

EEA CONSOLIDATED VERSION
OF
COMMISSION DELEGATED REGULATION (EU) No 946/2012
of 12 July 2012

supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions

(OJ L 282, 16.10.2012, p. 23)

as adapted for the purposes of the EEA Agreement by

DECISION OF THE EEA JOINT COMMITTEE No 205/2016

of 30 September 2016

(OJ L 46, 23.2.2017, p. 48)

that entered into force

on 1 October 2016

Legend:

- Text added by an EEA adaptation
- Replacing text by virtue of an EEA adaptation
- ~~Text deleted or disapplied by an EEA adaptation~~
- The provisions of this act shall be read in accordance with Protocol 1 to the EEA Agreement, unless otherwise specified in the adaptations to the provisions of this act agreed upon by the EEA Joint Committee and reported in the present document.

Article 1

Subject matter

AS REGARDS THE EU

This Regulation lays down procedural rules regarding fines and periodic penalty payments to be imposed by the European Securities and Markets Authority (ESMA) on credit rating agencies or other persons that are subject to ESMA's enforcement proceedings, including rules on rights of defence and limitation periods.

AS REGARDS THE EFTA STATES

This Regulation lays down procedural rules regarding fines and periodic penalty payments to be imposed by the EFTA Surveillance Authority on credit rating agencies or other persons that are subject to the EFTA Surveillance Authority's enforcement proceedings, including rules on rights of defence and limitation periods.

Article 2

Right to be heard by the investigating officer

AS REGARDS THE EU

1. Upon completion of his/her investigations and before submitting the file to ESMA's Board of Supervisors pursuant to Article 3(1), the investigating officer shall inform the person subject to investigation in writing of his/her findings and shall provide it with the opportunity to make written submissions pursuant to paragraph 3. That statement of findings shall set out the facts liable to constitute one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009, including any aggravating or mitigating factors of these infringements.

2. The statement of findings shall set a reasonable time limit within which the person subject to investigation may make its written submissions. The investigating officer shall not be obliged to take into account written submissions received after that time limit has expired.

3. In its written submissions, the person subject to investigation may set out all the facts known to it which are relevant to its defence. It shall attach any relevant documents as proof of the facts set out. It may propose that the investigating officer hear other persons who may corroborate the facts set out in the submissions of the person subject to investigation.

4. The investigating officer may also invite a person subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by the investigating officer. Oral hearings shall not be held in public.

AS REGARDS THE EFTA STATES

1. Upon completion of his/her investigations and before submitting the file to ESMA's Board of Supervisors and the EFTA Surveillance Authority pursuant to Article 3(1), the investigating officer shall inform the person subject to investigation in writing of his/her findings and shall provide it with the opportunity to make written submissions pursuant to paragraph 3. That statement of findings shall set out the facts liable to constitute one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009, including any aggravating or mitigating factors of these infringements.

Article 3

Right to be heard by ESMA's Board of Supervisors with regard to fines and supervisory measures

AS REGARDS THE EU

1. The complete file to be submitted by the investigating officer to ESMA's Board of Supervisors shall include at least the following documents:

- copy of the statement of findings that he addressed to the credit rating agency,
- copy of the written submissions by the credit rating agency,
- minutes of any oral hearing.

AS REGARDS THE EFTA STATES

1. The complete file to be submitted by the investigating officer to ESMA's Board of Supervisors and the EFTA Surveillance Authority shall include at least the following documents:

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2. Where ESMA's Board of Supervisors considers that the file submitted by the investigating officer is not complete, it shall send back the file to the investigating officer with reasoned request for additional documents.

3. Where ESMA's Board of Supervisors considers, on the basis of a complete file, that the facts, described in the statement of findings, appear not to disclose any possible infringement of the ones listed in Annex III to Regulation (EC) No 1060/2009, it shall take a decision to close the case and it shall notify such a decision to the persons subject to investigation.

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2. Where ESMA's Board of Supervisors considers that the file submitted by the investigating officer is not complete, it shall inform the EFTA Surveillance Authority thereof. The EFTA Surveillance Authority shall, without undue delay, send back the file to the investigating officer with reasoned request for additional documents.

3. Where ESMA's Board of Supervisors considers, on the basis of a complete file, that the facts, described in the statement of findings, appear not to disclose any possible infringement of the ones listed in Annex III to Regulation (EC) No 1060/2009, it shall inform the EFTA Surveillance Authority thereof. The EFTA Surveillance Authority shall, without undue delay, take a decision to close the case and it shall notify such a decision to the persons subject to investigation.

4. Where ESMA's Board of Supervisors does not agree with the findings of the investigating officer it shall submit a new statement of findings to the persons subject to investigation.

The statement of findings shall set a reasonable time limit within which the persons subject to investigation may make written submissions. ESMA's Board of Supervisors shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Articles 24 and 36a of Regulation (EC) No 1060/2009.

ESMA's Board of Supervisors may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA's Board of Supervisors. Oral hearings shall not be held in public.

