



BoA 2020 01

Board of Appeal
of the European Supervisory Authorities
Rules of Procedure

The Board of Appeal of the European Supervisory Authorities (“the Board of Appeal”),
Having regard to Regulations (EU) No 1093 of 2010, No 1094 of 2010, and No 1095 of 2010 of the European Parliament and of the Council of 24 November 2010 establishing the European Supervisory Authorities (“the ESA Regulations”), and in particular Articles 6 and 58 to 61 providing for the establishment of a Board of Appeal;

Having regard to the Management Board Decisions of each European Supervisory Authority (“ESA” or in the plural “ESAs”) appointing the Members and Alternates of the Board of Appeal in accordance with Article 58.3 of the ESA Regulations;

Whereas:

The ESA Regulations provide in Article 60.6 that the Board of Appeal shall adopt and make public its rules of procedure;

These Rules of Procedure replace those previously in force.

HAS ADOPTED THE FOLLOWING RULES OF PROCEDURE:

Chapter 1 Organisational matters

Article 1
Functioning of the Board of Appeal

1. The Board of Appeal shall be composed as stipulated in Article 58 of the ESA Regulations.
2. The Board of Appeal shall designate a President from among its Members. Designation of the President shall be by secret ballot, unless all Members and Alternates agree to proceed by consensus. The Member obtaining the votes of more than half the Members and Alternates composing the Board of Appeal shall be designated. If no Member obtains that majority, further ballots among the best placed candidates shall be held until that majority is attained. The President’s term shall be 2½ years and shall be renewable.

3. The President shall direct the business and the administration of the Board of Appeal.
4. The Board of Appeal shall also designate a Vice-President from among its Members by the same procedure.
5. In the event of the incapacity of the President or other exceptional reasons, the Vice-President will perform the functions of the President.
6. If a Member leaves at or before the end of his or her term, an Alternate shall take the Member's place until the relevant ESA has appointed a replacement.
7. In case of illness or other exceptional reasons, the President of the Board of Appeal may replace a Member with an Alternate for an appeal.
8. No Member or Alternate shall be liable to any person for any act or omission in connection with the appeal.

Article 2 Presiding over the appeal

1. The President presides at hearings and deliberations, or may nominate the Vice-President or another Member to do so. References in these Rules to "President" shall include the Vice-President or such other Member in relation to an appeal over which he or she has been nominated to preside.

Article 3 Independence and impartiality

1. The independence and impartiality of the Board of Appeal is as stipulated for in Article 59 of the ESA Regulations.
2. If a Member considers that for any reason he or she cannot participate in appeal proceedings, the Member must inform the President and the Secretariat in writing without undue delay, whereupon the President is to appoint an Alternate.
3. If the President considers that for any reason he or she cannot participate in appeal proceedings, the President must inform the Members and the Secretariat in writing without undue delay. The Vice-President shall be designated to preside over the appeal. Should the Vice-President be in the same position, another Member shall be designated to preside over the appeal.
4. The parties will be informed of the composition of the Board of Appeal by the Secretariat on behalf of the Board of Appeal as soon as possible.
5. A party objection as provided for in Article 59.4 of the ESA Regulations is to be made to the President through the Secretariat as soon as possible thereafter and in any case within ten days from the date when the party making the challenge knew, or with reasonable diligence could have known, about the facts and circumstances on which the challenge is based. If the Member withdraws, or the objection is upheld by the other Members, the President is to appoint an Alternate. The parties shall be notified by the Secretariat.

6. Where the Alternate is in a similar position as regards any of the above matters, the President shall designate a replacement from among the available Alternates, and if no Alternates are available, the size of the Board of Appeal shall be reduced. The parties shall be notified by the Secretariat about the composition of the Board.

7. The term "Board of Appeal" for these purposes means the Board as constituted for the appeal/s in accordance with these Rules, and the term "Member" includes "Alternate".

Article 4 The Secretariat

1. By Article 58.8 of the ESA Regulations, the ESAs shall ensure adequate operational and secretarial support for the Board of Appeal through the Joint Committee (which is established in the ESA Regulations). This is done through the Secretariat of the Board of Appeal ("the Secretariat") which rotates annually between the ESAs.

2. The ESA which chairs the Joint Committee when the Notice of Appeal is filed will provide the Secretariat which administers the appeal. The Secretariat shall be the contact point for the appellant, the respondent and the Board of Appeal members. The contact details for the Secretariat will be provided on the website of each ESA for convenience.

