

DECISION OF THE MANAGEMENT BOARD

Adopting Rules of Procedure on Professional Secrecy for Non-Staff, and repealing Management Board Decision on Professional Secrecy of 11 January 2011 (ESMA/2011/MB/4)

The Management Board,

Having regard to the Treaty on the European Union, and in particular Articles 4(3) and 339 thereof,

Having regard to Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) (hereinafter “the Authority”), amending Decision No 716/2009/EC and repealing Commission decision 2009/77/EC, and in particular Articles 2(4), 41, 42 and 70 thereof,

Whereas:

- (1) Ensuring the Authority’s independence from undue influence from other government, regulatory or administrative bodies and authorities, as well as from private sector operators and external stakeholders, and preserving high standards of professional secrecy with respect to all Non-Staff involved in the Authority’s activities are crucial for the Authority's credibility and reputation.
- (2) All Non-Staff involved in the Authority’s activities should abide by the duty of professional secrecy, which entails the obligation not to disclose information received in this official capacity, unless it is explicitly permitted.
- (3) The Authority’s Board of Supervisors may establish internal committees or panels for specific tasks attributed to it and may provide for the delegation of certain clearly defined tasks and decisions to internal committees (typically known as “ESMA groups”) or panels.

- (4) The members of the Board of Supervisors are entitled to nominate a representative to any ESMA group; this person is considered to be a delegate of the appointing Board of Supervisors Member¹.
- (5) Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies, Regulation (EU) 648/2012 of the European Parliament and of the Council on OTC derivatives, and Regulation (EU) 2015/2365 of the European Parliament and of the Council on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 provide for their own professional secrecy arrangements.
- (6) Board of Supervisors and Management Board proceedings and the documents conferred thereof are confidential. Anyone attending their meetings should respect their confidentiality and comply with the rules of procedure of the Authority as regards the obligation of professional secrecy². For this purpose, due consideration should be given to the Authority's Data Classification Policy.³
- (7) By the same token, persons appointed by the members of the Board of Supervisors to ESMA groups should also respect the confidentiality of the documents and information they have been granted access to.⁴ In the event a member to an ESMA group fails to abide by this duty, his/her replacement may be sought.⁵
- (8) Members of the Board of Supervisors, their officially nominated alternates and non-voting members, Observers to the Board of Supervisors are required to submit a declaration on confidentiality and commitment whereby they declare the awareness of their obligations, as stipulated in Articles 1(2) and 2 (3) of the ESMA Management Board Decision Adopting a Policy on Independence and Decision Making Processes for Avoiding Conflicts of Interest (Conflict of interest Policy) for non-Staff (ESMA/2014/MB/60).
- (9) Sharing ESMA documents and information internally within the national competent authorities may be necessary for working purposes and should remain at the discretion and under the responsibility of the members of the Board of Supervisors.

¹ Article 28 of the Procedures for ESMA Groups (ESMA/2011/BS/236rev2)

² Article 6 (2) of the ESMA BoS decision on the Rules of procedure (ESMA/2012/BS/88)

³ ESMA/2014/INT/134

⁴ Article 30 (p) of the Procedures For ESMA Groups (ESMA/2011/BS/236rev2)

⁵ Idem Article 18(h)

