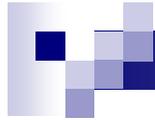


# Procedure for Single Case Decision Making before the European Securities and Markets Authority

Presentation for the **EU Ombudsman / ReNEUAL conference**

**Towards an EU administrative procedure law**

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I would like to express my gratitude  
to Stephen Karas, Head of the Unit Legal Cooperation and Convergence ESMA,  
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well as the other Polish individuals appointed to ESMA,  
for their valuable help;  
without their assistance this paper could not be made.

## At the beginning – a personal reflection:

- I am coming from a country with codified administrative procedure and therefore in every administrative matter, I am used to checking the procedural aspects. Particularly if the rights of the private parties involved have been properly safeguarded

- A high ranking officer of the Polish Financial Supervision Authority told me:

*„In a number of cases where we have to follow EU regulations or directives, often we are unable to follow the Code of Administrative Procedure of 1960 at the same time...”*

- Supervision over financial markets requires some corrections of traditional procedural rules

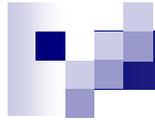
# The European System of Financial Supervision

- *"The crisis has proven that the current system of cooperation between national authorities whose powers are limited to individual Member States is insufficient as regards financial institutions that operate across borders".*

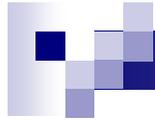
(Regulation (EU) No 1095/2010 (33))

- The European System of Financial Supervision ("**ESFS**") – an integrated network of national and Union Supervisory Authorities ("**ESAs**" or "**Authorities**")
- European Securities and Markets Authority ("**ESMA**")
- European Banking Authority ("**EBA**")
- European Insurance and Occupational Pensions Authority ("**EIOPA**")
- Joint Committee of the European Supervisory Authorities
- European Systemic Risk Board ("**ESRB**")

(Regulation (EU) No 1092/2010 (9))



- Day-to-day supervision over financial markets is left at the national level
- In the majority of cases competent authorities of member states shall be involved; but in some cases the Council, the Commission and ESRB may be involved as well
- As a result of involvement of several authorities in each case, emphasis is put on relations and cooperation between European Supervisory Authorities (“**ESAs**” or “**Authorities**”) and national authorities as well as on the internal decision making process within ESAs, not on procedure safeguarding rights of private parties (named financial market participants) involved
- Broad powers of ESAs on adoption of regulatory technical standards (qualified by us as rulemaking and therefore not covered by this presentation), adoption of guidelines and recommendations



Very similar powers of each European Supervisory Authority: ESMA, EBA, EIOPA, concerning supervision over the respective financial market,

but ESMA has some special powers. For instance:

- registration and supervision over credit rating agencies ("**CRA**")
- is involved in waivers of the obligation of regulated markets and MTFs to disclose the information concerning some transactions, as provided by MIFID Directive
- I was told that at the beginning of 2012, there are plans to make ESMA responsible for trade repositories and for granting or withdrawing their registration. Procedural aspects will be adopted by the European Parliament and the Council in the European Market Infrastructure Regulation

## Actions taken by ESMA towards competent authorities of member states and financial market participants:

- **Breach of Union law (Art. 17)** – (1) ESMA recommendation – (2) formal opinion of the Commission – (3) individual decision addressed to financial market participant.
- **Settlement of disagreements between competent authorities in cross-border situations (Art. 19)** – (1) conciliation – (2) decision to the competent authorities – (3) individual decision to financial market participant
- I was told that, on **Breach of Union Law** and **Settlement of Disagreements** procedures are currently drafted in close cooperation with EBA and EIOPA

## Actions taken by ESMA towards competent authorities of member states and financial market participants:

- **Action in emergency situations (Art. 18)** – (1) determination made by the Council, in consultation with the Commission and the ESRB – (2) the Authority may adopt individual decisions requiring competent authorities to take necessary action in accordance with the EU legislation; – (3) individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under that legislation, including the cessation of any practice;
- I was told that, on **Actions in emergency situations** discussions have been going on regarding the remit of powers granted. Procedures providing necessary flexibility to adequately react to various kinds of emergency situations will be developed accordingly
- **Temporary prohibition or restriction certain financial activities** that threaten the orderly functioning of financial markets or the stability of the whole or part of the financial system of the Union (Art. 9 sec. 5). The Regulation provides that Member State may request ESMA to reconsider its decision.
- I was told that, the future procedures will depend on provisions in future sectoral legislation.

