citizen would be left only with artificial "scenarios" on future performance which we strongly believe are even more misleading than past performance. And we have the experience of the work on the KID of structured UCITS funds where the use of scenarios (like (pessimistic, median and optimistic) that are not probability weighted is possible. Therefore, the average investor is led to believe that the "median" scenario is the most probable which is not the case.

We therefore consider that an elimination of information on past performance and especially past performance compared to that of the benchmark(s) chosen by the investment product provider would be a huge step back.

Taking into account that the need for historic performance information has not been explicitly included in the Regulation the SMSG considers that historical performance data should at least complement forward-looking indicators as this is important to put the latter in perspective. In this respect, the SMSG points at the fact that there is nothing in the Regulation that forbids the use of historic performance as one of the scenarios.

In our opinion this should be done by presenting past performance scenarios in a separate graph. With regard to the highly challenging forward-looking performance scenarios required in Level I, The SMSG considers that they should be probability weighted to the maximum extent possible whereby comparability between the methods used by different manufacturers should be ensured by the ESAs through establishing/prescribing a commonly used methodology. This to enable retail investors to trust in "high", "median" and "low" performance scenarios having the same meaning across manufacturers. This however will be an extremely challenging task if achievable at all.

Therefore, The SMSG wishes to formally warn the European regulators about the extreme danger of forcing EU individual investors to rely only on shaky, hardly comparable future performance scenarios, while depriving them of the only performance information that does not lie and that is least subject to misleading: the standardised and comparable historical performance of the product and of its objective benchmark (currently required for all UCITS funds).

This will maximize the risk to mislead and confuse individual investors and will certainly not improve their already rock-bottom (see the EU consumer scorecard published every year by the EC) trust level in the investments and savings industry. We believe Level I should be amended to reintroduce the disclosure of past performance of both the investment products and of their chosen objective benchmark. Future performance scenarios should be kept only for new structured products and based on probabilities.

13.4 PRIIPS - Own-initiative letter to EU Authorities

Rapporteur: Guillaume Prache (2015-SMSG-028)

The SMSG decided to send an own-initiative letter to EU Authorities to stress a major concern of all European securities and financial markets stakeholders regarding the “PRIIPs” Regulation: the elimination of past performance in the contents of the Key Information Document, and its replacement by “future performance scenarios.

In this letter of 13 October 2015, the SMSG explains why it is crucially important not to eliminate a standardised and publicly supervised past performance disclosure together with the disclosure of the products’ benchmarks. As mentioned in its recent public advice, the SMSG wishes to formally warn the European regulators about the extreme danger of forcing EU individual investors to rely only on shaky, hardly comparable future performance scenarios, while depriving them of the only performance information that is objective and that is least subject to mislead them: the standardised and comparable historical performance of the product and of its objective benchmark (currently required for all UCITS funds).

13.5 The Use of Credit Ratings by Financial Intermediaries Article 5(a) of the CRA Regulation

Rapporteur: Lindsey Rogerson (2015-SMSG-011)

The objective of this paper is to provide advice to the Joint Committee of the ESAs on the discussion paper on The Use of Credit Ratings by Financial Intermediaries Article 5(a) of the CRA Regulation.

The SMSG very much welcomes the Joint Committee’s efforts to allow for a sound discussion on the issue of the over-reliance on the use of credit ratings as part of its preparation for its forthcoming consultation paper.

The SMSG is not in a position to provide specific evidence as a user of credit ratings so we will offer a high level view of the issue as we see it. We expand on what we believe to be the keys issues in more depth below but the SMSG would like to highlight four points which we believe the Joint Committee must take into consideration when it produces its consultation paper. They are:

- Is there evidence that intermediaries do over-rely on credit ratings? The study by the AFM, cited in the discussion paper, suggests that intermediaries do not in fact mechanically rely on credit ratings.
- Due consideration must be given to the risks associated with alternative risk indicators/assessments. Credit ratings are a well understood “tool” for intermediaries and investors.
- Where contractual references to credit ratings are to remain, these should be to ratings from “any authorised CRA” not a specific named CRA.
- The effect that a move to alternatives will have on smaller intermediaries and market participants. Not all intermediaries, especially the smaller ones, will have the resources to carry out alternative internal risk assessments. The ESAs need to ensure that any proposals will not drive smaller intermediaries out of the industry and thus reduce choice for investors.

13.6 Cross-selling

Rapporteur: Jesper Lau Hansen (2015-SMSG-016)

The SMSG welcomes the joint consultation of the European Supervisory Authorities (ESAs) on cross-selling and concur with the view that cross-selling transactions may provide real benefits to retail investors, but also offer the risk that the interests of the client is not adequately considered. We believe that the guidelines are a necessary first step to ensure fair treatment of investors by providing the necessary transparency and focusing on the need to ensure proper training of staff and to avoid remuneration policies that may distort the incentive to provide suitability and appropriateness in this kind of investment transactions.

As the SMSG finds it important that cross-selling transactions are available also for retail investors, when offered in a transparent and proper way, we stress the need to achieve a proportionate regime that balances benefits with disadvantages and we believe that the proposed guidelines fulfil this aim.

At present, supervision is probably best placed with national competent authorities, but the SMSG believes that it may in time be necessary and efficient to engage the ESAs in direct supervision of cross-selling transactions in order to secure a truly pan-European approach.

13.7 The Green Paper "Building a Capital Markets Union" (CMU)

Rapporteur: Judith Hardt (2015-SMSG-017)

In May 2015 the SMSG presented its views on the CMU project in three papers published: a first paper including an over-arching response (included below) and in part II a “quick wins” comments and in part III a detailed response. (2015-SMSG-017 part, II and III)

In October 2012, the Securities Markets Stakeholder Group (SMSG) presented its views on the impact of regulation on Small and Medium Size Enterprises’ (SME) ability to access funding. The objective of the group was to give advice on how EU regulatory proposals impact the ability of small and medium sized companies to have access to funding (through both the private markets represented by e.g. private equity and venture capital funds, as well as through the public markets by listing on an ex-change) and how EU regulatory proposals impact investors’ ability to invest in these companies. The advice of the group was targeted at ESMA but might also be relevant for other European Supervisory Authorities (ESAs). This paper is a contribution from the SMSG to the current discussion on the CMU and is partly based on the initial advice of the group.

Introductory comments

In its initial advice, the SMSG stressed that expanding capital markets can bring many advantages to all companies, especially SMEs, including the diversification of potential investors and access to additional equity capital. The Group rightly feared that banks would be facing additional restrictions in the amounts of credit and liquidity they would be able to provide (in light of Basel III, measures to facilitate the resilience and resolvability of banks, and forthcoming structural reform initiatives) and which in turn would make it increasingly more difficult for them to extend loans to SMEs. The development of the Capital Markets Union, if well designed and executed, can help promote alternative funding sources (equity and debt), though both the private and public capital markets, and if part of an effort to foster a stable, positive economic environment, could help facilitate innovation and the growth for non-financial companies, necessary for Europe’s recovery.

To achieve this vision, the SMSG considers that the EU needs to take a holistic approach to the functioning of capital markets, and ensure that the regulatory environment is best able to support the provision of capital from savers and investors to companies of all sizes. We identify six objectives in particular that the EU and its Member States should aim to bring about:

First, the development of an effective advisory ecosystem to support companies and investors:

There is a need to focus on how to provide each category of capital suppliers, i.e. direct or indirect investors, the right incentives to invest not only in equity but also in debt issued by companies of all sizes. An efficient, transparent and competitive capital market, be it public or private, providing investors with multiple investment options (both short-term as well as long-term) will be a key component in offering investors the desirable liquidity they need for their investments.

