

Greg Medcraft
Chair of the IOSCO Board
Address
Country

Ref: ESMA Comments on the Task Force on Cross-Border Regulation

Dear Mr Medcraft,

The European Securities and Markets Authority (ESMA) welcomes the opportunity to comment on the Consultation Report (the “Report”) of the Task Force on Cross-Border Regulation (the “Task Force”) issued by IOSCO on 25 November 2014. ESMA is an active member of the Task Force and the purpose of this letter is not to address each of the issues mentioned in the Report but to highlight several key challenges.

ESMA is committed to working collaboratively with IOSCO to support its leadership efforts aimed at addressing cross-border regulatory challenges. It believes that IOSCO should play a prominent role in promoting international coordination and cooperation, developing tool kits to address cross-border issues related to regulation and supervision, facilitating early dialogue at policy-making stage and coordinating the implementation process in order to identify and solve areas of conflict.

ESMA believes that several issues could be further considered and discussed by the Members of the Board of IOSCO regarding cross-border cooperation.

Overview of the Tools and Key Features: the benefits of “Recognition” and “Passporting” versus “National Treatment”

The application of the laws of one country in the jurisdiction of another has become an important topic of debate following the implementation of G20 standards and the further globalisation of financial markets.

To improve matters from where they currently stand, it would seem important to find ways to facilitate passporting, mutual recognition or substituted compliance by the different authorities while at the same time avoiding any gaps in the legislation of different countries. Care must also be taken to ensure that the approach to determining mutual recognition or substituted compliance does not require “direct equivalence, clause by clause, of the foreign legislation” but instead that it ensures “consistency of goals and comparability of outcomes”.

Without minimising the difficulties of developing these tools, as passporting, mutual recognition and substituted compliance are processes which require time and analysis (e.g. developing a common methodology, analysis of the legal and supervisory framework of jurisdictions, establishment of a high degree of confidence between national competent authorities, promotion of cooperation arrangements, etc.), they appear to be the most appropriate way to address regulation and supervision issues in a global financial market. Against this framework, IOSCO should play a central role as regards the promotion of these tools, the development of standard methodologies, in developing internationally recognized and consistent standards of regulation, oversight and enforcement and in facilitating dialogue and mutual trust between competent authorities.

A higher degree of granularity of international standards

One of the cross-border regulatory challenges identified in the Report is insufficient granularity in international standards. Having granular standards available on time will help reduce the development of differences when an activity becomes subject to regulation across the globe. This will not make regulations identical but it should facilitate the second step which is the reliance on foreign regulatory systems when they achieve the same regulatory outcomes.

Early involvement and upfront engagement of regulators in G 20 policy discussions

To develop at international level sufficiently granular standards, a first important step is for policy makers and regulators to be more proactive in identifying, in a timely way, broad risk areas which potentially require future regulatory action.

Moreover, ESMA is of the view that more progress could be made regarding assessment of different existing regulatory frameworks worldwide before new rules are proposed in different jurisdictions. Ideally, harmonised rules at global level are agreed upon before national rules with cross-border impact are enacted.

An early dialogue between policymakers and regulators in the legislative process is also essential to ensuring consistency in the implementation of agreed international standards in a coordinated manner and in a coherent timeframe.

New tool for supervisory purposes

Improvements in cross-border regulatory and supervisory coordination form a cornerstone to meet regulatory objectives such as investor protection, stability and avoiding regulatory arbitrage. IOSCO should strive to develop a new Multilateral Memorandum of Understanding



(MMoU) for supervisory purposes. This work should be based on the principles and the template developed by IOSCO in 2010.

The purpose of this new MMoU (which would be complimentary to the existing IOSCO MMoU on enforcement) would be to provide a global and general framework for cooperation and the exchange of information between national regulators in relation to the supervision of securities markets. The cooperation and exchange of information between competent authorities would be designed to facilitate the provision of mutual assistance between them to better enable the carrying out of their supervisory responsibilities.

The possibility to sign up to a multilateral framework for supervisory purposes would be much more efficient for IOSCO members, especially from smaller jurisdictions, than negotiating multiple bilateral MoUs. In that context ESMA's MMoU between competent authorities (and between competent authorities and ESMA where ESMA has supervisory responsibilities) is a good example of a multilateral arrangement which focuses on supervisory cooperation and exchange of confidential information regarding supervisory matters. It is also to be noted that a multilateral memorandum regarding supervisory cooperation at global level already exists in the insurance sector.

ESMA looks forward to continuing to work with you on these important challenges.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'S/M' with a flourish.

Steven Maijor

Cc: Ashley Alder, Chairman, IOSCO Task Force on Cross-Border Regulation