

BoA D 2018 02

D E C I S I O N

given by

the

BOARD OF APPEAL
OF THE EUROPEAN SUPERVISORY AUTHORITIES

under Article 60.4 Regulation (EU) No 1095/2010
and the Board of Appeal's Rules of Procedure (BOA 2012 002)

in an **Appeal** by

V.

[Appellant]

against a decision of

The European Securities and Markets Authority
[Respondent]

Decision

Ref. BoA-D-2018-02

Board of Appeal

William Blair (President)

Anna Konstantinou

Beata Maria Mrozowska

Lars Afrell

Marco Lamandini

Pat McArdle

Place of this decision: Frankfurt a.M.

Date: 10 September 2018

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I. The appeal

1. The appellant, who is self-represented in this matter, seeks to bring an appeal against a decision of the Chair of ESMA of 29 August 2017 not to open a formal investigation against the Cyprus Securities and Exchange Commission (CySEC) pursuant to article 17 of Regulation (EU) No 1095/2010 (the “ESMA Regulation”). The appellant asks for the decision to be cancelled, and the procedure to be reopened. She states that she is representing a number of clients damaged by the activities of a Cypriot investment firm called IronFX Global Ltd (IronFX).
2. The respondent, the European Securities and Markets Authority (ESMA), which is represented by their Legal Team Leader and Legal Officer, refers to the rulings of the General Court and the CJEU in the case of *SV Capital v European Banking Authority* (Case T-660/14 and Case 577/15) and submits that the Board of Appeal lacks competence (that is, lacks jurisdiction) to hear the appeal. The respondent asks the Board to determine this issue as a preliminary matter, and to dismiss the appeal.
3. On 12 February 2018, the appellant sent an undated Notice of Appeal to the email address of the Board of Appeal at ESMA. The Notice of Appeal was not sent to ESMA in hardcopy, as it should have been under article 7 of the Board of Appeal’s Rules of Procedure. The Board understands that email did not arrive in the inbox but went into spam. The appeal did not come to light until the appellant sent a further email on 4 July 2018 complaining about the lack of a response.
4. The same day, the Secretariat apologised for the fact that the email had not been properly received, and explained that it had been forwarded to the Board of Appeal at the European Insurance and Occupational Pensions Authority (EIOPA) – this is because the ESMA Secretariat cannot administer an appeal against ESMA’s own decision. The President received the Notice of Appeal on 5 July 2018.

II. The Parties’ contentions on the Appeal

1. The appellant’s case

5. In the Notice of Appeal, the appellant sets out her case. The Board notes that this has helpfully been done by reference to publicly available information, links being provided in the electronic document.
6. She says that about 500 complainants requested ESMA to open a formal investigation into the way in which CySEC dealt with IronFX, but that ESMA’s

decision of 29 August 2017 not to do so has never been made public, and should be made public.

7. The appellant says that IronFX is a broker dealing in CFDs (that is, contracts for differences), forex and binary options. It has a very small footprint in Cyprus, but a lot of retail clients in the EU thanks to EU pass-porting rights. Her case is that since early 2015, IronFX has been refusing to return funds deposited by retail clients in a widespread and systematic manner. She refers to the findings of the Cyprus Audit Office to the effect that in 2015 an inspection by CySEC's officers showed a shortage of €176 million in client money. Her case is that CySEC failed to address the position properly by imposing appropriate sanctions and otherwise.
8. The appellant's case is that there were a number of infringements of Union Law by CySEC, including breaches of MiFID and EU rules on Capital Adequacy. Her case on this appeal is based on ESMA's power under article 17 of the ESMA Regulation to investigate the failure of a national competent authority (NCA) such as CySEC to comply with its obligations. ESMA was requested to launch a formal investigation by a large number of complainants. The issue was also the subject of proceedings in the European Parliament, and the applicant has provided the Board of Appeal with links to those proceedings.
9. The appellant contends that none of ESMA's reasons for refusing to open an investigation are valid. She submits that the fine imposed by CySEC was neither adequate nor dissuasive of further breach, that the number of complainants is in reality far more than 500 showing a rising trend from year to year, and that there are no suitable means of resolution of complaints at national level. Further, although the Markets in Financial Instruments Regulation (MiFIR) introduced product intervention powers for ESMA on 3 January 2018, at the time of the Notice of Appeal (February 2018) ESMA had not made use of its power.
10. The appellant contends that the failure of ESMA to open an investigation is particularly serious in the light of the full knowledge that it had of wrongdoing by IronFX and the lack of proper supervision by CySEC. The failure of ESMA to launch an investigation and/or use intervention powers, she says, has a negative impact on investor protection in the EU, not limited to Cyprus. Investment firms will keep defrauding small investors as long as no dissuasive and exemplary measures are taken. For these reasons the decision of 29 August 2017 should be cancelled, and the procedure reopened. The appellant also requests that the decision is made public.

