

DECISION OF THE BOARD OF SUPERVISORS

Rules of procedure

The Board of Supervisors

Having regard to Regulation (EU) 2019/2175 of the European Parliament and of the Council¹ amending 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)² (the “Regulation” and “ESMA”), and in particular Article 44 thereof,

Having regard to Decision of the EEA Joint Committee No 201/2016 of 30 September 2016 amending Annex IX (Financial Services) to the EEA Agreement, in order to reflect the incorporation of the Regulation into the EEA Agreement.

Has decided as follows:

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¹ OJ L 334, 27.12.2019, p.1.

² OJ L 331, 15.12.2010, p. 84.

Article 1 – Composition

Members

- (1) The Board of Supervisors is composed of the following (each a “Member”):
 - (a) ESMA’s Chairperson who shall be voting except on decisions with regard to the acts specified in Articles 10 to 16 of the Regulation and measures and decisions adopted under the third subparagraph of Article 9(5) of the Regulation and Chapter VI of the Regulation.
 - (b) the heads of the national authorities competent for the supervision of financial market participants:
 - (i) in each EU Member State (each a “Voting Member”), who shall be voting,
 - (ii) in each EEA EFTA Member State - (each an “EEA EFTA Member”) who shall be non-voting;
 - (c) one representative of the European Commission who shall be non-voting;
 - (d) one representative of the European Systemic Risk Board who shall be non-voting;
 - (e) one representative of the European Banking Authority who shall be non-voting;
 - (f) one representative of the European Insurance and Occupational Pensions Authority who shall be non-voting; and
 - (g) one representative of the EFTA Surveillance Authority who shall be non-voting.
- (2) In Member States where there is more than one authority responsible for the supervision according to the Regulation, those authorities shall agree on a common representative. Nevertheless, when an item to be discussed by the Board of Supervisors does not fall within the competence of the national authority being represented by a Member, that Member may bring a representative from the relevant national authority, who shall be non-voting.
- (3) For the purpose of acting within the scope of Directive 97/9/EC on investor-protection schemes, the Member of the Board of Supervisors referred to in paragraph 1(b) may, where appropriate, be accompanied by a representative from the relevant bodies which administer investor compensation schemes in each Member State, who shall be non-voting.
- (4) Where the Member referred to in paragraph 1(b) is not responsible for the enforcement of consumer protection rules, the Member may decide to invite a representative from the Member State’s consumer protection authority, who shall be non-voting. In the case where



the responsibility for consumer protection is shared by several authorities in a Member State, those authorities shall agree on a common representative.

Observers

- (5) The Board of Supervisors may decide to admit additional observers and invite experts.
- (6) In accordance with Article 75(2) of the Regulation, representatives of third countries shall be entitled to attend the Board of Supervisors meetings as an observer under the relevant provisions of any agreement concluded with the Union providing for such representation. Such representatives shall not attend any discussions relating to individual financial market participants, except where there is a direct interest.
- (7) Observers may include any State which has applied for membership of the European Union, on condition that the accession negotiations have been successfully completed.

Executive Director

- (8) The Executive Director participates in meetings of the Board of Supervisors without the right to vote.

Advisers

- (9) Members and observers may each be accompanied at meetings of the Board of Supervisors by one adviser. The Chairperson and Executive Director may be assisted by other ESMA staff.

Notification of documents

- (10) ESMA staff shall maintain a list of the Members and observers and of alternates nominated in accordance with Article 5(8). Members and observers shall notify the Chairperson in writing of the email addresses to which notifications required by these rules of procedure shall be sent and shall inform the Chairperson of any necessary change.

Article 2 – Tasks and powers

- (1) The Board of Supervisors shall have the tasks specified in Article 43 of the Regulation and any other tasks provided for in Union acts.
- (2) The Board of Supervisors shall, in accordance with Article 45(1) of the Regulation, elect the members of the Management Board. The Board of Supervisors shall adopt a decision specifying the process for such elections.