The EU needs to take a holistic approach, bringing both sides together. The CMU needs to be a catalyst for the development of an effective advisory ecosystem to support companies. We need vibrant communities of entrepreneurs, business leaders, advisers, analysts, investors of all sizes (national, pan-European, and from outside the EU), technology transfer bodies, public sector agencies and academics, to support exciting businesses as they grow for the long term. Such

communities can help tackle the difficult cultural changes required, through practical measures on the ground.

Second, align past and recent legislation with the objectives of CMU and widening the investor base for SME and improving credit information on SME:

In its 2012 report, the SMSG concluded that regulatory initiatives often have a combined negative impact on the ability of SMEs to access funding. It had singled out a number of problems including both the access of companies to capital markets as well as the difficulties for investors to invest into SMEs. The SMSG welcomes the fact that the Commission's Green Paper shares our analysis and has considered carefully the funding needs of SMEs. Three years later, there now appears to be an increasing need to review post-crisis regulation for any misalignment with the overall objectives of CMU.

In some areas there is a need for less EU regulation, in others to correct flaws caused by the EU regulation. For example, it is difficult to reduce SMEs dependence on bank financing by facilitating their trading on MTFs given the recent Market Abuse Regulation's extension to all listed companies' of reporting requirements (price sensitive information, managers' transactions and insider lists.) Similarly, MiFID and CSDR settlement discipline impedes SME and other markets, making it difficult to reach investors in other Member States. Meanwhile, it is difficult to incentivise cross-border raising of capital if equity issuers depend on NCAs because the home Member State is where the legal seat is, meaning not all companies are able to relocate to more competitive EU countries. This review process should be an important aspect of the CMU project.

Third, boosting long-term investment:

Complementing the development of an advisory environment bringing investors and companies of all sizes together, it is important - in view of the growing institutionalization of people's savings through pension funds, insurance schemes, mutual funds etc. - that investments made by institutions, both directly through the public markets as well as indirectly through intermediaries active in the private markets, are not compromised by aggregated or unfit for purpose regulatory initiatives. As part of the review process discussed above, the EU needs to overcome institutional constraints and post-crisis de-risking of financial services to allow long-term investment. As stressed in its 2012 advice, the SMSG considers that the implementation of CRD III and Solvency II have already generated a decrease in investment flows from banks and insurance companies into equities as well as to private equity and venture capital funds and other illiquid long term assets. If pension funds covered by IORPD5 IORPD2 would also have to comply with Solvency II type of risk weightings, they will be required to hold additional liquid assets. This would not only have a negative impact on pension funds' ability to invest into equity and other long-term assets, but may could over time lead to companies being faced with in-creased costs for pension benefits, as pension funds would find it difficult to generate the necessary long-term returns to match their long-term liabilities.

Fourth, facilitate the access to capital markets of retail investors:

These initiatives need to be complemented by measures that enable individual retail investors to invest more directly into capital markets, as an effective capital markets union will not function

without involving and attracting individual investors. According to the European Commission's Financial Services User Group, the proportion of equity owned by households has reduced by two-thirds since the mid-1970s to just 11 per cent. Risk aversion is high, and tens of billions of euros languish in savings accounts. Investing directly into SMEs or infrastructure projects generally is, for liquidity and risk diversification reasons, not the most likely allocation of retail funds, nor should it be. But comparisons with the US show there is more that can be achieved in this area, see for instance Bruegel's recent paper 'Capital Markets: A Long-Term Vision,' which shows that EU households have more than 40% of their financial wealth in the form of deposits compared to less than 15% in the case of US households. The point also underscores the need to enable retail investors to save more in capital markets instruments.

To achieve this, it is essential to restore investor trust and confidence. Only well-informed and well-protected investors will make responsible investment decisions from the range of capital markets products available, directly or indirectly, across the Member States. Equally important is to ensure that advisors advising these investors adequately understand the products marketed to different investors, and the suitability of these for each category. It is also necessary to keep in mind that investors do not act within national boundaries and that a supportive framework is needed to facilitate cross-border investment. From this perspective, the creation of a European pension product offers the potential to increase the volume of retirement savings invested on a cross border basis. A fair and simple taxation and reporting system for long-term individual investor-savers who directly invest in capital markets would make a real positive change on the capital supply side.

Fifth, to complement EU level action, the Member States need to do their bit:

The state of development of capital markets, the structure of the corporate sectors and institutions, as well as cultural attitudes to investment, all vary significantly across Member States. This is reflected in the different legal and consumer protection frameworks, especially in relation to company and insolvency law. It is obvious that these differences place strong limits on how far an integration of capital markets can proceed within the EU. But while these differences have to be taken into account, and regardless of any action to be initiated by the Commission, they should not be used as an excuse for national authorities and market participants to shield themselves from the disciplines of a potentially more dynamic Pan-European market place, connecting different categories of investors with investment opportunities in SMEs, other corporates and infrastructure projects across the EU's 28 Member States and beyond.

In order to achieve more integration, institutional and retail shareholders should be able to invest easily across borders with similar rights and duties. Member States need to play their role in overcoming these obstacles, either by responding positively to EU level initiatives to tackle them, or cooperating more effectively amongst themselves. This is by no means an exhaustive list, but by way of example, such barriers to an effective CMU include:

- the lack of an EU definition of shareholder (or the end-investor) at least for listed companies,

- the concept of differential/enhanced voting rights, introduced in some Member States and considered by the European Parliament in the Revision of the Shareholders' Rights Directive, could impact cross-border investment flows, one of the key objectives of a Capital Markets Union. It would favour majority shareholders, often domestic entities over minority shareholders, generally cross-border large and individual shareholders;
- Weaknesses in the Transparency Directive that mean cross-border institutional investors do not have common detailed rules on disclosing major shareholdings; and
- Finally more transparency for listed companies is needed at the EU level instead of (or at least before) intrusive EU intervention in the corporate governance of companies. For example, in order to give full information to actual and potential shareholders and to clients of investment funds, the full minutes of General Meetings must be published by issuers so that all the votes cast by retail and institutional investors are public.

Finally, a sixth objective should be a rebalancing of the powers between Member States' authorities and ESMA:

Some members of the SMSG believe that ESMA should be conferred with a wider range of direct supervisory powers where such a transfer of function brings material supervisory efficiencies. For instance, ESMA could be conferred with supervisory competence with respect to systemically important financial institutions (SIFIs) where a clear case has been made, e.g. market infrastructures such as trading platforms, central securities depositories or index providers.

They also believe that a further step could be to attribute supervisory and non-exclusive competence on all entities with EU-wide reach in order to have a truly European System of Financial 'Supervisors'.

Some members of the SMSG believe that ESMA should be conferred with a wider range of direct supervisory powers where such a transfer of function brings material supervisory efficiencies. For instance, ESMA could be conferred with supervisory competence with respect to systemically important financial institutions (SIFIs) where a clear case has been made, e.g. market infrastructures such as trading platforms, central securities depositories or index providers. They also believe that a further step could be to attribute supervisory and non-exclusive competence on all entities with EU-wide reach in order to have a truly European System of Financial 'Supervisors'. However, other members of the SMSG point out that there would be a number of issues if ESMA was to become the pan-European supervisor of CCPs. Indeed, CCPs are often supervised by Central Banks (and/or their prudential affiliates) given their role in the overall systemic risk of the financial system and because of their potential need of access to Central Bank liquidity.

