

SUMMARY OF CONCLUSIONS

Board of Supervisors

Date: 25 May 2011
Time: 09:00 – 17:00h
Location: ESMA, 11-13 avenue de Friedland, 75008 Paris
Contact: carlo.comporti@esma.europa.eu T: +33 158 3643 24

No Items

1. Adoption of agenda ESMA/2011/BS/112 *for decision*

The Chair welcomed new participants in the Board: Tobias Waller as the observer from Liechtenstein, Ronald Gerritse from the Netherlands, and Ugo Bassi from the European Commission.

Decision: The agenda was adopted with the addition of an item discussing the appointment of the Board of Appeal.

2. Summary of conclusions of 12 April meeting ESMA/2011/BS/113 *for decision*

The Chair noted that some comments have been received and incorporated into the draft summary of conclusions.

Decision: It was agreed that summaries of conclusions should be more concise and that therefore a shorter version should be circulated within two weeks for consideration at the next meeting of the Board of Supervisors.

3. Article 9 Implementation Task Force

- Preliminary report on implementation of Article 9 of the ESMA Regulation ESMA/2011/BS/114 *for discussion*

Jean-Paul Servais presented his report.

Warnings and bans

The Board discussed the report's proposals in relation to warning and bans, and in particular:

- the importance of developing a greater understanding of national approaches to product interven-



tion and banning;

- the scope for ESMA to develop a coordinating role in relation to national activities, taking account of the scope for products to be sold on a cross-border basis which would limit the effectiveness of national powers;
- the need to take into account whether EU action is proportionate and in line with subsidiarity principles, although it was noted that subsidiarity means action being taken at the most appropriate level so it is appropriate for ESMA to coordinate and take action in some circumstances, in particular those set out in Article 9(5) of the ESMA Regulation;
- the extent to which any general framework developed should be supported in EU legislation and be sufficiently flexible to cope with new situations;
- the scope for establishing product characteristics that are not considered acceptable for retail investors;
- the need to take account of the existing investor protection regulatory regime and if rules are poorly supervised then deal with the poor supervision directly;
- the need to take account of the different nature of markets across the EU and the differing level of sophistication of investors;
- the scope for ESMA to have a role in relation to financial literacy; and
- that Article 9 extends beyond pure investor protection to financial activities generally, and in particular financial stability issues.

Conclusion: Proposals on questions 1 and 4 concerning the ability to issue investor alerts and the need for a flexible approach to issuing warnings and banning activities were agreed. The Task Force should map the activities of national authorities in relation to product intervention and bans and use the information to consider the scope for a coordinating role for ESMA in relation to national activities. The Task Force should also consider ESMA's banning powers. The Task Force should develop specific proposals for further consideration by the Board of Supervisors.

Committee on Financial Innovation

The Board discussed the establishment of the committee on financial innovation, and in particular:

- the level of participation in the committee and whether its scope should extend to all Article 9 issues; and
- whether the committee should have an advisory or policy-making role and how it coordinates with other Standing Committees, EBA, EIOPA, Joint Committee and the ESRB while enabling ESMA to react quickly to developments.

Conclusion: It was agreed that the committee should not be a decision-making or policy-making body. The Task Force should consider further how the committee would coordinate with other parts of ESMA and with EBA, EIOPA, Joint Committee and ESRB, including whether the committee should be established as a normal standing committee or should also include the chairs of other Standing Committees. It



was agreed that ESMA should put itself forward to chair the Joint Committee sub-committee on consumer protection and financial innovation.

Data collection

The Board discussed collection of data, and in particular:

- the scope for focusing data collection on products that are subject to complaints, noting that complaints are generally available only in national languages and are frequently dealt with by ombudsmen and therefore are not always directly available from competent authorities.
- the scope for data collection to use a significant amount of time and resources that would need to be justified by identifying the purpose for which data is gathered and who will use it, including the time national authorities may need to establish their own systems where necessary.

Conclusion: The Task Force would continue its work based on a step-by-step practical approach.

4. Review Panel

- Report by Jean Guill ESMA/2011/BS/115 *for information*

Jean Guill presented his report.

- Prospectus Directive good practices questionnaire Annex 1 *for decision*

Decision: The Board approved the questionnaire.

- Decision establishing the Review Panel of ESMA Annex 2 *for discussion*

The Board discussed the draft decision, in particular:

- the desirability of requiring national authorities that object to publication of peer reviews to justify their objection and ESMA publishing the justification;
- that conflicts of interest provisions should be limited to personal conflicts in line with the Board of Supervisors rules of procedure;
- the level of independence and objectivity that should be required of members of the Review Panel;
- the scope for ESMA staff to chair sub-groups; and
- the Review Panel's interaction with other parts of ESMA.

