

SUMMARY OF CONCLUSIONS

Board of Supervisors

Date: 8 November 2011
Time: 08:30 – 18:30h
Location: ESMA
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No Items

1. Adoption of agenda *BS/208 decision*

The Chair welcomed new members of the Board: Konstantinos Botopoulos, the new Chairman of the Greek CMC; Martin Wheatley, Managing Director of the Conduct Business Unit of the UK FSA and CEO-designate of the UK Financial Conduct Authority; and Demetra Kalogerou, the new Chair of CySEC.

The Chair proposed that agenda point 3 would include a discussion on current developments in financial markets and noted that point 5 would be in restricted session.

Decision: The agenda was adopted.

2. Summary of conclusions of September meeting *BS/209 decision*

Decision: The summary of conclusions was adopted with an amendment to the opening paragraph of item 5 which should read “Julie Galbo (DK) presented her report.”

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

The Chair reported on:

- the Management Board meeting held on 8 November 2011, including the proposal that Martin Wheatley and Konstantinos Botopoulos chair SMSC and ESMA-Pol respectively and end their term at the same time as the other standing committee chairs (subject to Julie Galbo and Anneli Tuominen continuing in their roles for the remainder of their existing two-year term);
- the October meeting of the Securities and Markets Stakeholder Group at which the Chair, Guillaume Prache, and Vice-Chairs, Peter de Proft and Judith Hardt, had been elected;



- the referral of a complaint regarding the establishment of the Securities and Markets Stakeholder Group to the European Ombudsman by Uni Europa;
- the ESA Chairs' hearing before the European Parliament; and
- margin meeting, during a wider discussion on market structure issues in London, with UK FSA, SEC, CFTC, European Commission and other jurisdictions to discuss EMIR and the Dodd-Frank Act. Further meeting arranged which will be hosted by ESMA in December.

The Chair noted that the meeting of the Board of Supervisors due to be held on 19 June will be hosted by the Danish FSA in connection with Denmark's presidency of the Council.

The Executive Director reported on:

- confidentiality measures adopted since the previous meeting;
- contributions due from competent authorities, taking account of the redistribution of CESR's reserves and 2009 and 2010 TREM contributions;
- attendance at the recent Head of EU Agencies meeting; and
- the Financial Services Committee meeting to be held on 9 November 2011 which would include a report from the ESAs on 2011 achievements and 2012 challenges.

The Executive Director reminded Board members of their obligations regarding potential conflicts of interest, including the obligation to notify the Chair of any proposed occupational activities for a period of two years after ceasing to be a Board member.

The Chair updated the Board on the short-selling restrictions adopted by a number of jurisdictions in August. Emil Paulis (EC) noted political agreement had been reached on the Short-Selling Regulation which will increase national authorities' and ESMA's ability to deal with situations where such powers are needed, and noted that some of the powers could be exercised without a declaration of an emergency by the Council. Mr Paulis confirmed that the Regulation is maximum-harmonising, that the Regulation brings short-selling within the Union's exclusive competence except in the area of sovereign debt where Member States are able to opt-out of the relevant provisions and that the effective date was expected to be 1 November 2012.

The Executive Director updated the Board on ESMA's work on the European impact of the insolvency of MF Global. The Board welcomed further feedback on the information collected and a discussion on lessons learned from the firm's insolvency, including the adequacy of existing resolution procedures. The Executive Director noted that the Joint Committee had agreed to carry out further examinations of CDS data.

Francesco Mazzaferro noted the Financial Stability Board had recently released a document on shadow banking which was relevant to ESMA's work, and that ESRB would welcome further information from members of the Board regarding the current macro-prudential situation.

Konstantinos Botopoulos (GR) updated on the Board on current developments in Greece.

4. Commodities Task Force

- Terms of reference *BS/210 decision*

Decision: The terms of reference of the Commodities Task Force were approved.

- Appointment of Chair *decision*

Decision: Martin Wheatley/David Lawton were appointed to chair the Commodities Task Force.

5. Appointment of Management Board member *decision*

Decision: Following a vote by secret ballot, Martin Wheatley (UK) was appointed as a member of the Management Board until July 2013.

6. Corporate Reporting Standing Committee

- Report by Julie Galbo *BS/212 information*

Julie Galbo (DK) presented her report.

