

# **European Securities Markets Expert Group (ESME): Terms of reference**

## **1. Background**

The securities markets play a vital role in the economy of the EU. During the last five years, a number of key EU legislative measures with significant implications for securities markets have been adopted as part of the Commission's Financial Services Action Plan ("FSAP"). These are the Markets in Financial Instruments Directive ("MiFID"), the Prospectus Directive, the Market Abuse Directive ("MAD"), the Financial Collateral Arrangements Directive ("FCD"), the UCITS Directive and the Transparency Directive. These have recently been transposed into national law (MAD, FCD, Prospectus Directive and UCITS Directive) or will be in the next few years (MiFID and Transparency Directive).

As a follow-up to the FSAP, the European Commission has recently presented its financial services policy priorities up to 2010 in the White Paper on Financial Services Policy 2005-2010 ("White Paper"). One of those priorities is to implement, enforce and continuously evaluate the existing legislation and to apply rigorously the better regulation agenda to future initiatives. In elaborating upon those objectives, the White Paper identifies various practical steps to enable the Commission to understand better how Community law is applied in practice, and to ensure that the level of legal coherence that markets need is in fact being delivered. In this context, the Commission announced its intention to carry out sectoral and cross-sectoral consistency checks, reading across the relevant law to ensure coherence of terminology and effect. It noted that investigating legal coherence would necessarily involve studying the approaches taken by Member States, to understand better how Community law is applied in practice, and to ensure that the level of legal coherence that cross-border investment services and securities markets need is in fact being delivered.

The first sectoral consistency check will take place in the securities field, to which end it has been decided to set up an expert group of securities markets practitioners and experts to assist the Commission analysing the main issues in this respect.

## **2. Mandate of the expert group**

The objective of the "European Securities Markets Expert Group", hereinafter referred to as "the group" is to advise the Commission on various issues in relation to the EU securities markets. This non-binding advice will assist the Commission in fulfilling its tasks. These issues can be sub-divided into the following three functions:

### *1. Legal evaluation of securities Directives:*

The group will provide advice to the Commission as to the legal coherence of the EU framework by carrying out a sectoral consistency check of the EU securities directives, reading across the relevant law to identify – from the perspective of the regulated community and users of the securities markets – points of legal uncertainty in the legislative framework which impair the functioning of those markets. This will necessarily involve studying the approaches taken by Member States, to understand better how Community law is applied in

practice, and to assess whether the level of legal coherence that markets need is in fact being delivered. In case such issues of legal uncertainty arise, the group may suggest practical solutions for the issues identified. It is recognised that in some cases the group will not be able from its own collective expertise to access all 25 regimes. The Commission will rely on Member States to supply the relevant information, where needed, if possible through the agency of the European Securities Committee ("ESC") or other Expert Groups set up by the Commission.

## *2. Reports on operation of securities Directives*

One of the objectives of the Commission's financial services policy over the next 5 years is to evaluate existing legislation. The reports foreseen in the securities directives will be compiled in a way that fits harmoniously with this priority objective. It is intended that the reports will include relevant material from an economic, practitioner and legal perspective. In addition to the practitioners' view of the group, the Commission will also consult publicly and discuss the relevant issues with the ESC and the Committee of European Securities Regulators ("CESR"). The group is intended to provide important input on the application of various provisions of the Markets in Financial Instruments Directive, the Prospectus Directive, the Market Abuse Directive and the Transparency Directive. These reports cover:

- Article 65 of the MiFID:

*"1. Before 31 October 2007, the Commission shall, on the basis of public consultation and in the light of discussions with competent authorities, report to the European Parliament and Council on the possible extension of the scope of the provisions of the Directive concerning pre and post-trade transparency obligations to transactions in classes of financial instrument other than shares.*

*2. Before 31 October 2008, the Commission shall present a report to the European Parliament and to the Council on the application of Article 27.*

