



SMSG ADVICE TO THE EUROPEAN COMMISSION

Response to the Public Consultation on the Operations of the European Supervisory Authorities

I. Executive summary

The three European Supervisory Authorities (ESAs) were established in 2010 and constitute a cornerstone of the institutional reform package put in place post-crisis. In the period since their introduction they have successfully contributed to the building of the single rulebook, but a number of reports have highlighted the need for the ESAs' mandate to be reassessed in order to ensure their ongoing effectiveness. In particular, the ESAs' role in relation to supervisory convergence and consumer and investor protection has been highlighted. The European Commission's public consultation on the operation of the ESAs, launched on 21 March 2017, examines their role and operation and asks whether changes to the legal frameworks are needed in order to ensure that the ESAs are able to deliver on their mandates. Specifically, the consultation considers improvements to the current governance structure, the tasks and powers of the ESAs, additional powers in certain areas and the issue of funding.

The Securities and Markets Stakeholders Group (SMSG) considers that, in general, given the enormous task involved in creating a new layer of financial supervision in Europe, the ESAs have performed well. However, in a number of respects there is room for improvement. In particular, there is much more that can be done to foster convergence among national authorities. There is also a need to reinforce consumer and investor protection in the EU, and ESMA and the other ESAs can play an important role in this regard. The SMSG recognises the importance of effective governance and funding models for the ESAs, and that some changes may be required in order to ensure that the ESAs fulfil their mandate. In addition, the SMSG recognises the important role performed by stakeholder groups, both in ensuring effective regulation and in maintaining legitimacy and public confidence in the European System of Financial Supervision (ESFS), although more can be done to bolster and support the stakeholder groups in the exercise of their functions.

II. Explanatory remarks

1. The EU response to the financial crisis involved the introduction of a single rulebook for financial regulation and the creation of the ESAs, namely ESMA, EIOPA and EBA. The ESAs' mandate is to contribute

to the development of the single rulebook, tackle cross-border problems, and promote supervisory convergence. Over the period in which the ESAs have been operating, significant changes have taken place in terms of the development of the EU financial markets, including the development of the CMU and an increasing focus on supervisory convergence, and new challenges have arisen, such as the UK's decision to leave the EU. This public consultation on the operation of the ESAs, published on 21 March 2017, follows previous evaluations, notably the Commission's report on the ESAs and on the European System of Financial Supervision in 2014.¹

2. This consultation is designed to gather evidence on the operation of the ESAs, focusing on a number of issues in the following broad areas: (1) tasks and powers; (2) governance; (3) supervisory architecture; and (4) funding.
3. Given the limited time available to produce a response to this consultation, the SMSG has not prepared responses to all of the questions put forward in the consultation. Instead, it has concentrated its work on preparing responses to those questions which are high-level/principles-based, as opposed to the more technical questions, and it has focused on those questions which are of most salience to the SMSG. For example, the SMSG has not prepared responses to questions 16-18 of the consultation, which relate to the issue of new powers for specific prudential tasks in relation to insurers and banks, since these issues fall outside its direct remit.

III. Public Consultation on the ESAs

Tasks and powers of the ESAs

Optimising existing tasks and powers: Supervisory convergence

Q1. In general, how do you assess the work carried out by the ESAs so far in promoting a common supervisory culture and fostering supervisory convergence, and how could any weaknesses be addressed? Please elaborate on your response and provide examples.

Q2. With respect to each of the following tools and powers at the disposal of the ESAs:

- **peer reviews (Article 30 of the ESA Regulations);**
- **binding mediation and more broadly the settlement of disagreements between competent authorities in cross-border situations or cross-sectorial situations (Articles 19 and 20 of the ESA Regulations)**
- **supervisory colleges (Article 21 of the ESA Regulations);**

To what extent:

a) have these tools and powers been effective for the ESAs to foster supervisory convergence and supervisory cooperation across borders and achieve the objective of having a level playing field in the area of supervision;

b) to what extent has a potential lack of an EU interest orientation in the decision making process in the Boards of Supervisors impacted on the ESAs use of these tools and powers?