- (3) The Board of Supervisors may establish internal committees for specific tasks attributed to it.
- (4) The Board of Supervisors may establish internal committees for specific tasks attributed to the Management Board upon request from the Management Board or from the Chairperson.
- (5) 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 Chairperson.
- (6) The Board of Supervisors shall, on the proposal of the Chairperson after consulting the Management Board, take decisions on the convening of independent panels for the purposes of Articles 17,19 and 22(4) first subparagraph of the Regulation and convening of an independent panel for that purpose.

Article 3 – Chairmanship and Vice-Chairmanship

- (1) Meetings of the Board of Supervisors shall be chaired by the Chairperson.
- (2) The Board of Supervisors shall elect, from among its Voting Members, a Vice-Chairperson. The Vice-Chairperson shall not be elected from amongst the members of the Management Board. The Vice-Chairperson shall carry out the functions of the Chairperson in his absence or in cases where the Board of Supervisors evaluates the results achieved during the first term of office of the Chairperson in accordance with Article 48(4) of the Regulation.
- (3) Elections shall normally take place at the meeting preceding the expiry of the Vice-Chairperson's term of office or the date on which the position is expected to fall vacant. Where the position falls vacant unexpectedly, an election shall take place within three months.
- (4) The term of office of the Vice-Chairperson shall be two and a half years unless elected to fill a vacancy in the office in which case it shall be the remainder of the predecessor's term. The term of office shall in any event expire on ceasing to be a member of the Board of Supervisors. The term of office may be renewed once.
- (5) If both the Chairperson and the Vice-Chairperson are absent or unable to attend a meeting, those Members present shall elect a Member to chair the meeting.

Article 4 – Decision making procedures

Quorum

- (1) In order for the Board of Supervisors to vote, there shall be a quorum of two-thirds of the Voting Members.
- (2) If the quorum is not met, the Chairperson may convene an extraordinary meeting at which decisions may be taken without quorum.

Voting

- (3) The Chairperson tables items for decision. The Chairperson shall have the prerogative to call a vote at any time. Without prejudice to that power and to the effectiveness of ESMA's decision-making procedures, the Board of Supervisors shall strive for consensus when taking its decisions.
- (4) The Vice-Chairperson shall vote on behalf of the Chairperson in his/her absence whenever explicitly instructed by the Chairperson.
- (5) Decisions of the Board of Supervisors shall be taken by a simple majority of its Voting Members unless otherwise stated. Each Voting Member shall have one vote. A simple majority is achieved where more Voting Members vote in favour of a proposal than vote against it. Abstentions will not be counted as approvals or as objections and will not be considered when calculating the number of votes cast.
- (6) For acts relating to draft technical standards and guidelines and recommendations specified in Articles 10 to 16 of the Regulation, and measures and decisions adopted on financial provisions under the third subparagraph of Article 9(5) of the Regulation and Chapter VI of the Regulation, the Board of Supervisors shall take decisions on the basis of a qualified majority of its Voting Members, as defined in Article 16(4) of the Treaty on European Union ("TEU"). The Chairperson shall not vote on these decisions.
- (7) When a decision is to be adopted by the Board of Supervisors by a qualified majority, it shall be adopted if there are at least 55% of the Voting Members in favour and coming from competent authorities from Member States comprising at least 65% of the population of the Union.
- (8) For the purpose of paragraph 7, population figures shall be calculated using the population figures adopted by the Council of the European Union and in force at the relevant time for the purpose of adopting its own decisions by a qualified majority.
- (9) With regard to the composition of the panels in accordance with paragraphs 2,3 and 4 of Article 41 of the Regulation, the Board of Supervisors, when considering the proposals by the Chairperson, shall strive for consensus. In the absence of consensus, decisions of the

Board of Supervisors shall be taken by a majority of three quarters of its voting members. Each voting member shall have one vote.

