

## DECISION OF THE BOARD OF SUPERVISORS

### Rules of procedure on mediation

#### 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/EC<sup>1</sup> (the “Regulation” and “ESMA”), and in particular Articles 19, 21(4), 31(2)(c) and 41(1) and (6) 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)<sup>2</sup>,

Whereas:

- (1) Article 8(1)(b) of the Regulation assigns ESMA the task of mediating and settling disagreements between competent authorities.
- (2) According to Article 19(1) of the Regulation, in the cases specified in the legislative acts referred to in Article 1(2) of that Regulation, ESMA may assist the competent authorities in settling disagreements (i) at the request of one or more of the competent authorities concerned or (ii) on its own initiative where so provided by the acts referred to in Article 1(2) of the Regulation and a disagreement between competent authorities can objectively be determined.
- (3) Article 21(4) of the Regulation provides that ESMA shall have a legally binding mediation role to resolve disputes between competent authorities within colleges of supervisors in accordance with the procedure set out in Article 19 of the Regulation.
- (4) According to Article 41(1) of the Regulation, the Board of Supervisors may provide for the delegation of certain clearly defined tasks and decisions to internal committees, to the Management Board or to the Chair. In order to streamline the mediation process, the Chair should assess if the conditions to have recourse to mediation are met and should act as the mediator during the conciliation phase. If the competent authorities concerned

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

<sup>2</sup> OJ L 334, 27.12.2019, p. 1.

fail to reach an agreement within the conciliation phase, according to Article 41(3) of the Regulation, for the purposes of Article 19 of the Regulation, the Chair shall propose a decision to convene a Mediation Panel to be adopted by the Board of Supervisors and the Mediation Panel should propose the decisions for adoption by the Board of Supervisors pursuant to Article 41(5) of the Regulation.

- (5) Article 31(2)(c) of the Regulation provides that ESMA shall promote a coordinated Union response, inter alia, by carrying out non-binding mediation upon a request from the competent authorities or on its own initiative. It is appropriate to align the procedure for non-binding mediation with the procedure for binding mediation insofar as possible to ensure a robust framework applies. By way of exception, to improve ESMA's capacity to undertake non-binding mediation, with the agreement of the parties to non-binding mediation, the Chair should be able to delegate the role of mediator in the conciliation phase to a member of the Board of Supervisors, the Executive Director or a Head of Department of ESMA.
- (6) In cases where a disagreement involves a competent authority from an EEA EFTA State, the process of settlement has to take into account the role of the EFTA Surveillance Authority and the competent authorities of the EEA EFTA States, pursuant to the Decision of the EEA Joint Committee No 201/2016. It should also take into account Article 8 of the Multilateral Memorandum of Understanding on cooperation, information exchange and consultation between the EFTA Surveillance Authority and the ESAs providing the framework for actions under Article 19 of the ESMA Regulation as incorporated in the EEA Agreement.
- (7) According to the fourth subparagraph of Article 1(5) of the Regulation, when carrying out the tasks, ESMA shall act independently, objectively and in a non-discriminatory and transparent manner, in the interests of the Union as a whole, and shall respect, wherever relevant, the principle of proportionality. In addition, pursuant to Article 42(1) of the Regulation, when carrying out the tasks conferred upon them by this Regulation, the members of the Board of Supervisors 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 or from any other public or private body. This should be without prejudice to the possibility of the members of the Mediation Panel and Board of Supervisors to consult internally with their national competent authorities,

**Has adopted this decision:**

## **CHAPTER 1**

### ***General provisions***

#### **Article 1 – Mediation tasks of ESMA**

These Rules of Procedure regulate ESMA's mediation process, including the set-up and functioning of the Mediation Panel, for the purposes of facilitating the impartial settlement of disagreements between competent authorities under a binding mediation process pursuant to Article 19 as well as under a non-binding mediation process pursuant to Article 31(2)(c) of the Regulation.

## **CHAPTER 2**

### ***Binding mediation***

#### **Article 2 – The conciliation phase**

- (1) In accordance with the conditions set out in Article 19 of the Regulation, ESMA may assist in the settlement of a disagreement:
  - (a) upon a competent authority which is a party to the disagreement filing with ESMA the request set out in a template adopted by the Chair available on ESMA's website; or
  - (b) on ESMA's own initiative.
- (2) After verifying that the relevant legal requirements are met, the Chair shall:
  - (a) in the case of a request referred to in paragraph 1(a), accept that request; or
  - (b) in the case of an own initiative mediation referred to in paragraph 1(b), decide whether ESMA should act on its own initiative.
- (3) Where the Chair decides to mediate, the Chair shall set the period for conciliation between the competent authorities taking into account any relevant time periods specified in the acts referred to in Article 1(2) of the Regulation as well as the complexity and urgency of the matter. The Chair shall act as a mediator and facilitate an agreement among the parties. For this purpose, the Chair may require the parties to provide any relevant information and summon them to participate in meetings.
- (4) If the competent authorities concerned fail to reach an agreement within the conciliation phase, the Chair shall report back to the Board of Supervisors in accordance with Article 11 and launch a call for participation in a Mediation Panel to be convened in accordance with Article 8 of these Rules of Procedure. The Chair may express his/her own remarks on the outcome of the conciliation phase. The call for participation should include a

