European Securities and Markets Authority

16 November 2022
ESMA43-340-435

DECISION OF THE BOARD OF SUPERVISORS

delegating to the ESMA Chair the task of assessing the completeness of a file submitted to the Board of Supervisors by the Independent Investigating Officer

The Board of Supervisors,

Having regard to the Treaty on the Functioning of the European Union[1],

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC[2] ("ESMA"), in particular Article 41,

Having regard to Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies[3] ("CRAR"), in particular Article 23e(2),

Having regard to Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions[4] (the "CRA Delegated Regulation"), in particular Article 3,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories[5] ("EMIR"), in particular Article 64(2) and Article 25i(2),

Having regard to Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012[6] ("SFTR"), in particular Article 9,

Having regard to Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a

[1] OJ C 202, 7.6.2016, p. 1.
[2] OJ L 331, 15.12.2010, p. 84-119.
[3] OJ L 302, 17.11.2009, p.1.
[4] OJ L 282, 16.10.2012, p. 23-26.
[5] OJ L 201, 27.7.2012, p.1.
[6] OJ L 337, 23.12.2015, p.1.

specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012[7] (the "Securitisation Regulation"), in particular Article 14,

Having regard to Commission Delegated Regulation (EU) No 667/2014 of 13 March 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on trade repositories by the European Securities and Markets Authority including rules on the right of defence and temporal provisions[8] (the "TR Delegated Regulation"), in particular Article 3,

Having regard to Commission Delegated Regulation (EU) 2021/731 of 26 January 2021 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to rules of procedure for penalties imposed on third-country central counterparties or related third parties by the European Securities and Markets Authority[9] (the "Tier 2 CCP Delegated Regulation"), in particular Article 3,

Having regard to Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012[10] ("MiFIR"), in particular Article 38k(2),

Having regard to Commission Delegated Regulation (EU) 2022/803 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council by specifying rules of procedure for the exercise of the power to impose fines or periodic penalty payments by the European Securities Markets Authority regarding data reporting service providers[11] (the "DRSP Delegated Regulation"), in particular Article 3,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014[12] ("BMR"), in particular Article 48i(2),

Having regard to Commission Delegated Regulation (EU) 2022/804 of 16 February 2022 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council by specifying rules of procedure for measures applicable to the supervision by the European Securities Markets Authority of certain benchmark administrators [13] (the "Benchmark Administrator Delegated Regulation"), in particular Article 3,

[7] OJ L 347, 28.12.2017, p. 35.
[8] OJ L 179, 19.6.2014, p. 31.
[9] OJ L 158, 6.5.2021, p. 1-7.
[10] OJ L 173, 12.6.2014, p. 84.
[11] OJ L 145, 24.5.2022, p. 1-6.
[12] OJ L 171 29.6.2016, p. 1.
[13] OJ L 145, 24.5.2022, p. 7–13.

Whereas:

(1) Article 23e(1) CRAR, Articles 25i(1) and 64(1) EMIR (and, as relevant, Article 9 SFTR and Article 14 of the Securitisation Regulation), Article 38k(1) MiFIR and Article 48i(1) BMR provide that, where ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more infringements, ESMA shall appoint an investigating officer who shall investigate the matter and perform his functions independently from the Board of Supervisors.

(2) Article 23e(2) CRAR, Articles 25i(2) and 64(2) EMIR (and, as relevant, Article 9 SFTR and Article 14 of the Securitisation Regulation), Article 38k(2) MiFIR and Article 48i(2) BMR provide that the investigating officer shall investigate the alleged infringements, taking into account any comments submitted by the persons subject to investigation, and shall submit a complete file with his findings to the Board of Supervisors.

(3) Article 3(1) of the CRA Delegated Regulation, Article 3(1) of the Tier 2 CCP Delegated Regulation, Article 3(1) of the TR Delegated Regulation, Article 3(1) of the DRSP Delegated Regulation and Article 3(1) of the Benchmark Administrator Delegated Regulation describes the complete file to be submitted by the investigating officer to the Board of Supervisors.

(4) Article 3(2) of the CRA Delegated Regulation, Article 3(2) of the Tier 2 CCP Delegated Regulation, Article 3(2) of the TR Delegated Regulation, Article 3(2) of the DRSP Delegated Regulation and Article 3(2) of the Benchmark Administrator Delegated Regulation provide that where the Board of Supervisors or ESMA (as relevant) considers that the file submitted by the investigating officer is not complete, it shall send back the file to the investigating officer with reasoned request for additional documents or make a reasoned request for additional documents to the investigation officer, as relevant.

(5) Taking into account the increase in ESMA's tasks and responsibilities, to avoid delays in the adoption of a decision of completeness and to avoid undue administrative burden for the members of the Board of Supervisors, it is desirable that the decision on completeness is delegated to the Chair of ESMA.

(6) This delegation should be exercised in accordance with the conditions and directions set out in this decision. The conditions and directions should provide guidance for the exercise of the delegated tasks and, therefore, should limit the discretion involved.

