



BoA D 2020 01

DECISION

given by

the

BOARD OF APPEAL
OF THE EUROPEAN SUPERVISORY AUTHORITIES

under Article 60.2 Regulation (EU) No 1095/2010
and the Board of Appeal's Rules of Procedure (BoA 2019 04)

In the appeal case brought by

Jeffrey Michael Howerton

against

The European Securities and Markets Authority

Decision Ref.: 2020-D-01

Board of Appeal

Marco Lamandini (President)

Lars Afrell

Giuseppe Godano

Katalin Mero

Beata Maria Mrozowska

Michele Siri

Place of this decision: Paris

Date: [9] October 2020

APPEAL under Article 60 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council (the “ESAs Regulations”)

1. This is the decision of the Joint Board of Appeal of the European Supervisory Authorities on the appeal filed by the appellant Jeffrey Michael Howerton (“Howerton” or “appellant”) under Article 60 of the ESAs Regulations.

Background of facts

2. Between 5 and 6 July 2020 the appellant sent six requests to investigate the following national competent authorities under Article 17 of Regulation (EU) No 1095/2010: (1) the AFM, (2) the AMF, (3) the CySEC; (4) the CSSF, (5) the FCA and (6) the MFSA. The complaints relate to intellectual property rights regarding a TV script that the appellant wanted to sell to Netflix and allegations of abuse and more by several persons who, according to the appellant, would have attended Brown University at the same time as he attended it and would now be working for different law enforcement authorities such as the FBI, the California Department of Justice and the Mossad.
3. ESMA assessed the content of the six requests to investigate and concluded that the facts that were described in the requests were outside the scope of ESMA’s remit because they did not fall under any of the Union acts referred to in Article 1(2) of Regulation (EU) No 1095/2010. The appellant was informed of this conclusion by ESMA on 20 July 2020, by e-mail, which ESMA described as the “Contested Conclusion”. The same day the appellant asked ESMA to reconsider its position as expressed in the Contested Conclusion.
4. On 3 August 2020 ESMA staff sent an additional email to the appellant confirming the initial position as expressed in the Contested Conclusion of 20 July 2020.
5. The appeal against the Contested Conclusion was filed on 3 August 2020 and was notified to ESMA.
6. On 17 August 2020 the President, having consulted with the Board of Appeal, issued the first directions of case management, asking the parties to address the issue of admissibility of the appeal, as follows.

“Having regard to the subject-matter of the appeal and to Article 9 of the Rules of Procedures the Board shall first examine whether the appeal is admissible before examining whether it is founded, also in the spirit of assisting the parties in timely identifying the proper venue for the discussion and/or adjudication of the matter.

Subject to the view of the parties, in light of Articles 9 and 6(6) of the Rules of Procedure, the President proposes giving ESMA three weeks from the notice of these directions to respond on the admissibility of the appeal, and the appellant two weeks to reply.

In the event the appeal is determined to be admissible by the Board of Appeal, both parties shall be then granted in due course, with other directions of case management, appropriate terms for their submissions in the merits.

The parties are asked to confirm this proposal with the Secretariat and raise any other points they wish to raise at this stage.

The President wishes also to inform the parties that the filing and service of any further communication between the Parties and between the Parties and the Board of Appeal and its Secretariat (including the filing and service of the Respondent's response pursuant to Article 6 of the Rules of Procedure and of any other submissions of the parties) may take place by email. The acting secretariat of the Board of Appeal (boardofappeal@eba.europa.eu) must always be copied.

The parties shall be further informed, in due course, about the composition of the Board of Appeal according to Article 3(4) of the BoA Rules of Procedure".

7. In response of the directions of the President, neither party raised any other points and both acted in accordance with these directions. On 7 September 2020 ESMA filed its written submissions concerning the admissibility of the appeal. On 17 September 2020, the appellant submitted a brief reply.
8. On 8 September 2020 the Secretariat sent an email to both parties, informing on the composition of the Board to determine on this appeal as follows:

"The President thanks the ESMA for its written submissions concerning the admissibility of the appeal delivered on 7 September 2020. As indicated in the directions sent to the parties on 17 August 2020, the appellant has now two weeks to reply.

