

SUMMARY OF CONCLUSIONS

Securities and Markets Stakeholder Group

Date: 15/16 February 2012
Time: 14:00 – 17:30h, 9:00 – 13:00h
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1. Adoption of agenda

Decision: The agenda was adopted with one correction to the title of item 2.

2. Summary of conclusions of November meeting – *SMSG/10*

Decision: The summary of conclusions was adopted.

3. Steering Committee's report

The Chair reported on the activities of the Steering Committee, including:

- preparation of the joint and plenary meetings; and
- preparation of guidelines on acceptance of meeting requests, which would be decided on by the Steering Committee with reports to the plenary meetings on meeting requests and whether they have been accepted.

A. November meeting date

Decision: The Group agreed to meet on 23 November 2012. As the Chair cannot attend the Vice-Chairs will chair the meeting.

B. Follow-up of letter to European institutions

The Chair noted that there has been no response to date to the letter to the EU institutions concerning the need for EU legislators to provide adequate periods for ESMA to carry out its tasks and to allow for adequate stakeholder consultation.

The ESMA Chair noted that ESMA had not received a formal response to its own letters, but the deadlines in EMIR had been moved and ESMA had attended a Council working group meeting. ESMA also continued to raise the issue in the Parliament and with individual MEPs.

The Executive Director explained that ESMA understood that it has no formal role in the legislative process, but that it could participate through the Commission as an observer to help inform the discussion and hear the debates.

The Chair noted that a journalist had contacted him regarding the letter and asked members to refer to the letter if they are approached for comments.

C. Follow-up of letter to ESMA on secretariat support

The ESMA Chair having noted the need for senior secretariat support, the Executive Director explained that Jacob Lönnqvist, a senior officer in the Legal, Cooperation and Convergence Unit would be replacing Jonathan Overett Somnier as secretary to the Group and spending approximately half of his time in that role. The Chair welcomed Mr Lönnqvist and thanked Mr Overett Somnier for his work.

A formal reply to the letter will follow.

The Chair asked ESMA to keep the secretariat support under review.

4. Actions arising from joint meeting with ESMA's Board of Supervisors *15:00-15:45*

The Group discussed the joint meeting, including:

- the relationship between the SMSG's working groups and ESMA's own consultative working groups;
- the clear recognition shown by the Board of Supervisors of the value of the SMSG's work;
- the need for the Group to be open to being approached by ESMA on issues even where formal advice is not going to be produced;
- the interest shown by the Board of Supervisors in the Group's plans for own-initiative work on investor protection, SME financing and the role of financial markets in supporting the real economy;
- the need for ESMA to continue involving the Group at an early stage, for example on AIFMD, while ensuring that the Group adopts advice which is published;
- the scope for expanding the CRA supervision work stream into consideration of ESMA's direct supervisory roles more generally;

The Chair noted that the Group had been productive, which has raised expectations about what the Group can deliver. The meeting had provided reinforcement of the Group's views on its role and on how it fulfils it, by providing strategic advice at an early stage.

The ESMA Chair noted that ESMA receives a lot of stakeholder input regarding policy issues, but there is less input regarding its role in ensuring supervisory convergence. Identifying inconsistencies across different Member States was an area that the Group could help ESMA deliver as an organisation given the experience that its members will have, whether in their role in large international firms, or as representatives of pan-European associations.

Conclusions:

- It was agreed not to amend the Group’s work programme, but the workstream on investor protection could cover issues of supervisory convergence, and the CRA supervision workstream could look at ESMA’s supervisory activities more generally.
- Providing input on the Review Panel’s work programme should be built into the agenda of a future meeting, and consideration should be given to adding supervisory convergence as a standing item for the Group’s agenda.
- The Steering Committee would provide a template for members to provide views on supervisory convergence issues.
- ESMA would give further thought to how it can indicate to the Group the strategic topics on which it would like its input.
- The Group would continue to focus on the early stages of discussions, rather than on the detailed technical proposals in consultation papers, without excluding the latter.

5. SMSG advice

A. MiFID suitability and compliance function guidelines – SMSG/11 and SMSG/12 15:45-16:30

Pierre-Henri Conac presented on the proposed advice prepared by the working group.

The Group discussed the proposed advice, in particular:

- the role of the proportionality principle and the need for all firms to ensure compliance with regulatory requirements;
- the value of registration of advisers in contributing to professionalism;
- the scope to personalise suitability questionnaires;
- the ability of advisers to take into account investors’ standards of living and the differences in the availability of public data in different Member States; and
- the extent to which investors can be expected to take responsibility for their investment decisions, particularly taking account of the scope for conduct of business issues which may, taken as a whole, lead to systemic risk.