There is a consensus view that, as a matter of priority, the ESAs should make full use of their existing powers in terms of data collection, analysis, and publication, in particular in the areas of returns and prices (fees, article 9.1 of the ESAs Regulations) and of product intervention (article 9.5) to ban toxic products that bring negative value to investors. They should also better enforce existing investor protection rules. For all this they need their resources to grow, not to be cut.

The implementation of the ESAs guidelines through peer reviews and their consistent application across the 28 Member States is the most crucial element in ensuring consistent supervision as well as their contribution to consumer and investor protection.

Also, the importance of a level playing field for financial product services regulated by the three ESAs would require better coordination between all three agencies.

The Group questions whether the current governance structure is optimal to ensure that e.g. ESMA has the necessary powers to drive regulatory convergence and to allow to “crack-down” on national CAs who go further than what has been envisaged under certain Directives.

So we should consider how more can be done, and indeed is being done, to ensure consistent supervision within the existing framework, and recognise that there are constraints on how further developments can pragmatically be achieved.

One evident factor is going to have to be a resolution to the debate regarding the ESAs funding, as they are evidently stretched at the moment. This should involve resolution of the debate about how the ESAs are funded.

Indeed, there are some respects in which the ESMA and other ESAs could, given the budget, go even further than they have thus far planned. In particular it makes sense that they should be able to play a fuller role in contributing their views to inform the formulation of new Level 1 EU legislation. This would help to ensure that requirements which then come to be handed to them for subsequent Level 2 work are fully understood, have an adequate amount of time for their orderly adoption, and are more likely to be framed in a way which leads to effective regulation. Where new regulations are brought into force and problems then become evident, consideration should also be given to allowing the ESMA to promptly propose No-action Letter type of reliefs, subject to approval from the Commission and a process for reporting and oversight designed to properly respect the authority of the co-legislators.

13.8 Competition, choice and conflicts of interest in the credit rating industry

Rapporteur: Lindsey Rogerson (2015-SMSG-018)

The objective of this paper is to provide advice to the European Securities and Markets Authority on its call for evidence into Competition, choice and conflicts of interest in the credit rating industry.

The SMSG very much welcomes the opportunity to examine the effectiveness of measures taken to date to further competition among credit rating agencies, as well as to consider what additional steps, may be needed to bring about an effective functioning market for the provision of credit ratings.

The SMSG is not in a position to provide specific evidence as a user of credit ratings so we will offer a high level view of the issue as we see it. We expand on what we believe to be the keys issues in more depth below but the SMSG would like to highlight three points which we believe the Joint Committee must take into consideration when it considers the technical advice it will submit to the European Commission in due course:

First, any discussion on Credit Rating Agencies must be set in the context of the dominance of the three main credit ratings agencies. The market share of these three companies was >90% according to ESMA in December 2014. Indeed the combined market share of the three had increased by 3% from that recorded at December 2013.

Second, while the SMSG acknowledges that the timing of this review is not of ESMA's choosing, we feel strongly that it is too early to consider removing any statutory measures (CRA3, 462/2013) introduced to promote competition in the CRA industry. Many of these measures, including imposing a second rating agency on providers, are only just bedding in and so any assessment of their effectiveness is premature.

Finally, the SMSG believes this call for evidence has to be viewed in the wider context of the Commission's regulatory ambitions; and specifically its programme for Capital Markets Union. As the SMSG response to CMU (2015/SMSG/017 PART I) makes clear if CMU is to be achieved then greater diversity in credit rating providers will be an essential underpinning component.

13.9 Knowledge and Competence - MiFID II

Rapporteur: Chris Vervliet (2015-SMSG-020)

In the context of knowledge and competence requirements, the SMSG first of all reiterates some of its earlier advices. These referred to the assessment and certification of knowledge and competence; the need for training and support and the usefulness of a dialogue with employee representatives, where available, on the needs for training and sales policy in general. The SMSG believes that these three elements can reinforce one another.

While the SMSG agrees that the guidelines should be principle-based rather than overly prescriptive, it at the same time calls for supervisory convergence, peer reviews and transparency on the criteria used by the different member states, as this could facilitate the transfer of best practices and mutual recognition. Also, the SMSG considers it important that passporting does not result in a watering down of knowledge and competence criteria.

While there may be reasons to set higher standards depending on the risks, sophistication and the complexity of the products being advised/sold, the SMSG believes that the ESMA guidelines are first and foremost about minimum standards of knowledge and competence that apply to anyone providing advice to clients. In this respect, the SMSG is in favour of broad based minimum standards.

While the draft guidelines leave it to the NCA's to determine how exactly appropriate knowledge and experience should be assessed, some examples are being given. The SMSG suggests that more prominence be given to the possibility of dedicated courses followed by some kind of certification. With regard to "appropriate experience" it suggests 'close supervision' rather than the requirement of a senior being present at all times during client meetings. However, at the same time, the SMSG insists that the guide-lines not only refer to time and resources being made available to the trainee, but also to the one doing the coaching. With regard to the minimum period before someone can be considered to possess appropriate experience, the SMSG acknowledges that this may depend on the intensity of the training as well as on the person concerned. For all these reasons, it suggests that, beyond a regulatory minimum period (e.g. 12 months, as a period which is neither excessively long, nor too short), it should to a large extent be left to the investment firm to determine the appropriate period, assuming that the investment firm remains ultimately liable.

With regard to the grandfathering proposal for employees that provide the relevant services at the date of application, the SMSG believes that the criterion for the grandfathering should not so much be a certain time span of prior experience as in the ESMA proposal (5 years), but rather the principle that the grandfathering is only valid as long as the employee remains with the present employer and to the extent that the employer is ultimately liable and responsible. Also, the SMSG points at the usefulness that incentives are put in place for those enjoying the grandfathering clause to undergo the assessment anyway. These incentives could be provided by practical arrangements (for example: time and place of training and knowledge assessments) and by promoting the benefits of certification, for example in changing employer. Also, the SMSG insists that the grandfathering arrangement, being a one-off arrangement, does not absolve the financial institution from the obligation to provide training to and assess on an ongoing basis the knowledge and competence of its staff, including those that enjoy the grandfathering.

With regard to the proposed knowledge requirements, the SMSG is of the opinion that the difference between providing advice and providing information is rather a theoretical one, which in practice will be difficult to assess. It also suggests that more prominence be given to the ability to assess the client's risk profile and other relevant client characteristics. In addition, the SMSG suggests that the general principles of back-office operations, to the extent that these are relevant to the client, are included among the knowledge criteria, as well as the ability to understand the difference between past and future performance as well as the limits of predictability.

Although possibilities of cost-effective training can be envisaged, the SMSG is aware that there are costs attached to training and coaching. However, it believes that the cost of conduct risk could potentially by far outweigh the cost of training. It also wants to point at the benefits of a well-trained and competent staff, which could be a competitive advantage.

13.10 Best Practice Principles for Providers of Shareholder Voting Research and Analysis

Rapporteur: Carmine Di Noia (2015-SMSG-026)

The members of the SMSG welcome the opportunity of the ESMA Call for Evidence to express their view on the development of proxy advisors' activity in the past years.

