DECISION OF THE BOARD OF SUPERVISORS

Rules of procedure on breach of Union law investigations

The Board of Supervisors

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council establishing the European Securities and Markets Authority (the "Regulation" and "ESMA"), in particular Article 17 thereof,

Having regard to the Decision of the EEA Joint Committee No 201/2016 of 30 September 2016 amending Annex IX (Financial Services) to the EEA Agreement (2017/278)\(^1\)

Whereas:

(1) Article 17 of the Regulation provides for ESMA to investigate non-application by competent authorities of the acts referred to in Article 1(2) of the Regulation, or their application in a way which appears to be a breach of Union law.

(2) Article 6 of the Multilateral Memorandum of Understanding on cooperation, information exchange and consultation between the EFTA Surveillance Authority and the ESAs provides the framework for actions under Article 17 of the ESMA Regulation as incorporated in the EEA Agreement.

(3) Although decisions on initiating investigations remain within ESMA's discretion, for reasons of transparency and legal certainty, these rules of procedure ("Rules of Procedure") should set out factors, criteria and other related matters to be taken into account in relation to requests to initiate investigations that are received from third parties or, to the extent relevant, to ESMA's own initiative investigations.

(4) According to Article 41(1) of the Regulation, the Board of Supervisors may provide for the delegation of certain decisions. In order to meet the very short timescales provided in the Regulation for carrying out an investigation and making any necessary recommendations to competent authorities, decisions on initiating investigations should be taken by the Chairperson.

Has adopted this decision:

Chapter 1: Scope

Article 1 – Scope and application of the Rules

This Decision sets out the procedures for applying Article 17 of the Regulation on investigating breaches of Union law. They shall apply to requests to investigate received by ESMA as well as, to the extent relevant, own initiative investigations in the absence of a request.

\(^1\) OJ L46, 23.02.2017, p. 4.
Chapter 2: Request to investigate a breach of Union law

Article 2 – The Requester

(1) Requests to investigate an alleged breach or non-application of Union law (“Request”) may be made by one or more competent authorities, the European Parliament, the Council, the European Commission or the relevant stakeholder group (“Requester”).

(2) The Chairperson may also initiate investigations on his/her own initiative and for that purpose may take into account any Request made to ESMA by any other legal or natural person (also referred to as a "Requester") pointing to measures or practices of a competent authority indicating a breach or non-application of Union law.

(3) Requesters shall not have to demonstrate a formal interest; nor shall they have to prove that they are principally and directly concerned by the breach or non-application which is the subject of the Request.

(4) ESMA shall determine whether further action should be taken on a Request in accordance with these Rules of Procedure.

Article 3 – Submission of a Request and admissibility criteria

(1) Requests shall be sent to ESMA by electronic mail or by post using the complaint form which is available on ESMA’s website. The relevant contact details shall be defined by the Executive Director and may be updated periodically. Requests shall be made in one of the official languages of the Union.

(2) To be admissible, a Request shall

(a) set out a clear grievance explaining how a competent authority has not applied the acts referred to in Article 1(2) of the Regulation, or has applied them in a way which appears to be a breach of Union law, including the technical standards established in accordance with Articles 10 to 15 of the Regulation, in particular a failure of a competent authority to ensure that a financial market participant satisfies the requirements laid down in those acts; and

(b) not fall into one of the categories set out in Annex I.

Article 4 – Preliminary enquiry

The Chairperson may invite the competent authority concerned, the Requester or any other legal or natural person to provide information within a specified period.

Article 5 – Closure of the Request without opening an investigation

(1) The Chairperson may close the Request without initiating an investigation, where he/she considers that (i) the Request is inadmissible; or (ii) the Request is admissible but an investigation should not be initiated, as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex 2.