3. No ESA can administer an appeal directed against its own acts. If the appeal is directed against the ESA which is chairing the Joint Committee when the Notice of Appeal is filed, the appeal shall be administered by the ESA which chairs the Joint Committee in the following year.

4. For the purposes of continuity the same ESA which starts administering an appeal shall administer it until completion.

5. The ESA shall ensure that there is an adequate procedure in place so that from the outset of the appeal, no information passes from the Secretariat to the respondent ESA or any of the ESAs except as specified by the Rules of Procedure.

6. The administration of an appeal shall be conducted as set out below.

7. A Notice of Appeal shall be filed with the Secretariat at the ESA which took the decision appealed against ("the respondent" or "the respondent ESA") in accordance with Article 7 of these Rules.

8. The Secretariat at the respondent ESA shall forthwith send the Notice of Appeal to the Secretariat at the ESA which will administer the appeal determined in accordance with paragraphs (2) to (4).

9. The Secretariat administering the appeal shall confirm that the respondent ESA is aware of the appeal, and send the Notice of Appeal to the President and Members.

10. In consultation with the President and/or the Members, the Secretariat shall verify compliance with Article 5.

11. If the requirements in Article 5 have not been met, the Secretariat shall communicate this to the party wishing to bring the appeal.

12. The respondent ESA shall provide the name/s and contact details of the person/s dealing with the appeal on its behalf.

13. The Secretariat will act in accordance with the President's directions, and will maintain a register of appeals, circulate documents to the Board of Appeal members as required, organise Board of Appeal meetings, pre-hearings and hearings, and otherwise provide assistance in relation to the appeal.

14. Subject to the President's directions, all communication by the parties with the Board of Appeal is to be through the Secretariat and all communications are to be copied by the party sending them to the other party.

15. The Secretariat shall send the parties the Decision in accordance with Article 22.

Chapter 2 Statements of the parties' cases

Article 5

The appellant's Notice of Appeal

1. A party wishing to bring an appeal against a decision of the Authority under Article 60 of the ESA Regulations shall do so by filing a Notice of Appeal with the Secretariat of the Board of Appeal at the respondent ESA identifying the decision the subject of the appeal.

2. If the decision against which the appeal is brought is addressed to the appellant, the Notice of Appeal shall be filed in the language of the decision (or in one of the official languages of the European Union if the submission which gave rise to the decision appealed against was made in that language).

3. The decision the subject of the appeal shall be annexed to the Notice of Appeal.

4. The Notice of Appeal shall (i) state why it is admissible under Article 60 of the ESA Regulations, (ii) state the grounds on which it is based, (iii) if an application is made that the appeal should have suspensive effect under Article 60.3 of the ESA Regulations pending the outcome of the appeal, state the grounds of such application, (iv) state what remedy is sought under Article 60.5, and (v) attach copies of any documents on which the appellant intends to rely.

5. If the Notice of Appeal exceeds 10 pages, it should include a summary of (i) to (iv).

6. The Notice of Appeal shall clearly indicate full contact details to which the Secretariat and other parties may send communications with the appellant.

7. The Notice of Appeal shall give the names of the appellant's representatives/legal representatives (if any).

8. The appellant may at any time discontinue an appeal by giving notice of discontinuance to the respondent and to the Secretariat.

9. If there is more than one appellant, the above shall apply to each.

Article 6
The respondent's Response

1. The respondent shall set out its case in a Response.
2. The Response shall (i) state any contentions as to non-admissibility, (ii) state the grounds on which the appeal is contested, (iii) state the respondent's case as to any application that the appeal should have suspensive effect, (iv) state the respondent's case as to the relief that is sought under Article 60.5, and (v) attach copies of any documents on which the respondent intends to rely.
3. If the Response exceeds 10 pages, it should include a summary of (i) to (iv).
4. The Response shall clearly indicate full contact details to which the Secretariat and the appellant and other parties may send communications with the respondent.
5. The Response shall give the names of the respondent's representatives/legal representatives.
6. The Response must be filed with the Secretariat and served on the appellant/s within 3 weeks of service of the Notice of Appeal.
7. The respondent may at any time state that it does not oppose the appeal or that it is withdrawing its opposition to the appeal by giving notice to the appellant and to the Secretariat.
7. If there is more than one respondent, the above shall apply to each.