Has adopted this decision:

Article 1 – Delegation of tasks

(1) The Board of Supervisors delegates to the Chair of ESMA (the "Chair") the task to establish the completeness of the file submitted by the investigating officer to the Board of Supervisors pursuant to Article 3(2) of the CRA Delegated Regulation, Article 3(2) of the Tier 2 CCP Delegated Regulation, Article 3(2) of the TR Delegated Regulation, Article 3(2) of the DRSP Delegated Regulation and Article 3(2) of the Benchmark Administrator Delegated Regulation, as the case may be.

(2) The Chair shall not rule on any matter pertaining to the substance of the file and in particular shall not make any of the assessments under Articles 3(3) to 3(6) of the CRA Delegated Regulation, Articles 3(3) to 3(6) of the Tier 2 CCP Delegated Regulation, Articles 3(3) to 3(6) of the TR Delegated Regulation, Articles 3(3) to 3(7) of the DRSP Delegated Regulation and Articles 3(3) to 3(7) of the Benchmark Administrator Delegated Regulation.

(3) The tasks shall be exercised in accordance with Articles 2 and 3 of this Decision.

Article 2 – Conditions for the delegation

(1) The tasks delegated to the Chair under paragraph 1 of Article 1 are conferred on the Chair for an unlimited time.

(2) The Chair shall inform the Board of Supervisors of the outcome of the execution of the respective tasks delegated under Article 1 in line with Article 3.

(3) The Board of Supervisors can amend or revoke at any time the delegation of tasks established under this Decision. The decision of revocation shall put an end to the delegation of tasks established under this Decision.

Article 3 – Exercise of the delegation

Decision on completeness of the file

(1) The Chair shall review the contents of the file submitted by the investigating officer pursuant to Article 3(1) of the CRA Delegated Regulation, Article 3(1) of the Tier 2 CCP Delegated Regulation, Article 3(1) of the TR Delegated Regulation, Article 3(1) of the DRSP Delegated Regulation or Article 3(1) of the Benchmark Administrator Delegated Regulation, as the case may be, and shall rule on the completeness thereof within 30 days of receipt of such file.

(2) The Chair shall rule that the file is complete where the file contains the following documents:

(a) the statement of findings submitted by the investigating officer to the Board,

(b) a copy of the initial statement of findings addressed by the investigating officer to the person subject to the investigation,

(c) a copy of the written submissions by the person subject to the investigation,

(d) minutes of any oral hearing, and

(e) copies of any documentation referred to in points (a), (b), (c) and (d) above which is reasonably necessary in order for the Board of Supervisors to be able to determine whether an infringement has been committed, take a supervisory measure and/or establish the amount of the fine, excluding any documentation which is immaterial for purposes of these determinations.

(3) Where the Chair considers that the file is complete, the Chair shall submit a copy of his/her decision to the Board of Supervisors within 7 days of his/her decision. A copy of the decision shall be simultaneously sent to the investigating officer and the Executive Director.

(4) Where the Chair considers that the file is not complete, the Chair shall within 2 days of his/her decision send back the file to the investigating officer, together with a copy of his/her reasoned request for additional documents, which shall set forth:

(a) a list of any documents referred to in Paragraph 2 which are missing, and

(b) a reasonable deadline to provide such documents.

The Chair shall not consider that a file is not complete where the file contains all of the documents referred to in Paragraph 2.

Decision on completeness of the re-submitted file

(5) The investigating officer shall re-submit the complete file containing the documents set forth in Paragraph 4(a) within the deadline set forth in Paragraph 4(b).

(6) The Chair shall consider the completeness of the re-submitted file within 10 days of receipt of the re-submitted file from the investigating officer pursuant to Paragraph 5.

(7) The Chair shall consider that the re-submitted file is complete where the re-submitted file contains the documents set forth in Paragraph 4(a).

(8) Where the Chair considers that the re-submitted file is complete, the Chair shall submit a copy of his/her decision to the Board of Supervisors within 7 days of his/her decision. A copy of the decision shall be simultaneously sent to the investigating officer and the Executive Director.

(9) Where the Chair considers that the re-submitted file is not complete, the procedure set forth in Paragraphs 4 to 9 shall be reiterated mutatis mutandis. The Chair shall not consider that a re-submitted file is not complete where the re-submitted file contains all of the documents set forth in Paragraph 4(a).

Deadline Extension

(10) In the event where the deadline set forth in Paragraph 4(b) is insufficient to produce the required documents, the investigating officer may request a deadline extension before the expiration of the initial time limit, by sending to the Chair a written request setting forth the documents with respect to which an extension is requested and the reasons for such extension request.

(11) The Chair shall decide on any deadline extension within 7 days of the request submitted by the investigating officer pursuant to Paragraph 10.

Article 4 – Entry into force

This Decision takes effect on the day of its adoption.

Done at Prague on 16 November 2022

[signed]

Verena Ross
Chair
For the Board of Supervisors