The Call for Evidence has the purpose to gather information on the impact the Best Practice Principles for Providers of Shareholder Voting Research and Analysis adopted in March 2014 had on the activity of proxy advisors. The Principles were adopted following the Final Report of February 2013, where ESMA recommended the adoption of a self-regulation code and committed in undertaking a review of the code after two years.

The members of the SMSG believe it is too early to assess in a definite way the effectiveness of the self-regulatory framework now in place, considering that only a full proxy season has been completed since the adoption of the Principles.

As to the scope, the Principles correctly distinguish between providers of shareholder voting research and analysis, which are the key activities of proxy advisors, and providers of additional services.

The Principles address the main issues raised by the ESMA Final Report, which are: quality of service; conflicts of interest; communication with issuers and the public. The members of the SMSG believe that special attention should be given to the issue of conflicts of interest, especially due to the concentration in the proxy advisory industry.

The quality of the Statements of Compliance varies among different proxy advisors. It would be useful if they were published at the same time during the year, in a standardised format and on an annual basis, in order to ensure their comparability.

It is too early to observe a significant impact of the Principles on the activity of proxy advisors; however, improvements were reported on the side of transparency.

The members of the SMSG believe that special attention should be given to the monitoring process on the implementation of the Principles in order to enhance their effectiveness; the monitoring activity could be carried out by an independent committee, even industry based but with an independent chairman.

Although proxy advisors may play an important role in the voting process, the ultimate responsibility to monitor investments and make voting decisions lies with institutional investors. Therefore, the promotion of stewardship codes for institutional investors and their asset managers should be enhanced. In addition, the functioning of the full voting chain should be further investigated.

13.11 MAR Level 3 measures

Rapporteur: Rüdiger Veil (2015-SMSG-025)

The Market Abuse Regulation (MAR) establishes a common regulatory framework on insider dealing, the unlawful disclosure of inside information and market manipulation to ensure the integrity of financial markets in the Union and to enhance investor protection and confidence in those markets. To achieve these goals, ESMA has been mandated to draft regulatory and implementing technical standards (level 2) and to issue guidelines (level 3). The SMSG has already responded to ESMA's work regarding the level 2-measures. It now provides high level advice on relevant future topics to be dealt with on level 3.

First, the SMSG wishes to highlight that an easy access for market participants to the new single rulebook on market abuse will be of outmost importance. To this end, ESMA should establish an interactive online tool on its website which provides a comprehensive compendium of the level 1 and level 2-regulations as well as the related ESMA guidelines and Q&A's.

Second, the MAR requires ESMA to issue three sets of guidelines. ESMA will soon launch a consultation on this work. The SMSG welcomes the opportunity to give advice beforehand.

- One of the three guidelines will deal with the requirements for persons receiving market soundings (Art. 11 (11) MAR). Generally, ESMA's proposals appear to be reasonable. However, the SMSG wishes to ask ESMA to ensure that market soundings will not be discouraged by a too complex level 3-regime.
- As to the guidelines specifying the right to delay the disclosure of inside information (Art. 17 (11) MAR), the SMSG wishes to emphasize that the prerequisites for delay should not be interpreted narrowly. It therefore recommends CESR's list of examples of legitimate interests to be incorporated into ESMA's guidelines; however, making clear that this is a non-exhaustive list and other situations and circumstances could constitute legitimate interests as well. Furthermore, ESMA's guidelines should interpret the requirement "not misleading the public" in accordance with the former CESR guidance and specify that delay of disclosure is only misleading if an issuer actively sets signals that strongly contradict the inside information under delay.

In order to ensure a uniform application of market abuse rules, it will be important to deal with certain interpretational questions by way of guidelines.

- ESMA should further clarify some key aspects of insider trading law, such as price relevance of inside information. To this end, ESMA should aim to provide more analysis with respect to the divergent approaches taken by the NCAs in this specific area of insider trading law. In particular, ESMA should provide more guidance on the "reasonable investor test". Finally, ESMA's Guidelines should define which information directly concerns the issuer.
- The SMSG asks ESMA to clarify that issuers are under no obligation to respond to speculation or market rumours which are without substance.

The SMSG considers some other topics to be relevant for further clarification by EMSA, such as the interplay between the Market Abuse Regulation and the Takeover Directive. However, to achieve a level playing field it might suffice to deal with these questions in a Q&A format.

13.12 Sound remuneration policies under the UCITS Directive and AIFMD

Rapporteur: Anne Holm Rannaleet (2015-SMSG-031)

The objective of this paper is to provide high level advice to ESMA on its Consultation Paper titled “Guidelines on sound remuneration policies under the UCITS Directive”, launched July 23, 2015 and as per ESMA’s request to the SMSG dated August 11 2015.

The SMSG very much appreciates the opportunity to comment on this consultation paper. While the areas specifically addressed by the consultation paper as well as the approach followed and reasoning applied by ESMA in the development of the Guidelines are largely uncontroversial to the SMSG, the SMSG would still, and in line with its mandate to offer high level advice to ESMA, like to take this opportunity to express its strong support for the approach taken by ESMA on the matter of proportionality. This approach, which is in line with that taken by ESMA on the AIFMD Remuneration Guidelines, allows for the disapplication of certain requirements of these draft Guidelines on an exceptional basis and taking into account specific facts.

The SMSG believes it to be critical to ensure, that where sub-segments of industries as diverse as the UCITS or AIFM already have in place proven arrangements which have been negotiated and agreed with investors and/or which achieve the alignment of interest between investors and managers and their identified staff, which is the purpose of these guidelines, such fund managers should not be deprived of the possibility to disapply, on a case by case basis, certain of the requirements.

The notion of proportionality is inherent in European Union law and lies at the heart of EU governance and policy-making. A key element of sound regulation, it allows disapplication and thus “neutralization”, on an exceptional basis and subject to a case-by-case assessment, of certain requirements of the guidelines, where what is intended to be achieved by the regulation can be sufficiently achieved through the workings of the business model in question. This is especially important where a piece of regulation encompasses many different sub-sets of funds and managers with quite different business models, risk-profiles and negotiated structures like those regulated under the UCITS and/or AIFM Directives.

13.13 European Single Electronic Format (ESEF)

Rapporteur: Anne Holm Rannaleet (2015-SMSG-036)

ESMA has been mandated to draft RTS regarding format of annual financial reports based on a new article 4.7 inserted into Directive 2004/109/EC (the Transparency Directive) as a result of the amending Directive 2013/50/EC adopted on October 13, 2013 (Legislative Mandate enclosed). Article 4.7 states: “With effect from 1 January 2020 all annual financial reports shall be prepared in a single electronic reporting format provided that a cost benefit analysis has been undertaken by the European Supervisory Authority (European Securities and Markets Authority) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council.”

The SMSG shares ESMA’s view that better transparency, availability and comparability of issuers’ financial statements should, over time, lead to better efficiencies in capital allocations and hence also to issuers’ ability to attract capital across the EU, and not only from professional investors but also from retail investors. However, lacking a full cost benefit analysis (“CBA”), the SMSG members are divided in their views of whether the ultimate benefits to users, including the issuers, will outweigh the costs of this additional layer of reporting. While an analysis of the different technological options available has been undertaken by ESMA in preparation of the CP, ESMA is also including some questions in relation to the scope in the current CP. ESMA further notes that there is a possibility that the CBA may reach conclusions which are not in favour of establishment of the ESEF, but simultaneously also notes that it has no powers to amend the legislative policy decision.

The SMSG notes the relatively low response rate to the CBA regarding the preferred technical option and related cost, with e.g. only one issuer each from Germany and the UK responding (the two markets account for 35% of all issuers).