- (10) Should the obligation of professional secrecy be breached by a person who is subject to this decision, the Authority should be able to take proportionate action in order to minimize the possibility that such a breach occurs again. For this purpose, The Authority's Board of Supervisors members should be held responsible for any unauthorised disclosure of ESMA Information that originated from their respective authorities, but not for those that might have originated from the other relevant national authorities referred to in Article 40 (4), (5).
- (11) In line with Article 68(1) of Regulation (EU) 1095/2010, ESMA staff, including the Chairperson and Executive Director of the Authority, is subject to the Staff Regulations of Officials of the European Union and Conditions of Employment of Other Servants of the European Union (the Staff Regulations). Article 17 of the Staff Regulations enshrines the principle of professional secrecy and ANNEX IX of the said Regulations provides for disciplinary proceedings in case of breach of the professional secrecy duty.
- (12) The Authority is in a position to investigate possible breaches of the Staff Regulations by its own staff, however, the Authority's investigative powers remain limited when it comes to the enquiry of possible breaches of the Staff Regulations that would be committed by staff of other EU bodies participating to its activities.
- (13) Similarly, the Authority is not in a position to take any direct action against a staff member of national competent authority; The Authority is only empowered to recommend action against those individuals in so far as they participate in an ESMA group as members or are advisers to the members and observers of the Board of Supervisors and the Management Board. The Authority's action is limited to recommending a change of the NCA representative in the ESMA Group to the concerned Board member.
- (14) While the administration of the enquiry is the responsibility of the Chairperson, the approval of the enquiry report including the recommendations for possible remedial measures is the competency of the Management Board. The Board of Supervisors takes the final decision on the remedial measures.
- (15) Sincere co-operation between the Authority and the national competent authorities represented in the Board of Supervisors, ensuring inter alia the flow of appropriate and reliable information between them, is important as regards ensuring

robust governance and the safeguarding of the obligations stemming from Regulation (EU)1095/2010 and in particular that of professional secrecy.

Has adopted this decision:

SECTION I - SCOPE AND DEFINITIONS

Article 1 – Subject-matter and Scope

(1) This Decision lays down the Authority's internal rules of procedure and the practical arrangements for implementing the confidentiality rules enshrined in Article 70 of Regulation (EU) No 1095/2010.

(2) The present Decision is applicable to:

- (1) Members of the Board of Supervisors and the Management Board, namely:
 - (a) voting members of the Board of Supervisors and, their alternates, voting members of the Management Board, with the exception of the Authority's Chairperson, and their alternates;
 - (b) non-voting members to the Board of Supervisors, with the exception of the Authority's Chairperson, and their alternates;
 - (c) any representatives of competent authorities referred to in Article 40(4) and (5) of Regulation (EU) No 1095/2010;
 - (d) observers to the Board of Supervisors, and observers to the Management Board, with the exception of the Authority's Executive Director.
- (2) Unless otherwise specified, it is also applicable to:
 - (a) members and observers to ESMA groups, with the exception of the Authority's staff, and
 - (b) advisers to the members and observers to the Board of Supervisors and the Management Board.

Article 2- Definitions

For the purposes of this Decision:

- (1) **ESMA Information** means all oral or written information, facts, data and any other matters, of which persons referred to in Article 1(2) acquire knowledge, directly or indirectly, as a result of their ESMA activities whether or not contained in a document

of any kind (electronic or on paper or any other medium) that is proprietary to or possessed by the Authority and has not been made public by the Authority. As regards written information, ESMA information therefore comprises documents classified as “ESMA REGULAR”, “ESMA RESTRICTED” and “ESMA CONFIDENTIAL” under the Authority’s data classification policy (ESMA/2014/INT/134). Accordingly, information classified as “PUBLIC” or information which has already been public is not in the scope of this decision.

- (2) **Unauthorised Disclosure of ESMA Information** means the act of intentionally or unintentionally disclosing ESMA Information to unauthorised recipients.

SECTION II - GENERAL PRINCIPLES ON PROFESSIONAL SECRECY

Article 3 – Professional Secrecy on ESMA Information

- (1) Persons referred to in Article 1(2) of this Decision, shall not divulge any ESMA Information received whilst performing their ESMA duties to any natural or legal person whatsoever except:
- (a) Internally within the competent authorities on a need-to-know basis, taking the Authority’s data classification policy into account;
 - (b) As stipulated in Article 70(1) and (2) of Regulation (EU) No 1095/2010:
 - i. For the enforcement of acts referred to in Article 1(2) of Regulation (EU) 1095/2010 and in particular for legal procedures for the adoption of decisions;
 - ii. When it is necessary for the instruction of cases covered by criminal law;
 - (c) When exchanging information with other national supervisory authorities, central banks, judicial authorities, national courts of auditors, and/or for parliamentary inquiries, in accordance with applicable legislation;
 - (d) When exchanging with national governments, on a need to know basis, and only to the extent necessary for these to be able to perform their functions:
 - i. summaries of the Authority’s policy activities;
 - ii. information necessary for the determination of the annual budget of the national competent authorities.