*3. Before 30 April 2008, the Commission shall, on the basis of public consultations and in the light of discussions with competent authorities, report to the European Parliament and Council on: (a) the continued appropriateness of the exemption under Article 2(1)(k) for undertakings whose main business is dealing on own account in commodity derivatives; (b) the content and form of proportionate requirements for the authorisation and supervision of such undertakings as investment firms within the meaning of this Directive; (c) the appropriateness of rules concerning the appointment of tied agents in performing investment services and/or activities, in particular with respect to the supervision of them; (d) the continued appropriateness of the exemption under Article 2(1)(i).*

*4. Before 30 April 2008, the Commission shall present a report to the European Parliament and the Council on the state of the removal of the obstacles which may prevent the consolidation at the European level of the information that trading venues are required to publish.*

*(...)*

*6. Before 31 October 2006, the Commission shall, in the light of discussions with competent authorities, report to the European Parliament and Council on the continued appropriateness*

*of the requirements for professional indemnity insurance imposed on intermediaries under Community law."*

- Article 31 of the Prospectus Directive:

*"Five years after the date of entry into force of this Directive [i.e. 31 December 2008], the Commission shall make an assessment of the application of this Directive and present a report to the European parliament and the Council, accompanied where appropriate by proposals for its review."*

- Article 33 of the Transparency Directive:

*"The Commission shall by 30 June 2009 report on the operation of this Directive to the European Parliament and to the Council including the appropriateness of ending the exemption for existing debt securities after the 10-year period as provided for by Article 30(4) and its potential impact on the European financial markets."*

- The operation of the MAD since this Directive forms an essential part of the EU securities legislation. Even though a report is not required by the Directive itself, the Commission would also report on significant issues for evaluation in the MAD.

### *3. Specific issues related to functioning of EU securities markets*

The group will provide technical advice on the Commission's request on issues of contemporary relevance in the EU securities markets. Current examples of this would be credit rating agencies and financial analysts.

As regards credit rating agencies, the Commission monitors the credit rating agencies' compliance with applicable EU directives and the International Organisation of Securities Commissions' ("IOSCO") Code of Conduct Fundamentals for credit rating agencies. In this respect, the Commission intends to gauge the opinions of market participants, and especially those purchasing complex financial instruments, by requesting advice of the group on specific issues related to the regulation of credit rating agencies. It is important that the composition of the group should reflect expertise on these issues. In addition, the Commission will ask CESR to monitor compliance with the IOSCO Code.

In relation to financial analysts, the Commission will publish a Communication on how the MiFID and the MAD apply to financial analysts once the Level 2 measures under the MiFID have been adopted. The group could be asked for its views as to whether the existing regulatory requirements are adequate.

## **3. Composition and Operation**

### **3.1 Composition**

The group will be composed of a maximum of 20 high level experts with practical experience in the investment services and the securities industry. The members of the group will be drawn from business and academic communities and civil society. The members of the group will be appointed by the Commission on the basis of expressions of interest. The Commission will chair the group and will provide secretarial services. The members of the group should not advise the Commission in any other capacity. The group will be composed of practitioners

which is clearly different from the role of CESR which consists of national securities supervisors.

Given the practical focus of the group, the members should have knowledge of a broad and representative range of the activities and services regulated under the securities directives, and of national markets across the EU. The members should have sufficient experience of the practical application of those securities directives to identify areas of uncertainty affecting the financial market. The group as a whole should have expertise on all the issues described in the mandate of the group whereas each individual expert should cover specific fields of the required expertise.

Given the variety of issues on which the group will provide assistance to the Commission, the group should make full use of the possibilities to create specialised working groups and to invite other experts or observers on an ad hoc basis, in agreement with the Commission. In some issues there will be a useful overlap with the work of the Commission's Legal Certainty group, which is analysing issues relating to the holding and transfer of securities, and it might be appropriate to invite participants in that group to become involved.