2. The respondent's case

11. The respondent submitted an Application for Directions dated 11 July 2018, which was sent to the Board of Appeal on 12 July 2018 in which it asked the Board to give various directions to the following effect.
12. First, the respondent contends that the filing of the Notice of Appeal by email did not comply with article 7 of the Rules of Procedure of the Board of Appeal or with article 60(2) of the ESMA Regulation, and it asks the Board to direct that the appellant should file the Notice of Appeal in writing by registered letter or personal delivery.
13. Second, the respondent refers to article 9 of the Rules of Procedure of the Board of Appeal which provides that: "If the respondent/s contend/s that the appeal is not admissible under Article 60 of the [ESMA Regulation], the Board of Appeal shall determine whether or not it is admissible before examining whether it is well founded under Article 60.4". The language of the Rules of Procedure reflects that of the ESMA Regulation in this respect.
14. Accordingly, the respondent contends that the appeal is not admissible, and that this question should be determined as a preliminary matter. In this regard, it submits as follows.
15. On 29 August 2017, ESMA concluded not to initiate an investigation against CySEC, which is a national competent authority. It informed the appellant of this by an email sent to her on 7 September 2017 in response to her complaint. This informed her that ESMA's Chair had carefully considered the allegations of possible breach of Union law, and had come to the conclusion not to initiate an investigation under article 17 of the ESMA Regulation. The email of 7 September is annexed to the respondent's Application for Directions.
16. The Notice of Appeal, the respondent says, challenges the underlying conclusion of ESMA not to initiate an investigation against CySEC by contending that ESMA's conclusion was a decision that may be challenged before the Board of Appeal. The Respondent refers to the General Court's ruling of 9 September 2015 in *SV Capital OÜ v European Banking Authority (EBA)* (Case T-660/14), as confirmed by the Court of Justice's ruling of 14 December 2016 (Case 577/15).
17. In the *SV Capital* case, the issue was the competence of the Board of Appeal to hear an appeal against the EBA's discretionary determination not to open an investigation against a national competent authority pursuant to a request submitted by a private person. The General Court stated that such an act is not a decision adopted under one of the provisions of the EBA Regulation that can be challenged before the Board of Appeal in accordance with article 60(1) and (2) of that Regulation, and that the Board is therefore not competent to hear such

challenges. (The EBA Regulation is the same as the ESMA Regulation in this respect).

18. On this basis, the respondent considers that the Board of Appeal lacks competence to hear the present appeal.
19. Specifically, the respondent contends that the conclusion of ESMA not to initiate an investigation is not, and does not contain, a decision referred to in article 17 of the ESMA Regulation. The appellant is not one of the entities referred to in article 17(2) which may request ESMA to initiate an investigation into an alleged breach of or failure to apply EU law, nor is it a member of the Securities and Markets Stakeholder Group established in accordance with article 37 of the Regulation. Furthermore, the conclusion not to initiate an investigation is not a refusal to initiate an investigation upon request by one of the entities listed in article 17(2) ESMA Regulation, nor is it a recommendation or decision taken pursuant to article 17(2) to (6) of the ESMA Regulation.

3. Subsequent exchanges between the parties and the Board

20. On 23 July 2018, the President in consultation with the Board of Appeal notified the parties of the composition of the Board for the appeal, and asked the appellant to give her response to the points raised in the respondent's Application for Directions.
21. Also, the President in consultation with the Board of Appeal asked the respondent whether the reference in its Application for Directions to the "conclusion" of ESMA of 29 August 2017 not to initiate an investigation of CySEC under Article 17 of the ESMA Regulation is the same as the "decision" of 29 August 2017 which is referred to by the appellant. The respondent was also asked whether it intended to supply a copy of this document.
22. On 23 July 2018, the appellant indicated that she would give her response by 31 July 2018.
23. On 27 July 2018, the respondent responded to the Board's requests as follows:
 - (i) On 29 August 2017, after considering the allegations about the existence of a breach of Union law committed by CySEC arising from the appellant's (and others') complaint, ESMA's Chair concluded not to initiate an investigation against CySEC, and the appellant was sent the email of 7 September 2017 notifying her accordingly.
 - (ii) Given that the appellant in her Notice of Appeal refers to 'ESMA's ... decision on IronFX of 29 August 2017' the respondent assumes that the appellant challenges the conclusion of ESMA not to initiate an investigation.
 - (iii) The conclusion of ESMA's Chair not to initiate an investigation against CySEC is not, and does not contain, a decision in accordance with

Article 17 of the ESMA Regulation. The respondent reiterates its reference to the rulings in the *SV Capital* case.