The Chair considered that ESMA staff should be treated equally with members of the Review Panel and so there should not be restrictions on staff chairing sub-groups. In relation to the discussion on levels of independence, the Chair noted that Members of the Board of Supervisors are present as independent individuals and not as representatives of their competent authorities.

Conclusion: The Review Panel should finalise the draft decision for adoption by the Board, taking



accounts of the comments raised.

5. Credit Rating Agencies SC

- Report by Karl-Burkhard Caspari ESMA/2011/BS/116 *for information*

Karl-Burkhard Caspari presented his report, noting in addition that the CRA Amendment Regulation is expected to be published on 27 May, coming into effect on 1 June, one month ahead of ESMA taking over responsibility for supervision.

The SEC has published draft rules which will require analysis to establish whether they would be equivalent if implemented, with further analysis required to identify any changes in the final rules.

The Commission welcomed early development of advice on equivalence of the SEC rules and the swift progress being made on registration of CRAs.

The Chair noted that as Karl-Burkhard is stepping down as chair of the Standing Committee, as previously agreed the Standing Committee will be replaced with a Technical Committee. The Technical Committee will be chaired by the Executive Director. The Chair also reported that ESMA staff are making good progress on the MoU with the US.

Conclusion: The Standing Committee (and future Technical Committee) should focus its equivalence work on the US draft regulations with ESMA staff taking over the work on the remaining countries.

- ESMA staff note on exchange of letters between ESMA and the Japanese FSA ESMA/2011/BS/128 *for decision*
- Letter to the Japanese FSA on the cooperation of competent authorities regarding supervision and enforcement in the area of CRAs ESMA/2011/BS/128 Annex 1 *for decision*

The Board noted the staff note presented by the Acting Secretary General.

Decision: The Board approved the letter to the Japanese FSA.

- Report by Boguslaw Budzinski ESMA/2011/BS/117 *for information*

The Board noted the report presented by Ilona Pieczynska-Czerny.

The Acting Secretary-General (ASG) noted that the Commission had requested further background information on the technical advice provided on CRA fees, to be delivered against a very tight timescale.

Decision: The Board agreed to a one-day written procedure to approve the background information on fees to be submitted to the Commission.

6. IT Management and Governance Group



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|--|--|------------------------|
| <input type="checkbox"/> Report by Arja Voipio | ESMA/2011/BS/119
including Annexes 1
& 2 | <i>for information</i> |
| <input type="checkbox"/> Project Presentation Document | Annex 3 | <i>for decision</i> |
| <input type="checkbox"/> IT collaborative tools | Annex 4 | <i>for decision</i> |

The ASG presented the report, noting Arja Voipio's apologies that she is unable to attend and that the Management Board had discussed the report in its meeting on 24 May, proposing:

- rapid progress on three urgent projects: secure exchange of documents; CRA supervisory tools; and document management;
- further consideration of the video-conferencing project, in particular to coordinate with the other ESAs; and
- further work to identify synergies within the three ESAs, including within the four projects discussed but without delaying progress on the three urgent projects. ESMA staff would therefore liaise with EBA and EIOPA to explore this further.

The Board discussed the report and its annexes, in particular:

- the need to agree common standards and platforms with the other ESAs wherever possible, and welcoming agreement in the Joint Committee to increase coordination;
- the extent to which progress on video conferencing should be a priority;
- the need for business owners to be assigned in order to ensure the projects deliver tools that are most effective for ESMA;
- the trade-off between implementing solutions quickly and promoting integration with other ESAs.

It was noted that there is willingness to cooperate within the ESAs but that difficulties can arise because, for example, of different stages of implementation of existing systems within the ESAs, different membership of the ESAs affecting priorities, and different sectoral requirements. Establishment of the ESAs now provided greater scope to cooperate and overcome some of the difficulties caused by the structure of the 3L3 Committees.

Conclusion: The Board supported the Management Board proposal to proceed quickly with the secure exchange of documents, CRA supervisory tools and document management projects while undertaking a quick analysis, within a month, of the scope for synergies with the other ESAs. There is clear desire in the Board of Supervisors to establish video-conferencing facilities, but on the basis that any facilities should be consistent with systems at the other ESAs.

