

DECISION OF THE BOARD OF SUPERVISORS

Rules of procedure on breach of Union law investigations

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/EC¹ (the “Regulation” and “ESMA”) as amended by Regulation (EU) 2019/2175², and in particular Articles 17, 17a, 39, 41 and 44 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)³,

Whereas:

- (1) Article 17 of the Regulation provides for ESMA to investigate the non-application by competent authorities of the acts referred to in Article 1(2) of the Regulation, or their application in a way which appears to be a breach of Union law.
- (2) Article 6 of the Multilateral Memorandum of Understanding on cooperation, information exchange and consultation between the EFTA Surveillance Authority and the ESAs provides the framework for actions under Article 17 of the ESMA Regulation as incorporated in the EEA Agreement.
- (3) Although decisions on initiating investigations into alleged non-application or breaches of Union law remain within ESMA's discretion, for reasons of transparency and legal certainty, these rules of procedure (“Rules of Procedure”) should set out factors, criteria and other related matters to be taken into account in relation to requests to initiate investigations that are received from third parties or, to the extent relevant, to ESMA's own initiative investigations. In line with Article 41(6) of the Regulation, these Rules of Procedure also include provisions regarding the independent panels to be convened in accordance with Article 41(2) of the Regulation.

¹ OJ L 331, 15.12.2010, p. 84.

² OJ L 334, 27.12.2019, p. 1.

³ OJ L46, 23.02.2017, p. 4.

- (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 Chairperson. In addition, according to Article 41(2) of the Regulation, for the purposes of Article 17 of the Regulation, the Chairperson shall propose a decision to convene an independent panel to be adopted by the Board of Supervisors. In order to streamline the process, decisions on initiating investigations should be taken by the Chairperson, whereas, pursuant to Article 41(5) of the Regulation, decisions on proposing recommendations for adoption by the Board of Supervisors or on closing investigations should be taken by the independent panel established in accordance with Article 41(2) of the Regulation.
- (5) According to the fourth paragraph of Article 1(5) of the Regulation, “when carrying out the tasks, the Authority 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”.
- (6) Therefore, without prejudice to the possibility for the Independent Panel and Board of Supervisors members to be advised internally within their competent authority, it is necessary to update ESMA’s rules of procedure on breach of Union law investigations (ESMA43-318-5630), in order to strengthen the existing safeguards for the independence of members of the appointed Independent Panels and the Board of Supervisors.

Has adopted this decision:

CHAPTER 1

Scope

Article 1 – Scope and application of the Rules

This Decision sets out the procedure for applying Article 17 of the Regulation on investigating breaches of Union law. The Rules of Procedure shall apply to requests to investigate a competent authority received by ESMA as well as, to the extent relevant, to breach of Union law investigations initiated by ESMA on its own initiative in the absence of a request.



CHAPTER 2

Request to investigate a breach of Union law

Article 2 – The Requester

- (1) Requests to investigate an alleged breach or non-application of Union law (“Request”) may be made by one or more competent authorities, the European Parliament, the Council, the European Commission or the Securities and Markets Stakeholder Group (“Requester”).
- (2) The Chairperson may also initiate investigations on his/her own initiative, including on the basis of well substantiated information received from any other legal or natural person (also referred to as a “Requester”) and pointing to measures or practices of a competent authority which appear to constitute a breach or non-application of Union law.
- (3) Requesters shall not have to demonstrate a formal interest; nor shall they have to prove that they are principally and directly concerned by the breach or non-application which is the subject of the Request.
- (4) ESMA shall outline how it intends to proceed with a Request and, where appropriate, investigate the alleged breach or non-application of Union law in accordance with these Rules of Procedure.

Article 3 – Submission of a Request and admissibility criteria

- (1) Requests shall be sent to ESMA by electronic mail or by post using the complaint form which is available on ESMA’s website. The relevant contact details shall be defined by the Executive Director and may be updated periodically. These contact details shall be published on ESMA’s website.
- (2) Requests shall be made in one of the official languages of the Union.
- (3) Where the Requester is a legal or natural person, the Request can be submitted anonymously or confidentially.
- (4) To be admissible, a Request shall:
 - (a) set out a clear grievance explaining how a competent authority has not applied the acts referred to in Article 1(2) of the Regulation, or has applied them in a way which appears to be a breach of Union law, including the technical standards established in accordance with Articles 10 to 15 of the Regulation, in particular a failure of a competent authority to ensure that a financial market participant satisfies the requirements laid down in those acts; and
 - (b) not fall into any of the categories set out in Annex I.