Decision: The Group adopted both pieces of advice subject to two amendments to the suitability advice.

B. Short selling technical standards – SMSG/13

16:45-17:30

ESMA's Head of Markets, Rodrigo Buenaventura, explained to the Group ESMA's current position in relation to its work on short selling, noting that ESMA was analysing consultation responses with a view to delivering technical standards to the Commission by the end of March. A consultation on advice to the Commission had been published and copies would be provided to the Group to consider whether it wants to provide advice. The advice would be provided to the Commission by mid-April.

Antonio Mas and Dilwyn Griffiths, members of ESMA's working group on short selling, presented on the group's work including initial views on some of the issues raised by the Group's working group and by other stakeholders during the consultation process.

The Group discussed:

- the obligation on national competent authorities to consider taking action to restrict short selling if certain thresholds are met;
- the role of short selling measures in dealing with very temporary market imbalances;
- the proposal to produce a cost-benefit analysis only for the final report rather than in ESMA's consultation;
- the extent to which there is further value in discussing the delegated acts beyond the discussions held in December; and
- whether to prepare advice on ESMA's proposed advice on delegated acts.

Conclusion: It was agreed that as the working group had not been able to produce advice in the very short time available, the Group would not provide ESMA with formal advice on the proposed technical standards. A conference call would be arranged for the short selling working group with ESMA to provide input on certain new details of the delegated acts consultation paper.

Presentations and discussions

A. Joint Committee of the European Supervisory Authorities – SMSG/14

Stephanie Duverger of ESMA presented the role of the Joint committee, which is chaired by ESMA in 2012, along the lines of the presentation (document number SMSG/14) that had been shared prior to the meeting.

The group discussed:

- The need to have a good level of contact with other executive bodies of the Stakeholder Groups of the other two ESAs. This particular topic will be taken forward by the Steering Committee who will be in contact with the Stakeholder groups of EBA and EIOPA in order to set up common meetings.
- The importance of Prips and the need to make sure a strong link to MiFID consistency.

- The number of reporting obligations for CRAs (including under the remit of EBA).
- The need to have a constant cross-sector perspective of all items in the work of the Agency. In particular corporate governance should be added to the work programme for the Joint committee.
- Shadow banking may no longer be a cross-sector topic as most topics should be dealt with by ESMA.
- Questions were raised on the work done in relation to consumer protection, on financial conglomerates and on ESRB.

The ESMA Chair commented on the issues raised as follows:

- The SMSG is best placed to evaluate itself on the need for cross-sector contacts with the Stakeholder groups of EBA and EIOPA. As regards investor protection issues it is clear that insurance products and securities products have quite a different level of protection which is why the issue of Prips is indeed in the Joint committee work programme.
- On supervision there are areas of application variations as regards sovereign debt. Investor protection does not equal common application in all cases as IFRS is principle based.
- On the administrative burden for CRA it seems quite natural for CRAs to have to deliver data to several different places as ratings are used for regulatory purposes. Speaking of CRA the CEREP data base deserves to be mentioned as one important element of the work on CRA.
- As regards shadow banking this issue has gained in importance although it should be recognized that less activities are now in the shadow.

The chair of the SMSG suggested having a presentation of the CEREP database for the next meeting of the SMSG.

The ESMA ED commented that CRA III might bring some changes to the reporting obligations and also mentioned the work on conglomerates that the three agencies are doing together.

Conclusion: It was agreed that the steering committee would take forward the topic of cross-sector contacts by initiating a meeting firstly with the Chairs of the other Stakeholder groups in order to discuss the forms for such contacts, possibly by inviting in the future the Chairs of those groups to attend a meeting of the SMSG. Also, the steering committee will discuss more specifically the SMSG 2012 own initiatives (investor protection and SME financing in particular) to check if these could be of interest to the other SGs. It was also concluded that the SMSG would draw up a letter to the European Commission on the topics of shadow banking and Prips and that the SMSG might be able to work with the MiFID working Group on this topic.

The Coordinator of the Corporate Governance Advisory Group of ESMA's Corporate Finance Standing Committee, Pieter Teebom, gave a presentation of the work that ESMA is undertaking as regards proxy advisors, following the presentation distributed at the meeting, and presented more in-depth in the document 2012-SMSG-15 distributed prior to the meeting. The work of ESMA in this area will respond to the question if there has been a market failure in the first place that needs to be amended in the first place.