general description of the nature of the disagreement, reference to the relevant Union legislative act and the identity of the parties.

- (5) The Chair shall inform the parties to the mediation of any decision taken pursuant to this Article.

### **Article 3 – Decision phase**

- (1) Upon the start of the decision phase pursuant to Article 19(3) of the Regulation, the Mediation Panel shall set for the parties:
  - (a) a deadline for the transmission to the Mediation Panel and the other parties of their allegations accompanied by the relevant documentation;
  - (b) a subsequent deadline to reply to the allegations of the other parties.
- (2) The Mediation Panel may summon the parties, and, where appropriate, other relevant experts, for their testimony.
- (3) Before proposing the decision to the Board of Supervisors, in accordance with Article 39 of the Regulation, the Mediation Panel shall inform the parties of its intention to propose the decision, setting a time limit within which the parties may express their views on the matter. The time limit shall take full account of the relevant time periods specified in the acts referred to in Article 1(2) of the Regulation as well as the urgency, complexity and potential consequences of the matter.
- (4) The Mediation Panel shall decide whether to propose a decision for final adoption by the Board of Supervisors. Any dissenting view by a member of the Mediation Panel shall be reported to the Board of Supervisors with the proposed decision. If no decision is proposed, the Mediation Panel shall report back to the Board of Supervisors expressing its own remarks on the outcome of the procedure.
- (5) Any proposed decision shall:
  - (a) state the identity of the addressees;
  - (b) state the reasons on which it is based;
  - (c) require a party or parties to take specific action or to refrain from action in order to settle the matter, including revoking or amending a decision already taken by the party concerned or making use of any of the powers provided under the relevant Union law;
  - (d) inform the addressees of the legal remedies available under the Regulation;
  - (e) set a deadline within which the addressees shall comply with it and report on

compliance to ESMA;

- (f) set out the views expressed by the parties on the proposed decision; and
  - (g) state whether the decision should be made public in accordance with Article 39(6) of the Regulation.
- (6) The Board of Supervisors shall adopt a final decision pursuant to Articles 19(3) and 44(4) of the Regulation and decide on its publication in accordance with Article 39(6) of the Regulation.
- (7) Where the Board of Supervisors has addressed a decision under Article 19(3) of the Regulation to a party and the Mediation Panel considers that the party is not complying with that decision, and thereby is failing to ensure that a financial market participant complies with requirements directly applicable to it by virtue of the acts referred to in Article 1(2) of the Regulation, the Mediation Panel, where appropriate, shall propose to the Board of Supervisors an individual decision to be adopted in accordance with Articles 19(4) and 44(4) of the Regulation addressed to a financial market participant requiring the necessary action to comply with its obligations under Union law, including the cessation of any practice. Paragraphs (3) to (6) shall apply mutatis mutandis.
- (8) Members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole when deliberating and deciding on the settlement of disagreements.
- (9) The proceedings of the Board of Supervisors shall be secret pending the settlement of the disagreement. The members of the Board of Supervisors shall not divulge information concerning the settlement of a disagreement or discuss it with any person outside those participating in the settlement process, except staff of their respective competent authorities on a need-to-know basis for the specific purpose of receiving advice in relation to the settlement process.
- (10) No other persons shall interfere in the work of the Board of Supervisors or influence its members, except in accordance with the settlement process.
- (11) The members of the Board of Supervisors shall report to the Chair, without undue delay, any attempt to influence them in the performance of their tasks relating to the settlement of the disagreement. The Chair shall take any appropriate action to ensure the independence of the Board of Supervisors.