- (5) Without prejudice to its confidentiality obligations, ESMA shall inform the competent authorities about any admissible Request received about them.

Article 4 – Preliminary enquiry

- (1) The Chairperson may invite the competent authority concerned, the Requester or any other legal or natural person, including other competent authorities, to provide information within a specified period.
- (2) Where appropriate in order to resolve an alleged breach of Union law, the Chairperson may engage with the competent authority concerned in an attempt to reach agreement on actions to be taken by the competent authority concerned (“Settlement Discussions”).

Article 5 – Closure of the Request without opening an investigation

- (1) The Chairperson may close the Request without initiating an investigation, where he/she considers that:
 - (a) the Request is inadmissible;
 - (b) the Request is admissible, but an investigation should not be initiated, as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex II; or
 - (c) an agreement has been reached on actions to be taken by the concerned competent authority.
- (2) Where the Chairperson closes a Request without initiating an investigation, the fact that the Request has been closed shall be notified to the Requester and, if the competent authority concerned has been notified of the Request, to that authority. Where relevant, the Requester shall also be informed of appropriate alternative forms of redress, such as recourse to national courts, the European Ombudsman, a national ombudsman or any other national or international complaints procedure.

CHAPTER 3

Investigation of an alleged breach or non-application of Union law

Article 6 – Initiation of the investigation

- (1) If the Chairperson determines that a Request is admissible and that an investigation should be initiated, the Chairperson shall inform the Vice-Chairperson about the proposal to initiate an investigation.



- (2) Simultaneously, the Chairperson shall launch a call for participation in an independent panel to be convened in accordance with Article 7 of these Rules of Procedure ("Independent Panel").
- (3) If the Vice-Chairperson objects to the proposal to initiate an investigation within five working days, the Chairperson shall review his/her position.
- (4) The Requester and the competent authority concerned shall be informed of the initiation of an investigation. The date of this communication to the competent authority concerned shall be considered to be the date of the initiation of ESMA's investigation.

Article 7 – Composition, appointment, convocation and independence of the Independent Panel

- (1) Upon initiation of an investigation, the Chairperson shall, after consulting with the Management Board and in accordance with Article 41(2) of the Regulation, propose to the Board of Supervisors the adoption of a decision to appoint and convene an Independent Panel.
- (2) The Chairperson shall strive for a mixed and balanced composition of the Independent Panels. The categories of eligible candidates for the Independent Panels are listed in Annex III to these Rules of Procedure.
- (3) The Independent 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 Independent Panels. Except where the subject matter under consideration concerns highly specialised and concentrated activities, the Independent Panels shall not include more than one member working for the same national competent authority.
- (4) The decision to convene and appoint the Independent Panel shall be adopted by the Board of Supervisors in accordance with Article 44(1) of the Regulation.
- (5) When carrying out the tasks conferred upon them by the Regulation and these Rules of Procedure, the members of the Independent Panel shall act independently and objectively in the sole interest of the Union as a whole. For that purpose, the members of the Independent Panel shall make a written declaration of commitment and absence of any interest or external influence which may be considered prejudicial to their independence.
- (6) The proceedings of the Independent Panel shall be secret pending the closure of the investigation. The members of the Independent Panel shall not divulge information concerning the investigation or discuss it with any person outside the proceedings of the investigation, except staff of their respective competent authorities on a need-to-

know basis for the specific purpose of receiving advice in relation to the investigation proceedings.

- (7) No other persons, including the members of the Board of Supervisors who are not members of the Panel, shall interfere in the work of the Independent Panel, except in accordance with the proceedings of the investigation.
- (8) The members of the Independent Panel shall report to the Chairperson, without undue delay, any attempt to influence them in the performance of their tasks. The Chairperson shall take any appropriate action to ensure the independence of the Independent Panel.