- (10) With regard to the composition of the peer review committees referred to in Article 30(2) of the Regulation, Members of the Board of Supervisors shall strive for consensus. The Chairperson's proposal shall be considered approved unless the Board of Supervisors adopts a decision to reject it within ten calendar days by majority of three quarters of its voting members. Each voting Member shall have one vote.
- (11) ESMA staff shall maintain a record of votes taken on the adoption of acts.
- (12) Three voting members of the Board of Supervisors may request the Board of Supervisors to decide by simple majority whether (i) to address 'Questions and Answers' as set out in paragraph 1 of Article 16b of the Regulation as Guidelines pursuant to Article 16 of the Regulation, (ii) to request advice from the Securities and Markets Stakeholder Group (SMSG), (iii) to review questions and answers at appropriate intervals, (iv) to conduct open public consultations or (v) to analyse potential related costs and benefits.

Written procedure

- (13) Where appropriate, decisions may be taken by written procedure. In principle, all Voting Members should express their approval (I agree), objection (I disagree) or express abstention (I abstain). An abstention does not count as a yes or a no but reduces the total votes accordingly.
- (14) A proposal from the Chairperson shall be circulated to the Board of Supervisors:
 - (a) stating the time and date by which votes must be cast;
 - (b) stating whether a failure to vote in accordance with the principles detailed under paragraph 13 will be considered a vote for the proposal, and whether a minimum number of votes is required;
 - (c) where, exceptionally, the period for casting votes is less than 10 calendar days, giving the reason for the short period;
 - (d) describing the key issues and whether the decision proposed is consensual or controversial;
 - (e) justifying the use of written procedure where it is used in relation to the adoption of draft technical standards; and
 - (f) providing any other material considered necessary for making the decision that has not previously been forwarded to the Board of Supervisors.
- (15) Votes on decisions being taken by written procedure shall be in written form.

- (16) Where the Chairperson has informed the Board of Supervisors that a failure to vote will be considered a vote for a proposal, if within 48 hours three or more Voting Members request in writing to the Chair that a failure to vote should not be considered a vote for the proposal then:
- (a) a failure to vote shall not be considered a vote for the proposal;
 - (b) two-thirds of the Voting Members shall be required to express objection, approval or abstention;
 - (c) the time and date by which votes must be cast shall if necessary be extended to ensure a minimum of 24 hours for Voting Members to vote on the revised basis; and
 - (d) the Chairperson shall notify the Board of Supervisors accordingly.
- (17) The result of a written procedure shall be notified without delay to the Board of Supervisors.
- (18) With regard to the decisions in accordance with Articles 17, 19 and 30 of the Regulation the Board of Supervisors shall vote on the proposed decisions in a written procedure. The voting members of the Board of Supervisors shall have eight (8) working days to vote. Each voting member shall have one vote. The proposed decision shall be considered adopted unless a simple majority of voting members of the Board of Supervisors objects. Abstentions shall not be counted as approvals or as objections and shall not be considered when calculating the number of votes cast. If three voting members of the Board of Supervisors object to the written procedure, the draft decision shall be discussed and decided on by the Board of Supervisors in accordance with the procedure set out in Article 4(3) of these Rules.

Specific (types of) decisions

- (19) The Board of Supervisors has agreed different arrangements for taking specific decisions or specific types of decisions as set out in Annex I.
- (20) With regards to the draft decisions submitted to the Board of Supervisors by the CCP Supervisory Committee on issues in accordance with specific provisions of Regulation 648/2012³ (EMIR), other than those referred to in paragraph 21, the Board of Supervisors shall take a decision:
- (a) within 10 working days in case of draft decisions related to third country CCPs (TC-CCP) with respect to i) the determination of whether an applicant TC-CCP is non systemically important (Tier 1 CCP) or systemically important (Tier 2 CCP) or of

³ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, as amended

such substantial systemic importance that it should not be recognised, ii) the recognition of a TC-CCPs, and its review or withdrawal, and iii) Tier 2 CCPs' compliance with requirements relating to margins, liquidity risk controls, collateral, settlement and interoperability arrangements (i.e. the requirements of Articles 41, 44, 46, 50 and 54 of EMIR);

- (b) within 3 working days in case of all other draft decisions.
- (21) With regards to the draft decisions submitted to the Board of Supervisors by the CCP Supervisory Committee on validation of significant changes to the models and parameters of CCPs in accordance with Article 49 of EMIR, the Board of Supervisors shall take a decision:
- (a) within 3 working days in case of draft decisions validating significant changes;
 - (b) within 10 working days in case of draft decisions denying the validation of significant changes.