Chapter 3 Time limits, filing and service

Article 7
Filing and service

1. By Article 60.1 of the ESA Regulations, the appeal, together with a statement of grounds, shall be filed in writing at the ESA which took the decision appealed against (the respondent ESA) within 3 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 ESA published its decision.
2. The Notice of Appeal must be filed as follows:
 - (i) By email to the respondent ESA sent to the Secretariat at the email address of the Board of Appeal indicated on the respondent ESA's website; or
 - (ii) By registered post to the respondent ESA with a form for acknowledgement of receipt; or
 - (iii) By personal delivery to the respondent ESA against a receipt; or
 - (iv) In accordance with any direction given by the Board of Appeal in respect of a particular appeal as to filing.

3. Subject to any different direction given by the Board of Appeal, other documents should be sent by email subject to any applicable security standards (i) in the case of emails to the Secretariat which administers the appeal, to the email address of the Board of Appeal indicated on the website, and (ii) in the case of emails to a party, to the email address provided by that party in accordance with Article 5(6) (appellant) and Articles 4(8) and 6(4) (respondent).

4. Filing or service shall be deemed to have taken place at the time of receipt. It is the responsibility of the party sending an email to take reasonable steps to see that it has come to the attention of the recipient.

Article 8 Time limits

1. Any time limit prescribed by or imposed under these Rules may be extended by the Board of Appeal or by the President.

2. Time limits shall be calculated in accordance with Council Regulation 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits, OJ 1971 L 124, p. 1.

Chapter 4 Preliminary rulings

Article 9 Admissibility of the appeal

1. If the respondent/s contend/s that the appeal is not admissible under Article 60 of the ESA Regulations, the Board of Appeal shall determine whether or not it is admissible before examining whether it is well founded under Article 60.4.

2. The Board of Appeal may raise any question as to admissibility of its own motion.

3. The procedures set out in these Rules (including those set out below as to directions, pre-hearing conference, and oral representations) apply as the President shall deem appropriate to the determination of any question as to admissibility.

4. The decision of the Board of Appeal determining any question as to admissibility shall be given in writing, and shall be adopted in accordance with Article 58.6 of the ESA Regulations.

5. Unless otherwise determined by the President or the Board of Appeal, in the event a question of admissibility is raised by the respondent/s or the Board of Appeal, the time for filing and serving the Response in accordance with Article 6(6) in relation to whether the appeal is well founded shall only start to run from when the Board of Appeal has determined the admissibility of the appeal.

Article 10
Suspension under Article 60.3 of the ESA Regulations

1. An appeal does not have suspensive effect, but by Article 60.3 of the ESA Regulations, the Board of Appeal may, if it considers that the circumstances so require, suspend the application of the contested decision.
2. The procedures set out in these Rules (including those set out below as to directions and pre-hearing conference) apply as the President shall deem appropriate to the determination of any question as to suspension, save that in exceptional cases, the Board of Appeal may suspend the application of the contested decision for a period sufficient to permit full discussion of the suspension.
3. The decision of the Board of Appeal determining any question as to suspension shall be given in writing, and shall be adopted in accordance with Article 58.6 of the ESA Regulations. The Board of Appeal may amend its decision to suspend or not suspend at any time on the application of any of the parties.

Chapter 5 Case management

Article 11
Directions and pre-hearing conference

1. The President may give directions on behalf of the Board of Appeal by way of case management for the efficient conduct of the appeal at any stage in the appeal. This includes provision for observations on a party's own notifications or on communications from other parties under Article 60.4 of the ESA Regulations. Such directions will be sent through the Secretariat, and the President may consult with the other Members for such purposes.
2. The parties may also apply for such directions through the Secretariat at any stage in the appeal.
3. Observations as to what directions are appropriate may be made by the parties by email except as otherwise directed by the President.
4. Such directions may include directions that the appellant/s pays a provisional advance in order to cover the costs of the appeal, as defined in Article 25, including without limitation the cost of transcribing hearings, conference phone and video links. Sums may be ordered to be paid in advance, and/or in stages, and if ordered, must be paid by the appellant to the Secretariat within 7 days. The Board of Appeal shall only make such an order if satisfied that it will not impair the appellant's exercise of its right of appeal.
5. If it is appropriate, the President may direct a pre-hearing conference (taking place in person, by phone, video link, or otherwise). The President may conduct the pre-hearing conference alone or with (or in consultation with) other Members.
6. Without limiting its scope, the above procedure also applies to directions given by the Board of Appeal as regards any application to amend the Notice of Appeal, the Response or the appellant's reply to the Response, an application to add or substitute parties, directions for the production of further documents, directions as

to witness evidence, permission to adduce expert evidence, permission to call oral evidence, permission to extend time limits and directions as to hearing appeals at the same time.