Article 8 – Investigation

- (1) Where an investigation has been initiated, the Chairperson shall be responsible for investigating the alleged breach or non-application of Union law. In doing so, the Chairperson shall regularly update the Independent Panel and seek its steer on any key issues that may arise.
- (2) Where appropriate in order to resolve an alleged breach of Union law, the Chairperson may also engage with the competent authority concerned in Settlement Discussions. In considering whether to engage in Settlement Discussions with the competent authority concerned, the Chairperson shall have due regard to his/her previous efforts to settle the case with the competent authority concerned and the likelihood of a successful and timely outcome, as well as to the applicable legal timeframe for investigations.
- (3) The Chairperson may request additional information from the competent authority concerned or from any other competent authority in accordance with Article 17(2) of the Regulation.
- (4) The Chairperson may request additional information from any other relevant legal or natural person.
- (5) The Chairperson shall set clear deadlines for the transmission of information, with due regard to the applicable legal timeframe for investigations.
- (6) The methodology applied across investigations shall be consistent.

Article 9 – Conclusion of the investigation

- (1) Within three weeks of initiating an investigation, the Chairperson shall submit to the Independent Panel an investigation report setting out the findings and conclusions on:
 - (a) whether there has been a breach or non-application of Union law; or
 - (b) whether the investigation should be closed.

- (2) Together with the investigation report, the Chairperson shall submit the investigation file, including any documentation transmitted and submissions made by the competent authority concerned during the preliminary enquiry and the investigation.
- (3) Where the investigation report concludes that there has been a breach or non-application of Union law, the investigation report shall be accompanied by a draft recommendation.

The draft recommendation shall:

- (a) set out the action necessary for the competent authority concerned to comply with Union law;
 - (b) state the reasons on which it is based; and
 - (c) set a deadline within which the competent authority concerned shall comply with it and report on compliance to the Chairperson.
- (4) Where deemed appropriate to resolve a breach or non-application of Union law, the Independent Panel may engage with the competent authority concerned in an attempt to reach agreement on actions necessary for the competent authority to comply with Union law (also referred to as “Settlement Discussions”). In considering whether to engage in Settlement Discussions with the competent authority concerned, the Independent Panel shall have due regard to the previous efforts by the Chairperson to settle the case with the competent authority concerned and the likelihood of a successful and timely outcome, as well as to the applicable legal timeframe for investigations.
 - (5) The Independent Panel shall review all the documentation and decide whether:
 - (a) it intends to adopt the investigation report and the draft recommendation, as amended as appropriate; or
 - (b) to close the investigation without proposing the adoption of a draft recommendation by the Board of Supervisors. The decision to close the investigation shall be in written and duly reasoned.

Article 10 – Closure of an investigation without proposing the adoption of a draft recommendation by the Board of Supervisors

Where the Independent Panel closes the investigation without proposing a draft recommendation for adoption by the Board of Supervisors, the Requester and the competent authority concerned shall be informed of the reasons for closing the investigation. Where relevant, the Requester shall be also informed of appropriate alternative forms of redress, such as recourse to national courts, the European Ombudsman, a national ombudsman or any other national or international complaints procedure.

Article 11 – Breach or non-application of Union law

- (1) If the Independent Panel has the intention to conclude that there has been a breach or non-application of Union law, the Independent Panel shall, in accordance with Article 39 of the Regulation, inform the competent authority concerned about its intention to propose the adoption of a recommendation to the Board of Supervisors and provide it with the opportunity to make written submissions on the draft recommendation. The Independent Panel shall state the period within which the competent authority concerned may express its views. In its written submissions, the competent authority concerned shall set out all the facts known to it which are relevant and attach any relevant documents as proof of the facts set out.
- (2) After hearing the views of the competent authority concerned, the Independent Panel shall take a decision on whether to submit the draft recommendation to the Board of Supervisors for its adoption and, if so, shall make any revisions to the draft recommendation considered necessary.
- (3) Where the Independent Panel decides to proceed as provided above, it shall submit to the Board of Supervisors the investigation report, the draft recommendation and the investigatory file, including a copy of any written submissions made by the competent authority concerned as well as information about any Settlement Discussions held.
- (4) The Chairperson shall, in accordance with Article 39 of the Regulation, inform the competent authority concerned about the draft recommendation submitted by the Independent Panel on behalf of the Board of Supervisors and provide it with the opportunity to make written submissions. The Chairperson shall state the period within which the competent authority concerned may express its views, taking into account the overall duration of the investigation and the legal timeframe for the adoption of the recommendation. In its written submissions, the competent authority concerned shall set out any new facts known to it which are relevant, and which have not yet been presented during the investigation and attach any relevant documents as proof of the facts set out.
- (5) If proposed by the competent authority concerned, the Board of Supervisors may also decide to invite it to present its position orally in accordance with the Title III of the Conflict of Interest Policy for Non-Staff⁴.
- (6) The Board of Supervisors shall take a decision on whether to adopt the draft recommendation in accordance with Article 44(4) of the Regulation.
- (7) If the Board of Supervisors decides to adopt the draft recommendation and to address it to the competent authority concerned, in accordance with Article 17(3) of the Regulation, that authority has ten working days from the receipt of the recommendation to inform the Chairperson of the steps it has taken or intends to take

