

**European Financial
Markets Lawyers
Group**

Holger Hartenfels

c/o

**EFMLG Secretariat
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Main
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**Ref: Your letter of 24 February 2014 on the interpretation of EU legislation by ES-
MA**

Dear Mr Hartenfels,

On behalf of Steven Maijor, ESMA Chair, and Verena Ross, Executive Director, I would like to thank you for your letter in respect of the risks of any possible interpretation of EU legislation by ESMA. Please find below our response to the points you raised therein.

You suggest that ESMA should achieve consensus before publishing guidelines and recommendations in order to avoid potential situations of a non-level playing field, as some national competent authorities (NCAs) would in case of no consensus opt not to comply with them.

Though ESMA always aims to establish a broad consensual view, it was a deliberate decision of the European co-legislators that guidelines and recommendations shall be endorsed by a qualified majority of the Board of Supervisors after, where appropriate, an open public consultation and an analysis of the costs and benefits has been carried out and an opinion or advice from the Securities and Markets Stakeholder Group has been requested. This contrasts with the necessity to always achieve consensus, which would allow ESMA to only move as far as the minimal common interest of all NCAs is reached, respectively this would amount to giving a veto power to every NCA. This is certainly not what the co-legislators intended in reaction to the

financial crisis.

Furthermore it should also be noted that under Article 16(3) Regulation (EU) No 1095/2010 (“ESMA Regulation”) national competent authorities are not provided with the right to opt in or out of guidelines and recommendations depending on whether they agree or not to their content; rather, they always have the obligation to make every effort to comply and report their compliance or provide their reasons for non-compliance. Finally, under Article 16(4) ESMA has an obligation to report guidelines and recommendations to the European Parliament, Council and the Commission (a report that is made public under Article 43(5)), including an identification of any national competent authority that does not comply with them and explaining how ESMA intends to ensure that any non-compliant competent authority complies in the future. This reporting obligation contributes to ensuring a level-playing-field among national competent authorities.

These characteristics (QMV, public consultation, ‘every effort’ obligation, reporting to EU institutions) increase the significance of guidelines and recommendations as an effective guidance instrument that ESMA can use to carry out its tasks and achieve its objectives.

You furthermore mention that Q&As should not constitute a new source of “regulation” that goes beyond what the original legislation contemplated and the fact that there is in your view no prior public open consultation on the potential answers in the Q&As.

Article 29(1) ESMA Regulation provides ESMA with the power to provide opinions to competent authorities and Article 29(2) ESMA Regulation provides ESMA with the power to develop new practical instruments and convergence tools to promote common supervisory approaches and practices. Q&As are an example of these practical instruments and convergence tools and may be used in conjunction with the power to provide an opinion to competent authorities. In promoting a common supervisory culture, Q&As can also contribute to the prevention of regulatory arbitrage.

Please note that Q&As are non-binding acts and, unlike guidelines and recommendations, the ESMA Regulation does not require ESMA to consult on them. However, if it considers it necessary, ESMA may on its own initiate consult with representatives of the Securities and Markets Stakeholder Group, the relevant Standing Committees’ Consultative Working Group or, where



specific expertise is needed, with other external parties. Please note further that Q&As do not create a soft regulation or an interpretation that goes beyond the underlying legislation.

I would like to emphasise that ESMA endeavours to make use of this power in the best interests of supervisory convergence, in particular to avoid the regulatory inconsistencies and conflicts at national level you mention.

Last, I would like to draw your attention to the existence of ESMA's Securities and Markets Stakeholder Group (SMSG), established in accordance with Art 37 ESMA Regulation, as the SMSG seems the appropriate forum for further discussion of the issues you have raised, taking into account its power to issue opinions and advice focusing, *inter alia*, on ESMA's tasks set out in Articles 16 and 29 ESMA Regulation.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'S. Vuarlot-Dignac', written in a cursive style.

Sophie Vuarlot-Dignac

Head of Legal, Convergence and Co-operation Unit

CC: Mr Patrick Pearson, Acting Director DG Financial Markets, European Commission