Furthermore, the parties are hereby informed about the sitting composition of the Board of Appeal according to Article 3(4) of the BoA Rules of Procedure:

- Marco Lamandini (President and Rapporteur)
- Lars Afrell
- Giuseppe Godano
- Katalin Mérió
- Beata Mrozowska
- Michele Siri

The contentions of the parties on the admissibility of the appeal.

The appellant

9. In its Notice of Appeal, the appellant complains that ESMA decided not to investigate further his complaints, and not to start any breach of Union law proceedings under Article 17 of Regulation (EU) No. 1095/2010 against the six national competent authorities mentioned in the complaint and argues that ESMA appears to have dismissed the appellant's concerns "based on its own participation in the same system [of European financial supervisory authorities]", disregarding the merits of the complaint. The appellant further argues that he believes the appeal is admissible under Article 17 of Regulation (UE) No 1095/2010 and ESMA "could have opted to investigate but choose not to for other reasons".

ESMA

10. ESMA submits that the appeal is inadmissible for several reasons. First, because the Contested Conclusion is not a decision within the meaning of Article 60(1) of Regulation (EU) No 1095/2010 because the facts described by the appellant in his complaint against the 6 national supervisory authorities did not fall within the scope of any of the acts referred to in Article 1(2) of Regulation (EU) No 1095/2010. Second, because ESMA has discretion to decide whether or not to initiate an investigation under Article 17 of Regulation (EU) No 1095/2010, in particular when it acts on its own initiative upon request of a person who is not one of the entities expressly mentioned in Article 17. Article 17(2) expressly acknowledges such discretion by indicating that ESMA will investigate an alleged breach or non-application of Union law (solely) “where appropriate”. ESMA further refers, in this context, to case law of the CJEU and to the decision of the Board of Appeal of 10 September 2018 and to the amendments to Article 17(2) adopted by Regulation (EU) 2019/2175 and concludes that, for these reasons, the Board of Appeal lacks competence to hear the present appeal.

Discussion by the Board of Appeal of the parties’ contentions

11. The Board of Appeal has read with great attention the 54-pages of the appeal, describing the appellant’s claims and his suffering.

12. However, the Board of Appeal fails to see how the facts described in the appeal, and previously in the complaint submitted to ESMA, may involve securities markets or any other subject-matter within the remit of ESMA and of the Board of Appeal. The facts described by the appellant first in the complaints sent to six national competent authorities (AFM, AMF, CySEC, CSSF, FCA and MFSA), then in the complaint received by ESMA and finally in the appeal, relate, indeed, to intellectual property rights regarding a TV script the appellant wanted to sell to Netflix and allegations of abuse by several persons. They do not relate in any way to aspects under the supervision of the relevant six national authorities and of ESMA. The Board of Appeal do not see, therefore, how the six national financial supervisory authorities and ESMA could investigate and take supervisory steps with regard to the facts described by the appellant in his complaints and in the appeal.

13. In the circumstances, therefore, in the Board of Appeal’s view, ESMA rightly considered that the facts that were described in the requests were outside the scope of ESMA’s remit because they did not fall under any of the Union acts referred to in Article 1(2) of Regulation 1095/2010. Article 1(2) reads as follows:

“2. The Authority shall act within the powers conferred by this Regulation and within the scope of Directives 97/9/EC, 98/26/EC, 2001/34/EC, 2002/47/EC, 2004/109/EC, 2009/65/EC, Directive 2011/61/EU of the European Parliament and of the Council, Regulation (EC) No 1060/2009 and Directive 2014/65/EU of the European Parliament and of the Council, Regulation (EU) 2017/1129 of the European Parliament and of the Council, and to the extent that those acts apply to firms providing investment services or to collective investment undertakings marketing their units or shares and the competent authorities that supervise them, within the relevant parts of, Directives 2002/87/EC and 2002/65/EC, including all directives, regulations, and

decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority.

The Authority shall contribute to the work of the European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council related to the prevention of the use of the financial system for the purpose of money laundering or terrorist financing in accordance with Directive (EU) 2015/849 of the European Parliament and of the Council and Regulation (EU) No 1093/2010. The Authority shall decide on its agreement in accordance with Article 9a(9) of Regulation (EU) No 1093/2010.