The SMSG’s conclusion against this background is that it currently can only offer very general advice on the subject and the reasoning followed by ESMA in leading up to the CP.

The SMSG fully agrees with ESMA that all companies’ entire Annual Financial Reports should be made available in PDF format and ideally also be accessible via one single access point. The SMSG also appreciates the general reasoning of ESMA to distinguish between structured (i.e. numbers like e.g. P&L, Balance Sheet and cash-flow statements and non-structured data (e.g. narrative of Directors’ and Auditors’ reports) when concluding that initially only the structured information (including the local language notes in PDF) be made available in a standardised electronic format (filed at the NCAs but accessible also via a central point at ESMA).

At the same time the SMSG notes that the non-structured data, i.e. the narratives, are crucial in order to arrive at a more comprehensible understanding of a company’s historic, current and future performance, its markets, its competitive situation as well as risks, and further notes that there is a huge risk that without this data the information to be submitted in a structured format will be of less use to the users. The SMSG further notes the dangers of critical nuances being lost when, in a next step, one would look at trying to standardize also this unstructured data according to set formats.

In the same spirit the SMSG acknowledges the merits of starting with IFRS companies only and to use XBRL or iXBRL for the reporting of the structured data, as these seem to be the more generally preferred options according to the CBA – also when, over time, looking at international

comparability. The SMSG is also supportive to undertaking this exercise in a phased approach so that e.g. SMEs (as per the State Aid definition) are only included at a later stage and, when there is sufficient evidence of active use by investors of the standardized structured data.

The SMSG further notes that the EC's recently launched proposal for a Prospectus Regulation envisages the introduction of a standardised Universal Registration Document ("URD"). While this URD in the current proposal is optional, it introduces yet another element of standardised reporting describing the issuer's organisation, business, financial position, earnings and prospects.

The SMSG would thus like to advise ESMA to consider all of these initiatives to standardize reporting and see how these could best be addressed as a whole rather than cumulatively so that the costs of subjecting all issuers to any extra layer of reporting, in addition to the statutory, stock market and regulatory reporting already undertaken are minimized. In addition the SMSG advises that there may be other (simpler) alternatives to moving towards reporting in single electronic format, like ensuring that all annual financial reports be available also in an English PDF version (and sorted by e.g. sector) via a single access point, which could provide the same benefits as those currently envisaged by the ESEF, but without losing the unstructured data and its nuances.

14. Papers approved by the SMSG during 2016

14.1 SMSG Opinion Paper on PRIIPs Regulation – Performance Measures

Rapporteur: Jesper Lau Hansen (2016-SMSG-006)

In this opinion paper, the SMSG presents its grave concern that the key information documents (KIDs) made subject to the PRIIPs Regulation will not include historical data, which is a source of relevant information for retail investors that is objective, comprehensible and usefully complements other indicators. It is the opinion of the SMSG, and shared by its consumer and industry representatives alike, that to exclude historical data from the presentation of risks and rewards will be seriously detrimental to re-tail investors and their possibility of understanding and comparing PRIIPs and would represent an un-warranted step backwards in investor protection. The paper opens with a comment on the role of the SMSG and why it responds to an issue that concerns the interpretation of a level 1-legislative text.

14.2 MAR Guidelines

Rapporteur: Rüdiger Veil (2016-SMSG-010)

The objective of this paper was to provide advice to ESMA on the Consultation Paper on Draft Guidelines on the Market Abuse Regulation (MAR).

In the paper the SMSG commends ESMA for its ongoing commitment to establishing the single rulebook on market abuse (which is of particular importance given the Capital Markets Union agenda) and welcomes the consistent harmonisation of requirements applying to market soundings under the Market Abuse Regulation as this is a new element of the market abuse regime and its scope is uncertain. As also stated in the MAR, the SMSG underlines that market soundings are important for the proper functioning of the financial markets and that it is thus important that organisational and reporting requirements imposed on either of Disclosing Market Participants (DPMs), Market Soundings Recipients (MSRs) or issuers themselves are balanced. In this respect, the SMSGs agree with most of the proposed guidelines and only recommends to clarify some aspects of the new regime as well as uses the opportunity to comment on the indicative list of legitimate interests of issuers which are likely to be prejudiced by immediate disclosure of inside information.

The SMSG welcomes ESMA's understanding of the indicative list being non-exhaustive and considers various examples of possible legitimate interests, including the legitimate interests of issuers with a two-tiered board structure as provided for under draft guideline 1c.

However, the SMSG asks ESMA to review the wording of the conditions specified in guideline 1c (decisions taken or contracts entered into by an issuer with a two-tiered board structure) and points to relevant fundamental principles of company law in Member States whose issuers have a two-tiered board structure.

14.3 CRA – advise on validation and review of CRA methodologies

Rapporteur: Lindsey Rogerson (ESMA/2016-SMSG-011)

The Securities and Markets Stakeholder Group is an advisory group, and we do not have the technical expertise to answer the consultation in detail. However we feel it is important that when considering the consultation responses ESMA keeps to mind the wider context of maintaining market integrity and protecting investors and therefore make the following high level response to its Discussion Paper on the validation and review of Credit Rating Agencies' methodologies.

The validation of credit ratings cannot be considered in isolation. Any assessment must be set in context of the circumstances under which it was applied and take onboard any influence and/or bias which may have occurred as a result of the fees paid to the ratings agency for the specific rating or indeed ancillary services.

As the SMSG has stated previously we believe that the arrival of the European Ratings Platform (ERP) will greatly assist not only EMSA but interested third parties including academics and journalists in identifying possible anomalies in methodologies as well as in their application.

Checking that a methodology is valid will not in and of itself protect investors. The transparency that the ERP will provide not only on the performance of individual ratings but also on fees and fee arrangements will help highlight where and when there are problems with the application of any specific methodology.

ESMA is by necessity a risk-based regulator and cannot be expected to sign off every single rating methodology created by a CRA. Rather it should target its resources into examining methodologies which have been brought into question by either a low accuracy ratio or where the financial relationship between CRA and company seeking the rating warrant further investigation.

14.4 SMSG position paper on supervisory convergence

Rapporteur: Rüdiger Veil (2016-SMSG-014)

The objective of the paper is to provide advice to ESMA on supervisory convergence as one of the key strategies to be pursued by ESMA from 2016 until 2020. The focus is on the tools and instruments which ESMA may use for fostering consistency within the network of financial supervisors and developing high-quality and uniform supervisory standards. As regards the enforcement aspect of supervisory convergence, the SMSG would like to encourage ESMA to pay greater attention to the ways in which NCAs supervise markets, in particular regarding information provided by issuers under Union law (corporate disclosure: prospectuses; financial reports; inside information; notifications about directors' dealings; notification about changes of major shareholdings; disclosure of information relating to corporate governance issues). The position paper also clarifies which role the group may play in supporting ESMA in its task to ensure consistent supervisory practices across the European Union.

Annexes

Annex I - Members and categories



The SMSG at its first meeting in 2014 after appointment together with ESMA chair Steven Maijoor in front of ESMA's premises in 103 rue de Grenelle, Paris, France.