- (iv) According to Article 5(1) of ESMA's rules of procedure on breach of Union law investigations, ESMA's Chair may, as a matter of discretion, close a request to investigate an alleged breach or non-application of Union law without initiating an investigation.
- (v) In 2018 the appellant applied to the respondent for access to this document in accordance with Regulation (EC) No 1049/2001. The respondent denied access to the document informing the appellant that the requested document is covered by the exemption laid down in the third hyphen of Article 4(2) and in the second paragraph of Article 4(3) of Regulation (EC) No 1049/2001.
- (vi) On the basis of the above, the respondent considers that a copy of the Chair's conclusion not to initiate an investigation against CySEC should not be provided to the appellant.

24. By a Response dated 30 July 2018, sent to the Board of Appeal on 31 July 2018, the appellant gave her response to the respondent's Application for Directions. She says that:

- (i) Only the email address of the Board of Appeal was shown on the ESMA website, and that was why the Notice of Appeal was sent by email. She says that the respondent's request for a hardcopy document raises a purely formal issue.
- (ii) The appellant opposes the respondent's argument that a determination not to open an investigation against a national competent authority cannot be challenged by a private person. She contends that she was entitled to request an investigation pursuant to article 17, because the instructions for requesting an investigation are published on the ESMA website and are therefore directed with to everybody, including consumers. The decision not to do so was of direct and individual concern to her, because she suffered damage due to the breach of Union Law by CySEC.
- (iii) Further, ESMA was requested to open an investigation pursuant to article 17 not only by the appellant, but by a large number of complainants. This large number of complainants can be considered as "Requesters" pursuant to the ESMA Rules of Procedures on Breach of Union Law Investigations.
- (iv) Further, ESMA was requested to open an investigation possibly by the European Parliament, and the Petition Committee of the European Parliament asked ESMA to open an investigation on 10 July 2017 (paragraph 3 of the response).
- (v) ESMA was possibly requested to open an investigation by one or more of the entities expressly referred to in article 17(2) ESMA Regulation, these Requesters are possibly indicated in the text of the ESMA conclusion, the text of the decision possibly contains reference to the Requesters which is important for assessing the admissibility of the

appeal, and for this reason, a copy of the ESMA conclusion should be provided.

25. On 7 August 2018, having consulted with the members, the President made the following further directions:
- (i) The respondent should respond to the appellant's response to the effect that the European Parliament asked ESMA to open an investigation.
 - (ii) The respondent should respond to the appellant's response to the effect that one or more of the entities expressly referred to in article 17(2) of the ESMA Regulation may be indicated in the text of the ESMA conclusion of 29 August 2017.
26. On 3 September 2018, there having been no response from the respondent to these directions and having consulted with the members, the President directed that the respondent had to respond by close of business on 4 September 2018 at the latest.
27. On 3 September 2018, the respondent replied as follows:
- (1) As regards paragraph 3 of the appellant's response neither the European Parliament nor the Committee on Petitions (of the European Parliament) during the hearing in July 2017 asked ESMA to open an investigation in accordance with Article 17 of Regulation (EU) 1095/2010.
 - (2) With respect to paragraph 4 of the appellant's response no entity referred to in Article 17(2) of Regulation (EU) 1095/2010 is indicated in the text of the ESMA conclusion given that no such entity asked ESMA to open an investigation in accordance with Article 17 of Regulation (EU) 1095/2010.

III. The Board's conclusions

28. The following points are those which arise for the Board's decision.

(1) The service of the Notice of Appeal

29. As noted above, the Notice of Appeal was emailed by the appellant to the Board of Appeal at ESMA on 12 February 2018, but did not arrive in the inbox but went into spam. The appeal did not come to light until the appellant sent a further email on 4 July 2018 complaining about the lack of a response.

30. By article 60(2) of the ESMA Regulation:

“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.”

