

DECISION OF THE BOARD OF SUPERVISORS

Rules of procedure

The Board of Supervisors

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/EC¹ (the “Regulation” and “ESMA”), and in particular Article 44 thereof,

Having regard to the Treaty of Accession concerning the conditions of accession of the republic of Croatia and the adjustment to the treaty on European Union, the treaty on the Functioning of the European Union and the treaty establishing the European Atomic Energy Community,²

Having regard to Decision of the EEA Joint Committee No 201/2016 of 30 September 2016 amending Annex IX (Financial Services) to the EEA Agreement, in order to reflect the incorporation of the Regulation into the EEA Agreement.

Has decided as follows:

Article 1 – Composition

Members

- (1) The Board of Supervisors shall be composed of the following (each a “Member”):
 - (a) ESMA’s Chairperson who shall be non-voting;
 - (b) the heads of the national authorities competent for the supervision of financial market participants:
 - (i) in each EU Member State (each a “Voting Member”),

¹ OJ L 331, 15.12.2010, p. 84.

² OJ L112, 24.04.2012, p.21.

- (ii) in each EEA EFTA Member State - (each a 'EEA EFTA Member') who shall be non-voting;
 - (c) one representative of the Commission who shall be non-voting;
 - (d) one representative of the European Systemic Risk Board who shall be non-voting;
 - (e) one representative of the European Banking Authority who shall be non-voting;
 - (f) one representative of the European Insurance and Occupational Pensions Authority who shall be non-voting; and
 - (g) one representative of the EFTA Surveillance Authority who shall be non-voting.
- (2) In Member States where there is more than one authority responsible for the supervision according to the Regulation, those authorities shall agree on a common representative. Nevertheless, when an item to be discussed by the Board of Supervisors does not fall within the competence of the national authority being represented by a Member, that Member may bring a representative from the relevant national authority, who shall be non-voting.

Observers

- (3) The Board of Supervisors may decide to admit additional observers and invite experts.
- (4) In accordance with Article 75(2) of the Regulation, representatives of third countries shall be entitled to attend Board of Supervisors meetings as an observer under the relevant provisions of any agreement concluded with the Union providing for such representation. Such representatives shall not attend any discussions relating to individual financial market participants, except where there is a direct interest.
- (5) Observers may include any State which has applied for membership of the European Union, on condition that the accession negotiations have been successfully completed.

Executive Director

- (6) The Executive Director participates in meetings of the Board of Supervisors without the right to vote.

Advisers

- (7) Members and observers may each be accompanied at meetings of the Board of Supervisors by one adviser. The Chairperson and Executive Director may be assisted by other ESMA staff.

Notification of documents

- (8) ESMA staff shall maintain a list of the Members and observers and of alternates nominated in accordance with Article 5(9). Members and observers shall notify the Chairperson in writing of the email addresses to which notifications required by these rules of procedure shall be sent and shall inform the Chairperson of any necessary change.

Article 2 – Tasks

- (1) The Board of Supervisors shall have the tasks specified in Article 43 of the Regulation and any other tasks provided for in Union acts.
- (2) The Board of Supervisors shall, in accordance with Article 45(1) of the Regulation, elect the members of the Management Board. The Board of Supervisors shall adopt a decision specifying the process for such elections.

Article 3 – Chairmanship and Vice-Chairmanship

- (1) Meetings of the Board of Supervisors shall be chaired by the Chairperson.
- (2) The Board of Supervisors shall elect from among its Voting Members an alternate (the “Vice-Chairperson”). The Vice-Chairperson shall not be elected from amongst the members of the Management Board. The Vice-Chairperson shall carry out the functions of the Chairperson in his absence.
- (3) Elections shall normally take place at the meeting preceding the expiry of the Vice-Chairperson’s term of office or the date on which the position is expected to fall vacant. Where the position falls vacant unexpectedly, an election shall take place within three months.
- (4) The term of office of the Vice-Chairperson shall be two and a half years unless elected to fill a vacancy in the office in which case it shall be the remainder of the predecessor’s term. The term of office shall in any event expire on ceasing to be a member of the Board of Supervisors. The term of office may be renewed once.
- (5) If both the Chairperson and the Vice-Chairperson are absent or unable to attend a meeting, those Members present shall elect a Member to chair the meeting.