Members	Representing	Appointment ³⁾
Jesper Lau Hansen (Chair)	Academics	1 January 2014 (II)
Judith Hardt (Vice Chair)	Financial market participants	1 January 2014 (II)
Peter De Proft (Vice Chair)	Financial market participants	1 January 2014 (II)
Angel Berges-Lobera	Academics	1 January 2014 (II)
Thomas Book	Financial market participants	1 January 2014 (II)
Salvatore Bragantini	Small and medium enterprises	1 January 2014 (II)
Marina Brogi	Academics	1 January 2014 (I)
Lubomir Christov	Users of financial services	1 January 2014 (I)

Pierre-Henri Conac	Academics	1 January 2014 (II)
Elizabeth Corley	Financial market participants	1 January 2014 (I)
Carmine Di Noia**	Financial market participants	1 January 2014 (II)
Jaroslaw Dominiak	Users of financial services	1 January 2014 (I)
Krzysztof Grabowski	Financial market participants	1 January 2014 (I)
Mark Hemsley***	Financial market participants	1 January 2016 (I)
Fernando Herrero	Consumers	1 January 2014 (I)
Anne Holm Rannaleet	Financial market participants	1 January 2014 (II)
Christiane Hölz	Users of financial services	1 January 2015 (I)
Alexander Justham****	Financial market participants	1 January 2014 (I)
Rene Karsenti	Financial market participants	1 January 2014 (I)
Sari Lounasmeri	Users of financial services	1 January 2014 (II)
Antonio Mele*****	Academics	1 July 2015 (I)
Niamh Moloney	Academics	1 January 2014 (II)
Zsolt Nagygyörgy	Financial institution employees	1 January 2014 (I)
Jean-Pierre Pinatton	Financial market participants	1 January 2014 (II)
Guillaume Prache	Consumers	1 January 2014 (II)
Chrystelle Richard	Academics	1 January 2014 (I)
Lindsey Rogerson	Consumers	1 January 2014 (I)
Jan Maarten Slagter*****)	User of financial services	1 January 2014 (II)
Giedrius Steponkus	Users of financial services	1 January 2014 (I)
Stavros Thomadakis*****)	Academics	1 January 2014 (I)
Rüdiger Veil	Academics	1 January 2014 (I)
Chris Vervliet	Financial institution employees	1 January 2014 (I)
Gabriele Zgubic	Consumers	1 January 2014 (I)

*) Roman number marks appointment (I) or reappointment (II).

***) Carmine Di Noia resigned from the SMSG in the beginning of 2016 due to his appointment as a commissioner at CONSOB. He was not replaced at the time of this report.

****) Mark Hemsley replaced Alexander Justham

*****) Alexander Justham stepped down from the group end September 2015 when leaving LSE

*****) Antonio Mele replaced Stavros Thomadakis

*****) Jan Maarten Slagter stepped down in 2014 and was replaced by Christiane Hölz

*****) Stavros Thomadakis stepped down from the Group in spring 2014

Annex II- Rules of Procedure

DECISION OF THE SECURITIES AND MARKETS STAKEHOLDER GROUP

Rules of Procedure

The Securities and Markets Stakeholder Group

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (the European Securities and Market's Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC¹ (the 'Regulation' and 'Authority'), in particular Article 37 of the Regulation

Whereas:

(1) Article 37(1) of the Regulation provides that the Group's role is, to 'help facilitate consultation with stakeholders in the areas relevant to the tasks of the Authority'. More in particular, Article 37(1) provides that the Group 'shall be consulted on actions taken in accordance with Articles 10 to 15 concerning regulatory technical standards and implementing technical standards and, to the extent that these do not concern individual financial institutions, Article 16 concerning guidelines and recommendations. Such facilitation of consultation implies the Group being asked to give its advice in advance of the issue of any such consultation by the Authority.

(2) Article 37(5) provides that the Group 'may submit opinions and advice to the Authority on any issue related to the tasks of the Authority, with particular focus on the tasks set out in Articles 10 to 16 and Articles 29, 30 and 32', where the latter refer to common supervisory culture, peer reviews of competent authorities and assessment of market developments.

(3) Article 17(2) of the Regulation provides that the Group may submit a request to the Authority, as appropriate, to investigate the alleged breach or non-application of Union law.

(4) The Authority's working language is English and it is therefore advisable that the Group has the same working language.

(5) Group members may be on occasion privy to documents and information which are not yet public and are therefore confidential in nature. The Members firmly undertake not to disclose this information to any individuals outside the Group.

HAS ADOPTED THE FOLLOWING RULES OF PROCEDURE:

Article 1 – Membership appointment and mandates

(1) The appointment of the Group members is made by the Board of Supervisors in accordance with Article 37(3) of the Regulation.

(2) Group members serve in a personal capacity in accordance with their appointment under Article 37.

¹ OJ L331, 15.12.2010, p. 12.

- (3) According to Article 37(4) of the Regulation, Group members shall serve for a period of two and a half years, following which a new selection shall take place.
- (4) Members may serve two successive terms.
- (5) Should a member's position be vacated for whatever reason before the end of their term, a new member shall be appointed out of the list of alternates adopted by the Authority at the latest call for expression of interest for setting up the Group.

Article 2 – Chairperson and Vice-Chairperson

- (1) The Group shall be chaired, in a personal capacity, by one of the Group members. The Group shall elect a Chairperson and one or two Vice-Chairperson(s) during its first meeting or at the beginning of the second meeting. The election of the Chairperson and Vice-Chairperson shall be preceded by and based on a nomination procedure. Any member of the Group may nominate him- or herself or any other member of the Group.
- (2) The Chairperson shall be chosen by consensus. If consensus cannot be achieved the Chairperson shall be elected in a secret ballot by a simple majority of the Group members present at the time of the election. If no simple majority is achieved in the first round, a second round of voting shall be held between the two candidates who received the highest number of votes in the first round. The Chairperson shall serve for the remainder of his or her current term as a Group member.
- (3) The Chairperson shall:
 - (a) chair the meetings of the Group;
 - (b) with the Vice-Chairperson(s), co-ordinate the agenda for the meetings of the Group with the Authority and the members of the Group;
 - (c) provide the agreed output of the Group to the Authority's Board of Supervisors; and
 - (d) make public statements on behalf of the Group on the basis of formally agreed positions.
- (4) To assist the Chairperson, the Group shall also elect one or two Vice-Chairperson(s), in a personal capacity, from among its members following the same procedure used to elect the Chairperson and, where possible, at the same meeting. Where there is a tie between two candidates, the Group may agree to appoint both candidates as Vice-Chairpersons. The Vice-Chairperson (or one of the Vice-Chairpersons) shall replace and represent the Chairperson in case of absence or impediment. If the Chairperson and the Vice-Chairperson (or both Vice-Chairpersons) are absent the meeting shall be chaired by a member of the Group nominated by the Chairperson and Vice-Chairperson(s). The nomination shall be communicated to the Group seven days in advance of the meeting where possible.
- (5) The Chairperson or a Vice-Chairperson may be removed from office on a decision adopted by two-thirds of the members of the whole Group.
- (6) If the position of Chairperson or Vice-Chairperson is vacant, whether due to removal from office or otherwise, an election shall be held as soon as possible to appoint a new Chairperson or Vice-Chairperson under the procedure set out in this Article. Where two Vice-Chairpersons have been appointed, the position of Vice-Chairperson is not vacant if one Vice-Chairperson remains in position.

Article 3 – Convening and location of meetings

- (1) Meetings of the Group shall be convened by the Chairperson. The Group shall meet at least four times a year in accordance with Article 37(1) of the Regulation in the form and according to the timetable determined in agreement with the Authority. The Group shall meet with the Board of Supervisors regularly, at least twice a year, in accordance with Article 40(2) of the Regulation. Additional meetings of the Group may be convened depending on the calendar of ESMA's regulatory output and related consultation procedures.