- Sovereign debt exposure issues *Annex 1A information*
- Accounting for Exposure to Greek Sovereign Debt – Enforcement Considerations with respect to IFRS interim financial statements for accounting periods ended on 30 June 2011 *Annex 1B decision*
- Exposure to Greek government bonds - co-ordination of enforcement of IFRS accounting *Annex 1C information*
- Accounting issues related to exposure to sovereign debt in IFRS financial statements *Annex 1D discussion*

The Board discussed the proposed opinion and public statement, noting the importance of the proposed opinion which was based on the situation as at 30 June 2011. The Board discussed, in particular:

- the extent to which the opinion might lead to restatements of accounts for some entities;
- the need to take into account all available relevant market data;
- that some issues could be non-material and that this should be indicated in the opinion;
- whether a clearer message would be given ahead of the preparation of year-end reports by combining the opinion with the statement or whether ESMA’s focus should be on setting out its view for year-end reports only;
- the desirability of reviewing the implementation of the principles set out in any statement; and



- the nature of opinions.

Emil Paulis (EC) noted that the Commission supported a push for maximum transparency in the field of financial reporting, and that it believed ESMA should aim to change market practices to give a coherent approach across Member States.

Julie Galbo noted that CRSC and EECS were asking the Board of Supervisors to adopt a clear position rather than issue high-level statements.

The Chair noted broad support for the messages in the opinion and in the statement and that the opinion, although based on the historical position, contained messages that are not just of historical interest. The Chair agreed that implementation of the opinion and statement should be reviewed in the course of 2012.

Jean-Paul Servais (BE) asked for legal advice to be obtained on ESMA's potential liability in relation to issuing an opinion.

Decision: The Board agreed to adopt an integrated document containing the proposed opinion and statement. A conference call will be held to adopt the final text, with a view to issuing the document around 1 December.

- Post-Implementation Review IFRS 8 *Annex 2 decision*

Decision: The Board approved publication of the report on the review of European enforcers of the implementation of IFRS 8 – Operating Segments.

- Consultation paper on the role of materiality in financial reporting *Annex 3 decision*

Decision: The Board approved publication of the consultation paper.

- Comment letter on IASB technical agenda consultation *Annex 4A & 4B decision*

Decision: The Board approved the comment letter and its publication.

7. Secondary Markets Standing Committee

- Report by Martin Wheatley *BS/213 information*

Martin Wheatley presented his report. Following a description of the steps taken to date on the review of pre-trade transparency waivers issued prior to the creation of the CESR process for reviewing such waivers, the Executive Director took the floor to make a proposal on a way forward, based on the following approach:

- in those cases where clear contradictions have been found between a pre-trade transparency waiver and MiFID, those contradictions should be notified to the national competent authority;
- on that basis, ESMA should require a clear plan and timeline from the relevant competent authorities to converge to a MiFID-compliant situation (which might imply a revision of the features of the system that do not comply with MiFID requirements) and, only if this is not met, take the necessary ac-



tions under ESMA's powers.

Conclusion: The Board supported the Executive Director's proposal.

- Guidelines on systems and controls on a highly automated environment *Annex 1 discussion*

The Board discussed the consultation feedback received on the guidelines, including:

- the impact of the new legislative proposal on MiFID;
- the ability to regulate aspects of high-frequency trading under the current MiFID text;
- the importance of circuit-breakers and cross-market surveillance from a systemic perspective;
- the role of compliance officers; and
- the inclusion in the guidelines of examples of abusive behaviour.

The Executive Director explained that national competent authorities are required to confirm whether they comply or intend to comply with guidelines. Rodrigo Buenaventura noted that in the current proposal financial market participants will not be asked to report on their compliance.

Conclusion: SMSC would continue finalising the guidelines with a view to them being adopted in the December meeting of the Board of Supervisors.

- Revision of the communications process of suspensions and removals of financial instruments under Article 41 MiFID *Annex 2 decision*

The Board discussed the proposed revision of the communications process, in particular risks for ESMA in making data public, which the Executive Director agreed would require further analysis.

Decision: The Board approved the proposed revision to the communications process.

- Internal process for future applications of pre-trade transparency waivers *Annex 3 decision*

The Executive Director noted the importance of ESMA achieving consistent application of MiFID. ESMA staff would work with SMSC to ensure that there is a clear process for reviewing potential incorrect application, with the relevant NCA being informed immediately and being given a short period for making the necessary changes to bring itself into compliance.

