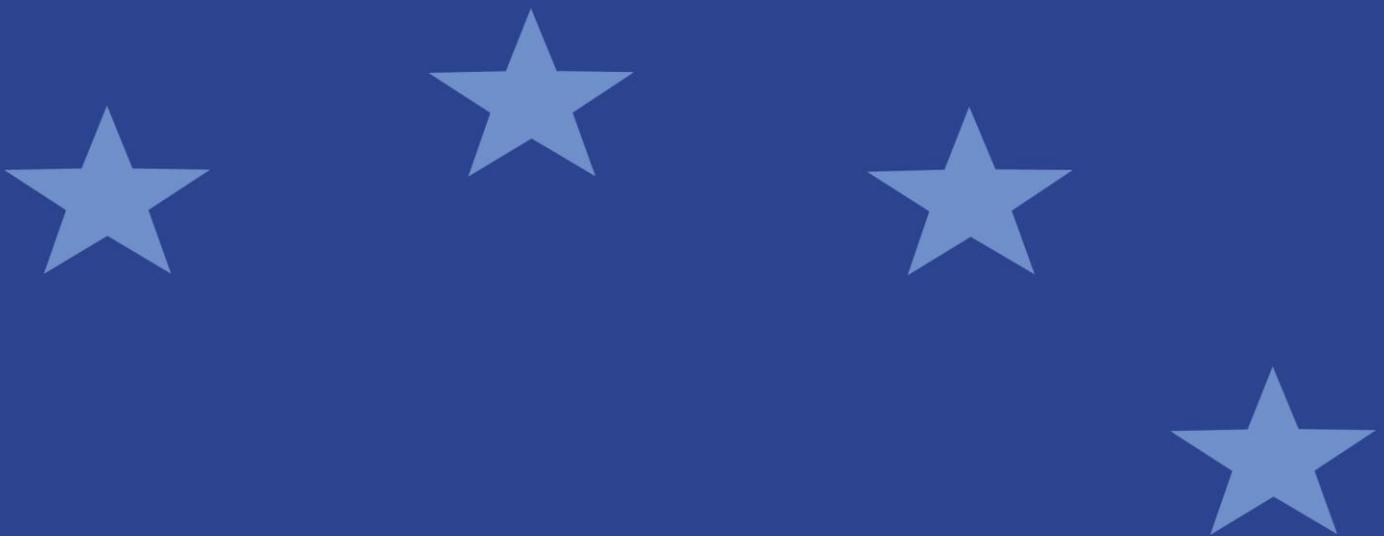




European Securities and
Markets Authority

Guidelines and Recommendations

Cooperation including delegation between ESMA, the competent authorities and the sectoral competent authorities under Regulation (EU) No 513/2011 on credit rating agencies





European Securities and
Markets Authority

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II. Scope

1. These guidelines apply to: ESMA, *competent authorities* and *sectoral competent authorities*.
2. These guidelines apply in relation to the cooperation between ESMA, the *competent authorities* and the *sectoral competent authorities*, including the procedures and detailed conditions relating to the delegation of tasks, under the Regulation (EU) No 513/2011 on credit rating agencies.
3. These guidelines apply from 6 October 2011.

III. Definitions

4. For the purposes of these guidelines terms shown in italics have the meaning defined in the table below or, if not shown in the table, have the meaning defined in Article 3 of the *Regulation*.

<i>Regulation</i>	<i>Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies as amended by Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011</i>
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<i>ESMA Regulation</i>	<i>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</i>
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IV. Purpose

5. The purpose of these guidelines is to establish a cooperation framework between ESMA, the competent authorities and the sectoral competent authorities for the purposes of the Regulation and of the relevant sectoral legislation, without prejudice to their respective supervisory powers. They are issued in accordance with Article 21 (2) of the *Regulation*.
6. The cooperation framework is intended to build on the obligation of ESMA, the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), the competent authorities and the sectoral competent authorities to cooperate where it is necessary for the purposes of the Regulation and for those of the relevant sectoral legislation in accordance with Article 26 of the Regulation. It also builds on ESMA's ability to delegate specific supervisory tasks to a competent authority in accordance with Article 30 of the Regulation.

A- Guidelines on delegation of tasks

Criteria

7. Where it is necessary for the proper performance of a supervisory task, ESMA may delegate specific supervisory tasks to the competent authority of a Member State in accordance with these guidelines (Article 30(1) of the *Regulation*).