(2) The Group meetings shall in principle be held at the Authority's premises. However, whenever there is an objective need and upon request of the Group and agreement with the Authority, one meeting per year may exceptionally be held in another location that is convenient to all members of the Group. Each member can attend the meeting in conference call twice a year, and additionally with the agreement of the Chairperson.

(3) In order for the Group to convene and make decisions, there shall be a quorum of two-thirds of its members. If the quorum is not met, decisions may be taken without quorum on a preliminary basis subject to subsequent approval by written procedure.

Article 4 – Agenda

(1) The Chairperson of the Group shall draw up the agenda following a consultation with the members of the Group and the Authority. All suggestions shall be noted on the agenda, including those that are not scheduled for discussion.

(2) The agenda shall be circulated to the Group by its secretariat three weeks in advance of each meeting. New items may only be added to the agenda in the light of new developments at the start of a meeting if there is consensus from members present.

(3) A yearly work plan linked to the Authority's work plan shall be adopted each year by the Group and kept under regular review by the Group. Dates as well as some more strategic key topics for meetings of the next calendar year shall be agreed upon in the autumn.

Article 5 – Secretariat support and Group documents

(1) The Authority shall ensure adequate secretariat support for the activities of the Group, its Chairperson and Vice-Chairperson(s).

(2) The Authority shall send drafts on which the Group is consulted and all other working documents to the Group members at the earliest opportunity and no later than one week in advance of the date of the meeting.

(3) In urgent or exceptional cases, the time limits for sending the documentation may be reduced to three working days of the Authority in advance of the date of the meeting.

(4) The Authority shall organise meeting facilities, circulate meeting agendas, background materials and minutes, provide technical coordination for the preparation of opinions, advice or any other input the Group may wish to provide to the Authority and arrange the reimbursement of travel expenses.

Article 6 – Role of the Group

(1) The role of the Group is to help facilitate the Authority's consultation with stakeholders in areas relevant to the tasks of the Authority. In carrying out its role the Group:

(a) expects to receive from the Authority, and discuss with it, information on issues relevant to the Group's role sufficiently early as to enable the Group to carry out its role most effectively;

(b) shall be consulted by the Authority on actions taken in accordance with Articles 10 to 15 of the Regulation concerning regulatory technical standards and implementing technical standards; and

(c) shall be consulted by the Authority on actions taken in accordance with Article 16 of the Regulation concerning guidelines and recommendations to the extent that these do not concern individual financial market participants.

(2) The Group may also:

(a) submit opinions and advice to the Authority on any issue related to the tasks of the Authority with particular focus on the tasks set out in Articles 10 to 16 (regulatory technical standards, implementing technical standards, and guidelines and recommendations), 29 (common supervisory culture), 30 (peer reviews of competent authorities) and 32 (assessment of market developments) of the Regulation; and

(b) request the Authority to investigate an alleged breach or non-application of Union law within the scope of Article 17 of the Regulation.

(3) Where the Group issues opinions or advice at the request of the Authority, the Group shall deliver its opinions or advice within the deadline requested by the Authority. The Authority shall ensure that the Group has sufficient time to agree and deliver its opinion or advice. Where the Group issues opinions or advice on its own initiative, it shall liaise with the Authority.

Article 7 – Decision-making

(1) As far as possible, the Group shall take decisions by consensus.

(2) In the event that a consensus has not been reached and decisions are put to a vote, agreement among two-third of the members present shall be required except in relation to elections for the Chairperson or Vice-Chairperson which shall follow the procedure set out in Article 2.

(3) In exceptional circumstances where it has not been possible to reach consensus and three or more members present consider that their views are not adequately reflected in an opinion to be issued by the Group, those members are entitled to include a minority opinion in the Group's opinion. Such a minority opinion may state the names of the members whose views it reflects.

Article 8 – Written procedure

(1) If necessary, the Group and any Working Group may adopt its decisions through use of written procedure. To this end, the Authority shall be responsible for the distribution to the Group members of drafts on which the Group is being consulted and/or any other working documents.

(2) The written procedure is to be initiated by the Chairperson of the Group or by the rapporteur of any working group upon a request on the part of at least 50% of the members of the Group or working group or on his/her own initiative.

(3) The written procedure shall specify the date by which Members shall provide their views or votes which shall not normally be less than ten days after the launch of the written procedure. Votes on decisions taken by written procedure shall be in written form and a failure to vote shall be considered a vote for the proposal.

(4) However, if one-third of Group members ask for the question to be examined at a meeting of the Group, the written procedure shall be suspended and the question shall be added to the agenda of the next meeting of the Group or on the agenda of an extra-ordinary meeting to be organised according to the urgency of the issue.

Article 9 – Working language

The working language of the Group shall be English.

Article 10 – Working groups

(1) In agreement with the Authority, the Group may establish working groups, from among its members, to examine specific issues related to the discharge of the Group's tasks.

(2) Working groups shall be dissolved as soon as their tasks are fulfilled. Working groups shall appoint a rapporteur who will coordinate the activity of the working group and chair its meetings in a fair and inclusive manner.

(3) The Group shall decide on the mandate, composition and duration of each working group. These working groups shall report to the Group. The composition of these groups should reflect, where possible, a balance of the Group's constituencies.

(4) Working Groups shall aim to provide a report to the Group that can form the basis for a decision to be taken by the Group. Reports shall therefore reflect views discussed in the working group, including minority views, in a way that is designed to achieve consensus in the Group. Working groups shall therefore

work on the basis of consensus. In the event consensus is not reached, the working group shall adopt its report on the agreement of two-thirds of its members present.

(5) Working group meetings shall be held at the Authority premises or such other location as is agreed by the members of the working group and the Authority or via conference call.

(6) Working groups may in its work interact with ESMA Staff.

Article 11 – Attendance and duties of Group Members

(1) The Chairperson and the Executive Director of the Authority is invited to attend the meetings of the Group and can ask the Vice-Chairperson and/or members of the Authority's Management Board and/or the Chairpersons of the relevant Standing Committees and working groups of the Authority and/or members of the Authority's staff to join specific meetings.

(2) The European Commission may also be invited to attend the meetings of the Group.

(3) At each meeting, the secretariat shall draw up an attendance list.

(4) Members are expected to attend and actively participate in the meetings of the Group.

(5) Members are expected to actively contribute to the work undertaken by the Group and to undertake any other duties decided on an *ad hoc* basis by the Group.

(6) Failure to attend three meetings of the Group in a twelve month period shall be deemed a failure to perform the member's duties. In such a case, upon consultation with the Group Chairperson, the Authority may ask the Board of Supervisors to vacate the current position and to select a new Group member.

Article 12 –Conflicts of interest

(1) At the start of each meeting, any member whose participation in the Group's or a working group's deliberations would raise a conflict of interest on a specific item on the agenda, other than the fact of their current positions with organisations, shall inform the Chairperson or rapporteur and disclose the conflict to the Group or working group in a transparent manner. That member may continue to discuss and vote on such items. In the event that the Chairperson's participation in a specific item on the agenda would raise a conflict of interest, the Chairperson shall inform the Group and the discussion of that item shall be managed by the Vice-Chairperson (or one of the Vice-Chairpersons).

(2) Members' conflicts of interest will be duly noted in any report or opinion published by the Group or any of its working groups.