31. By article 7(2) of the Board of Appeal's Rules of Procedure, the Notice of Appeal is to be filed by registered post, personal delivery against a receipt, or in accordance with any direction given by the Board of Appeal in respect of a particular appeal.
32. The appellant says that at the time she filed the appeal the instructions on the ESMA website were very brief, and contained no guidelines for filing an appeal, and no indicative form for filing an appeal. She says that only the email address of the Board of Appeal was shown on the ESMA website, and that was why the Notice of Appeal was sent by email.
33. These points are factually incorrect. At the time the appellant sent the email, the ESMA website contained (and currently contains) guidelines making it clear that formal documents are to be filed in physical form, a form of notice of appeal, and the address of ESMA at which hard copies should be filed.
34. As a matter of fact, therefore, had the appellant complied with the Rules, her Notice of Appeal would not have been missed, and the delay that occurred between February and July 2018 would not have occurred.
35. However, in principle, the Board sees no reason to direct the appellant now to file the Notice of Appeal by registered post or personal delivery as the respondent requires. The appellant's mistake was, as she says, a matter of formality. If the Board of Appeal has competence to hear the appeal, an appropriate order, and one permitted under article 7(2)(iii) of the Rules of Procedure, would be to direct that the emailed filing of 12 February 2018 is to stand. The major question is whether the Board of Appeal has such competence, and that question is now considered.

(2) The competence of the Board of Appeal to hear the appeal

36. Where a national competent authority applies its supervisory powers in a way which appears to be a breach of Union law, article 17(2) of the ESMA Regulation empowers ESMA to investigate the alleged breach or non-application of Union law as follows:

“Upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group, or on its own initiative, and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law.”

37. Article 60 of the ESMA Regulation gives rights of appeal to the Board of Appeal against certain decisions of ESMA, including under article 17. It provides that:

“Any natural or legal person, including competent authorities, may appeal against a decision of the Authority

referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.”

38. In summary, and as set out in detail above, the appellant argues that her appeal falls within these provisions, and that the Board of Appeal should determine it on the merits, whereas the respondent argues that the Board of Appeal lacks competence to hear the appeal on the basis of the decision in the *SV Capital* case cited above.
39. The *SV Capital* case concerned the founding Regulation of the European Banking Authority, the terms of which are materially identical to those of the ESMA Regulation for present purposes.
40. The appellant in that case asked the EBA to initiate an investigation into the failure of the supervisory authorities in Finland and Estonia to remove two directors of a Finnish bank established in Estonia who, the appellant claimed, failed to satisfy the “fit and proper test”. The EBA refused to do so, and the appellant appealed to the Board of Appeal against its decision.
41. The Board of Appeal dismissed the appeal, holding that the decision was one which the EBA was entitled to take.
42. The appellant challenged that decision in the General Court, seeking an order that the case should be remitted to the EBA for the purpose of examining the merits of its complaint.
43. The General Court refused to make this order, holding further that the Board of Appeal did not have competence to hear the appeal. The appellant’s appeal was dismissed by the CJEU.
44. For present purposes, the main ground of the Court’s decision (and that particularly relied on by the respondent) is that the appellant was not one of the entities expressly referred to in article 17(2) of the Regulation that is entitled to request an investigation, and that consequently the Board of Appeal had no jurisdiction to hear its appeal against the refusal of the relevant authority (in that case the EBA) to do so.
45. The CJEU stated as follows:

“40 ... the appellant is not one of the entities expressly referred to in Article 17(2) of Regulation No 1093/2010 which may request the EBA to initiate an investigation into an alleged breach or failure to apply EU law. In particular, the appellant does not claim to be a member of the Banking

Stakeholder Group, established in accordance with Article 37 of Regulation No 1093/2010.

41 Moreover, the General Court's finding that the appellant is not one of the entities expressly referred to in Article 17(2) of Regulation No 1093/2010 is in no way altered, contrary to what the appellant seems to claim, by the fact that the EBA may initiate investigations on its own initiative."

46. The practical effect of the decision is to limit appeals against decisions of the European Supervisory Authorities (that is, ESMA, the EBA and EIOPA) to investigate or not to investigate alleged breaches or non-application of Union law to national competent authorities, the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group. The fact that the Authority may initiate investigations on its own initiative does not affect this conclusion.

47. The appellant, like the appellant in the *SV Capital* case, falls into none of these categories. On this basis, the respondent contends that the Board of Appeal lacks competence to hear the appeal.

48. In response, the appellant makes three main points.

49. First, she contends that she was entitled to request an investigation pursuant to article 17, because the instructions for requesting an investigation are published on the ESMA website and are therefore directed to everybody, including consumers. The decision not to do so was of direct and individual concern to her, because she suffered damage due to the breach of Union Law by CySEC.