#### **Article 4 – Binding mediation involving a competent authority of an EEA EFTA State**

This decision shall apply for the settlement of a disagreement under binding mediation where at least one of the parties to the disagreement is a competent authority of an EEA EFTA State, with the following modifications:

- (a) a reference to Union acts shall apply to the extent that those acts are incorporated into the EEA Agreement and taking into account any adaptations made;
- (b) a competent authority of an EEA EFTA State shall submit a request for assistance to settle a disagreement to the EFTA Surveillance Authority, which shall without delay forward such request to ESMA accompanied by information regarding the relevant legal requirements of Union acts as incorporated into the EEA Agreement;
- (c) the Chair shall inform the EFTA Surveillance Authority without delay of requests made by competent authorities of Member States which involve competent authorities of EEA EFTA States;
- (d) for the purposes of Article 8, the EFTA Surveillance Authority shall be an observer to the Mediation Panel; to that end it shall make a declaration of commitment to act independently and objectively in its role as an observer to the Mediation Panel;
- (e) for the purposes of Article 3(3), the Chair shall:
  - (i) inform the EFTA Surveillance Authority that the Mediation Panel intends to propose a draft;
  - (ii) set a time limit within which the EFTA Surveillance Authority may allow any natural or legal person, including a competent authority, which is the addressee of the decision to be taken to express its views on the matter. The time limit shall take full account of the relevant time periods specified in the acts referred to in Article 1(2) of the Regulation as well as the urgency, complexity and potential consequences of the matter;
- (f) for the purposes of Article 3(4), the Mediation Panel shall submit a draft to the Board of Supervisors. ESMA shall without undue delay submit the draft adopted by the Board of Supervisors to the EFTA Surveillance Authority or inform the EFTA Surveillance Authority if the draft could not be adopted;
- (g) for the purposes of Article 3(6), ESMA shall coordinate publication of any decision with the EFTA Surveillance Authority;
- (h) Article 3(7) shall be replaced with the following: “Where a competent authority of

an EEA EFTA State does not comply with the decision of the EFTA Surveillance Authority, and thereby fails to ensure that a financial market participant complies with requirements directly applicable to it by virtue of the acts referred to in Article 1(2) of the Regulation as incorporated into the EEA Agreement, the EFTA Surveillance Authority shall without undue delay inform ESMA. The Mediation Panel shall, where appropriate, propose a draft requiring the necessary action to comply with obligations under the EEA Agreement, including the cessation of any practice. Paragraphs (3) to (6) shall apply mutatis mutandis. ESMA shall without undue delay submit a draft decision adopted by the Board of Supervisors to the EFTA Surveillance Authority.”

### **CHAPTER 3**

#### ***Non-binding mediation***

#### **Article 5 – Scope**

Pursuant to Article 31(2)(c) of the Regulation, in cases of disagreement between competent authorities, the competent authorities concerned may ask the Chair or the Chair may decide that ESMA should act on its own initiative to facilitate an agreement using non-binding mediation according to the rules set out in this Chapter. Any request by a competent authority or decision by the Chair that ESMA should act on its own initiative shall be without prejudice to the possibility for binding mediation to take place in accordance with Chapter 2.

#### **Article 6 – Procedure**

- (1) ESMA may assist in the settlement of a disagreement:
  - (a) upon a competent authority which is a party to the disagreement filing with ESMA the request set out in a template available on ESMA’s website; or
  - (b) on ESMA’s own initiative.
- (2) Where the Chair decides to assist on the basis of non-binding mediation under Article 31(2)(c) of the Regulation, the Chair shall act as mediator or, with the agreement of the parties to the non-binding mediation, the Chair may appoint another individual to act as mediator. Such individual may be a member of the Board of Supervisors, the Executive

Director or a Head of Department at ESMA. In that case, references to the 'Chair' in paragraph (3) of this Article, paragraphs (3) and (4) of Article 9 and paragraph (1) of Article 11, shall be construed as references to that individual.

- (3) The Chair shall facilitate an agreement among the parties. For this purpose, the Chair may require the parties to provide any relevant information and summon them to participate in meetings.
- (4) If the competent authorities concerned fail to reach an agreement, the Chair shall report back to the Board of Supervisors in accordance with Article 11 and launch a call for participation in a Panel to be convened in accordance with the procedure set out in Article 8. The Chair may express his/her own remarks on the outcome of the conciliation phase. The call for participation should include a general description of the nature of the disagreement, reference to the relevant Union legislative act and the identity of the parties.
- (5) Once the Board of Supervisors convenes the Mediation Panel, the Mediation Panel shall set for the competent authorities concerned:
  - (a) a deadline for the transmission to the Mediation Panel and the other competent authorities concerned of their allegations accompanied by the relevant documentation;
  - (b) a subsequent deadline to reply to the allegations of the other competent authorities concerned.
- (6) The Mediation Panel may summon the parties and, when appropriate, other relevant experts, for their testimony.
- (7) Before proposing the opinion, the Mediation Panel shall inform the parties of its intention to propose the opinion, setting a time limit within which the parties may express their views on the matter. The time limit shall take full account of any deadlines set in the acts referred to in Article 1(2) of the Regulation as well as the urgency, complexity and potential consequences of the matter.
- (8) The Mediation Panel shall propose the opinion for final adoption by the Board of Supervisors under Article 29(1)(a) in accordance with Article 44(1) of the Regulation. The proposed opinion shall include:
  - (a) the identity of the addressees;
  - (b) the opinion and the reasons on which it is based; and
  - (c) where appropriate, the deadline by which the addressees should take, or cease taking, any action proposed.
- (9) The proposed opinion shall be accompanied by materials setting out the views expressed by the parties on the proposed opinion, and by a recommendation on