Article 13 – External Guests

(1) Exceptionally, the Chairperson or a rapporteur may invite an external party to give testimony on a specific subject for consideration by the Group or working group as input. A suggestion to invite an external party can be made by any member and shall be approved by a simple majority of all members following consultation with the Authority. Once the external guest has been approved, the Chairperson or rapporteur shall inform the members no later than at the same time as the agenda is circulated and ask the members if any other point of view should be heard at the same meeting.

(2) The external guest will only be asked to participate in the part of the meeting directly related to her/his testimony and will be bound by the same rules on confidentiality regarding the session as set out in these Rules.

Article 14 – Summaries of conclusions

(1) Summaries of the discussion and conclusions on each point on the agenda shall be drafted by the Authority and circulated to the Group following approval by the Chairperson.

(2) Summaries of conclusions of previous meetings shall be adopted by the Group by written procedure or at meetings.

Article 15 – Information and confidentiality

- (1) The Authority shall provide to the Group all information that is necessary for it to carry out its role, subject to professional secrecy as set out in Article 70 of the ESMA Regulation and ESMA's Rules of Professional Secrecy and Confidentiality.
- (2) Members of the Group shall not share outside the Group any unpublished documents of the Authority which have been made available to them.
- (3) If Members of the Group fail to respect these obligations, the Authority may request the Member to stand down.

Article 16 – Regular Reporting and Transparency

- (1) The Authority shall include in its annual report a chapter providing an overview of the activities of the Group, including a summary of any opinions, reports and other advice it has formulated over the course of the given year.
- (2) The summary for inclusion in the annual report shall be approved by the Chairperson and Vice-Chairperson(s) of the Group.
- (3) The Group may produce an Activity Report that shall contain an executive summary of the opinions and reports delivered by the Group listing main achievements and inputs to the Authority, which shall be prepared by the Group and reviewed by the Chair and Vice-Chair(s).
- (4) The Authority shall make public on its website:
 - (a) the names of members of the Group and any changes or amendments to the Group's membership;
 - (b) the opinions and advice of the Stakeholder Group and the results of their consultations; and
 - (c) the summaries of conclusions of its meetings
 - (d) Short biographies (CV's) of the Members of the Group.

Article 17 – Correspondence

- (1) Correspondence sent to the Group by third parties shall be addressed to the Authority, for the attention of the Stakeholder Group Chairperson.
- (2) Correspondence sent to Group members by the Authority or group Members shall be sent to the e-mail address which they provide for that purpose.

Article 18 – Access to documents

- (1) Public access to the Group's documents shall be the same as that applying to the Authority's documents.
- (2) The Authority shall be competent to take decisions regarding requests for access to Group documents.

Article 19 – Protection of personal data

All processing of personal data for the purposes of these rules of procedure shall be in accordance with Regulation (EC) No 45/2001.

Article 20 – Collaboration with other groups

The Group should work as an interface with other groups in the financial services area established by the Commission or by Union legislation or as otherwise agreed with the Authority.

Article 21 – Amendments to these Rules of Procedure

The Group may amend these Rules of Procedure by a majority of two-thirds of the Group's members, in particular in order to take into account possible developments in the roles, tasks and organisation of the Authority and the Group.

Done at Paris on 29 January 2014

SMSG Chair

For the Securities and Markets Stakeholder Group

ANNEX III – The SMSG Survey

Process

At the February 2016 meeting the SMSG decided to conduct a self-assessment based on a questionnaire submitted by its members on a no-names basis.

Questions were defined based on an interaction between the Steering Committee, Marina Brogi and Lindsey Rogerson and ask for members' opinions in the following key areas: Assessment of SMSG's working methods; Assessment of SMSG's working relations with ESMA; Independence, composition and transparency; Quality of advice provided by/to ESMA; Visibility and public impact/Effectiveness/Timeliness of SMSG report; Additional questions and suggestions.

SMSG members were asked to express their opinion from unsatisfied (score 1) to very satisfied (score 5).

- 1 = "Unsatisfied"
- 2 = "Partly satisfied"
- 3 = "Satisfied"
- 4 = "More than satisfied"
- 5 = "Extremely satisfied"

The qualitative opinion was translated into the number score and then the average (Avg) and the standard deviation (SD) were calculated. The latter measures to what extent the average is indicative of a close to consensus opinion i.e. actual opinions expressed are close to the average. A lower standard deviation means that actual opinions are close to the calculated average, conversely a high standard deviation means that actually the average is the result of diverse views and does not really capture the opinions in the group.

The questionnaire was sent out in late March and again in early April and the 21 replies received by 7 April, collected so as to maintain anonymity, were compiled. Breakdown of responses to each question shown in both table and histogram form and the average opinion and standard deviation are provided in the charts which follow here below.

Overview and results

Results can be summarised as follows: areas in which the SMSG is more than satisfied (questions with the highest average score); areas in which there is room for improvement (questions with the lowest average score); areas in which SMSG members have different views (questions with the highest standard deviation).

The following areas of satisfaction emerge: 3.3 Legitimacy (was the SMSG legitimated to give its opinion?) (Avg: 4.25; SD: 0.89); 3.4 SMSG position as an independent body of advisors for ESMA (Are there conflicts of interests?) (Avg: 4.24; SD: 1.15); 1.5 Voting procedure at meetings (Avg: 4.15; SD: 1.01)

The areas of improvement are: 5.3 Interaction with other market participant groups (Avg: 2.16; SD: 0.93); 5.1 Website (Avg: 2.43; SD: 1.05); 2.2 Timeliness of info flows provided by ESMA (Avg: 2.76; SD: 1.11); 5.2 Timeliness of publication of advice (Avg: 2.90; SD: 0.87); 1.3 Supply and timeliness of information in preparation of meetings (Avg: 2.90; SD: 1.02)

There are certain topics on which SMSG members have split views, namely: 2.3 Feedback from ESMA staff (Avg: 3.43; SD: 1.26); 2.1 Ability to influence the agenda of ESMA (Avg: 2.90; SD: 1.23); 4.2 Feedback provided by ESMA on where SMSG has made a difference (Avg: 3.00; SD: 1.20)

In the comments the following solutions were suggested.

As concerns 1.3 Supply and timeliness of information in preparation of meetings comments were:

- 'SMSG's member should receive ESMA staff presentations or at least a short note on topics on the agenda ahead of the meetings so that we can think about constructive remarks';
- 'It would be better if a specific tool could be used to share and store documents; more technical support would be a benefit'.

As concerns 2.1 Ability to influence the agenda of ESMA one comment was:

'Be pro-active in suggesting Agenda items and Own Papers, that are related to recent trends etc. so the SMSG does not get lost in the ongoing detailed consultations on matters already of the past so to say, but are also aware of what may be in the pipe-line as markets and practitioners adapt to local, national, regional, global trends'.

On 5.3 Interaction with other market participant groups:

- 'To hold joint meetings of the steering committees of the stakeholder groups of the 3 ESAs, either on an ad hoc basis (in case need be) or at least once per year to let the SMSG (or the steering committee) define with which other groups that fall within Article 20 a collaboration would be beneficial to the work of the SMSG';
- 'As part of the orientation for new SMSG members it would have been helpful to have been given an organigram of all the various advisory groups ESMA has and how they fit together as well as what is the legal basis for their existence – i.e. is it in statute like the SMSG. It would also have been helpful if there were pan-ESA forums for at least the members representing consumers and users of financial services'.