Please elaborate on questions (a) and (b) and, importantly, explain how any weaknesses could be addressed.

¹ Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), SWD(2014) 261 final, 8.8.2014.

Q3. To what extent should other tools be available to the ESAs to assess independently supervisory practices with the aim to ensure consistent application of EU law as well as ensuring converging supervisory practices? Please elaborate on your response and provide examples.

Q4. How do you assess the involvement of the ESAs in cross-border cases? To what extent are the current tools sufficient to deal with these cases? Please elaborate on your response and provide examples.

4. The SMSG considers promoting supervisory convergence an absolutely key task for ESMA and the other ESAs. For a well-functioning single market, it is not enough to have a common rule book but also the interpretation of those rules by supervisors and conveying those rules into supervisory practice should converge. It has too often been the case that the single market is hampered by diverging interpretations and gold plating of the EU rules by Member States. This poses major barriers to cross-border provision of financial services and has a negative impact on the efficiency of the single market, and thereby the service customers get. In many cases, better coordination of the implementation of EU rules and enforcement by national authorities could have made it unnecessary to have more level 1 rules. A more convergent supervisory approach would create better trust among the national regulators, thereby moving the focus to enforcement instead of continuous rounds of new rulemaking.
5. The SMSG prepared a position paper on supervisory convergence on 13 June 2016. That advice is still a valid position and therefore the views raised there will not be repeated here, but reference is made to that position.² For the years since their creation, given the enormous task of creating a new layer of financial supervision in Europe, the ESAs have performed well. There is still ample room to go even further in fostering convergence among national authorities, as the past years have been largely dedicated to creating level 2 regulation rather than converging supervisory practices. The SMSG supports continuing on that promising path, building on it and shaping it further. In other words, an evolutionary approach seems to be better than a revolutionary one, which could lead to a period of uncertainty and possibly disruptive effects.
6. The SMSG is of the view that ESMA should be given stronger enforcement powers where it has direct supervisory powers. The sanctioning powers of ESMA are currently not comparable with those of other supervisors. A credible threat of sanctions is needed for effective supervision. ESMA seems also to lack effective means to ensure that risks to consumer and investor protection are appropriately controlled. An example of this is the case of CFDs and binary options which continue to be an issue despite ESMA issuing warnings and Q&As.
7. In the SMSG's opinion ESMA should also take a more active and visible role in coordinating and facilitating enforcement cross-border and not only rely on Q&As, as this would strengthen trust in the markets.
8. The SMSG considers that it would be appropriate for the ESAs to have an exemptive mechanism equivalent to the No-Action Letters commonly used by certain non-EU financial authorities. Having such a tool at the ESA's disposal would allow greater agility in the appropriate and proportionate implementation of regulatory requirements, when faced with implementation challenges unforeseen at the time of primary legislation. This would also facilitate greater cross-border harmonisation of financial regulatory reform. We note that empowering the ESAs with direct exemptive authority similar in status to that of the US agencies may give rise to legal considerations with respect to the status and powers of the ESAs. However, we consider that it should be possible to arrive at an appropriate legal construct which achieves

² https://www.esma.europa.eu/sites/default/files/library/2016-smsg-014_position_paper_sc.pdf

a comparable effect, and we commend the ESAs and the Commission to work collaboratively to craft such a solution.

Optimising existing tasks and powers: Non-binding measures: guidelines and recommendations

Q5. To what extent are the ESAs tasks and powers in relation to guidelines and recommendations sufficiently well formulated to ensure their proper application? If there are weaknesses, how could those be addressed? Please elaborate and provide examples.