## The procedure for single case decision-making – one short Article 39 in the entire Regulation

- Before making the decisions provided for in this Regulation, the Authority shall inform any named addressee of its intention to adopt the decision – **Right to be informed about proceedings pending**
- Setting a time frame in which the addressee may express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter – **Right to be heard – rather to comment**
- The decisions of the Authority shall state the reasons on which they are based – **Right to be given reasons**
- The addressees of decisions of the Authority shall be informed about legal remedies available under the Regulation – **Right to be informed about remedies**

- Once the Authority has made a decision pursuant to Article 18(3) or (4), it shall review that decision at appropriate intervals. **Obligation of the Authority to periodical review of the decision**
- The decisions shall be made public and shall state the identity of the competent authority or financial market participant concerned and the main content of the decision. **Obligation to publish the decision**
- Obligation to publish, 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. **Right to protect business secrets**

## Procedural rules concerning registration & supervision over credit rating agencies ("CRAs")

- Problems with credit rating agencies: major ones: S&P, Moody's, Fitch
- ESMA should be exclusively responsible for the registration and supervision of credit rating agencies in the Union. (Regulation EU no 513/2011 ["CRA II Regulation"] (6))

## Powers over credit rating agencies:

- registration of CRAs
- withdrawal of the registration
- request for information
- on site inspections
- imposing fines
- temporarily prohibit the CRA from issuing credit ratings with effect throughout the Union
- require the credit rating agency to bring the infringement to an end
- suspend the use, for regulatory purposes, of the credit ratings issued by the CRA

## Procedure concerning registration of CRA

- CRAs may apply to ESMA for certification
- ESMA shall, within 45 working days of the notification examine the application for registration. ESMA may extend the period of examination by 15 working days
- Decision on the withdrawal of registration shall take immediate effect throughout the Union, but within 5 working days of the adoption of a decision, ESMA shall notify its decision to the credit rating agency concerned
- When ESMA refuses to register the CRA or withdraws the registration of the CRA, it shall provide full reasons in its decision

## Few procedural rules in the Regulation concerning CRAs matters:

- Art. 21 to 25 provide procedural requirements for ESMA constant supervision; these procedural requirements have been heavily influenced by the Commission competition law enforcement procedures. Appointment of independent investigation officer – (2) investigation – (3) hearing – (4) decision of ESMA Board of Supervisors being either „supervisory measure” or imposition of a fine. The Commission shall adopt further rules of procedure for the exercise of power to impose fines, including provisions on rights of defence, temporal provisions, collection of fines and shall adopt detailed rules on the limitation periods for the imposition and enforcement of penalties
- **right to be heard** - upon completion of his investigation and before submitting the file with his findings to ESMA's Board of Supervisors, the investigating officer shall give the persons subject to investigation the opportunity to be heard on the matters being investigated.
- **access to files:**
  - after investigation, but before decision
  - in other matters access to files not restricted to certain period and with some exceptions (In case of penalties right of access to the file shall not extend to confidential information or internal preparatory documents of ESMA.)
- Further details will be adopted shortly in regulatory technical standards

## Waivers procedure

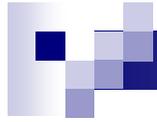
- Waivers of the obligation of regulated markets and MTFs to disclose certain information concerning transactions – discussion within internal groups of ESMA including Secondary Markets Committee, as well as the opinion of the ESMA voted on by the Board of Supervisors
- The procedure is rather an internal set of rules of conduct, not administrative procedure with some safeguard provisions concerning rights of interested third parties

# Appeal

- The Board of Appeal is a joint body of the ESA composed of six members and six alternates
- The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision. The Board of Appeal shall decide upon the appeal within 2 months after the appeal has been lodged
- An appeal lodged shall not have suspensive effect. However, the Board of Appeal may suspend the application of the contested decision
- The Board of Appeal shall invite the parties to the appeal proceedings to file observations on its own notifications or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make oral representations
- The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal
- The Board of Appeal shall adopt and make public its rules of procedure (not done yet)

## Few comments:

- ESAs bound by all procedural rules stemming from the treaties and compulsory for all the Union authorities, but:
  - procedure is focused on the regulation of cooperation of different authorities including ESMA internal bodies
  - some internal acts concerning procedure are still being drafted and discussed
  - different procedures for different types of matters, often to be adopted internally with limited common standard: independence of the ESMA officers; access to documents & information of private parties; on-site inspections; obligation to publish the decision and to protect secrets, confidentiality of the proceedings, private party's right to be heard, obligation to inform about decision and right to appeal
- Unification of the administrative procedure and expansion of rights of financial market participants and other private parties, can be done within the general regulation of the EU administrative procedure



**Thank You**