7. Appointment of the Board of Appeal (Closed session) ESMA/2011/MB/67 *for discussion*

The Chair presented the report that had been provided to the Management Board, noting the importance



of respecting the confidentiality of the discussion given that it involved discussion of individuals.

The Chair noted that the Management Board had identified four candidates as members and alternates. The Board discussed the four candidates proposed.

Conclusion: The Board supported the four candidates proposed by the Management Board and advised that focus should be given to legal and supervisory expertise while minimising the scope for conflicts of interest, or perception of conflicts of interest, that could arise where lawyers are active in private practice.

8. Protocol for the Cooperative Oversight Arrangement of the Warehouse Trust Company LLC ESMA/2011/BS/120 *for decision*

The ASG presented the report and protocol.

The Board discussed, in particular:

- the ability to share confidential information with voting members of the Board of Supervisors;
- the possible need for ESMA to ensure appropriate arrangements for sharing relevant information with national authorities when entering into similar agreements;
- the extent to which the decision to enter into the protocol should take account of ongoing EU legislative discussions regarding reciprocity and mutual recognition and EU discussions with the US, given involvement of the ECB and three European national authorities and central banks in addition to ESMA.

The ASG noted that ESMA supported the Commission's position on reciprocity and mutual recognition and had raised the issues in correspondence with Mary Schapiro and Gary Gensler. The ASG noted that experience of data exchange with DTCC had been positive to date.

The Chair noted that ESMA has to fulfil its own responsibilities as an independent authority and that ESMA has a clear interest in being a party to the protocol. The Chair further noted that ESMA's confidentiality obligations extend to members of the Board of Supervisors as individuals, but do not extend to Board members' staff.

Decision: The Board agreed in principle to ESMA entering into the protocol. The final decision will be taken by written procedure following circulation of further information by ESMA staff.

9. Post-Trading SC

- Report by Jean-Pierre Jouyet ESMA/2011/BS/121 *for information*

Thierry Francq presented his report. Mr Francq noted that the final text of EMIR is awaited and that pending its adoption progress was being made with developing technical standards so far as possible, although unfortunately without ESCB input despite invitations. It was hoped that ESCB input could be obtained prior to consultation later in 2011.

The Chair agreed to support further attempts to involve ESCB at an early stage.



Pre-assessment of the design of TARGET2-Securities (T2S) Services during the development phase Annex 1 *for decision*

Letter to T2S Programme Board Annex 2 *for decision*

The Board discussed T2S, in particular:

- the need for the Commission and ESMA to coordinate work on proposed CSD legislative provisions on outsourcing which will extend to arrangements with T2S;
- the desirability for financial stability purposes of an assessment of the resilience of T2S to malicious attacks;
- the scope for ESMA and national supervisors to take appropriate steps if they are ultimately unsatisfied with aspects of T2S, independently from any ECB assessment.

Decision: The pre-assessment report and letter to the T2S Programme Board were approved.

10. Corporate Reporting SC

Report by Fernando Restoy ESMA/2011/BS/122 *for information*

Fernando Restoy presented his report.

Letter to IAASB on disclosures Annex 1 *for decision*

Decision: The letter was approved.

Note on the IASB's post-June 2011 agenda Annex 2 *for discussion*

Conclusion: The Board noted the note.

Appointment of new SC Chair *for decision*

The Chair reported that Fernando Restoy would step down as Chair of the Standing Committee following its June meeting and invited further indications of interest in chairing the Standing Committee, including amongst alternates or at board level within national authorities. The Chair would be willing to chair the Standing Committee if needed and pending a permanent appointment. Mr Restoy thanked ESMA staff, in particular the Standing Committee's rapporteurs, for the excellent support provided.

11. Secondary Markets SC

Report by Alexander Justham ESMA/2011/BS/123 *for information*

David Lawton presented Alexander Justham's report.

Pre-trade transparency waiver NL1 Annex 1 *for decision*

Decision: Following discussion of the note by ESMA staff, the Board decided that, in ESMA's opinion,



the NL1 waiver does not comply with MiFID (Karl-Burkhard Caspari disagreeing) and that this opinion should be made public.

- Note by ESMA staff on voting on pre-trade transparency waivers ESMA/2011/BS/124 *for discussion*

The ASG presented the note by ESMA staff.