9. The former Committee of European Securities Regulators (CESR) could not make binding statements on the interpretation of European law. This is also true for guidelines and recommendations published by ESMA on the grounds of Article 16(1) ESMA Regulation. Though these instruments aim to achieve a “common, uniform and consistent” application of Union law, they are not legally binding. They rather constitute non-binding recommendations on how to interpret the provisions of European directives and regulations. Whilst they may not be legally binding, the NCAs and financial market participants “shall make every effort to comply with” the guidelines and recommendations. Thus, they are in fact hardly able to deviate from them (which is reflected by the high compliance rate). This is also true for market participants, though they are not subject to the comply-or-explain-mechanism laid down in Article 16(3) ESMA Regulation. Market participants usually treat guidelines and recommendations as if they were binding rules. Moreover, guidelines and recommendations are at least legally relevant. As the ECJ has already decided about recommendations issued by the Commission, “national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law” (*Grimaldi*).
10. Against this background, the SMSG considers guidelines and recommendations as a useful and important tool for ESMA to prevent regulatory arbitrage and ensure supervisory convergence across the EU. However, it is important that ESMA launches public consultations before the issuance of these instruments and is required to request advice from the SMSG. Given the de facto importance and the legal relevance of guidelines and recommendations, it is vital to grant sufficient time to respond. Furthermore, it should be considered to establish a right to appeal for market participants.
11. ESMA also has a range of other soft-law measures which arise from Article 29 ESMA Regulation. These include the use of Q&A documents that are intended to provide further clarification on the meaning of EU legislation. In many jurisdictions although there is no requirement to follow the approach suggested in the Q&As, nevertheless as a matter of practice they are followed by market participants. These documents can provide very valuable guidance to market participants and yet their importance is perhaps not always fully appreciated and understood. Clarification of the precise status of Q&As would be beneficial, as would certain issues around their operation. As Q&As currently are not consulted on in advance of their publication, answers given might lead to questions in similar cases not being discussed in the process, or might be disagreed with in the light of other market conditions or in other jurisdictions. Given the immediate practical effects of published Q&As, parties impacted by them should be offered an efficient process to address such questions. The SMSG therefore proposes a specific right of appeal that would be available to market participants or national regulators who disagree with a response published by one of the ESAs.

Optimising existing tasks and powers: Consumer and investor protection

Q6. What is your assessment of the current tasks and powers relating to consumer and investor protection provided for in the ESA Regulations and the role played by the ESAs and their Joint Committee in the area of consumer and investor protection? If you have identified shortcomings, please specify with concrete examples how they could be addressed.

Q7. What are the possible fields of activity, not yet dealt with by ESAs, in which the ESA's involvement could be beneficial for consumer protection? If you identify specific areas, please list them and provide examples.

12. The SMSG considers that effective consumer and investor protection across the EU is a crucial pre-condition for a successful single retail financial market and Capital Markets Union. Convergence of consumer and investor protection measures should be a key issue for the ESAs. The SMSG believes that investors should be able to expect and receive the same level of protection irrespective of the Member State in which they are based, or in which they buy their financial products. To ensure a sufficient level of consumer and investor protection across the EU requires convergence not only regarding implementation of EU level rules, but also of national practices in the enforcement of those rules.
13. The SMSG considers that effective consumer and investor protection requires that NCAs should have such protection clearly within their mandate. Many, if not most, NCAs already do so, but it would be valuable for the Commission and the co-legislators to review the NCA's mandate to ensure that this is the case in all Member States. If necessary this is an issue that should be clarified at Level 1.
14. The SMSG notes that there are divergences in the level of consumer and investor protection at national level at the present time. The SMSG acknowledges that ESMA has only recently shifted its focus from drafting and implementation of the post-2008 regulation to supervising and enforcement. We also acknowledge that certain consumer and investor protection rules (such as the MiFiD II provisions) have not yet entered into force. Nevertheless, divergence between such protection at Member State level is problematic and the SMSG believes that ESMA has a crucial role in addressing this issue. First, ESMA has a valuable role in monitoring the implementation and enforcement of measures at national level. The SMSG has been consistent in advocating the need for ESMA to carry out peer-reviews as a way of establishing whether NCAs are adhering to European regulations which are in place to protect investors. This is an area in which ESMA has already been active. For example, ESMA recently conducted a peer review on the enforcement of suitability requirements under MIFID.³ The SMSG believes that ESMA's role in investigating these matters and identifying areas of divergence is valuable and should be further developed. Identifying deficits as well as inconsistencies in supervision and enforcement is vital for consumer and investor trust and properly functioning capital markets. It is notable that the European Commission's 2016 Consumer Markets Scoreboard, which monitors EU consumers' ratings of how 42 goods and services markets work, placed investment products in 40th position. Increasing consumer trust should therefore be a priority.
15. Greater transparency regarding these issues would be beneficial. The SMSG believes that where ESMA identifies inconsistent outcomes for investors across Member States these findings should be published. Publication of the findings of ESMA's peer reviews would help to highlight inconsistencies in adoption and interpretation of EU investor protection regulations at Member State level. As a minimum, EU investors should be informed when an ESMA peer review concludes that an NCA has not implemented EU mandated protections.
16. The majority of the SMSG are of the view that ESMA's current powers are sufficient to address the situation where divergence exists, but that more and better use of ESMA's existing powers is required in order to advance the level of convergence between Member States. A substantial minority of the SMSG, however, doubts that the existing tools available to ESMA for improving supervisory and enforcement practice on the national level, such as recommendations, guidelines and peer reviews, are sufficient for addressing this problem, and are of the view that ESMA will need to have more direct powers in order to tackle issues of divergence and thus to ensure adequate consumer and investor protection. These tools could include minimal standards for conduct-of-business supervision that are developed and enforced