⁴ ESMA-22-328-402



to ensure compliance with Union law. The Chairperson shall inform the Commission and the Board of Supervisors accordingly.

- (8) When carrying out the tasks conferred upon them by the Regulation and these rules of procedure, the members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole.
- (9) The proceedings of the Board of Supervisors shall be secret pending the closure of the investigation. The members of the Board of Supervisors shall not divulge information concerning the investigation or discuss it with any person outside those participating in the investigation proceedings, except staff of their respective competent authorities on a need-to-know basis for the specific purpose of receiving advice in relation to the investigation proceedings.
- (10) 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 investigation.
- (11) The members of the Board of Supervisors shall report to the Chairperson, without undue delay, any attempt to influence them in the performance of their tasks relating to the investigation. The Chairperson shall take any appropriate action to ensure the independence of the Board of Supervisors.

CHAPTER 4

Financial market participants

Article 12 – Individual decision addressed to financial market participants

- (1) In accordance with Article 17(4) of the Regulation, ESMA shall provide any necessary assistance to the Commission in relation to any formal opinion that the Commission proposes to issue in case of non-compliance by the competent authority concerned with ESMA's recommendation.
- (2) When Article 17(6) of the Regulation applies, the Chairperson shall convoke the Independent Panel that was appointed to investigate the breach or non-application of Union law and provide it with the formal opinion issued by the Commission and any other relevant documentation.
- (3) Where relevant, the Independent Panel shall submit to the Board of Supervisors a draft individual decision addressed to a financial market participant requiring the necessary actions to be taken in order to comply with its obligations under Union law for its adoption. The draft individual decision may require the cessation of any practice. The Independent Panel shall only submit a draft individual decision to the Board of Supervisors, where all the following conditions are met:

- (a) it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system; and
 - (b) the relevant requirements of the acts referred to in Article 1(2) of the Regulation are directly applicable to financial market participants.
- (4) Any draft individual decision submitted for adoption to the Board of Supervisors shall be in conformity with the formal opinion issued by the Commission and shall state the reasons on which it is based, the period within which the financial market participant shall comply with the decision and the legal remedies available to it.
- (5) Article 11(1), 11(2), 11(3), 11(4) and 11(5) shall apply mutatis mutandis.
- (6) A copy of the individual decision shall be provided to the competent authority concerned and to the Commission.

CHAPTER 5

Monitoring and publication

Article 13 – Publication

- (1) A decision addressed to a financial market participant shall be published on ESMA's website and shall state the identity of the financial market participant concerned and the main content of the decision, unless such publication is in conflict with the legitimate interests of the financial market participant, or with the protection of its 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.
- (2) After having informed the relevant competent authority, ESMA shall publish such details as are appropriate in respect of any recommendation that has been addressed to a competent authority under these rules, after duly taking into consideration the constraints as referred to in Article 13(1). The Chairperson shall provide the Requester with any non-confidential details of the recommendation as appropriate in the circumstances, in line with the Code of Good Administrative Behaviour.
- (3) In its annual report, ESMA shall set out which competent authorities and financial market participants have not complied with the recommendations, formal opinions or individual decisions referred to in Articles 11 and 12 of these Rules of Procedure.