Article 12
Rapporteur

1. The President should (with the consent of the person concerned) designate another Member/s or Alternate/s as Rapporteur for the case to the Board of Appeal in respect of the appeal. The function of a Rapporteur is internal to, and part of the deliberations of, the Board of Appeal.

2. The President may decide not to name a Rapporteur and perform the duties himself or herself.

Article 13
Hearing appeals at the same time

1. Where two or more appeal notices have been filed in respect of the same matter, or which involve the same or similar issues, the Board of Appeal may, if it considers it appropriate, direct that the appeals or any particular issue or matter raised by the appeal notices may be heard at the same time.

Article 14
Failure to comply

1. Where a party has, without reasonable excuse, failed to comply with a direction of the Board of Appeal or a provision of these Rules, the Board of Appeal may: (i) make a costs order against that party; (ii) where that party is the appellant, dismiss the appeal wholly or in part; (iii) where that party is the respondent, strike out the whole or part of its Response.

2. The Board of Appeal shall make no order under this Article without giving the party in question notice so that it has an opportunity to make representations against the making of such an order.

3. Any irregularity resulting from any failure to comply with any provision of these Rules or of any direction of the Board of Appeal shall not affect the validity of the proceedings or of any decision made by the Board of Appeal.

Chapter 6 Evidence

Article 15
General

1. The Board of Appeal shall be the judge of the admissibility of any evidence adduced and of its probative value.

Article 16
Exchange of documents

1. Subject to any other direction, promptly after the time for the Response, the parties shall exchange copies of any further documents on which they intend to rely.
2. A party is entitled to request the other party/s to produce further documents. In case of disagreement, the Board of Appeal may give directions for the production of further documents, but shall only do so if it considers it to be necessary for the just determination of the appeal.
3. For the avoidance of doubt, "documents" includes electronic documents.
4. No new evidence may subsequently be submitted save with the permission of the Board of Appeal.

Article 17
Witnesses and experts

1. A party may adduce witness evidence. Such evidence is to be in the form of a written statement served within the time permitted. Any witness shall declare that, "I solemnly declare upon my honour and conscience that I shall state the truth, the whole truth and nothing but the truth."
2. With the permission of the Board of Appeal, a party may adduce expert evidence. Permission will only be given if the Board of Appeal considers it to be necessary for the just determination of the appeal. Such evidence is to be in the form of a written statement served within the time permitted. Any expert shall declare that, "I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief."

Chapter 7 Oral representations

Article 18
Oral representations

1. By Article 60.4 of the ESA Regulations, parties are entitled to make oral representations. In the absence of a request, the Board of Appeal may require oral representations if it considers it to be necessary for the just determination of the appeal.
2. The parties shall be entitled to legal representation at such hearing.
3. Taking account of the views of the parties, the Board of Appeal will give directions as to the order and form of such hearing and set a timetable. These matters as well as the time for the hearing will normally be fixed at the pre-hearing conference (otherwise the Secretariat will notify the parties).
4. The hearing shall take place at the seat of one of the European Supervisory Authorities, unless the Board of Appeal gives different directions. In any case, the Secretariat shall be present.

5. The hearing shall be in public, unless the Board of Appeals directs, upon request from a party or on its own initiative, and with good reason, that it should be held in private.
6. The Board of Appeal may give directions as to adjournment of the hearing on the application of a party, or on its own initiative, but adjournment is to be regarded as exceptional.
7. There shall be a record of the hearing made in accordance with the Board of Appeal's direction.
8. If a party fails to appear, the Board of Appeal may proceed in its absence.
9. The quorum for the valid constitution of the Board of Appeal in order to hear oral representations shall require the presence of four of its Members.
10. In the absence of oral representations, the Board of Appeal will consider the appeal on the basis of the written material provided by the parties.

Article 19
Oral evidence

1. Exceptionally, and at a party's request, the Board of Appeal may give permission for that party to call a witness or an expert who has given a written statement under Article 17 to give oral evidence at the hearing, in person, on the phone or by video link.
2. Witnesses may be examined by the parties under the control of the President (including as to timetable). Questions may be put to them by any Member.
3. Any witness shall declare that, "I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth."
4. Any expert shall declare that, "I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief."