Finalising documents

- (22) The text of acts adopted by the Board of Supervisors shall be signed by the Chairperson.

Article 5 – Meetings

Convening meetings

- (1) Meetings of the Board of Supervisors shall be convened by the Chairperson at his or her own initiative or at the request of one third of its Members. Invitations shall be sent to email addresses notified by each Member and observer to the Chairperson for this purpose.
- (2) Meetings of the Board of Supervisors shall normally be held at ESMA's premises. Meetings may be held by telephone or video conference call, or other technical means.
- (3) Meeting dates and places of future meetings shall be notified by the Chairperson to the Board of Supervisors as soon as practicable. When circumstances require, and provided a majority of the Members does not object, the Chairperson may change the date or place of a meeting. Notification of such change shall be given to Members and observers as soon as practicable and normally no later than three weeks before the original or revised date of the start of the meeting, whichever is the earlier.
- (4) When a meeting is requested by one third of the Members, the Chairperson shall convene a meeting to take place within six weeks of receipt of the request, or as soon as practicable in urgent cases.

- (5) An agenda, accompanied by the relevant material for decision making, should be forwarded to the Board of Supervisors at least 10 days prior to a meeting. Material relating to a proposed decision to submit draft regulatory technical standards or implementing technical standards under Articles 10 or 15 respectively of the Regulation shall be forwarded to the Board of Supervisors at least 10 days prior to a meeting. Material shall be provided as soon as practicable in urgent cases.
- (6) The Board of Supervisors shall convene meetings with the Securities and Markets Stakeholder Group regularly, at least twice per year.

Attendance

- (7) Members shall meet in person at least twice a year.
- (8) Each competent authority shall appoint, in writing, a high-level alternate from its authority, who may replace its Member, in case this person is prevented from attending or is carrying out the functions of the Chairperson in his absence.
- (9) Non-Voting Members and observers - with the exception of the Executive Director, the EEA EFTA Members and the representative of the EFTA Surveillance Authority - shall not attend any discussions within the Board of Supervisors relating to individual financial institutions, unless otherwise provided for in Article 75 of the Regulation or in the acts referred to in Article 1(2) of the Regulation.

Agenda

- (10) The Chairperson shall set the agenda for each meeting to be adopted by the Board of Supervisors.

Summary of conclusions

- (11) ESMA staff shall prepare a summary of conclusions of each meeting of the Board of Supervisors setting out the discussions held, and decisions taken. The summary of conclusions shall record the outcome of any vote on the adoption of draft regulatory technical standards or draft implementing technical standards under Articles 10 and 15 of the Regulation respectively. The draft summary of conclusions shall be forwarded to Members and observers within two weeks of the meeting. Once approved by the Members, the summary of conclusions shall be signed by the Chairperson and made public.
- (12) Within at most six weeks from the date of a meeting of the Board of Supervisors, the summary of conclusions is forwarded to the European Parliament and made public. This version shall not reflect discussions within the Board of Supervisors relating to individual financial market participants.

Article 6 – Code of conduct

Independence

- (1) When carrying out the tasks conferred upon the Board of Supervisors by the Regulation, the Chairperson and the Members 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.
- (2) Member States, Union institutions or bodies, and any other public or private body, shall not seek to influence the Members of the Board of Supervisors in the performance of their tasks.

Confidentiality

- (3) All proceedings of the Board of Supervisors shall be confidential. Anyone attending shall respect their confidentiality and shall comply with ESMA's internal rules of procedure concerning professional secrecy.

Transparency

- (4) The decisions and minutes of meetings of the Board of Supervisors shall be subject to the provisions on access to documents in Article 72 of the Regulation and measures taken for its implementation.

Conflicts of interest

- (5) In line with article 42(3) ESMA has a conflict of interest policy for non-staff in place as set out in ESMA22-328-402.