whether publication of the opinion would be in conflict with the legitimate interests of financial market participants, or with 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.

- (10) The Mediation Panel may make such other recommendations to the Board of Supervisors as it considers appropriate.
- (11) Members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole when deliberating and deciding on non-binding mediation cases.
- (12) The proceedings of the Board of Supervisors shall be secret pending the settlement of the disagreement. The members of the Board of Supervisors shall not divulge information concerning the settlement of the disagreement or discuss it with any person outside those participating in the settlement process, except staff of their respective competent authorities on a need-to-know basis for the specific purpose of receiving advice in relation to the settlement process.
- (13) No other persons shall interfere in the work of the Board of Supervisors or influence its members, except in accordance with the proceedings of the settlement process.
- (14) The members of the Board of Supervisors shall report to the Chair, without undue delay, any attempt to influence them in the performance of their tasks relating to the settlement of disagreement. The Chair shall take any appropriate action to ensure the independence of the Board of Supervisors.

#### **Article 7 – Non-binding mediation involving a competent authority of an EEA EFTA State**

This decision shall apply for the settlement of a disagreement under non-binding mediation where at least one of the parties to the disagreement is a competent authority of an EEA EFTA State, with the following modifications:

- (a) a reference to Union acts shall apply to the extent that those acts are incorporated into the EEA Agreement and taking into account any adaptations made;
- (b) a competent authority of an EEA EFTA State shall submit a request for non-binding mediation to the EFTA Surveillance Authority, which shall without delay forward such request to ESMA accompanied by information regarding the

relevant legal requirements of Union acts as incorporated into the EEA Agreement;

- (c) the Chair shall inform the EFTA Surveillance Authority without delay of requests for non-binding mediation made by competent authorities of Member States which involve competent authorities of EEA EFTA States;
- (d) for the purposes of Article 6(7), the Chair shall also inform the EFTA Surveillance Authority that the Mediation Panel intends to propose an opinion or recommendation pursuant to Article 6(8).

## **CHAPTER 4**

### ***Establishment of the Mediation Panel and final provisions***

#### **Article 8 – Composition, appointment, convocation, voting and independence of the Mediation Panel**

- (1) Where the competent authorities concerned have not reached an agreement within a conciliation phase referred to in these Rules of Procedure the Chair shall propose to the Board of Supervisors the adoption of a decision to appoint and convene a Mediation Panel which shall consist of the Chair and six other members, following an open call for participation and after consulting the Management Board.
- (2) The Chair shall strive for a mixed and balanced composition of the Mediation Panels. The categories of eligible candidates for the Mediation Panels are listed in the Annex to these Rules of Procedure.
- (3) The Mediation Panels shall mainly be comprised of members of the Board of Supervisors. In addition, to ensure adequate expertise on the subject matter under consideration, senior staff from competent authorities and ESMA can be selected to be members of the Mediation Panels. Except where the subject matter under consideration concerns highly specialised and concentrated activities, the Mediation Panels shall not include more than one member working for the same national competent authority.
- (4) The decision to convene a Mediation Panel, for the purposes of binding mediation, shall be adopted by the Board of Supervisors in accordance with the fourth subparagraph of Article 44(1) of the Regulation and, for the purposes of non-binding mediation, by simple majority in accordance with the first subparagraph of Article 44(1) of that Regulation.
- (5) For the purposes of taking its decisions, each member of the Mediation Panel shall have

one vote and decisions of the Mediation Panel shall be taken where at least four members vote in favour.

