

- THE VICE-CHAIR -

Mr Steven Maijor  
Chair of the European Securities and Markets Authority (ESMA)

Ms Verena Ross  
Executive Director of the European Securities and Markets Authority (ESMA)

24 February 2014

Dear Mr Maijor  
Dear Ms Ross

### **Interpretation of EU legislation by ESMA**

At the EFMLG we do recognise the important challenges the new European legislation entail, not only for the financial sector and the end users, but also for the national competent authorities in charge of overseeing compliance with the new regulations and, very specifically, for ESMA. We are also aware of the great difficulty and exigency the new regulations require from ESMA, both due to the complexity of the subject matter in respect of which ESMA has to draft implementing technical and regulatory standards of second level as well as the often constrained time frames in which such tasks have to be done.

The above, together with the complexity, innovative and, frequently, vagueness of the first and second level regulation makes it necessary that ESMA issues guidelines and recommendations from time to time to assist stakeholders to properly understand and apply the regulation, with the aim, as stated in Article 16 of Regulation 1095/2010, to serve the purpose, among others, of establishing consistent, efficient and effective supervisory practices and ensuring the common, uniform and consistent application of Union law.

In order to preserve a level playing field and not to impair it by the right of each national competent authority to confirm whether it complies or intends to comply with a particular guideline or recommendation, from the EFMLG we think that, **prior to any final publication, consensus should have been reached among all national competent authorities whereby they undertake to comply with the agreed guidelines or recommendations once published in its definitive form.** Until such consensus and undertaking is reached, it would be preferable not to publish anything and to, instead, continue negotiating the final text of the guidelines or recommendations, so as to avoid a potential case of non-level-playing field if some national competent authorities opt to comply with those guidelines or recommendations while some others opt not to comply with them.

Additionally, in the process of issuing a document of guidelines or recommendations, a prior open public consultation is crucial, as it is also the case in any first level or second level legislative enactment. Thanks to such prior open public consultation, the authorities will be able to know beforehand what the impact of

the regulatory measures are likely to be, what the suggestions, comments and recommendations from the stakeholders are and what the concerns and worries of market participants are. It is important to point out that, unlike it is the case in other jurisdictions, in the EU there is no possibility of issuing “no action letters” to tackle the loopholes or inconsistencies of the regulations after they have been enacted. This is why it is even more important to permit the market participants to convey their views, opinions and comments in all legislative initiatives, no matter the level, without exception.

In this regard, we would like to share with you our concern on the lack of transparency and public participation involving the different Q&As published from time to time by ESMA. Setting aside any considerations as to whether a Q&A is one of the tools envisaged by Article 29 of Regulation 1095/2010, the fact is that, very often, such **Q&As are interpreting the regulation in a way which not necessarily is the only reasonable one and that such interpretation is not taking into account the stakeholders' opinion in any stance, as there is no prior open public consultation on the potential answers** to be provided by ESMA. It is absolutely beyond dispute that Q&As are a useful tool to clarify those questions that first and second level regulations do not address in a sufficiently clear or detailed way, but in its interpretative role ESMA's Q&A documents should not constitute a new source of “regulation” (soft regulation, but regulation) that goes beyond what the original legislation contemplated, especially considering that such Q&As are drafted without public participation. Consequently, this new form of “regulation” might result, at a national level, in regulatory inconsistencies, conflicts and duplicative requirements, increasing thus the potential for regulatory arbitrage.

At the EFMLG we would welcome having the opportunity to comment further our general concerns and to work together in order to find alternatives that may increase public participation in the development of the interpretation criteria of the regulation, with the aim of increasing the level playing field throughout the Union. In this vein the EFMLG would welcome having the opportunity to meet with you discussing these issues.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Holger Hartenfels'.

Holger Hartenfels  
Vice-Chair