Article 7 – Provisions for EEA EFTA Members and the EFTA Surveillance Authority

- (1) The competent authorities of the EEA EFTA Member States and the EFTA Surveillance Authority shall, but for the right to vote, have the same rights and obligations as the competent authorities of the EU Member States in the work of ESMA.
- (2) A Multilateral Memorandum of Understanding on cooperation, information exchange and consultation concluded between the EBA, EIOPA, ESMA and the EFTA Surveillance Authority in 2018 further clarifies practical arrangements of the cooperation between these authorities in relation to the application of Union law as incorporated into the EEA Agreement.

- (3) When carrying out the tasks conferred upon the Board of Supervisors by the Regulation, the EEA EFTA Members shall act independently and objectively in the sole interest of the EEA as a whole and shall neither seek nor take instructions from any government of a Member State or from any other public or private body.

Article 8 – Secretariat

- (1) The Executive Director shall provide a secretariat and the appropriate administrative support to enable the Board of Supervisors to carry out its work.

Article 9 – Final provisions

Correspondence

- (1) All correspondence with the Board of Supervisors shall be addressed to ESMA at its headquarters.

This Decision shall take effect on the day of its adoption and shall be made public.

Done at Paris on 11 January 2011 (ESMA/2011/BS/1)

Amended at Copenhagen on 19 June 2012 (ESMA/2012/BS/88)

Amended at Paris on 27 May 2013 (ESMA/2012/BS/88 rev1)

Amended at Paris on 10 December 2015 (ESMA/2012/BS/88 rev2)

Amended at Paris on 14 December 2016 (ESMA/2012/BS/88 rev3)

Amended at Paris on 16 January 2020 (ESMA22-328-266)

Amended at Paris on 12 March 2020 (ESMA22-328-266)

Steven Maijoor
Chair
For the Board of Supervisors



Annex 1 - Specific type of decisions and delegations

Specific types of decisions

1. Procedures under Article 23 of the Short Selling Regulation (ESMA/2013/BS/6 Annex 2)
2. Procedures under Article 27 of the Short Selling Regulation (ESMA/2012/BS/129 Annex 3)
3. Procedures under Article 28 of the Short Selling Regulation (ESMA/2012/BS/129 Annex 5)

Delegations from the Board of Supervisors to the Chairperson

1. Withdrawal of any outstanding exemptions a registered credit rating agency benefits from under the conditions laid down in Article 6(3) of Regulation on Credit Rating Agencies (ESMA/2016/BS/249)
2. Adoption of non-controversial changes to technical instructions on IT and data matters (ESMA74-362-111)
3. Approval of the update of the lists of Cross Border CRAs in the Memorandum of Understanding between ESMA and the Financial Conduct Authority (ESMA90-1-108)
4. Assessment regarding third country trading venues for the purposes of Articles 20 and 21 of MiFIR (ESMA71-155-5775)
5. Assessment regarding third country trading venues for the purposes of Articles 57(4) of MiFID (ESMA70-155-5905)
6. Adoption of opinions on pre-trade transparency waivers under MiFiD (ESMA41-137-1092)
7. Agreement and signature of the Memorandum of Understanding related to ESMA's monitoring of the on-going compliance with recognition conditions by CCPs and by CSDs established in the United Kingdom (ESMA70-151-2226)
8. Delegation of the adoption of new recognition decisions for CCPs and CSDs established in the United Kingdom (ESMA70-151-2227)
9. Withdrawal of the registration decisions of CRAs and TRs established in the United Kingdom (ESMA70-151-2228)
10. Procedure on letters or other appropriate documents specifically related to technical matters in relation to financial reporting and auditing to relevant external bodies (ESMA32-65-42)



Delegations from the Board of Supervisors to a Panel of the Board of Supervisors

1. Delegation of the task to analyse the T2S related information and to take decisions related to T2S matters in circumstances outside of Article 18(1) of the Regulation (ESMA/2015/BS/124)
2. Rules of Procedure of the Panel in Charge of the Assessment of the Completeness of the File Submitted by the Independent Investigating Officer (ESMA/2014/BS/229)