Article 4 – Decision making procedures

Quorum

- (1) In order for the Board of Supervisors to vote, there shall be a quorum of two-thirds of the Voting Members.

Voting

- (2) The Vice-Chairperson shall not normally vote when carrying out the functions of the Chairperson but may, exceptionally, do so if his vote as a Member could not otherwise be exercised.
- (3) Decisions of the Board of Supervisors shall be taken by a simple majority of its Voting Members unless otherwise stated. Each Voting Member shall have one vote. A simple majority is achieved where more Voting Members vote in favour of a proposal than vote against it. Abstentions will not be counted as approvals or as objections, and will not be considered when calculating the number of votes cast.
- (4) For acts relating to draft technical standards and guidelines and recommendations specified in Articles 10 to 16 of the Regulation, and measures and decisions adopted on financial provisions under the third subparagraph of Article 9(5) of the Regulation and Chapter VI of the Regulation, the Board of Supervisors shall take decisions on the basis of a qualified majority of its Voting Members, as defined in Article 16(4) of the Treaty on European Union (“TEU”) and in Article 3 of the Protocol (No 36) on transitional provisions.
- (5) With regard to decisions in accordance with Article 19(3) of the Regulation, for decisions taken by the consolidating supervisor, the decision proposed by the panel referred to in Article 41(2) of the Regulation shall be considered as adopted if approved by a simple majority, unless it is rejected by Voting Members representing a blocking minority of the votes as defined in Article 16(4) TEU and in Article 3 of the Protocol (No 36) on transitional provisions.
- (6) For all other decisions in accordance with Article 19(3) of the Regulation, the decision proposed by the panel shall be adopted by a simple majority of the Voting Members according to the principle where each Voting Member has one vote.
- (7) When a decision is to be adopted by the Board of Supervisors by a qualified majority, it shall be adopted if there are at least 55% of the Voting Members in favour, comprising at least sixteen of them and coming from competent authorities from Member States comprising at least 65% of the population of the Union.
- (8) In accordance with Article 3(2) of the Protocol (No 36) on transitional provisions, until 31 March 2017 a Voting Member can request application of the following voting rule instead: “when a decision is to be adopted by the Board of Supervisors by a qualified majority, it shall be adopted if there are at least 260 votes in favour representing a majority of the Voting Members. If a Voting Member so requests, it shall be verified that the Member States of the Voting Members constituting the qualified majority represent at least 62% of the total population of the Union”.

- (9) For the purpose of paragraphs 7 and 8, population figures shall be calculated using the population figures adopted by the Council of the European Union and in force at the relevant time for the purpose of adopting its own decisions by a qualified majority.
- (10) ESMA staff shall maintain a record of votes taken on the adoption of acts.

Written procedure

- (11) Where appropriate, decisions may be taken by written procedure. In principle, all Voting Members should express their approval (I agree), objection (I disagree) or express abstention (I abstain). An abstention does not count as a yes or a no but reduces the total votes accordingly.
- (12) A proposal from the Chairperson shall be circulated to the Board of Supervisors:
 - (a) stating the time and date by which votes must be cast;
 - (b) stating whether a failure to vote in accordance with the principles detailed under paragraph 11 will be considered a vote for the proposal, and whether a minimum number of votes is required;
 - (c) where, exceptionally, the period for casting votes is less than 10 calendar days, giving the reason for the short period;
 - (d) describing the key issues and whether the decision proposed is consensual or controversial;
 - (e) justifying the use of written procedure where it is used in relation to the adoption of draft technical standards; and
 - (f) providing any other material considered necessary for making the decision that has not previously been forwarded to the Board of Supervisors.
- (13) Votes on decisions being taken by written procedure shall be in written form.
- (14) Where the Chairperson has informed the Board of Supervisors that a failure to vote will be considered a vote for a proposal, if within 48 hours three or more Voting Members request in writing to the Chair that a failure to vote should not be considered a vote for the proposal then:
 - (a) a failure to vote shall not be considered a vote for the proposal;
 - (b) two-thirds of the Voting Members shall be required to express objection, approval or abstention;