CHAPTER 6 ***Final provisions***

Article 14 – ESMA Staff

- (1) The Chairperson shall be assisted on legal and policy issues by ESMA staff.
- (2) Under the guidance of the Chairperson, ESMA staff shall in particular:
 - (a) close complaints which are clearly inadmissible (e.g., complaints that set out a grievance which is clearly outside the scope of the acts referred to in Article 1(2) of the ESMA Regulation, or that are clearly related only to an act or omission of an individual market participant rather than of a relevant NCA, or that are not written in an official language of the Union),
 - (b) ensure adequate record-keeping; and
 - (c) prepare the reporting.
- (3) The Chairperson may delegate the closure of cases referred to in Article 5(1)(b) of these Rules of Procedure to the Head of the Legal and Enforcement Department.
- (4) ESMA staff shall provide operational and secretariat support to the Independent Panel appointed in each case.

Article 15 – 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) 2018/17255 and ESMA's Implementing Rules⁶.
- (2) Where a Request to investigate a competent authority is submitted anonymously or confidentially, ESMA shall process it in accordance with Article 17a of the Regulation.
- (3) The Rules of Procedure governing confidentiality in accordance with Article 70 of the Regulation and with ESMA's Rules on Professional Secrecy and Confidentiality⁷ which lay down practical arrangements for the implementation of the Regulation, shall apply to these proceedings.

⁵ OJ L 295, 21.11.2018, p. 39.

⁶ ESMA40-133- 716

⁷ ESMA40-1432018523-304



Article 16 – Conflict of interest

- (1) For the purposes of Article 6 of these Rules of Procedure, the Chairperson shall seek to replace the Vice-Chairperson with a member of the Management Board, who will be appointed by it where any of the following situations applies:
 - (a) the alleged breach of Union Law concerns a competent authority of the Member State of the Vice-Chairperson;
 - (b) the alleged breach of Union Law relates to a financial market participant established in the Member State of the Vice-Chairperson;
 - (c) any other form of conflict of interest affecting the Vice-Chairperson is identified.

The Chairperson shall ensure that none of these situations apply to the member of the Management Board appointed to replace the Vice Chairperson.

- (2) When proposing a decision to convene an Independent Panel, the Chairperson shall only propose the appointment of those candidates who:
 - (a) are not representatives of the competent authority concerned by the investigation;
 - (b) have no direct links with the competent authority concerned by the investigation; and
 - (c) have no interest in the matter under investigation.
- (3) Where the Independent Panel decides to submit a draft recommendation or a draft individual decision for adoption to the Board of Supervisors, the specific procedure set out in the Title III of the Conflict of Interest Policy for Non-Staff⁸ shall apply at the level of the Board of Supervisors.

Article 17 – Monitoring, recordkeeping and reporting to the Board of Supervisors

- (1) The Chairperson shall take any necessary steps to monitor whether the addressees of recommendations, formal opinions and individual decisions comply with them and shall report regularly to the Board of Supervisors on their compliance.
- (2) ESMA Staff shall maintain a record of the requests to investigate that it has received and of the decisions taken under this procedure and shall report that information annually to the Board of Supervisors.

⁸ ESMA-22-328-402



Article 18-Requests concerning an EEA EFTA State

This Decision shall apply to investigations of an alleged breach or non-application of the EEA Agreement by a competent authority of an EEA EFTA State, and to Requests to carry out such an investigation, with the following modifications:

- (1) References to Union law shall be understood as references to the EEA Agreement.
- (2) In Article 2(1), the Standing Committee of the EFTA States and the EFTA Surveillance Authority shall also be considered as “Requesters”.
- (3) For the purpose of Article 6(4), the Chairperson shall inform the EFTA Surveillance Authority of the initiation of an investigation.
- (4) For the purpose of Article 7(4), the Chairperson shall inform the EFTA Surveillance Authority about the appointment and convocation of the Independent Panel.
- (5) For the purpose of Article 11(1), the Independent Panel shall inform the EFTA Surveillance Authority about the draft recommendation before its submission to the Board of Supervisors.
- (6) For the purpose of Article 11(6), a copy of the recommendation shall be provided to the EFTA Surveillance Authority. The EEA EFTA competent authority concerned shall, within 10 working days of receipt of the recommendation, inform ESMA and the EFTA Surveillance Authority of the steps that it has taken or intends to take to ensure compliance with the EEA Agreement.
- (7) In Article 12, references to a decision shall be understood as references to a draft prepared by ESMA and to be adopted by the EFTA Surveillance Authority.
- (8) Article 12(1) shall be replaced with the following: “Where the Chairperson considers that the EEA EFTA competent authority has not complied with the EEA Agreement within 1 month from receipt of the recommendation, the Chairperson may ask the EFTA Surveillance Authority to issue a formal opinion on the basis of the ESMA recommendation or, where new developments require it, may prepare a draft formal opinion to be submitted to the EFTA Surveillance Authority, on his own initiative or at the request of the EFTA Surveillance Authority. That draft formal opinion shall be based on the recommendation and shall be adopted as a draft formal opinion by the Board of Supervisors. The EEA EFTA competent authority shall, within 10 working days of receipt of any formal opinion adopted by the Surveillance Authority, inform ESMA and the EFTA Surveillance Authority of the steps it has taken or intends to take to comply with that formal opinion.”
- (9) Article 12(5) shall be replaced with the following: “The Chairperson shall inform the EFTA Surveillance Authority, setting a time limit within which the EFTA Surveillance Authority may allow any natural or legal person, including an EEA EFTA competent authority which is the addressee of the decision to be taken, to express its views on