(2) In the event that the Chairperson closes the Request without initiating an investigation, the fact that the Request has been closed shall be notified to the Requester and, if the competent authority concerned has been notified of the Request, to that authority. The Requester shall also be informed of appropriate alternative forms of redress, such as recourse to national courts, the European Ombudsman, a national ombudsman or any other national or international complaints procedure.
Chapter 3: Investigation of an alleged breach or non-application of Union law

Article 6 – Initiation of the investigation

(1) If the Chairperson determines that a request is admissible and that an investigation should be initiated, the Chairperson shall inform the Vice-Chairperson about the proposal to initiate an investigation.

(2) If the Vice-Chairperson objects to this proposal within five working days, the Chairperson shall review his/her position.

(3) The Requester and the competent authority concerned shall be informed of the initiation of an investigation.

(4) The date of this communication to the competent authority concerned shall be considered to be the date of the initiation of ESMA’s investigation.

Article 7 – Investigation

(1) Where an investigation has been initiated, the Chairperson shall be responsible for investigating the alleged breach or non-application of Union law.

(2) The Chairperson may request additional information from the competent authority concerned in accordance with Article 17(2) of the Regulation.

(3) The Chairperson may request additional information from any other relevant legal or natural person.

(4) The Chairperson shall set clear deadlines for the transmission of information.

(5) The methodology applied across investigations by investigating staff shall be consistent.

Article 8 – Conclusion of the investigation

(1) Within five weeks of initiating an investigation, the Chairperson shall conclude whether he/she considers there has been a breach of Union law or whether to close the investigation without issuing a recommendation.

(2) The Chairperson shall consult the Vice-Chairperson before making his/her conclusion on the basis of non-anonymised information.

(3) If the Vice-Chairperson objects to this conclusion within five working days, the Chairperson shall review his/her position. The Chairperson shall include the views of the Vice-Chairperson in the investigation report accompanying the draft recommendation.

Article 9 – Closure of an investigation without issuing a recommendation

The Requester and the competent authority concerned shall be informed of the reasons for closing the investigation. The Requester shall be also informed of appropriate alternative forms of redress, such as recourse to national courts, the European Ombudsman, a national ombudsman or any other national or international complaints procedure.

Article 10 – Breach or non-application of Union law

(1) If the Chairperson concludes that there has been a breach of Union law, he/she shall inform, in accordance with Article 39 of the Regulation, the competent authority concerned about the draft recommendation before its submission to the Board of Supervisors. He/she shall state the period within which the competent authority concerned may express its views.
(2) The draft recommendation shall:
   (a) set out the action necessary to comply with Union law;
   (b) state the reasons on which it is based; and
   (c) set a deadline within which the competent authority shall comply with it and report on compliance to the Chairperson.

(3) After hearing the views of the competent authority concerned, the Chairperson shall take a decision on whether to submit the recommendation for adoption to the Board of Supervisors and, if so, shall make any revisions to the draft recommendation considered necessary.

(4) In case the Chairperson decides to proceed as provided above, he/she shall submit the draft recommendation, the investigation report and the views of the competent authority concerned to the Board of Supervisors for decision.

(5) If the Board of Supervisors agrees to address a recommendation to the competent authority concerned, in accordance with Article 17(3) of the Regulation, that authority has ten working days from the receipt of the recommendation to inform the Chairperson of the steps it has taken or intends to take to ensure compliance with Union law. The Chairperson shall inform the Commission and the Board of Supervisors accordingly.

Chapter 4: Financial market participants

Article 11 – Individual decision addressed to financial market participants

(1) ESMA shall provide any necessary assistance to the Commission in relation to any formal opinion the Commission proposes to issue in case of non-compliance by the competent authority in accordance with Article 17(4) of the Regulation.

(2) When Article 17(6) of the Regulation applies, the Chairperson shall, where relevant, propose to the Board of Supervisors an individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under Union law. The decision may require the cessation of any practice. The Chairperson shall only propose this individual decision, where both of the conditions are met:
   (a) it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system; and
   (b) the relevant requirements of the acts referred to in Article 1(2) of the Regulation are directly applicable to financial market participants.

(3) The Chairperson shall inform the financial market participant in accordance with Article 39 of the Regulation. Article 10(1), 10(3) and 10(4) shall apply mutatis mutandis.