8. The delegation of a task may be considered necessary if the proper performance of the specific supervisory task requires knowledge and experience with respect to local conditions, where these are available at the competent authority.
9. The competent authority may perform delegated supervisory tasks with its own resources and capabilities – or by using the services of third parties appointed by them. Supervisory responsibilities under the *Regulation*, including registration decisions, final assessments and follow-up decisions concerning infringements, cannot be delegated. (Article 30(4) of the *Regulation*).

Appropriate tasks for delegation

10. ESMA will typically delegate tasks where they require specialist knowledge and experience with respect to local conditions, where these are available at the competent authority. This may include tasks such as carrying out of specific investigatory tasks and on-site inspections. (Recital 15 to the *Regulation*).

Effect of delegation

11. A delegation of tasks does not affect the responsibility of ESMA and does not limit ESMA's ability to conduct and oversee the delegated activity (Article 30 (4) of the *Regulation*).

Consultation of relevant competent authorities

12. Prior to the delegation of a task, ESMA is required to consult the relevant competent authority about the detailed conditions relating to such delegation of tasks including the scope of the task to be delegated, the timetable for its performance, and the transmission of necessary information by and to ESMA (Article 30(2) of the *Regulation*).
13. In preparing ESMA's work programme for the coming year, ESMA's Executive Director will estimate the use ESMA expects to make of delegation arrangements in that year in consultation with relevant competent authorities. The consultation will, to the extent possible, identify:
 - a. the scope of tasks to be delegated, including expected outcomes and the level of resources that would be needed to perform the task (type of personnel requested, estimated number of man-hours needed etc.);
 - b. the timetable for the performance of the tasks to be delegated; and
 - c. why ESMA considers it necessary for the task to be delegated.
14. Relevant *competent authorities* should respond to the consultation promptly, and within four weeks of being consulted unless ESMA and the respective competent authority agree to reduce this period. In particular, a *competent authority* should inform ESMA, providing reasons, if it:
 - a. disagrees that it is necessary to delegate the task; or
 - b. does not consider itself capable of performing the task proposed to be delegated (e.g. in case of a shortage of staff available).
15. The Executive Director will take the consultation responses into account in preparing the work programme and seek to resolve any concerns raised in the consultation. If a disagreement persists the

Executive Director and a high-level representative of the competent authority shall discuss the issue and endeavour to find a solution acceptable to both parties.

16. ESMA's final work programme will be discussed and adopted by ESMA's Board of Supervisors on the basis of a proposal by the Management Board. (Article 43(4) of the ESMA Regulation). In case the Executive Director and the competent authority cannot reach an agreement during the consultation process the Board of Supervisors will be provided with the arguments brought forward from the parties, and in making its decision give particular regard to the resource available at the competent authority.
17. Before ESMA delegates a specific supervisory task, ESMA will consult the relevant competent authority. Consultation will take place as soon as is practicable and at least nine weeks before performance of the task is to commence unless the parties agree to reduce this period. To the extent that ESMA has not already consulted the competent authority during preparation of the work programme, ESMA will consult on:
 - a. the scope of the specific task to be delegated, including expected outcomes and the level of resources that would be needed to perform the task (such as the type of personnel requested and the estimated number of man-hours needed);
 - b. the timetable for the performance of the specific task;
 - c. the transmission of necessary information by and to ESMA, including information ESMA considers necessary for the proper performance of the specific task; and
 - d. why ESMA considers it necessary for the specific task to be delegated.
18. ESMA will also provide details of the ESMA staff who will be responsible for coordinating the delegated task.
19. The competent authority should respond to the consultation within four weeks of being consulted unless ESMA and the respective competent authority agree to reduce this period. In particular, a competent authority should inform ESMA, providing reasons, if it:
 - a. disagrees that it is necessary to delegate the specific task; or
 - b. does not consider itself capable of performing the specific task proposed to be delegated (e.g. in case of a shortage of staff available).
20. ESMA will seek to resolve any concerns raised in the consultation before deciding to delegate the task, if necessary transferring the matter to senior staff in ESMA and the competent authority. In resolving the concerns raised, particular regard will be given to the resource available at the competent authority.
21. ESMA will notify the competent authority as soon as is practicable after making the decision to delegate a specific task and at least three weeks before performance of the task is expected to commence unless the parties agree to reduce this period. The delegation decision will specify as a minimum:
 - a. the scope of the specific task delegated;
 - b. the timetable for the performance of the specific task;
 - c. the information that ESMA will transmit to the competent authority in order for it to carry out the specific task; and

- d. the information the competent authority is required to transmit to ESMA during or after performing the specific task.