50. It is correct, as the appellant says, that the Decision of ESMA's Board of Supervisors, (ESMA/2012/BS/87rev), which sets out Rules of procedure on breach of Union law investigations, is on ESMA's website, and is in that sense directed at everybody.

51. Article 2 of these Rules provide that:

"(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 relevant stakeholder group ("Requester").

(2) The Chairperson may also initiate investigations on his/her own initiative and for that purpose may take into account any Request made to ESMA by any other legal or natural person (also referred to as a "Requester") pointing to measures or practices of a competent authority indicating a breach or non-application of Union law."

52. However, these Rules do not, and could not, widen the scope of ESMA's investigatory powers and duties, which come from the ESMA Regulation. The fact of their publication on ESMA's website does not, therefore, assist the appellant's case.
53. Second, the appellant says that ESMA was requested to open an investigation not only by herself, but by a large number of complainants. This large number of complainants can be considered as "Requesters" pursuant to the ESMA Rules of Procedures on Breach of Union Law Investigations.
54. However, in the Board's view, the number of complainants is not sufficient to give a right of appeal when none of the complainants falls within the categories of entities that are entitled to request ESMA to initiate an investigation under article 17(2) of the ESMA Regulation.
55. Third, the appellant says that ESMA was possibly requested to open an investigation by one or more of the entities expressly referred to in article 17(2) of the ESMA Regulation, specifically (she says) by the European Parliament. She says that these Requesters are possibly indicated in the text of the ESMA conclusion, the text of the decision possibly contains reference to the Requesters which is important for assessing the admissibility of the appeal, and for this reason, a copy of the ESMA conclusion should be provided.
56. In this regard, and as indicated above, the respondent says that the appellant has already applied to the respondent for access to this document under Regulation (EC) No 1049/2001. Access was refused on the basis of the exemption in the third hyphen of Article 4(2) and in the second paragraph of Article 4(3) of Regulation (EC) No 1049/2001. The respondent has therefore objected to the provision to the appellant of a copy of the Chair's conclusion not to initiate an investigation against CySEC.
57. The Board of Appeal has considered whether to order provision of the document to the appellant. It can see that she has a personal interest in the conclusion that was reached not to initiate an investigation, and that there is also a more general interest in transparency to take into account.
58. However, the respondent has provided a clear answer to the points raised by the appellant. Neither the European Parliament nor the Committee on Petitions of the European Parliament during the hearing in July 2017 referred to by the appellant asked ESMA to open an investigation in accordance with Article 17 of Regulation (EU) 1095/2010. No entity referred to in Article 17(2) of the Regulation is indicated in the text of the ESMA conclusion given that no such entity asked ESMA to open an investigation in accordance with Article 17 of the Regulation.
59. On that basis, the possibilities the appellant mentions do not arise. That being so, it is clear on the authority of the *SV Capital* case cited above that (as the

respondent submits) the Board has no competence to hear this appeal. It is doubtful in such circumstances that the Board could properly order production of the document, even if it thought it right to do so.

60. The Board would wish to add that the issues raised by the appellant are of very significant concern. It is entirely understandable that she and others in her position should be seeking a remedy.
61. The Board also wishes to add that since the Notice of Appeal was originally sent by the appellant, ESMA has imposed certain prohibitions on the marketing, distribution or sale of binary options to retail investors, and restrictions on the marketing, distribution or sale of CFDs (contracts for differences) to retail investors. This is under new product intervention powers in article 40 of the Markets in Financial Instruments Regulation (MiFIR).

IV. Decision

62. For the reasons given above, the Board of Appeal unanimously decides that it lacks competence to consider this appeal and/or the appeal is inadmissible.
63. The Secretariat is instructed to forthwith send a certified copy of this Decision to the parties, informing them of the right of appeal under Article 61 of the ESMA Regulation, and to file the original in the Secretariat's records.
64. The original of this decision is signed by the Members of the Board of Appeal in electronic format, as authorised by Article 22.2 of the Rules of Procedure, and countersigned by hand by the Secretariat.

William Blair (President)
(SIGNED)

Marco Lamandini
(SIGNED)

Anna Konstantinou
(SIGNED)

Pat McArdle
(SIGNED)

Lars Afrell
(SIGNED)

Beata Maria Mrozowska
(SIGNED)

On behalf of the Secretariat
Kai Kosik
(SIGNED)

A signed copy of the decision is held by the Secretariat.