(4) A copy of the decision shall be provided to the competent authority concerned and to the Commission.

Chapter 5: Monitoring and publication

Article 12 – Publication

(1) A decision addressed to a financial market participant shall be published on ESMA’s website and
shall state the identity of the financial market participant concerned and the main content of the decision, unless such publication is in conflict with the legitimate interests of financial market participants in the protection of their business secrets or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system of the Union.

(2) ESMA shall publish such details as are appropriate in respect of any recommendation that has been addressed to a competent authority under these rules, after duly taking into consideration the constraints as referred to in Article 13(1). The Chairperson shall provide the Requester with any non-confidential details of the recommendation as appropriate in the circumstances, in line with the Code of Good Administrative Behaviour.

(3) In its annual report, ESMA shall set out which competent authorities and financial market participants have not complied with the formal opinions, recommendations or decisions referred to in Articles 11 and 12 of these Rules of Procedure.

Chapter 6: Final provisions

Article 13 – ESMA Staff

(1) The Chairperson shall be assisted on legal and policy issues by ESMA staff.

(2) Under the guidance of the Chairperson, ESMA staff shall in particular:
   (a) close complaints which are clearly inadmissible (e.g. complaints that set out a grievance which is clearly outside the scope of the acts referred to in Article 1(2) of the ESMA Regulation, or that are clearly related only to an act or omission of an individual market participant rather than of a relevant NCA, or that fail to indicate the personal details of the complainant),
   (b) ensure adequate record-keeping and,
   (c) prepare reporting.

Article 14 – Confidentiality

If the Requester is an individual, disclosure of his/her identity and of information submitted by him/her to the competent authority concerned is subject to the individual's prior agreement and must comply, inter alia, with European Parliament and Council Regulation (EC) No 45/2001 ².

The Rules of Procedure governing confidentiality in accordance with Article 70 of the Regulation and with ESMA’s Rules on Professional Secrecy and Confidentiality which lay down practical arrangements for the implementation of the Regulation, shall apply to these proceedings.

Article 15 – Conflict of interest

(1) The Chairperson shall seek to replace the Vice-Chairperson with a member of the Management Board, who will be appointed by it where any of the following situations applies:

   (i) the alleged breach of Union Law concerns a competent authority of the Member State of the Vice-Chairperson;
   (ii) the alleged breach of Union Law relates to a financial market participant established in the Member State of the Vice-Chairperson;

² European Parliament and Council Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.
(iii) any other conflict of interest of the Vice-Chairperson is identified.

(2) The Chairperson shall ensure that none of these situations apply to the member of the Management Board appointed to replace the Vice Chairperson.

(3) The member of the Management Board and/or the Board of Supervisors representing the competent authority to which the draft recommendation is addressed shall assess whether it is appropriate to participate in the decisions referred to in these Rules of Procedure.

Article 16 – Monitoring, recordkeeping and reporting to the Board of Supervisors

(1) The Chairperson shall take any necessary steps to monitor whether addressees of recommendations, formal opinions and individual decisions comply and shall report regularly to the Board of Supervisors on that compliance.

(2) The Chairperson shall maintain a record of the requests to investigate that it has received and of the decisions taken under this procedure and shall report that information annually to the Board of Supervisors on the basis of anonymised information.

Article 17-Requests concerning an EEA EFTA State

This Decision shall apply to investigations of an alleged breach or non-application of the EEA Agreement by a competent authority of an EEA EFTA State, and to requests to carry out such an investigation, with the following modifications:

(1) References to Union law shall be understood as references to the EEA Agreement.

(2) In Article 2(1), the Standing Committee of the EFTA States and the EFTA Surveillance Authority shall also be considered as ‘Requesters’.

(3) For the purpose of Article 6(3), the Chairperson shall inform the EFTA Surveillance Authority of the initiation of an investigation.

(4) For the purpose of Article 10(1), the Chairperson shall also inform the EFTA Surveillance Authority about the draft recommendation before its submission to the Board of Supervisors.