Changes to the delegation arrangement concerning a specific task

22. If ESMA wishes to change the delegation arrangement concerning a specific task, in particular in relation to the scope or timetable for the task or the information to be transmitted by ESMA or the competent authority, it shall consult the competent authority as soon as practicable on the proposed changes. ESMA will seek to resolve any concerns raised in the consultation, if necessary escalating the matter to senior staff in ESMA and the competent authority. ESMA will decide on, and notify, any changes to the delegation arrangement at least three weeks before performance of the task is to commence unless the parties agree on reducing the period.
23. If a competent authority considers, when carrying out a delegated task, that the scope of the task will require significantly greater resources initially planned for, it should inform the relevant member of ESMA staff in order to agree the appropriate steps to take.

Performance of the delegated task

24. ESMA will provide the relevant competent authority with such information and guidance as may prove helpful to carry out the delegated task in good time.
25. During the performance of the task, the competent authority may ask ESMA for any information that is necessary for the proper performance of the delegated task. ESMA will either provide the necessary information promptly or provide a reason why this is not possible and an indication of when the information will be provided.
26. The competent authority performing the task should communicate any significant findings to ESMA without undue delay.
27. Upon completion of the task, the competent authority concerned should pass to ESMA all relevant information it obtained and do its best to provide prompt answers to any additional questions ESMA may have.

Delays in completion of the delegated task

28. The *competent authority* performing the task should notify ESMA as soon as is practicable of any expected delays in performing the task. The *competent authority* should seek to minimise such delays and, if necessary, propose a revised timetable for the task.

Revocation of delegation

29. ESMA will review the delegation at appropriate intervals and may revoke it at any time. (Article 30 (4) of the Regulation).
30. ESMA will normally consult a competent authority as soon as it starts considering revoking a delegation.

Reimbursement of costs

31. ESMA will reimburse a competent authority in full for the costs incurred as a result of carrying out delegated acts. The payment will be made in a reasonably prompt manner¹.

B- Guidelines on other forms of cooperation

32. In case of cooperation by way of assistance provided to ESMA by a competent authority in accordance with Articles 23c(4) or 23d(5) of the *Regulation*, ESMA will provide the core resourcing, while *competent authorities* should assist by facilitating ESMA's work.

Assistance with on-site inspections and general investigations not stemming from delegation of tasks

33. For general investigations carried out by ESMA (e.g. supervisory activities as enumerated under Article 23 c (1) of the *Regulation*), officials of the competent authority of the Member State where such an investigation is conducted may be required to assist ESMA's authorised persons in carrying out their duties.
34. For on-site inspection carried out by ESMA, officials of, and those authorised or appointed by, the competent authority of the Member State where an on-site inspection in a credit rating agency is to be conducted are required, upon the request of ESMA to actively assist the officials of and other persons authorised by ESMA in carrying out on-site inspections. To that end, they enjoy the same powers granted to ESMA by Article 23.d (2) of the *Regulation*. (Article 23d(5) of the *Regulation*)
35. In case of request of assistance for the purpose of para. 33 or para.34, ESMA will notify the competent authority of its request for assistance as soon as is practicable in advance and at least eight weeks before the general investigation or the inspection is due to start unless the parties agree to reduce this period.
36. ESMA will inform the competent authority of the scope of the general investigation or of the on-site inspection and the expected level of assistance required. ESMA is not however entitled to request a competent authority to perform an inspection or other supervisory task on its behalf except by means of a delegation pursuant to Article 30 of the *Regulation*. ESMA will seek to agree details of the assistance with the competent authority, if necessary referring the matter to senior staff in ESMA and the competent authority.
37. ESMA will notify requests for assistance in writing. In urgent situations ESMA may make requests orally which will be followed by a written notification within the next two days.
38. Where a person opposes an on-site inspection, the competent authority concerned should afford officials of and other persons authorised by ESMA the necessary assistance. This should include requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, so as to enable ESMA to conduct its on-site inspection.
39. If the general investigation or the on-site inspection mentioned above requires authorisation by a judicial authority according to national rules, such authorisation has to be applied for. Such authori-

¹ To be revised following the release of the delegated Act on the fees regime to be apply to the CRAs.

sation may also be applied for as a precautionary measure. (Article 23 c (5) and 23 d (7) and (8) of the *Regulation*).