### **3.2 Call for expressions of interest**

Upon adoption of the proposed Decision establishing the group, the Commission will invite expressions of interests in writing from individual experts wishing to participate in the group, to be posted in the form of a written correspondence to the Commission no later than 1 month after publication of the call for applications.

Responses to the call for interest should be accompanied by material demonstrating that the individual expert satisfies the criteria which will be specified in the following paragraph.

### **3.3 Final determination of group composition**

The members of the group will be appointed by the Commission on the basis of applications by individual experts from business and academic communities and civil society, including consumers or investors representatives, involved in investment services and the securities industry on a cross-border level, who have responded to the call for expression of interest.

The Commission will assess the eligibility of individual experts who have responded to the call for expression of interest against the following criteria:

- proven expertise and recent practical experience, including at European or international level, in areas relevant to the investment services and securities industry and/or, in the impact of the EU securities directives in those areas;
- the ability of the individual expert to shape the views of the business and academic communities and civil society in respect of the matters covered by the mandate.

The Commission will endeavour to ensure that the group's composition spans the range of functions within the investment services and securities industry which are relevant to the issues raised by these terms of reference. The Commission will also seek to ensure an appropriate multi-disciplinary mix within the group.

In making the final selection of group members based on the basis of submitted proposals, the Commission shall be guided by the need to ensure that, in addition to covering all main areas of expertise, the group has, to the greatest extent possible, a balanced geographical composition. This means that members should be drawn from across the single market, to the extent that is possible having regard to the distribution of the relevant activities. However, the overriding criterion will be the practical experience of individual experts in dealing with the securities related issues specified in the mandate.

The Commission will appoint the members of the group in a personal capacity, and members will be required to advise the Commission independently of any outside influence. The members of the group are appointed for a 2 year renewable mandate.

### **3.4 Operation**

The Commission will organise and chair the meetings of the group. Up to four plenary meetings will take place in Brussels on Commission premises in accordance with the procedures and schedule established by it.

It is likely that the Commission may decide to set up one or more sub-groups within the group to examine specific questions. The Commission will set the terms of reference for these sub-groups. Any such sub-group will be disbanded as soon as it has fulfilled its function. The Commission will decide upon the frequency and location of the meetings of any such sub-groups, and the discussions carried out within a sub-group may also take place by means of other methods of communication such as conference calls or e-mail exchanges.

The Commission may ask experts (such as members of other Commission's expert groups) or observers (including representatives from associations representing consumers or investors) with specific competence on a subject on the agenda to participate in the deliberations of the group or a sub-group if this is useful or necessary.

The Commission will set a work programme for each calendar year. The programme will determine the subjects for discussion during the calendar year and set a timetable for the group or, where appropriate, the sub-group concerned. Any sub-group will be required to provide a draft report which will be presented to the plenary of the group for approval. The group shall report regularly to the Commission summarising its analysis and advice. The Commission is not bound by the advice of the group which is without prejudice to the advice of other Commission's expert groups on related issues covered by the mandate. The group will ensure appropriate coordination with those other relevant Commission expert groups in order to avoid duplication of work.

Members of the group will remain as members until such time as their term of appointment expires or the group's mandate is fulfilled. Members are expected to participate actively in the group's meetings and in at least one of the subgroups. Those who are no longer able to contribute effectively to the group's deliberations may be replaced by the Commission for the remaining period of their mandate. The general selection criteria will apply when selecting new members.

An expert or observer may not divulge information obtained through participation in the deliberations of the group or a sub-group if the Commission classifies that information as confidential.

The Commission shall publish on the Internet site of the DG Internal Market and Services, in the original language of the document concerned, the group's conclusions and reports as well as the summaries of its meetings or of its sub-group(s).

### **3.5 Duration**

The group's activities will start in 2006 and will continue until 2009 unless the Commission decides to prolong the mandate of the group and of any sub-groups which might have been established.

### **3.6 Expenses of group members**

The Commission will reimburse travel and subsistence expenses for its members in connection with the group's activities in accordance with the provisions in force at the Commission. The members will not be paid for their duties.