- (c) the time and date by which votes must be cast shall if necessary be extended to ensure a minimum of 24 hours for Voting Members to vote on the revised basis; and
 - (d) the Chairperson shall notify the Board of Supervisors accordingly.
- (15) The result of a written procedure shall be notified without delay to the Board of Supervisors.

Specific (types of) decisions

- (16) The Board of Supervisors has agreed different arrangements for taking specific decisions or specific types of decisions in the following cases:
- Internal process for future applications of MiFID pre-trade transparency waivers (ESMA/2012/SMSC/130)
 - Procedures under Article 23 of the Short Selling Regulation (ESMA/2013/BS/6 Annex 2)
 - Procedures under Article 27 of the Short Selling Regulation (ESMA/2012/BS/129 Annex 3)
 - Procedures under Article 28 of the Short Selling Regulation (ESMA/2012/BS/129 Annex 5)
 - Decision on the Rules of Procedure of the Panel in Charge of the Assessment of the Completeness of the File Submitted by the Independent Investigating Officer (ESMA/2014/BS/229)
 - Decision of the Board of Supervisors of Delegation to a Panel to assess and validate significant changes to the models and parameters of CCPs and establishment of validation procedures (ESMA/2015/BS/29rev).

Finalising documents

- (17) The text of acts adopted by the Board of Supervisors shall be signed by the Chairperson.

Article 5 – Meetings

Convening meetings

- (1) Meetings of the Board of Supervisors shall be convened by the Chairperson at his or her own initiative or at the request of one third of its Members. Invitations shall be sent to email addresses notified by each Member and observer to the Chairperson for this purpose.

- (2) Meetings of the Board of Supervisors shall normally be held at ESMA's premises. Meetings may be held by telephone or video conference call, or other technical means.
- (3) The date and place of future meetings shall normally be decided at meetings of the Board of Supervisors. Meeting dates and places that have not been decided in this way shall be notified by the Chairperson to the Board of Supervisors as soon as practicable.
- (4) When circumstances require, and provided a majority of the Members does not object, the Chairperson may change the date or place of a meeting. Notification of such change shall be given to Members and observers as soon as practicable and normally no later than three weeks before the original or revised date of the start of the meeting, whichever is the earlier.
- (5) When a meeting is requested by one third of the Members, the Chairperson shall convene a meeting to take place within six weeks of receipt of the request, or as soon as practicable in urgent cases.
- (6) An agenda, accompanied by the relevant material for decision making, should be forwarded to the Board of Supervisors at least 10 days prior to a meeting. Material relating to a proposed decision to submit draft regulatory technical standards or implementing technical standards under Articles 10 or 15 respectively of the Regulation shall be forwarded to the Board of Supervisors at least 10 days prior to a meeting. Material shall be provided as soon as practicable in urgent cases.
- (7) The Board of Supervisors shall convene meetings with the Securities and Markets Stakeholder Group regularly, at least twice per year.

Attendance

- (8) Members shall meet in person at least twice a year.
- (9) Each competent authority shall appoint, in writing, a high-level alternate from its authority, who may replace its Member, in case this person is prevented from attending or is carrying out the functions of the Chairperson in his absence.
- (10) For the purpose of acting within the scope of Directive 97/9/EC, Members may, where appropriate, be accompanied by a representative from the relevant bodies which administer investor compensation schemes in each Member State, who shall be non-voting.
- (11) Non-Voting Members and observers - with the exception of the Chairperson, the Executive Director, the EEA EFTA Members and the representative of the EFTA Surveillance Authority - shall not attend any discussions within the Board of Supervisors relating to individual financial institutions, unless otherwise provided for in Article 75 of the Regulation or in the acts referred to in Article 1(2) of the Regulation.