- (6) The members of the Mediation Panel shall act independently and objectively in the sole interest of the Union as a whole. For that purpose, the members of the Mediation Panel shall make a written declaration of commitment and absence of any interest or external influence which may be considered prejudicial to their independence.
- (7) The proceedings of the Mediation Panel shall be secret pending their deliberations and actions taken in the course of binding or non-binding mediation, as the case may be. The members of the Mediation Panel shall not divulge information concerning the ongoing binding or non-binding mediation or discuss it with any person outside the Mediation Panel, except staff of their respective authorities on a need-to-know basis for the specific purpose of receiving advice in relation to settlement of the disagreement.
- (8) No other persons, including the members of the Board of Supervisors who are not members of the Mediation Panel, shall interfere in the work of the Mediation Panel.
- (9) The members of the Mediation Panel shall report to the Chair, without undue delay, any attempt to influence them in the performance of their tasks. The Chair shall take any appropriate action to ensure the independence of the Mediation Panel.

## **Article 9 – Data protection and confidentiality**

- (1) Any processing of personal data, including the exchange or transmission of personal data with the competent authority concerned shall be undertaken in accordance with Regulation (EU) 2018/1725<sup>3</sup> and ESMA's implementing rules<sup>4</sup>.
- (2) The rules governing confidentiality in accordance with Article 70 of the Regulation and ESMA's internal rules of procedure concerning professional secrecy<sup>5</sup> shall apply to the Chair and any person involved in the proceedings of the Mediation Panel.
- (3) A request may be made to the Chair or the Mediation Panel for the confidential treatment of a document or any information contained in a document to be filed in connection with a disagreement which is submitted to the Chair (until and during conciliation phase) or before the Mediation Panel (during decision/opinion phase), respectively.

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<sup>3</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

<sup>4</sup> Implementing rules on data protection (ESMA40-133- 716).

<sup>5</sup> Decision on Professional secrecy (ESMA40-1432018523-304).

- (4) In determining the request, the Chair or the Mediation Panel, as the case may be, shall have regard as appropriate to the relevant provisions of Regulation (EC) No 1049/2001<sup>6</sup>.

#### **Article 10 – Conflicts of interest**

- (1) When proposing a decision to convene a Mediation Panel, the Chair shall only propose the appointment of those candidates who:
  - (a) are not representatives of the competent authority party to the disagreement;
  - (b) have no direct links with the competent authority party to the disagreement; and
  - (c) have no interest in the matter subject to mediation.
- (2) Where the Mediation Panel decides to submit a draft opinion or decision for adoption to the Board of Supervisors, Title III of the Conflict of Interest Policy for Non-Staff<sup>7</sup> shall apply at the level of the Board of Supervisors.

#### **Article 11 – Monitoring, compliance and reporting**

- (1) The Chair shall take any necessary steps to monitor whether addressees of opinions or decisions adopted under these Rules of Procedure comply and report regularly to the Board of Supervisors. The Chair shall also report any non-compliance to the Mediation Panel.
- (2) In the report referred to in Article 3(5) of the Regulation, the Chair shall set out the nature and type of disagreements between competent authorities, the agreements reached and the decisions taken to settle such disagreements.
- (3) The ESMA annual report referred to in Article 53(7) of the Regulation shall state in a summary form the disagreements brought before ESMA, the decisions of the Mediation Panels and the decisions of the Board of Supervisors pursuant to Articles 19(3) (binding mediation, decision(s) addressed to competent authority/ies), 19(4) (binding mediation, decision(s) addressed to individual market participant(s)) and 31(2)(c) in conjunction with Article 29(1)(a) (non-binding mediation, opinions addressed to competent authorities) of the Regulation.

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<sup>6</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

<sup>7</sup> Conflict of interest policy for non-staff (ESMA-22-328-402).



- (4) ESMA staff shall maintain a record of the applications for mediation that it has received and of the decisions taken under this procedure and shall report that information annually to the Board of Supervisors.

#### **Article 12 – Communications**

Competent authorities shall be invited to agree to written and oral communications being in the working language of ESMA for the purposes of binding and non-binding mediation where possible.

#### **Article 13 – ESMA staff**

- (1) The Chair shall be assisted by ESMA staff.
- (2) ESMA staff shall provide operational and secretariat support to the Mediation Panel appointed in each case.

#### **Article 14 – Publication**

These Rules of Procedure, and any supplementary forms and guides that may be adopted by the Chair, shall be published on ESMA's website.

#### **Article 15 – Repeal**

This decision repeals the rules of procedure set out in ESMA Decision ESMA41-140-139.

#### **Article 16 – Entry into force**

This decision shall enter into force the day following its adoption.



Done at Paris, 22 March 2022

*[signed]*

For the Board of Supervisors

The Chair

Verena Ross

## **ANNEX**

### ***Categories of eligible candidates for the Mediation Panels***

1. Members of the Board of Supervisors;
2. Senior staff from the national competent authorities
3. Senior staff from ESMA.