Decision: The Board approved the revised internal process.

8. Investment Management Standing Committee

- Report by Giuseppe Vegas *BS/214 decision*

Giuseppe Vegas (IT) presented his report.

- Technical Advice to the European Commission on Level 2 measures for the *Annex decision*



Alternative Investment Fund Managers Directive

Nicoletta Giusto reported on the key issues that arose from the consultation on the proposed technical advice, noting the input recently received from the European Banking Authority. The advice of the Securities and Markets Stakeholder Group was also considered, and a proposed response setting out how ESMA had taken account of the advice was circulated to the Board (ESMA/2011/BS/214 Annex 2).

The Board discussed the proposed technical advice, in particular:

- Emil Paulis (EC) welcomed the work carried out by ESMA which would be used to the fullest extent possible in informing the Commission’s implementing measures, noting there may be some small areas where the Commission may find, following further legal analysis, it has to depart from ESMA’s advice.
- the need for clarification of the scope of the Directive, noting that work within ESMA is underway and technical standards on the types of managers will need to be prepared;
- whether distinctions could be made between affiliated and non-affiliated sub-custodians;
- the ability of collateral managers to be responsible for custody;
- the ability to use more than one professional indemnity insurance policy;
- the potential use of the Member State from which products are distributed as a criterion in determining the Member State of reference in Box 113, ESMA staff noting that the focus of the provisions of the Level 1 text is on the Member State in which products are distributed and therefore the advice should remain unchanged; and
- the importance for the monitoring of systemic risk of having information on gross leverage in order to understand the effect of netting.

Decision: The Board approved the technical advice for publication and submission to the Commission. It was agreed to send the response to the Stakeholder Group’s advice to the Group.

9. Legislative approach to PRIPs

BS/215 decision

Letter to Commissioners Barnier and Dalli

Annex 1 decision

The Chairperson proposed sending a letter to the Commission regarding the Commission’s proposal in relation to PRIPs which, it was feared, could lead to ongoing differences in selling practices between the investment and insurance sides of the retail market.

The Board discussed the letter, in particular the extent to which differences in approach may be needed due to sectoral differences, and to which extent this may lead to continued regulatory arbitrage.

Decision: The Board agreed to send the proposed letter to the Commission subject to some revisions to take account of the discussion in the Board.

10. Investor warning on foreign exchange

BS/216 decision



& Annex

The Executive Director presented the proposal for an investor warning on foreign exchange on behalf of the Foreign Exchange Task Force. The Executive Director noted support of ESMA staff, IPISC and ESMA-Pol for the proposed warning together with an investor alert which would cover more generally the risks of foreign exchange.

The Board discussed the proposal, in particular:

- whether other risks were appropriate topics for ESMA’s first investor warning;
- the most appropriate communication tool for the issues raised, and whether there is a sufficiently clear distinction between the proposed investor ‘warnings’ and investor ‘alerts’;
- the extent of evidence of investor harm and whether the Article 9(3) test of a serious threat to ESMA’s objectives was met, taking account of very high leverage levels in some countries, the unauthorised nature of some firms, the unsophisticated nature of many clients, and aggressive marketing;
- the desirability of covering the potential effect of stop-loss limits;
- the desirability of clarifying whether the proposal relates to foreign exchange as a product, or against the use of unauthorised products;
- broadening the warning to a wider range of complex products; and
- the interaction with ESMA’s consumer education work.

Conclusion: The Chair noted broad agreement on ESMA issuing some form of communication which should make clear that it relates to practices in some countries, rather than being a pan-European problem. The majority of the Board favoured communicating the message as a warning issued under Article 9(3) of the ESMA Regulation. The communication should warn about unauthorised trading but also alert investors to the risks when dealing with authorised firms. ESMA staff would clarify the scope of the warning and seek to include reference to stop-loss provisions. The Chair supported taking a broader look at complex products. Members were asked to submit further comments in writing. ESMA staff would prepare a revised text to be adopted under Article 9(3) for approval by written procedure.

11. Post-Trade Standing Committee

- Report by Jean-Pierre Jouyet

BS/217 information

Thierry Francq (FR) presented the report by Jean-Pierre Jouyet.