The Group discussed the proposed advice, in particular:

- ESMA has a role to play after the shareholder's rights directive. A balance needs to be found as regards proxy advisors and issuers. Examples were accounted for of situations where shareholders do not understand the European national legal framework and involuntarily vote against rules which would be in the interest of these shareholders. One view given was that it is too soon to decide on a broadened regulation and that there rather there should be a comply or explain procedure put in place. It was remarked that the issue of proxy advisors should be regulated.
- The remark was made that this is a very timely discussion - there are foreign owners who do not understand the regulatory environment. The question should be analyzed as a continuum of the role of market advisors with the aim of ensuring the quality and competition of advisors. The task of carrying out the voting as proxy advisors is different and should not be made a part of the work for the SMSG, as it would lead to a lot of questions on shareholders' rights for example.
- The remark was made that the use of proxy advisors decreases the transparency in the experience from the Swedish market.
- The view was also given that individual shareholders have indeed been forgotten in the recent discussions on securities and markets regulatory initiatives. Individual shareholder organisations may also collect proxies and provide voting advice. They should be taken into account in any projects to regulate voting advice.

The ESMA Chair noted that many issuer-related topics are not in the mandate of ESMA and expressed sympathy with the comment made that the focus of the SMSG should probably be on topics related to giving advice, as issues on company law could risk to lead to being outside the remit of ESMA.

The SMSG Chairman concluded the SMSG should - if a working group is set up - aim at finalizing a position in time for the meeting in June. The SMSG should act before a Consultation Paper is released from ESMA and it was noted that the current stage is the early stage of the discussion even if ESMA is releasing a Discussion Paper soon. Further he stated that he was in agreement with the comment made that the work of the SMSG should focus on the connection with advice.

Decision: In an open voting procedure the SMSG decided to set up a Working Group on Proxy voting. The **Working** group will work towards an advice/position paper for the June meeting of the SMSG. It was decided that Jesper Lau Hansen would act as rapporteur, with Jean-Pierre Pinatton, Tjalling Wiersma, Peter de Proft, Aleksander Chlopecki, Sofia Argirova, Pedro Braga

da Cruz, Carmine di Noia, Hans van Damme and Jaroslaw Dominiak participating. [Subsequent to the meeting also Niamh Moloney joined the group.]

A comment was made on the work of the CFSC in general, where it was noted that the Prospectus and the Transparency Directives are the main pieces of work but that it now would have to be changed as also a very large number of portfolio companies would be added to the scope with the implementation of the Alternative Investment Fund Managers Directive (AIFMD).

The ESMA Chair indicated that he shared the concerns of the SMSG Member of the resources that will be needed in order to fulfill the requirements of the AIFMD and commented that ESMA will not scare away from the challenges and will ask for more resources when needed, in order to be able to cope with these challenges.

Furthermore a comment was made to add on the agenda for the September SMSG meeting a discussion on the need for the SMSG to have discussions on topics at a very early stage, (even if this by some was already considered to be an early stage) and it was noted that since the members of the SMSG are all covered by obligation on confidentiality there should be no hindrances to that being the case.

C. *SME financing*

Almorò Rubin de Cervin, Financial Services Policy Unit, DG Markt, European Commission, gave a presentation of the proposed regulation that the European Commission is putting forward on Small and Medium Sized Enterprises (SME). He clarified that the work of the European Commission is taken forward both in the Directorates of Internal Market and the Directorate of Enterprise and Industry. (The proposal [COM (2011) 870 final] is available at the web-site of the European commission.)

The proposal will have three main parts: regulatory measures, capital requirements and reduction of burden of cost.

The aim of the work is multifaceted and includes the creation of a passport for European Capital funds; it includes a revision of state aid rules, access to capital markets and more. It is a very complex piece of work. A set of measures will be proposed in order to have the rules on SMEs applied coherently across the EU:

- SMEs are covered in MiFID II
- The idea is to have a label which can be attractive to investors. One key aspect of the proposal will be the level of investor protection,
- Listed SMEs are more volatile than other stocks - a compromise has to be found between an access at the EU level and a social system,
- The reduction of regulatory burdens and the reduction of costs should be a priority whenever possible. Orientation debates will take place. The Transparency Directive will eliminate quarterly reporting. The Prospectus Directive beginning March based on ESMA's advice will

include calibration of size to avoid duplication. The proposals will also include actions on market failures for SMEs.

- There is a lack of information on SME's and DG Enterprise and Industry will undertake a call for proposal in mid-2012. SME finance forum will undertake promotion activities towards accessing capital markets.
- The list of actions and activities is not finalized – if there are better ideas those are welcome and could be put on that list.
- The European Commission sees an important role for ESMA for SMEs and this is an important issue also for the Commission.