40. ESMA is likely to require assistance in applying for such authorisation and will normally include this in a request for assistance.

Reimbursement of costs

41. In any case, ESMA shall reimburse costs incurred as a result of any work of assistance to ESMA pursuant to the *Regulation* (Article 19). The payment will be made in a reasonably prompt manner².

Attendance of a competent authority's officials to on-site inspections not stemming from a request of ESMA

42. Officials of the competent authority concerned may also attend on-site inspections upon request to ESMA. (Article 23d(5) of the *Regulation*)
43. When ESMA is planning an on-site inspection, it will notify the relevant competent authority as soon as ESMA has decided to conduct the inspection, where possible, this will be no later than four weeks before the inspection is to start.
44. Except in urgent cases, the competent authority concerned should submit any request to attend an on-site inspection to ESMA in writing as soon as is practicable and, where possible, at least two weeks before the inspection is to start provided ESMA's notification of the inspection allows for meeting this deadline.

Exchange of information

45. ESMA, the competent authorities, and the sectoral competent authorities are required, without undue delay, to supply each other with the information required for the purposes of carrying out their duties under the *Regulation* and under the relevant sectoral legislation. (Article 27(1) of the *Regulation*)
46. Requests to ESMA for information should be sent to the Credit Rating Agencies Unit. Competent authorities should notify ESMA's Credit Rating Agencies Unit of a contact point to which ESMA should submit any requests for information.
47. Requests for information should, to the extent possible, specify:
 - a. a precise description of their scope;
 - b. the purpose for which the information is sought and why it will be of assistance;
 - c. if the request results from investigations of violations of any laws or regulations, a short description of the relevant provisions that may have been violated and, if known, a list of the persons or institutions believed to possess the information sought;
 - d. an indication of the sensitivity of the information contained in the request and whether the identity of the requester can be disclosed to persons who may need to be approached for information;

² To be revised following the release of the delegated Act on the fees regime to be apply to the CRAs.

- e. whether the requester is or has been in contact with any other authority or law enforcement agency in the relevant Member State in relation to the subject matter of the request;
- f. any other authority which has an active interest in the subject matter of the request;
- g. places where the information may be obtained and;
- h. an indication of the urgency of the request, or the desired time period for the reply.

48. Recipients of requests should:

- a. take all reasonable steps to obtain and provide the information sought within any time period indicated, to the extent permitted by law;
 - b. use the relevant means at its disposal for the execution of the request, consulting and agreeing with the requester on the types of enquiry that may be necessary for the execution of a request except that where ESMA is seeking information that can only be obtained from a person identified in Article 23b(1) of the Regulation, it may only request a competent authority to obtain that information by means of a delegation under Article 30 of the Regulation;
49. To the extent permitted by law, the requester should provide the recipient of the request with such further assistance as may reasonably be required for the efficient execution of the request including the provision of further information as to the circumstances surrounding the request, staff or other resources.

Permissible uses of information exchanged and confidentiality

50. ESMA, competent authorities, and all persons who work or who have worked for ESMA, for the competent authorities or for any other person to whom ESMA has delegated tasks, including auditors and experts contracted by ESMA are subject to the obligation of professional secrecy (Article 32 of the Regulation).
51. All the information that is acquired by or exchanged between ESMA, the competent authorities, the sectoral competent authorities or other authorities and bodies referred to in Article 27 (2) of the Regulation shall be considered confidential except where ESMA or the competent authority or other authority or body concerned states at the time of communication that such information may be disclosed or where such disclosure is necessary for legal proceedings (Article 32 (2) of the Regulation). With prior consent of ESMA, competent authorities are permitted to use the services of third parties where they deem it appropriate for performing delegated tasks and may only disclose confidential information to such third parties, if the third party in question is subject to professional secrecy in accordance with Article 32(1) of the *Regulation*.
52. Information that is supplied should be used solely for the purposes stated in the transmission letter except where disclosure is necessary for legal proceedings.
53. Recipients of information provided under Article 27 of the Regulation should obtain the prior consent of the authority which provided the information if they propose to use it for any other purpose. Any consent may be subject to conditions.
54. Nothing in these guidelines prevents information from being used or disclosed where such use or disclosure is required in order to comply with the obligations under the Regulation or other legislation.