

## DECISION OF THE MANAGEMENT BOARD

### Professional secrecy

#### The Management Board

**Having regard** to Article 70 of 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<sup>1</sup> (the “Regulation” and “ESMA”)

#### Whereas:

- (1) Article 70 of the Regulation requires ESMA to lay down in its internal rules of procedure the practical arrangements for implementing the confidentiality rules referred to in that article.
- (2) The Management Board is responsible for ensuring that ESMA carries out its mission and performs the tasks assigned to it in accordance with the Regulation and is therefore the most appropriate body to adopt internal rules on professional secrecy.

#### Has adopted this decision:

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#### Article 1 – Obligation of professional secrecy

- (1) In accordance with Article 70(1) of the Regulation, all Members of the Board of Supervisors and the Management Board, the Executive Director and members of ESMA’s staff, including secondees and all other persons carrying out tasks for ESMA on a contractual basis are subject to the requirements of professional secrecy pursuant to:
  - (a) Article 339 of the Treaty on the Functioning of the European Union; and
  - (b) the relevant provisions in Union legislation, in particular Union legislation within ESMA’s scope of action.
- (2) The requirements in paragraph (1) apply even after the person’s duties have ceased.

<sup>1</sup> OJ L 331, 15.12.2010, p. 84.



- (3) Individuals may also be subject to national legal requirements which can include criminal penalties.
- (4) The Annex sets out non-exhaustive extracts of relevant Union professional secrecy duties.

## **Article 2 – Disclosure of confidential information**

- (1) In accordance with Article 70(2) and (3) of the Regulation, without prejudice to cases covered by criminal law, any confidential information received by persons referred to in Article 1 whilst performing their duties may not be divulged to any person or authority whatsoever, except:
  - (a) in summary or aggregate form, such that individual financial market participants cannot be identified;
  - (b) for the enforcement of the acts referred to in Article 1(2) of the Regulation, and in particular for legal proceedings for the adoption of decisions; and
  - (c) when exchanging information with national supervisory authorities in accordance with the Regulation and other Union legislation applicable to financial market participants.
- (2) In accordance with Article 35(3) of the Regulation, persons referred to in Article 1 of this decision must not use confidential information received from competent authorities and other public authorities or from financial market participants and other parties except for the purposes of carrying out the duties assigned to ESMA by the Regulation.
- (3) Information disclosed to national supervisory authorities remains subject to the conditions of professional secrecy.
- (4) Members of the Board of Supervisors and the Management Board, the Executive Director and members of ESMA's staff, including secondees and all other persons carrying out tasks for ESMA on a contractual basis shall respect the requirements relating to processing of personal data under Regulation (EC) No 45/2001 when handling and disclosing confidential information.

## **Article 3 – Internal procedures**

- (1) Persons referred to in Article 1 whilst performing their duties must:
  - (a) observe absolute confidentiality concerning ESMA's affairs, other than as required to perform their usual duties;
  - (b) keep information confidential, even if it is favourable and not adverse to the financial market participant concerned;
  - (c) take particular care in casual, social or other contact with journalists, financial market participants and individuals and other people operating in the financial markets; and
  - (d) seek guidance if they are at all uncertain as to whether confidential information can be disclosed.



- (2) ESMA's affairs include all aspects of ESMA's duties, activities, committees, stakeholder and working groups, whether or not related to particular financial market participants.
- (3) Sources of guidance include ESMA's legal service.

#### **Article 4 – Acceptance of appointments after duties have ceased**

- (1) Article 16 of the Staff Regulations require former staff members to inform ESMA if they intend to engage in an occupational activity within two years of leaving its service. If there is a conflict of interest ESMA has a right to take certain action to protect its interests.
- (2) Article 70(1) of the Regulation applies Article 16 of the Staff Regulations to members of the Board of Supervisors and the Management Board and to officials seconded by Member States on a temporary basis. ESMA's decision on outside activities and assignments shall also apply by analogy.
- (3) In applying Article 16 of the Staff Regulations and ESMA's decision on outside activities and assignments to members of the Board of Supervisors and the Management Board, any necessary notifications shall be made to the Chairperson (in place of the Appointing Authority) who shall consult the Management Board (in place of ESMA's Joint Committee).

#### **Article 5 – Final provisions**

This decision enters into force immediately.

Done at Paris on 11 January 2011

Carlos Tavares  
Vice-Chair  
For the Management Board



## **Annex**

### **Excerpts of legislation applying professional secrecy requirements**

#### *Article 339 of the Treaty on the Functioning of the European Union*

The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

#### *Article 70 of the ESMA Regulation*

- (1) Members of the Board of Supervisors and the Management Board, the Executive Director, and members of the staff of the Authority including officials seconded by Member States on a temporary basis and all other persons carrying out tasks for the Authority on a contractual basis shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased.

Article 16 of the Staff Regulations shall apply to them.

In accordance with the Staff Regulations, the staff shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence staff members of the Authority in the performance of their tasks.

- (2) Without prejudice to cases covered by criminal law, any confidential information received by persons referred to in paragraph 1 whilst performing their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial market participants cannot be identified.

Moreover, the obligation under paragraph 1 and the first subparagraph of this paragraph shall not prevent the Authority and the national supervisory authorities from using the information for the enforcement of the acts referred to in Article 1(2), and in particular for legal procedures for the adoption of decisions.

- (3) Paragraphs 1 and 2 shall not prevent the Authority from exchanging information with national supervisory authorities in accordance with this Regulation and other Union legislation applicable to financial market participants.

That information shall be subject to the conditions of professional secrecy referred to in paragraphs 1 and 2. The Authority shall lay down in its internal rules of procedure the practical arrangements for implementing the confidentiality rules referred to in paragraphs 1 and 2.



### *Article 16 of the Staff Regulations*

An official shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Officials intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service shall inform their institution thereof. If that activity is related to the work carried out by the official during the last three years of service and could lead to a conflict with the legitimate interests of the institution, the Appointing Authority may, having regard to the interests of the service, either forbid him from undertaking it or give its approval subject to any conditions it thinks fit. The institution shall, after consulting the Joint Committee, notify its decision within 30 working days of being so informed. If no such notification has been made by the end of that period, this shall be deemed to constitute implicit acceptance.