³ MiFID suitability requirements, Peer review report, ESMA, April 2016:

<https://www.esma.europa.eu/press-news/esma-news/esma-finds-room-improvement-in-national-supervision-investment-advice-retail>

by ESMA, such as minimal monitoring plans for NCAs and the right to carry out mystery shopping routines.

Optimising existing tasks and powers: Enforcement powers- breach of EU law investigations

Q8. Is there a need to adjust the tasks and powers of the ESAs in order to facilitate their actions as regards breach of Union law by individual entities? For example, changes to the governance structure? Please elaborate and provide specific examples.

17. See our response to Questions 1-4.

Optimising existing tasks and powers: International aspects of ESAs' work

Q9. Should the ESA's role in monitoring and implementation work following an equivalence decision by the Commission be strengthened and if so, how? For example, should the ESAs be empowered to monitor regulatory, supervisory and market developments in third countries and/or to monitor supervisory co-operation involving EU NCAs and third country counterparts? Please elaborate and provide examples.

18. The financial crisis of 2008 has made the case very clearly on the necessity for a wider global regulatory convergence and supervisory cooperation, as stated in the G20 Leaders' statement in 2009. As financial markets are globally connected, stable and sustainable growth of the markets and economies calls for consistency of rules in Europe, including the EU27 and UK, and also internationally. For example, IOSCO plays a very important role in securities markets convergence.

19. The ESAs have indeed already been active at the international level, contributing to regulatory and supervisory cooperation via MoUs and other such arrangements. Brexit creates new challenges on this for European regulatory and supervisory architecture. The current equivalence regimes were not created for a market the size of the UK, so a new framework will need to be developed for the EU27/ UK market access and regulatory/ supervisory cooperation. Given the size and importance of the UK financial market servicing the EU27 economy, the role of the ESAs will also need to reflect that. Monitoring the regulatory and supervisory developments and constant dialogue on these developments will be necessary.

20. For the ESAs, it is important to create a framework post-Brexit where they can have an active regulatory and supervisory dialogue with the UK authorities, given the amount of financial markets activity conducted in the UK and also the pool of knowledge and experience that UK regulators and supervisors have. It should also be possible for the ESAs to have non-EU staff for training and exchange purposes to facilitate knowledge sharing.

Optimising existing tasks and powers: Access to data

Q10. To what extent do you think the ESAs powers to access information have enabled them to effectively and efficiently deliver on their mandates? Please elaborate and provide examples.

Q11. Are there areas where the ESAs should be granted additional powers to require information from market participants? Please elaborate on what areas could usefully benefit from such new powers and explain what would be the advantages and disadvantages.