European Commission clarified that the definition of SME used in the proposed regulation is the one of DG Enterprise and Industry with smaller than 50 million in market capitalization but that for the access to capital a wider definition should be used.

The SMSG discussed the topic and members gave the following views:

- It was noted that it is good that the Transparency Directive will be a maximum harmonization Directive in some areas as a great deal of gold-plating is in place in this area. It was however also noted that the maximum harmonization of the prospectus directive does not necessarily lead to similar approaches (e.g. listings in Sweden and Finland respectively).
- As the main driver is globalization it will be much harder for SMEs due to fragmentation. The solution will come from harmonization.
- The biggest obstacle for SMEs is the absence of a single market. The US has a big venture capital market due the same language and same rules. It is also a problem that investment funds that specifically target the SME market are missing, and the stocks of these companies are not as liquid as for bigger companies. Furthermore HFT is the enemy of SMEs as it dries liquidity away from them. It is a balancing act to reduce red tape but not the information. Possibilities for tax deductions are also an issue since there is a bias against SMEs.
- Ratings on SMEs would reduce costs as a lack of ratings may add a risk premium
- Obstacles to liquidity are connected to being able to sell. And here there are conflicting regulations. The MiFID and MAD accepted market practices have been helpful in providing liquidity, but this possibility will now being taken away in MAD II and MIFID II that will prohibit these practices.
- We could look at how we can promote cross-border activities. The SMEs are prisoners of national markets. Also to be noted that some SMEs are only control companies. There are also company law issues like double voting for example. Furthermore it could be noted that some SMEs are family owned businesses that wish to keep family control.
- It was remarked that there is a need to facilitate better EU cross border investor balance and there would remain an important role for banks in the financing of SMEs. The view was also given that it would be useful to create banks specialized in SMEs.

- A member remarked on a perceived lack of coordination within the European Commission between the DG Enterprise and Industry and DG Markt.
- The SMSG should focus on how new regulation could play a role. Giving a label that could be lighter could be counterproductive, meaning a loss in confidence. MiFID did fail as regards SMEs. An analysis of the SMSG should start by investigating how one could create a new “biotope”.
- Long-term capital will be more difficult to come by due to Solvency II.
- It was mentioned that the SME’s are an area where it would be important to see what the views of the stakeholder groups of EBA and EIOPA are.
- It was remarked that adding fixed costs hurt small companies more than large ones.
- New listings are also a concern for management and retail investors need to understand the risks involved. There are also issues of double taxation.
- The use of IFRS was identified as a major regulatory burden and it was thought that listings outside regulated markets should be re-examined.
- The regulatory burdens should be made lighter and not the information requirements.
- It was remarked that a possible working group should liaise with EBA and EIOPA (due to the importance of Solvency II) Rules should give the possibility for high-net worth individuals to finance SMEs.

The ESMA Chair noted the difficulties for developing a European market on SMEs and that it could be understood why for certain companies it would not be economically rational to be listed due the heavy regulatory burdens which follow from i.a. IFRS, TD and PD; . He noted that this could possibly be an area where contacts with EBA and EIOPA could be needed, and that perhaps it could be suitable to see one person from each of their SMSGs.

Almorò Rubin de Cervin, of the European Commission remarked on some of the comments made saying that the DG Markt can very well have different comments from other parts of the Commission – this is a single market issue. The European Commission cannot, however, create a European Market. An analysis will be made of all burdens put forward. The SME label could help to create specialized investors.

Decision: In an open voting procedure the SMSG decided to set up a Working Group on SMEs. The Working group will work towards an advice/position paper for the SMSG. It was decided that Judith Hardt and Ludo Bammens would act as rapporteurs together with the assistance from Anne Holm Rannaleet, and with the following additional members of the working group: Roland Bellegarde, Angel Berges-Lobera, Pedro Braga da Cruz, Salvatore Bragantini, Pierre-Henri Conac, Jesper Lau Hansen, Sari Lounasmeri, Carmine Di Noia, Jean-Pierre Pinatton, Peter de Proft, Xavier Rolet, and Adriana Tanasoiu. The new working group will develop a mandate capturing the scope of its work including focus on the size of SMEs to be captured.

It was decided that the steering committee would get into contact with EBA and EIOPA -SG Chairs and discuss in particular Prips and SME financing.



6. AOB

For the April or June meeting the SMSG should start thinking about the work programme of 2013 and in particular the issue of supervision.