- Follow-up to the first advice to the Commission on settlement discipline

Annex 1 decision

The Board discussed the proposed advice, including:

- references to the existing powers of competent authorities;
- the support provided by the analysis carried out for the measures proposed, and the risks of unde-



sired effects; and

- the need for proportionate data collection and care over its analysis.

Emil Paulis (EC) noted that the Commission expects to make a legislative proposal on CSDs which will take account of ESMA's work.

Thierry Francq (FR) noted that the advice was not prescriptive, leaving room for further work on specific proposals. There is a need for more extensive data collection because of the limits on ESMA's ability to carry out full analysis of whether there are any risks to financial stability based on the current data that is available.

Francesco Mazzaferro (ESRB) noted that it is expected that the ESRB Steering Committee will be discussing the need for macro-prudential authorities to adjust levels of margins and haircuts. The Executive Director informed the Board that ESMA had written to the ESRB noting the need for strong margin and collateral requirements for CCPs, while acknowledging the potential need to strengthen those requirements at times using a framework that ensures EU consistency. The letter would be circulated to the Board of Supervisors. Emil Paulis noted that the issue of margin and collateral was settled by EMIR for OTC derivatives and there will be further consideration in the context of recovery and resolution proposals for CCPs.

Decision: The Board approved the advice for submission to the Commission.

- Consolidated report on settlement fails *Annex 2 information*

12. ESMA-Pol

- Progress report *BS/218 decision*

The Executive Director presented the report.

- ToR Task Force on regulation on short-selling and certain aspects of CDS *Annex 1 decision*

The Executive Director noted that the date for ESMA to provide technical standards was not yet set, but would be ahead of the implementation date of 1 November 2012. Emil Paulis explained that the Commission must have six months for adopting technical standards, taking account of the objection periods for the Council and Parliament. The Chair noted ESMA's own legal obligations in preparing technical standards.

Decision: The terms of reference were approved.

13. Credit Rating Agencies

- Report by Verena Ross *BS/219 information*

The Executive Director presented the report and introduced Felix Flinterman as ESMA's new Head of the CRA Unit.

Adam Farkas (EBA) noted that EBA had been asked for information on reliance on third country ratings to inform ESMA's decision on extending the relevant transitional period and expects to be able to provide the



information to ESMA by 18 November 2011, and confirmed that EBA had no comments on ESMA's consultations on CRA regulatory technical standards.

Emil Paulis (EC) updated the Board on the Commission's CRA3 legislative proposal.

The Executive Director updated the Board on how ESMA proposes to use delegation arrangements in its supervisory arrangements.

The Chair thanked members of the Board and their authorities and ESMA staff for their work in reaching registration decisions.

14. Work programme for 2012

*BS/220 decision
Annex 1
Annex 2*

The Executive Director presented ESMA's work programme for 2012 on behalf of the Management Board, noting that a revised high-level note will be prepared and circulated separately for approval by written procedure. The work programme and high-level note would then be submitted to the Parliament and Council and published.

The Board discussed the proposed work programme, including:

- the priority of work on audit and on AIFMD third country issues;
- the desirability of coordinating requests for information to competent authorities;
- the need to highlight ESMA's role on converging supervisory practices.

The Executive Director agreed to look at the requests for amended priorities and coordinating data requests, noting that in 2012 there will be significant data requests.

Decision: The Board approved the work programme for 2012 subject to finalisation of the points raised, and circulation of a revised high-level note for approval in written procedure.

15. Review Panel

- Report by Jean Guill

BS/221 information

Jean Guill (LU) presented his report. The Executive Director introduced Stephan Karas, ESMA's new Head of the Legal, Coordination and Convergence Unit.

The guidelines on highly automated trading, implementation of aspects of UCITS IV, supervision of best execution and suitability criteria were proposed as potential topics for peer review in 2012, focusing on supervisory actions and retail investor concerns, rather than regulation.

- Decision re-establishing the Review Panel

Annex 1 decision

Decision: The Board approved the decision (ESMA/2011/BS/229).



- Prospectus Directive good practices self-assessment report

Annex 2 decision

The Board discussed the self-assessment report, including:

- whether the report, as the first stage of a peer review, should be published;
- the need for greater challenge in the self-assessment process; and
- the need to consider the substance of the practices under review in addition to verifying procedures.

Decision: The Board approved the report. The report should be published as part of the final peer review findings. The Review Panel should consider how to assess the substance of the practices as part of the peer review.