21. The SMSG is supportive of the need for data by ESMA and thereby reinforcing ESMA's access to data. It should be noted, however, that market participants are already confronted with a multitude of information requirements by authorities on the European level (SSM) and on the national level. Information requirements from different authorities sometimes pursue the same objectives, but differ in form and

depth of detail. That leads to additional, but unnecessary, regulatory costs. The SMSG proposes to avoid such double structures where possible. Information requests should therefore be coordinated.

22. The SMSG suggests that the three ESAs and the SSM develop an online RegTech tool in order to facilitate compliance with data reporting requirements. Ideally market participants should be able to submit all necessary data via one and the same tool, which automatically selects and distributes the data relevant for specific authorities to these authorities. In this way, the format and detail of data reporting will be standardised, duplication of reporting efforts can be avoided, and efficiency significantly increased.

Optimising existing tasks and powers: Financial reporting

Q14. What improvements to the current organisation and operation of the various bodies do you see would contribute to enhance enforcement and supervisory convergence in the financial reporting area? How can synergies between the enforcement of accounting and audit standards be strengthened? Please elaborate.

23. The SMSG welcomes the ongoing convergence activities of ESMA in the area of enforcement, to improve the consistency and quality in this area across the EU. This is a key issue and it is the view of the SMSG that this may be an area in which ESMA should take a role in enforcement in the future,⁴ although it is also noted that any increase in ESMA's role would need to be appropriately resourced. We acknowledge the substantial progress that has already been made over the past years, e.g. by issuing Guidelines on Alternative Performance Measures, Guidelines on Enforcement of Financial Information, by issuing its individual IFRS review reports or by performing a peer review of national enforcement agencies including onsite inspections. The SMSG is convinced that these ongoing convergence activities should continue to take into account the diversity of different national enforcement models and processes which may serve as best practice solutions to be shared among national enforcers, and encourages ESMA to continue to identify such best practice solutions while asking for supervisory convergence where needed on the basis of the existing ESMA regulation.

Direct supervisory powers in certain segments of capital markets

Q19. In what areas of financial services should an extension of ESMA's direct supervisory powers be considered in order to reap the full benefits of a CMU?

24. The SMSG takes note of the significant convergence work at the international level with respect to principles for financial markets infrastructures such as CCPs, and considers that it would be beneficial for the purpose of CMU construction and of EU financial stability for systemic CCPs in the EU to have a common supervisor. We note that both ESMA and the SSM have elements of the skillsets required for such a task, and recommend that one of these institutions, or possibly the two acting collegially, should be given this direct supervisory power. This authority could also be granted in respect of Third-Country CCPs whose activity is systemic to the EU financial system.

25. In addition, the SMSG considers that the construction of the CMU would be enhanced by granting to ESMA direct supervisory authority over critical benchmarks as defined in Regulation EU 2016/1011.

Q20. For each of the areas referred to in response to the previous question, what are the possible advantages and disadvantages?

Q21. For each of the areas referred to in response to question 19, to what extent would you suggest an extension to all entities or instruments in a sector or only to certain types or categories?

⁴ This is an issue raised by SMSG in a previous paper on supervisory convergence: https://www.esma.europa.eu/sites/default/files/library/2016-smsg-014_position_paper_sc.pdf

Please elaborate on your responses to questions 19 to 21 providing specific examples.

26. The SMSG has not identified significant shortcomings in relation to ESMA's direct supervisory powers. Care should be taken that any such transfer of responsibility in the future be fully justified, both on a cost benefit analysis and in terms of governance, accountability and subsidiarity. The SMSG considers that if further tasks are given to ESMA, then this extension of responsibilities should be matched with adequate powers and tools to conduct properly the new supervisory tasks. If there are significant levels of innovation at a local level in areas regulated by ESMA then it may be that additional communication between ESMA and the NCAs may be required.

Governance of the ESAs

Assessing the effectiveness of the ESAs governance

Q22. To what extent do you consider that the current governance set-up in terms of composition of the Board of Supervisors and the Management Board, and the role of the Chairperson have allowed the ESAs to effectively fulfil their mandates? If you have identified shortcomings in specific areas please elaborate and specify how these could be mitigated.