the matter, taking full account of the urgency, complexity and potential consequences of the matter.”

- (10) Article 12(6) shall not apply.
- (11) For the purpose of Article 13, ESMA shall coordinate publication of any decision with the EFTA Surveillance Authority.
- (12) The Rules of Procedure of ESMA Board of Supervisors shall apply for taking decisions in accordance to Articles 11 and 12.

Article 19 – Communications

Competent authorities shall be invited to agree to written and oral communications being in the working language of ESMA for the purposes of preliminary enquiries and breach of union law investigations where possible.

Article 20 – Entry into force

- (1) This decision replaces and repeals the decision ESMA43-318-5630.
- (2) This decision shall enter into force the day following its adoption.

Done at Paris on 25 January 2022.

[signed]

Verena Ross
Chair
For the Board of Supervisors



ANNEX I

Inadmissible Requests

A request is inadmissible if:

1. It is not written in one of the official languages of the Union;
2. it is clearly unsubstantiated;
3. it is frivolous or vexatious;
4. it fails to set out a grievance;
5. it sets out a grievance which is outside the scope of the acts referred to in Article 1(2) of the Regulation;
6. it fails to refer, explicitly or implicitly, to a competent authority to which the alleged breach of Union law may be attributed;
7. it concerns the acts or omissions of a private person or body, unless the request reveals the involvement of competent authorities or alleges their failure to act in response to those acts or omissions;
8. it sets out a grievance which is materially the same as one for which ESMA has already informed the Requester of its position or has adopted a clear, public and consistent position.

ANNEX II

Positive investigation factors

1. The alleged breach undermines the foundations of the rule of law (for example, systemic infringements, breaches of human rights or fundamental freedoms);
2. The alleged breach concerns a repeated or systemic infringement (for example a pattern of complaints indicating systematic incorrect application, interpretation, practice or approach of the competent authority concerned) or a general policy or supervisory approach;
3. The alleged breach may have a significant, direct impact on ESMA's objective to protect the public interest by: contributing to the short, medium and long-term stability and effectiveness of the financial system for the Union economy, its citizens and businesses, improving the functioning of the internal market including in particular a sound, effective and consistent level of regulation and supervision; ensuring the integrity, transparency, efficiency and orderly functioning of financial markets; strengthening international supervisory coordination; preventing regulatory arbitrage and promoting equal conditions of competition; ensuring that the taking of investment and other risks are appropriately regulated and supervised; enhancing customer and investor protection and enhancing supervisory convergence across the internal market.

Negative investigation factors

4. The Request is more suitable to be dealt with by another person or body, such as inter alia, the European Commission, another European Supervisory Authority, a national competent authority, a national complaints scheme or a court, or such other person or body is already dealing with it or has already dealt with it;
5. The Request is more suitable to be dealt with by other means (for example peer review, mediation, guidelines);
6. The Request sets out a grievance which does not relate to a clear and unconditional obligation in an act referred to in Article 1(2) of the Regulation;
7. The alleged breach does not concern a repeated or systematic infringement (for example a pattern of complaints indicating systematic incorrect application, interpretation, practice or approach of the competent authority concerned) or a general supervisory or policy approach.

ANNEX III

Categories of eligible candidates for the Independent Panels

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