14. The Board of Appeal shares the view of ESMA that it is doubtful that a communication to a party, such as the Contested Conclusion, inasmuch as it simply informs the requesting party that his or her complaint is beyond the scope of ESMA remit - and cannot be considered, therefore, to the effect of any determination on own initiative of ESMA under Article 17 of Regulation (EU) No 1095/2010 – may be seen as a decision according to Article 17 and thus as a decision within the meaning of Article 60(1) of Regulation (EU) No 1095/2010. Article 60(1) reads as follows:

“1. Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person” (emphasis added)

This translates into a first reason of inadmissibility of the present appeal.

15. A second, and concurrent, reason of inadmissibility stems from the case-law of the Court of Justice. The court, in its judgments of 9 September 2015, T-660/14 *SV Capital OÜ v EBA*, T-660/14, EU:T:2015:608 and, on appeal, of 14 December 2016, *SV Capital OÜ v EBA*, C-577/15 P, EU:C:2016:947 clarified that a decision adopted by one of the ESAs (in that case, the European Banking Authority; but the same principle applies in the present case, where the relevant ESA is ESMA) not to initiate a proceedings under Article 17 is an act which is not reviewable by the Board of Appeal. Thus, even assuming that the Contested Conclusion were to be considered a decision to the effect of Article 17 and Article 60 of Regulation (EU) No 1095/2010 (as the Board of Appeal believes it is not), the Contested Conclusion could not be appealed before the Board of Appeal.
16. This is also in line with the Board of Appeal precedents following the CJEU judgment. In *Kluge v. EBA* (BoA/2016/001) the appellants sought to appeal under Article 60(1) EBA Regulation the authority’s decision *not to* open an investigation on alleged breaches of Directive 2006/48/EC by the *Finantsinspeksioon*, the Estonian Financial Supervisory Authority. EBA relied on *SV Capital* to object to the BoA’s competence, arguing that private individuals, like the appellant, may request the EBA to initiate an investigation against a competent authority, but if EBA refuses, they lack a right of appeal because they are not among the “qualified” entities listed in Article 17(2) EBA

Regulation and thus are not ‘addressees’ of the decision. The BoA followed *SV Capital* and found that it lacked competence to decide on the appeal.

17. The same rationale was applied in *B v ESMA* (BoA D/2018/02), an appeal against a decision of ESMA’s Chair *not to* open a formal investigation against the *Cyprus Securities and Exchange Commission* (CySEC) under Article 17 of the ESMA Regulation, for alleged infringements of MiFID and EU rules on capital adequacy. Upon admissibility, ESMA argued that the appellant was not a “qualified” entity referred to in article 17(2) of ESMA Regulation as entitled to request an investigation, and thus the Board of Appeal was not competent to hear its appeal. The appellant suggested that ESMA might have been requested to open an investigation also by article 17(2) entities, and asked for a copy of the ESMA conclusion, to which ESMA had denied access pursuant to an alleged exemption under Article 4(2) and (3) of Regulation (EC) No 1049/2001 (Access to Documents Regulation). The Board acknowledged the appellant’s personal interest in the decision, as well as the more general interest in transparency, but since ESMA had clearly stated that no Article 17(2) entity had requested an investigation, and there was no reason to doubt such statement the Board concluded that it had no competence to hear the appeal.
18. *IPE v. ESMA* (2014/BOA/05) was another appeal against an ESMA decision not to open an investigation on its own initiative for an alleged breach of Union law where the Board upheld the *SV Capital v. EBA* position that the power to investigate is discretionary. Thus, the appeal was inadmissible.
19. In the result, although it will be apparent from the above that the Board has fully appreciated the importance for the appellant of the matters discussed in this appeal, the Board considers that the appeal, for the reasons stated above, is inadmissible.

The decision

On these grounds the Board of Appeal unanimously decides to dismiss the appeal as inadmissible.

The original of this Decision is signed by the Members of the Board in electronic format, as authorised by Article 22.2 of the Rules of Procedure and countersigned by hand by the Secretariat.

Lars Afrell
(SIGNED)

Giuseppe Godano
(SIGNED)

Marco Lamandini (President)
(SIGNED)

Katalin Mero
(SIGNED)

Beata Mrozowska
(SIGNED)

Michele Siri
(SIGNED)

On behalf of the Secretariat
Tijmen Swank
(SIGNED)

A signed copy of the decision is held by the Secretariat.