5. Where ESMA's Board of Supervisors agrees with the findings of the investigating officer it shall inform the persons subject to investigation accordingly. Such communication shall set a reasonable time limit within which the person subject to investigation may make written submissions. ESMA's Board of Supervisors shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Articles 24 and 36a of Regulation (EC) No 1060/2009.

ESMA's Board of Supervisors may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA's Board of Supervisors. Oral hearings shall not be held in public.

6. If ESMA's Board of Supervisors has decided that one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009 has been committed by a person subject to investigation and has adopted a decision imposing a fine in accordance with Article 36a, it shall notify immediately such decision to the person subject to investigation.

4. Where ESMA's Board of Supervisors does not agree with the findings of the investigating officer it shall inform the EFTA Surveillance Authority thereof. The EFTA Surveillance Authority shall, without undue delay, submit a new statement of findings to the persons subject to investigation.

The statement of findings shall set a reasonable time limit within which the persons subject to investigation may make written submissions. ESMA's Board of Supervisors, before preparing a draft for the EFTA Surveillance Authority, or the EFTA Surveillance Authority shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Articles 24 and 36a of Regulation (EC) No 1060/2009.

ESMA's Board of Supervisors or, as the case may be, the EFTA Surveillance Authority may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA's Board of Supervisors. Oral hearings shall not be held in public.

5. Where ESMA's Board of Supervisors agrees with the findings of the investigating officer it shall inform the EFTA Surveillance Authority thereof. The EFTA Surveillance Authority shall, without undue delay, inform the persons subject to investigation accordingly. Such communication shall set a reasonable time limit within which the person subject to investigation may make written submissions. ESMA's Board of Supervisors, before preparing a draft for the EFTA Surveillance Authority, or the EFTA Surveillance Authority shall not be obliged to take into account written submissions received after the expiry of that time limit for adopting a decision on the existence of an infringement and on supervisory measures and the imposition of a fine in accordance with Articles 24 and 36a of Regulation (EC) No 1060/2009.

ESMA's Board of Supervisors or, as the case may be, the EFTA Surveillance Authority may also invite the persons subject to investigation to which a statement of findings has been addressed to attend an oral hearing. The persons subject to investigation may be assisted by their lawyers or other qualified persons admitted by ESMA's Board of Supervisors. Oral hearings shall not be held in public.

6. If the EFTA Surveillance Authority has decided that one or more of the infringements listed in Annex III to Regulation (EC) No 1060/2009 has been committed by a person subject to investigation and has adopted a decision imposing a fine in accordance with Article 36a, it shall notify immediately such decision to the person subject to investigation.

Article 4

Right to be heard by ESMA's Board of Supervisors with regard to periodic penalty payments

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Before taking a decision imposing a periodic penalty payment according to Article 36b(1) of Regulation (EC) No

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Before taking a decision imposing a periodic penalty payment according to Article 36b(1) of Regulation (EC) No

1060/2009, the Board of Supervisors shall submit a statement of findings to the person subject to the proceedings setting out the reasons justifying the imposition of a penalty payment and the amount of the penalty payment per day of non-compliance. The statement of findings shall set a time limit within which the person concerned may make written submissions. The Board of Supervisor shall not be obliged to take into account written submissions received after the expiry of that time limit for deciding on the periodic penalty payment.

1060/2009, the EFTA Surveillance Authority shall submit a statement of findings to the person subject to the proceedings setting out the reasons justifying the imposition of a penalty payment and the amount of the penalty payment per day of non-compliance. The statement of findings shall set a time limit within which the person concerned may make written submissions. The EFTA Surveillance Authority shall not be obliged to take into account written submissions received after the expiry of that time limit for deciding on the periodic penalty payment.

Once the credit rating agency or person concerned has complied with the relevant decision referred to in paragraphs (a) to (d) of Article 36b(1) of Regulation (EC) No 1060/2009, a periodic penalty payment can no longer be imposed.

ESMA's Board of Supervisors may also invite the person subject to the proceedings to attend an oral hearing. The person subject to the proceedings may be assisted by their lawyers or other qualified persons admitted by ESMA's Board of Supervisors. Oral hearings shall not be held in public.

ESMA's Board of Supervisors or, as the case may be, the EFTA Surveillance Authority may also invite the person subject to the proceedings to attend an oral hearing. The person subject to the proceedings may be assisted by their lawyers or other qualified persons admitted by ESMA's Board of Supervisors or, as the case may be, the EFTA Surveillance Authority. Oral hearings shall not be held in public.

Article 5

Access to the file and use of documents

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1. If so requested, ESMA shall grant access to the file to the parties to whom the investigating officer or the Board of Supervisors has sent a statement of findings. Access shall be granted following the notification of any statement of findings.

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1. If so requested, ESMA or, as the case may be, the EFTA Surveillance Authority shall grant access to the file to the parties to whom the investigating officer or the EFTA Surveillance Authority has sent a statement of findings. Access shall be granted following the notification of any statement of findings.

2. File documents accessed pursuant to this Article shall be used only for the purposes of judicial or administrative proceedings concerning the application of Regulation (EC) No 1060/2009.