16. Committee for Economic and Markets Analysis

- Report by Carlos Alves

BS/222 information

Carlos Tavares presented the report of Carlos Alves.

The Executive Director reported on ESMA's work on stress testing, thanking competent authorities for the input provided at a national level and asking for approval of a stress test working group and indications of interest in participating in that working group to ensure a representative group.

- Terms of reference for a working group on high frequency trading

Annex decision

The Board discussed the terms of reference, in particular the importance of the second stage in scoping the proposed data collection and ensuring it is standardised so the costs are understood and the data provides an effective basis for further work.

Decision: The Board approved the creation of a stress test working group and the terms of reference of the working group on high frequency trading, with proposals for further work on high frequency trading to return to the Board of Supervisors.

17. Joint meeting with the Securities and Markets Stakeholder Group

BS/223 discussion

The Chair reported on the proposal for holding joint meetings with the Securities and Markets Stakeholder Group.

Conclusion: The Board supported the proposal.

18. Agreement with the ESRB on establishment of confidentiality procedures

BS/224 decision & Annex

The Executive Director presented the agreement.

Decision: The Board approved the agreement.



19. Progress reports

- Report by Jean-Paul Servais (IPISC)

BS/226 information

The Board noted the report.

20. AOB

There was no additional business.

21. Future meetings

information

- 20 December 2011 (Paris)
- 14 February 2012 (tbd)
- 17 April 2012 (tbd)
- 19 June 2012 (tbd)
- 11 September 2012 (tbd)
- 6 November 2012 (tbd)
- 18 December 2012 (tbd)

Steven Maijoor
Chair



PARTICIPATION LIST

Voting Members

Member State	Representative	Accompanying Person
Belgium	Jean-Paul Servais	Antoine van Cauwenberge
Bulgaria	Stoyan Mavrodiiev	Antoniya Gineva Nina Koltchakova
Czech Republic	Pavel Hollman	
Denmark	Julie Galbo	
Germany	Thomas Neumann (observer)	Stefan Pankoke
Estonia	Raul Malmstein	Gerle Reinumägi
Ireland	Gareth Murphy (alternate)	Patricia Dunne
Greece	Konstantinos Botopoulos	Eleftheria Apostolidou Anastassios Gabrielides
Spain	Fernando Restoy	Antonio Mas
France	Thierry Francq (alternate)	Thierry Courret
Italy	Giuseppe Vegas	Nicoletta Giusto
Cyprus	Demetra Kalogerou	
Latvia	Sandis Andersmits (alternate)	
Lithuania	Vaidas Cibas (alternate)	
Luxembourg	Jean Guill	
Hungary	László Balogh (alternate)	
Malta	André Camilleri	
Netherlands	Ronald Gerritse	Mirèl Ter Braak Max Simonis
Austria	Kurt Pribil	Andrea Kuras-Goldmann
Poland	Marek Szuszkiewicz	Adam Blasiak



Portugal	Carlos Tavares	Manuel Costa
Romania	Gabriela Anghelache	Raluca Tariuc
Slovenia	Damjan Žugelj	Sabina Bešter
Slovakia	Eva Svetlošáková (alternate)	Slavomir Stastný
Finland	Anneli Tuominen	Jarmo Parkkonen
Sweden	Martin Andersson	Anna Jegnell Oskar Ode
United Kingdom	Martin Wheatley	David Lawton Cristina Frazer

Non-voting members

ESMA Chair	Steven Maijoor	
European Commission	Emil Paulis	Emiliano Tornese
ESRB	Francesco Mazzaferro	Fabio Recine
EIOPA	Carlos Montalvo	
EBA	Adam Farkas	

Observers

Iceland	Gudrun Jonsdottir	
Liechtenstein	Mario Gassner	
Norway	Anne Merethe Bellamy (alternate)	Kristin Lund

ESMA

Executive Director	Verena Ross
Head of Markets Division	Rodrigo Buenaventura
Head of Investor Protection and Reporting Division	Laurent Degabriel



Head of Credit Rating Agencies Unit	Felix Flinterman
Head of Legal, Cooperation and Convergence Unit	Stephan Karas
Acting Head of Economic Research and Financial Stability Unit	Oliver Burkart
Minutes	Jonathan Overett Somnier