(5) For the purpose of Article 10(5), a copy of the recommendation shall be provided to the EFTA Surveillance Authority. The EEA EFTA competent authority concerned shall, within 10 working days of receipt of the recommendation, inform ESMA and the EFTA Surveillance Authority of the steps that it has taken or intends to take to ensure compliance with the EEA Agreement.

(6) Article 11(1) shall be replaced with the following: “Where the Chairperson considers that the EEA EFTA competent authority has not complied with the EEA Agreement within 1 month from receipt of the recommendation, the Chairperson may ask the EFTA Surveillance Authority to issue a formal opinion on the basis of the ESMA recommendation or, where new developments require it, may prepare a draft formal opinion to be submitted to the EFTA Surveillance Authority, on his own initiative or at the request of the EFTA Surveillance Authority. That draft formal opinion shall be based on the recommendation and shall be adopted as a draft formal opinion by the Board of Supervisors. The EEA EFTA competent authority shall, within 10 working days of receipt of any formal opinion adopted by the Surveillance Authority, inform ESMA and the EFTA Surveillance Authority of the steps it has taken or intends to take to comply with that formal opinion.”

(7) In Article 11(2), references to a decision shall be understood as references to a draft prepared by ESMA and to be adopted by the EFTA Surveillance Authority.

(8) Article 11(3) shall be replaced with the following: “The Chairperson shall inform the EFTA Surveillance Authority...”
Authority, setting a time limit within which the EFTA Surveillance Authority may allow any natural or legal person, including an EEA EFTA competent authority, which is the addressee of the decision to be taken to express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter.”

(9) Article 11(4) shall not apply.

(10) For the purpose of Article 12, the ESMA shall coordinate publication of any decision with the EFTA Surveillance Authority.

(11) Rules of Procedure of the ESMA Board of Supervisors shall apply for taking decisions in accordance to Articles 8, 10 and 11.

**Article 18 – Executive Director**

The Executive Director shall establish the necessary internal procedures for the implementation of this Decision.

**Article 19 – Entry into force**

This decision enters into force the day following its adoption.

Done at Copenhagen on 19 June 2012.
Amended at Paris on 9 July 2014.
Amended at Paris on 5 July 2017

Steven Maijoor
Chair
For the Board of Supervisors
ANNEX I

Inadmissible Requests

A request is inadmissible if:

1. it is anonymous, fails to show the address of the sender or shows an incomplete address;
2. it fails to set out a grievance;
3. it sets out a grievance which is outside the scope of the acts referred to in Article 1(2) of the Regulation;
4. it fails to refer, explicitly or implicitly, to a competent authority to which the alleged breach of Union law may be attributed;
5. it concerns the acts or omissions of a private person or body, unless the request reveals the involvement of competent authorities or alleges their failure to act in response to those acts or omissions;
6. it sets out a grievance which is materially the same as one for which ESMA has already informed the Requester of its position or has adopted a clear, public and consistent position.
ANNEX II

Positive investigation factors

1. The alleged breach undermines the foundations of the rule of law (for example, systemic infringements, breaches of human rights or fundamental freedoms);

2. The alleged breach concerns a repeated or systemic infringement (for example a pattern of complaints indicating systematic incorrect application, interpretation, practice or approach of the competent authority concerned) or a general policy approach;

3. The alleged breach may have a significant, direct impact on ESMA’s objectives concerning: contributing to the short, medium and long-term stability and effectiveness of the financial system, functioning of the internal market; integrity, transparency, efficiency and orderly functioning of financial markets; preventing regulatory arbitrage and promoting equal conditions of competition; and enhancing customer protection.

Negative investigation factors

4. The Request is more suitable to be dealt with by another person or body, such as inter alia, the European Commission, another European Supervisory Authority, a national competent authority, a national complaints scheme or a court;

5. The Request is more suitable to be dealt with by other means (for example peer review, mediation, guidelines);

6. The Request appears frivolous or vexatious;

7. The Request sets out a grievance which does not relate to a clear and unconditional obligation in an act referred to in Article 1(2) of the Regulation.