- (2) For any other situation, persons referred to in Article 1 (2) shall seek the Authority's prior consent. In this event, disclosure of ESMA Information could be permitted by the Authority's Chairperson on a case by case basis, taking into account the nature and classification of ESMA Information to be disclosed as well as its potential impact and detriment for the Authority.

Article 4—Professional Secrecy on ESMA Information on individual financial market participants

Persons referred to in Article 1(2) of this Decision shall not divulge any ESMA Information containing information or data relating to individual financial market participants received whilst performing their duties to any person or authority whatsoever except in summary or aggregate form, such that individual market participants cannot be identified, and only under the exceptions referred to in points a and b of Article 3 (1).

Article 5-Operational safeguards applicable to ESMA Information

- (1) Notwithstanding the exceptions or conditions stipulated in Articles 3 and 4 of this Decision, persons referred to in Article 1(2) shall, in the performance of their duties:
- (a) Observe confidentiality concerning the Authority's activities insofar as they would not already be in the public domain; Especially take extra care in casual, social, professional or other contact with journalists, financial market participants and individuals operating in the financial markets;
 - (b) Be aware and observe the Authority's Data Classification Policy, according to which all data owned, used, created, acquired, held or maintained by the Authority is classified into one of the following confidentiality levels: 'PUBLIC', 'ESMA REGULAR USE'; 'ESMA RESTRICTED USE'; 'ESMA CONFIDENTIAL USE'.
 - (c) In case of doubt, seek guidance from the Authority as to whether ESMA Information may be disclosed.
 - (d) Inform the Authority should they become aware of any unauthorised disclosure of ESMA Information.

(2) In particular, persons referred to in Article 1(2)(1) of this Decision shall, in the performance of their duties, ensure that:

- (a) Their respective authorities ensure a level of protection equivalent to that of the Authority's as regards ESMA Information, and
- (b) The staff of their respective authorities is made aware of the duty of professional secrecy towards the Authority, under Article 70(3) of Regulation (EU) No 1095/2010.

SECTION III- PROCEDURE FOR IDENTIFYING AND HANDLING POTENTIAL BREACHES OF PROFESSIONAL SECRECY

Article 6 – Decision to launch an enquiry

- (1) In case the Authority becomes aware of an alleged unauthorised disclosure of ESMA Information, the Chairperson of the Management Board, taking into account the nature and classification of ESMA Information disclosed as well as its impact and detriment for the Authority, may launch an enquiry.
- (2) If the Chairperson of the Management Board decides to launch an enquiry, he or she will inform the Management Board about this event.
- (3) The enquiry shall be conducted by the Chairperson of the Management Board. The Chairperson may delegate this task to a member of the Management Board. (the MB enquiry)
- (4) The Chairperson of the Management Board or, in case of delegation to one of its members, the member to whom the enquiry has been delegated, may be assisted by a staff member of the Authority. The Authority's Executive Director shall appoint the member of the Authority's staff to assist in the MB enquiry.

Article 7 – Conduct of the enquiry

- (1) In carrying out the MB enquiry, the person to whom this task is assigned shall be granted the right to:
 - (a) have access to ESMA documents and data which are relevant to the unauthorised disclosure of ESMA information;