Q23. To what extent do you think the current tasks and powers of the Management Board are appropriate and sufficient? What improvements could be made to ensure that the ESAs operate more effectively? Please elaborate.

Q24. To what extent would the introduction of permanent members to the ESAs' Boards further improve the work of the Boards? What would be the advantages or disadvantages of introducing such a change to the current governance set-up? Please elaborate.

Q25. To what extent do you think would there be merit in strengthening the role and mandate of the Chairperson? Please explain in what areas and how the role of the Chairperson would have to evolve to enable them to work more effectively? For example, should the Chairperson be delegated powers to make certain decisions without having them subsequently approved by the Board of Supervisors in the context of work carried out in the ESAs Joint Committee? Or should the nomination procedure change? What would be the advantages or disadvantages? Please elaborate.

27. Currently, the Board of Supervisors guides the work of ESMA and has the ultimate decision-making responsibility regarding a broad range of matters including the adoption of ESMA Technical Standards, Opinions, Guidelines and the issuance of advice to the EU institutions. The Board of Supervisors is composed of NCAs' representatives, which have the right to vote, and EU representatives, which cannot vote. The EU representatives include: European Commission, EBA, EIOPA, EFTA and ESRB.

28. The SMSG is supportive of ESMA having the independence needed to support the successful and timely development of a stronger Capital Markets Union across Europe. ESMA's role in this regard is vital. Strengthening independence would be particularly important, for example, in ensuring that there is clear convergence of consistent implementation of regulations and directives that support CMU and the prompt addressing of any areas of under/non-performance at the NCA level, which might inhibit effective and fair capital market performance and competitiveness. However, given the significant likely changes in the nature and structure of European CMU post-Brexit, and with elements of policy priorities still to be further defined, the SMSG could not reach a majority consensus on the questions raised in the consultation on specific governance amendments in the limited time available.

Stakeholder groups

Q26. To what extent are the provisions in the ESA Regulations appropriate for stakeholder groups to be effective? How could the current practices and provisions be improved to address any weaknesses? Please elaborate and provide concrete examples.

29. It is vital both to ensure effective regulation and to maintain legitimacy and public confidence in the ESFS that ESMA, and its use of powers, is subject to public transparency, and that ESMA remains accountable to the public. To that end, the ESMA Regulation requires 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” (Recital 48 ESMA Regulation). Furthermore, the ESMA Regulation established the SMSG “to help facilitate consultation with stakeholders in areas relevant to ESMA’s tasks”. The SMSG may submit opinions and advice to ESMA on any issue related to ESMA’s tasks with a focus on the single rulebook (Arts. 10-16 ESMA Regulation) and supervisory convergence (Arts. 29, 30 and 32 ESMA Regulation). Furthermore, the SMSG is expected to warn ESMA of any breaches of EU law, including level 1 legislation that comes to its attention (Art. 17(2) ESMA Regulation). Finally, ESMA has established Consultative Working Groups (CWGs) over the last years, which allow ESMA to benefit from the experiences of stakeholders on specific issues dealt with by its Standing Committees.
30. The three-fold concept of (i) public consultations on specific pieces of legislation and consultation through (ii) the SMSG and (iii) CWGs has generally proven successful. However, the SMSG wishes to address some weaknesses of the system. First, the interaction between the SMSG and the CWGs could be improved, in particular against the background of the very short deadlines of consultations on level 2 and 3 measures. The SMSG would appreciate an earlier involvement in the single rulebook work to fulfil its tasks. In particular, the SMSG proposes that the CWG Meetings Agendas be delivered in advance to the SMSG and that the SMSG be allowed to send one or more observers to the meetings that will, in turn, report to the SMSG. This course of action would allow the SMSG to better discharge its functions, by being more aware of what issues are being discussed at the CWG level and enabling the SMSG to decide whether or not it is in its interest to send one or more observers to a CWG meeting.
31. Second, joint work with the other Stakeholder Groups could be improved. It would be beneficial if the Stakeholder Groups cooperated and provided advice on specific themes of common interest. This has already partly happened (e.g. Joint Advice by the BSG and SMSG on EBA and ESMA Guidelines on the Assessment of the Suitability of Members of the Management Body and Key Function Holders). However, it would be helpful to strengthen the respective mandate of the Stakeholder Groups in the ESA Regulations, provide a framework for a cooperation (i.e. establishment of a Joint Committee of the Stakeholder Groups) and ensure funding of these respective activities.
32. The SMSG can act not only in response to a consultation from ESMA, but may also provide advice on matters that are deemed important by its members. In certain cases, the SMSG has already issued opinion papers on topics that are relevant for ESMA’s tasks, in particular on supervisory convergence and market developments. This “own initiative work” will be another strategic focus of the SMSG for the coming years. The SMSG considers the provisions of the ESMA Regulation flexible enough to allow the SMSG to also carry out own initiative work. It appreciates the opportunity to discuss this work with ESMA’s Chair and Executive Director and exchange views with the Board of Supervisors.
33. In addition, the SMSG believes joint meetings with the Board of Supervisors to be extremely useful since they significantly contribute to the developing by it of its advice tasks. The SMSG therefore proposes increasing the number of Board of Supervisors/SMSG joint meetings.
34. As regards SMSG composition, the SMSG acknowledges that the current composition is heterogeneous and this reflects, to some extent, the heterogeneous nature of the stakeholders involved in securities markets. The SMSG is of the opinion that the current heterogeneity is positive, as it enables ESMA to be provided with a comprehensive view of different stakeholder positions. SMSG efforts are directed at getting consensus when possible. Where this is not achievable, reflecting different stakeholders’ approaches and explaining them is also beneficial to ESMA to the extent it shows different interests and views on a particular matter.