The Board discussed the note, and in particular:

- whether decisions on waivers should be issued as opinions addressed to individual competent authorities under Article 29 of the ESMA Regulation, or as guidelines/recommendations under Article 16, noting that in practice the existing practice of publication leads to the decisions being treated as precedents by competent authorities and financial market participants.
- the practical challenges of issuing the decisions as guidelines;
- the desirability of providing opinions on individual cases and identifying underlying principles which could then usefully be issued as general guidelines or recommendations; and
- the mapping carried out when the CESR procedure was adopted to identify existing waivers, and scope to revisit those waivers to ensure a level playing field amongst financial market participants, with ESMA if necessary using its breach of Union law powers.

Conclusion: ESMA decisions on individual pre-trade transparency waivers should be issued as opinions and clearly stated to be such. The Standing Committee will review previous waivers to ensure a level playing field in the light of the new ESMA arrangements. This can result in new ESMA opinions on existing waivers. ESMA opinions and CESR positions could be taken into account to support breach of Union law investigations where appropriate. Underlying principles of individual waivers should also be issued as guidelines where possible.

12. Progress reports

- Report by Jean-Paul Servais (IPISC) ESMA/2011/BS/125 *for information*
- Report by Anastassios Gabrielides (ESMA-Pol) ESMA/2011/BS/126 *for information*
- Report by Giuseppe Vegas (IMSC) ESMA/2011/BS/127 *for information*

The Board noted the progress reports.

13. Report by Chair, Acting Secretary General and Interim Executive Director

Oral report

for information

The Chair reported on:

- the Management Board meeting held on 24 May 2011, in particular a decision to redistribute CESR Member reserves at the earliest opportunity during the course of 2011, and progress in relation to recruitment of ESMA's middle management;



- progress regarding the level of representation in the Board of Supervisors;
- discussions with the Commission regarding ESMA's involvement in the EU legislative process;
- arrangements for ESMA's official inauguration on 11 July 2011, to be attended by Commissioner Barnier and Sharon Bowles MEP; and
- discussions on future funding arrangements for the ESAs taking account of broad support in the Board of Supervisors for 100% Union funding.

14. A.O.B.

- Proposed letter to SEC and CFTC regarding cross-border effects of Dodd Frank and cover letter from Thierry Francq, Alexander Justham and Karl-Burkhard Caspari *for discussion*

Karl-Burkhard Caspari reported on the proposed letter.

Decision: The Board approved the letter subject to drafting proposals to be provided by the Commission.

15. Future meetings *for information*

- 11 July 2011 (pm) and 12 July 2011 (am) (Paris)
- 20 September 2011 (Warsaw)
- December 2011 (Paris)

The Chair proposed an additional meeting at the end of October, with dates for the October and December meetings to be fixed by ESMA staff and shared as soon as possible.

Steven Maijoor
Chair



PARTICIPANT LIST

Voting Members

Member State	Representative	Accompanying Person
Belgium	Jean-Paul Servais	Antoine van Cauwenberge
Bulgaria	Antoniya Gineva	Nina Koltchakova
Czech Republic	Pavel Hollmann	-
Denmark	Julie Galbo	Hanne Råe Larsen
Germany	Karl-Burkhard Caspari	Philipp Sudeck
Estonia	Raul Malmstein	-
Ireland	Gareth Murphy	Elva Martin
Greece	Anastassios Gabrielides	Eleftheria Apostolidou
Spain	Fernando Restoy	Antonio Mas
France	Thierry Francq	Xavier Tessier Thierry Courret
Italy	Giuseppe Vegas	Nicoletta Giusto
Cyprus	Liana Ioannidou	-
Latvia	Irena Krumane	-
Lithuania	Renata Babkauskaitė	-
Luxembourg	Jean Guill	-
Hungary	László Balogh	-
Malta	Andre Camilleri	-
Netherlands	Ronald Gerritse	Max Simonis
Austria	Kurt Pribil	Andrea Kuras-Goldmann
Poland	Ilona Pieczynska-Czerny	Adam Blasiak
Portugal	Carlos Alves	Margarida Matos Rosa
Romania	Bogdan Chetreanu (observer)	



Slovenia	Damjan Zugelj	Sabina Bester
Slovakia	Slavomir Stastný	Ivan Barri
Finland	Jarmo Parkkonen	
Sweden	Martin Andersson	
United Kingdom	David Lawton (alternate)	Cristina Frazer

Non-voting members

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

Observers

Iceland	Gunnar Andersen	-
Liechtenstein	Tobias Wanner	Philipp Roeser
Norway	Eirik Bunaes	Kristin Lund

ESMA

Acting Secretary General	Carlo Comporti
Interim Executive Director	Olivier Salles
Minutes	Jonathan Overett Somnier