- (b) have access to information from the competent authorities of the Member States according to Articles 2(4) and 35 of Regulation (EU) No 1095/2010 and in particular from the National Competent Authority which is most relevant for the enquiry, including from its internal audit service.
 - (c) be provided with the necessary resource and technical assistance from the Authority's staff and in particular from the Information and Communication Technology Unit of the Resources Department.
- (2) In case there are indications that the unauthorised disclosure of ESMA Information could be attributed to one of the persons listed in Article 1(2), the Chairperson of the Management Board or its member to whom the enquiry may have been delegated may directly invite the relevant persons identified in Article 1(2) (1) to provide information on the alleged unauthorised disclosure of ESMA Information. Should these persons wish to reply, information should be provided within a period not exceeding ten (10) working days. In case the unauthorised disclosure of ESMA information originated from any representative of competent authorities referred to in Article 40(4) and (5) of Regulation (EU) No 1095/2010, then this invitation shall be addressed to this person.
- (3) After the conclusion of the MB enquiry, the Chairperson of the Management Board or its member to whom the enquiry may have been delegated, shall adopt a report on its factual findings. Before the adoption, a draft version of the report shall be made available to the persons invited to provide information under paragraph (2) in order for them to be given the opportunity to present their views, perform an accuracy check and provide additional information, as the case may be, on corrective measures already put in place (or planned) in order to prevent future leaks of ESMA Information from happening at the concerned NCA. Should they wish to respond, their reply shall be provided in writing within a period not exceeding ten (10) working days.
- (4) The Management Board will duly consider any reply received, and will finalize its report. In doing so, it may recommend for the Board of Supervisors' consideration that specific remedial measures be put in place.
- (5) These remedial measures may consist of the following components:
 - (a) Measures to be decided upon by the Authority, such as:
 - i. Temporary restriction of the NCA concerned to have access to ESMA Information in the particular group or standing committee from which the ESMA Information subject to the unauthorized disclosure originated;
 - ii. Any other measure that would be deemed appropriate and available under Union Law.

- (b) An action plan to be recommended to be undertaken at the NCA concerned, which may consist of:
- i. The enquiry according to national law provisions of the alleged unauthorised disclosure of ESMA information, if not yet initiated.
 - ii. Possible preventative measures, such as the introduction of new internal procedures and/or arrangements at national level to safeguard professional secrecy in as far as ESMA information is concerned.
 - iii. Appointment of a new representative to an ESMA group or standing committee from which the ESMA Information subject to the unauthorised disclosure might have originated.
 - iv. Any other action that would be deemed appropriate and available under national law, such as recourse to internal audit services.

Article 8 – Board of Supervisors’ Review and Follow-up

- (1) The Management Board may decide to present the outcome of the MB enquiry along with the proposed remedial measures to the Board of Supervisors for information and/or decision; The identity of the person and the national competent authority, liable for the unauthorised disclosure of ESMA Information will be revealed, in order to create awareness and further impede any future possible recurrence of such an unauthorised disclosure of ESMA information. This revelation shall take place at the Board of Supervisors and is not meant to be or become public.
- (2) In case the Management Board decides to refer the outcome of the MB enquiry to the Board of Supervisors, the person identified in article 7(2) shall be invited to present his/her views before the Board of Supervisors during the discussion of this item.
- (3) In case a remedial action plan to be implemented at NCA level is recommended by the Board of Supervisors, the concerned NCA will report on the implementation at national level no later than three months after their adoption. Based on this update, and if satisfied, the Board of Supervisors will lift any other preventive measures imposed by the Authority under Article 7 (5) (a).

Article 9 – Conflict of interest

- (1) When performing their duties, under this decision, Management Board members shall refrain from potentially exposing themselves to conflicts of interests and are expected to particularly observe the Authority’s Policy on Independence and Decision Making Processes for avoiding Conflicts of Interest (Conflict of Interest Policy) for Non-Staff (ESMA/2014/MB/60).

- (2) Management Board members and the Authority's staff involved, are required to confirm that there is no conflict of interest with respect with the case examined, before assuming their tasks according to this decision.
- (3) If a Management Board member declares an interest in this context, or if his/her respective authority is mentioned in the case at hand, then this Management Board member will be restricted from participating to the deliberations on this subject or from being assigned the MB enquiry.
- (4) If a member of the Authority's staff declares an interest in this context, then he/she should be substituted.

SECTION IV – GENERAL PROVISIONS

Article 10- Data Protection

Persons subject to this decision shall respect the requirements relating to processing of personal data under Regulation (EC) No 45/2001 when handling and disclosing ESMA information.

Article 11- Repeal

From the entry into force of this Decision, the Management Board Decision on professional secrecy of 11 January 2011 (ESMA/2011/MB4) shall be repealed. References in other legal instruments to that Decision shall be construed as references to this Decision.

Article 11 – Entry into force

This Decision shall enter into force the day after its adoption and shall be made public.

Done at Paris on 25 January 2017

Steven Maijoor
Chair
For the Management Board