35. The SMSG makes the following additional issues in respect of the SMSG composition. First, inputs from academics as member of the SMSG are highly appreciated. While being happy with the current and previous compositions of the SMSG, the importance of academics in these consultative groups being clearly independent of industry is stressed by the SMSG. Second, a weighted representation of the stakeholders involved in the SMSG is important, particularly in respect of consumers, investors and users of financial services. This will become even more relevant if ESMA assumes additional consumer protection functions. The SMSG acknowledges that this is already required by Article 37 ESMA Regulation and supports the view that this principle should always be taken into account when determining SMSG composition.
36. Additionally, the SMSG believes that the ESAs Regulations should also ensure "adequate compensation" and "adequate secretarial support" for its members. This is specifically stressed in respect of not for profit user-side members.

Adapting the supervisory architecture to challenges in the market place

Q27. To what extent has the current model of sector supervision and separate seats for each of the ESAs been efficient and effective? Please elaborate and provide examples.

Q28. Would there be merit in maximising synergies (both from an efficiency and effectiveness perspective) between the EBA and EIOPA while possibly consolidating certain consumer protection powers within ESMA in addition to the ESMA's current responsibilities? Or should EBA and EIOPA remain as standalone authorities?

37. The SMSG generally strongly supports the broadening of ESMA responsibilities in the consumer and investor protection field. In particular, it would welcome a major involvement of ESMA in research activities in this respect, for example, research on behavioural finance. Such enhanced responsibilities should bring various benefits both within the EU, and outside the EU, by rationalising most conduct-of-business regulatory relations with third country market authorities.
38. Whatever the final decision taken as to the European financial supervisory architecture, the SMSG believes it to be a long-term objective, as various considerations would need to be addressed, particularly the ESAs' interface with NCAs, which are currently part of varying architecture arrangements, with various members having conduct of business supervision and insurers' responsibilities partly located in the national prudential authorities.
39. The SMSG is of the opinion that consumers and investors should have the same level of protection when acquiring different financial products. Achieving this requires a horizontal approach that covers the three financial sectors' products in a similar way.
40. The SMSG does not reach a consensus as to what is the best model for European financial supervisory architecture at this moment in time. In view of the lack of existing evidence on this issue and the impossibility of studying the issue in sufficient detail before the expiry of the consultation period, a majority of the SMSG prefers to refrain from taking a position on this issue at this stage, while a significant minority would be in favour of evolving to a twin peaks model.
41. The SMSG considers also that ESMA's role in providing expertise in macro-prudential policy should be taken more into account: ESMA already has a mandate in the ESMA Regulation, and is given various powers in sectoral legislation. ESMA has its own capacity, both legally and in terms of expertise, to tackle macro-prudential risk. In that context, the ESRB framework takes insufficiently into account securities markets regulators and if the mandate and powers of the ESRB are to be expanded, the Group feels that it would be essential that the ESRB be reformed to include more non-banking expertise. (see recent European Commission Consultation Document: Review of the EU Macro Prudential policy framework, available at http://ec.europa.eu/finance/consultations/2016/macroprudential-framework/index_en.htm).