Chapter 8 Lodging of the appeal

Article 20
Lodging of the appeal

1. When the President considers that the evidence is complete, the President shall notify the parties that the appeal has been lodged for the purposes of Article 60.2 of the ESA Regulations.

Chapter 9 Deliberations and Decision of the Board of Appeal

Article 21 Deliberations and Decision

1. The deliberations of the Board of Appeal shall be private.
2. For preliminary decisions under articles 13, 16.2, 17, 18.3,4,5, 19.1 and 26, the President and the Rapporteur are entitled to act in the name of the Board of Appeal; they will inform the other members in due time. In case the President and the Rapporteur disagree, such decision will be taken by the Board of Appeal.
3. The Decision of the Board of Appeal shall be adopted in accordance with Article 58.6 of the ESA Regulations. In that regard, abstentions are not permitted.

Article 22 Form of Decisions

1. The Decision of the Board of Appeal shall be in writing and give reasons. The Decision shall include (not necessarily in this order):
 - the names of the Members taking part
 - the name of the responsible Secretariat member
 - the names of the parties and their representatives/lawyers
 - a statement as to the course of the proceedings, the contentions of the parties, and the form of order which they sought
 - a summary of the relevant facts
 - the Decision and the reasons for it
 - whether the decision was a unanimous or majority decision, and if a majority decision, identifying the supporting and dissenting Members
 - the operative part of the Decision
2. The Decision shall be signed by the Members and the Secretariat. The signatures may be electronic and held by the Secretariat for reference if required. Thereafter the Secretariat shall send it to the parties, informing them of the right of appeal under Article 61 of the ESA Regulations.

Article 23 Rectification of decisions

1. The parties may within 7 days of being sent the Decision provide the Board of Appeal through the Secretariat with a list of clerical mistakes, errors in calculation or obvious slips in the Decision.
2. The Board of Appeal may by way of order of its own motion or in response to such list (and if necessary after obtaining the representations of the parties) rectify clerical mistakes, errors in calculation and obvious slips in the Decision.
3. The rectification order shall be annexed to the rectified Decision.

Article 24 Publication

1. The Secretariat shall ensure that the Decision is made public in accordance with Article 60.7 of the ESA Regulations.
2. The Board of Appeal may direct the redaction of information from the published Decision should it decide it is right to do so pursuant to an application by a party under Article 26 or of its own motion.

Chapter 10 Costs

Article 25 Costs orders

1. The costs of the appeal shall comprise the reasonable legal and other costs incurred by the parties for the appeal.
2. The question of costs may be dealt with in the decision of the Board of Appeal. Otherwise, any question of the apportionment of costs shall be dealt with after publication of the decision of the Board of Appeal (subject to any earlier order made under Article 11.4). In either case, the parties shall be entitled to make representations in that regard.
3. The Board of Appeal may decide which of the parties shall bear the costs or in which proportion they shall be borne by the parties.
4. Any advances made by the appellant under Article 11.4 shall be taken into account and off set against any amounts owed by the appellant for costs or recovered against any amounts owed by the respondent for costs. Any excess shall be returned to the appellant.
5. Costs, if ordered, must be paid to the receiving party within 7 days.

Chapter 11 Miscellaneous

Article 26 Confidentiality requests

1. An application may be made to the Board of Appeal for the confidential treatment of a document/s or any information contained in a document/s to be filed and/or served in connection with proceedings before the Board of Appeal.
2. In determining the application, the Board of Appeal shall have regard as appropriate to the relevant provisions of Regulation (EC) No 1049/2001¹.

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p.43.

Article 27
Publication and amendment of the Rules

1. The Secretariat shall ensure that the Rules of Procedure are published in accordance with the publication practice of the European Supervisory Authorities. Publication means making available to the public, including by electronic means.
2. The Secretariat shall ensure that participants to an appeal, including the appellant, are made aware of the Rules of Procedure.
3. These Rules may be amended by the Board of Appeal, and forms and a guide may be issued from time to time.

Article 28
Entry into force

These Rules of Procedure shall take effect on the day following that of their adoption.

Done on 25.02.2020.

*Signed by the President on behalf of the Board of Appeal
and by the Secretariat*