Article 6

Limitation periods for the imposition of penalties

AS REGARDS THE EU

1. ESMA's powers to impose fines on credit rating agencies shall be subject to the following limitation periods:

- (a) three years in the case of infringements for which the minimum basic amount of the fine foreseen in Article 36a(2) of Regulation (EC) No 1060/2009 is EUR 50 000 or less.
- (b) five years in the case of all other infringements.

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1. The EFTA Surveillance Authority's powers to impose fines on credit rating agencies shall be subject to the following limitation periods:

2. The periods of time referred to in paragraph 1 shall begin to run on the day following that on which the infringement is committed. However, in the case of continuing or repeated infringements, those periods of time shall begin to run on the day on which the infringement ceases.

3. Any action taken by ESMA for the purpose of the investigating or proceedings in respect of an infringement of Regulation (EC) No 1060/2009 shall interrupt the limitation period for the imposition of fines. That limitation period shall be interrupted with effect from the date on which the

2. The periods of time referred to in paragraph 1 shall begin to run on the day following that on which the infringement is committed. However, in the case of continuing or repeated infringements, those periods of time shall begin to run on the day on which the infringement ceases.

3. Any action taken by ESMA or the EFTA Surveillance Authority for the purpose of the investigating or proceedings in respect of an infringement of Regulation (EC) No 1060/2009 shall interrupt the limitation period for the imposition of fines. That limitation period shall be interrupted with effect from the date on which the action is

action is notified to the credit rating agency or the person subject to the investigating or proceedings.

4. Each interruption shall cause the limitation period to start running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without ESMA having imposed a fine. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 5.

5. The limitation period for imposing fines shall be suspended for as long as the decision of ESMA is the subject of proceedings pending before the Board of Appeal, in accordance with Article 58 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽⁵⁾, and before the Court of Justice of the European Union, in accordance with Article 36e of Regulation (EC) No 1060/2009.

notified to the credit rating agency or the person subject to the investigating or proceedings.

4. Each interruption shall cause the limitation period to start running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the EFTA Surveillance Authority having imposed a fine. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 5.

5. The limitation period for imposing fines shall be suspended for as long as the decision of ESMA or the EFTA Surveillance Authority is the subject of proceedings pending before the EFTA Court in accordance with Article 35 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Article 7

Limitation periods for the enforcement of penalties

AS REGARDS THE EU

1. The power of ESMA to enforce decisions taken pursuant to Articles 36a and 36b of Regulation (EC) No 1060/2009 shall be subject to a limitation period of five years.

2. The five-year period referred to in paragraph 1 shall start to run on the day following that on which the decision becomes final.

3. The limitation period for the enforcement of penalties shall be interrupted by:

- (a) a notification by ESMA to the credit rating agency or other person concerned of a decision varying the original amount of the fine or periodic penalty payment;
- (b) any action of ESMA or a Member State authority acting at the request of ESMA, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.

4. Each interruption shall cause the limitation period to start running afresh.

5. The limitation period for the enforcement of penalties shall be suspended for so long as:

- (a) time to pay is allowed;
- (b) enforcement of payment is suspended pursuant to a pending decision of ESMA Board of Appeal, in accordance with Article 58 of Regulation (EU) No 1095/2010, and the Court of Justice of the European Union, in accordance with Article 36e of Regulation (EC) No 1060/2009.

AS REGARDS THE EFTA STATES

1. The power of the EFTA Surveillance Authority to enforce decisions taken pursuant to Articles 36a and 36b of Regulation (EC) No 1060/2009 shall be subject to a limitation period of five years.

2. The five-year period referred to in paragraph 1 shall start to run on the day following that on which the decision becomes final.

3. The limitation period for the enforcement of penalties shall be interrupted by:

- (a) a notification by the EFTA Surveillance Authority to the credit rating agency or other person concerned of a decision varying the original amount of the fine or periodic penalty payment;
- (b) any action of the EFTA Surveillance Authority or a Member State authority acting at the request of the EFTA Surveillance Authority, designed to enforce payment or payment terms and conditions of the fine or periodic penalty payment.

4. Each interruption shall cause the limitation period to start running afresh.

5. The limitation period for the enforcement of penalties shall be suspended for so long as:

- (a) time to pay is allowed;
- (b) enforcement of payment is suspended pursuant to a pending decision of the EFTA Court in accordance with Article 35 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Article 8

Collection of fines and periodic penalty payments

The amounts of fines and periodic penalty payments collected by ESMA shall be lodged to an interest bearing account opened by the accounting officer of ESMA until such time as they become final. In the meantime such amounts shall not be entered in ESMA's budget or recorded as budgetary amounts.

Once ESMA's Accounting Officer has established that the fines and/or periodic penalty payments have become final following the outcome of all possible legal challenges he shall transfer these amounts plus any interest accruing to the Commission. These amounts shall then be entered in the EU budget under general revenue.

ESMA's Accounting Officer shall report on a regular basis to the Authorising Officer of DG MARKT on the amounts of fines and periodic penalty payments imposed and their status.

Article 9

Calculation of periods, dates and time limits

Regulation (EEC, Euratom) No 1182/71 shall apply to periods of time, dates and time limits.

Article 10

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 12 July 2012.