Agenda

- (12) The Chairperson shall decide the agenda for each meeting.

Summary of conclusions

- (13) ESMA staff shall prepare a summary of conclusions of each meeting of the Board of Supervisors setting out the decisions taken. The summary of conclusions shall record the outcome of any vote on the adoption of draft regulatory technical standards or draft implementing technical standards under Articles 10 and 15 of the Regulation respectively. The draft summary of conclusions shall be forwarded to Members and observers within two weeks of the meeting. Once approved by the Members, the summary of conclusions shall be signed by the Chairperson.

Article 6 – Code of conduct

Independence

- (1) When carrying out the tasks conferred upon the Board of Supervisors by the Regulation, the Chairperson and the Voting Members shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body.

Confidentiality

- (2) All proceedings of the Board of Supervisors shall be confidential. Anyone attending shall respect their confidentiality and shall comply with ESMA's internal rules of procedure concerning professional secrecy.

Transparency

- (3) The decisions and minutes of meetings of the Board of Supervisors shall be subject to the provisions on access to documents in Article 72 of the Regulation and measures taken for its implementation.

Conflicts of interest

- (4) All Members and their alternates shall disclose to the Board of Supervisors any conflict of interest which that individual may have and is aware of before the resolution of a matter to which that conflict relates in accordance with the Policy on Independence and Decision Making Processes for avoiding Conflicts of Interest (Conflict of Interest Policy) for Non-Staff (ESMA/2014/MB/60). A Voting Member shall not vote on a matter where that individual has a material conflict of interest.

Article 7 – Provisions for EEA EFTA Members and the EFTA Surveillance Authority

- (1) The competent authorities of the EEA EFTA Member States and the EFTA Surveillance Authority shall, but for the right to vote, have the same rights and obligations as the competent authorities of the EU Member States in the work of ESMA.
- (2) A Multilateral Memorandum of Understanding on cooperation, information exchange and consultation concluded between the EBA, EIOPA, ESMA and the EFTA Surveillance Authority shall further clarify practical arrangements of the cooperation between these authorities in relation to the application of Union law as incorporated into the EEA Agreement.
- (3) When carrying out the tasks conferred upon the Board of Supervisors by the Regulation, the EEA EFTA Members shall act independently and objectively in the sole interest of the EEA as a whole and shall neither seek nor take instructions from any government of a Member State or from any other public or private body.

Article 8 – Secretariat

The Executive Director shall provide a secretariat and the appropriate administrative support to enable the Board of Supervisors to carry out its work.

Article 9 – Final provisions

Correspondence

- (1) All correspondence with the Board of Supervisors shall be addressed to ESMA at its headquarters.

Transitional measures

- (2) In accordance with Articles 8(1)(l) and 76(4) of the ESMA Regulation, ESMA takes over, as appropriate, all existing and on-going tasks from the Committee of European Securities Regulators (CESR) and is the legal successor of CESR. In particular, guidelines, recommendations, standards and any other Level 3 material issued by CESR continue in force until such time as they are readopted, replaced or revoked, having the status provided for under the Charter of the Committee of European Securities Regulators.

This Decision shall take effect on the day of its adoption and shall be made public.



Done at Paris on 11 January 2011 (ESMA/2011/BS/1)

Amended at Copenhagen on 19 June 2012 (ESMA/2012/BS/88)

Amended at Paris on 27 May 2013 (ESMA/2012/BS/88 rev1)

Amended at Paris on 10 December 2015 (ESMA/2012/BS/88 rev2)

Amended at Paris on 14 December 2016 (ESMA/2012/BS/88 rev3)

Steven Maijoor
Chair
For the Board of Supervisors