Funding of the ESAs

Q29. The current ESAs funding arrangement is based on public contributions:

a) should they be changed to a system fully funded by the industry;

b) should they be changed to a system partly funded by industry?

Please elaborate on each of (a) and (b) and indicate the advantages and disadvantages of each option.

Q30. In your view, in case the funding would be at least partly shifted to industry contributions, what would be the most efficient system for allocating the costs of the ESA's activities:

a) a contribution which reflects the size of each Member State's financial industry (i.e., a "Member State key"); or

b) a contribution that is based on the size/importance of each sector and of the entities operating within each sector (i.e., an "entity-based key")?

Please elaborate on (a) and (b) and specify the advantages and disadvantages involved with each option, indicating also what would be the relevant parameters under each option (e.g., total market capitalisation, market share in a given sector, total assets, gross income from transactions etc.) to establish the importance/size of the contribution.

Q31. Currently, many NCAs already collect fees from financial institutions and market participants; to what extent could a European system lever on that structure? What would be the advantages and disadvantages of doing so? Please elaborate.

42. The SMSG strongly supports the view that the ESAs' funding must be stable and commensurate, so that they can comply with their very important functions, and play a significant role in supporting European financial market development, consumer and investor protection and financial stability. The SMSG is, in general, of the opinion that a partial indirect industry financing through NCAs and a partial EU budget financing is a balanced and correct financing structure for the ESAs, although some SMSG members had a preference for the industry funding to be direct rather than indirect. This is subject to the following points.

43. *Direct industry supervision.* The SMSG believes that industry funding of NCAs is linked to industry direct supervision. Consequently, direct industry funding for ESAs is considered appropriate only where this direct relationship exists. In the case of ESMA, direct supervision of industry is limited to Credit Rating Agencies and Trade Repositories that already pay a supervisory fee. However, schemes based partially on indirect industry funding through NCAs are considered by the SMSG to be positive, since ESMA functions cover to some extent cooperation and coordination with NCAs in the development of their supervisory tasks. In addition, taking advantage of current NCA collecting structures, as proposed in the EC Public Consultation, thus avoiding a direct collecting relationship of ESMA with industry, is very welcome.

44. *ESMA functions.* ESMA is heavily oriented at increasing the level of supervisory convergence as well as achieving a single rulebook for European markets and participants. These policy objectives are key for the development of the European Capital Markets. This means that ESMA activities are to a significant extent oriented to achieve EU objectives. In the SMSG's opinion, this would suggest that maintaining a partial financing by the EU budget makes sense. Moreover, where indirect industry-based financing proved insufficient- in case of crisis it can be reduced due to the reduction of industry activity- EU budget financing should operate as a guarantee for the stable and commensurate ESAs financing. Finally, maintaining part of the financing from the EU budget will allow EU authorities to have closer contact with the actual cost of supervision derived from new regulatory measures and requirements, and will help to conduct proper impact assessments.

45. *No cost increase for industry and proportionality.* The SMSG very strongly supports the view that whatever the new financing structure for the ESAs, it should not mean any increase in current industry regulatory costs. A reallocation of powers between NCAs and ESMA in the future could be accompanied with a proportional reallocation of funding too, but again without implying any increase in costs for industry.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 10 May 2017

[signed]

Ruediger Veil
Chair
Securities and Markets Stakeholder Group