



ESMA's enforcement powers

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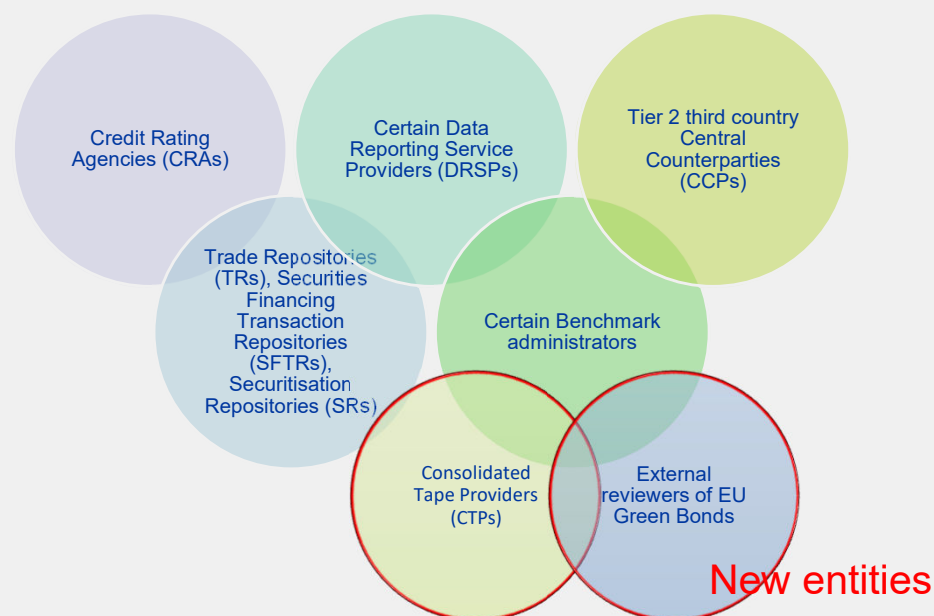
Head of Enforcement Unit (ESMA)

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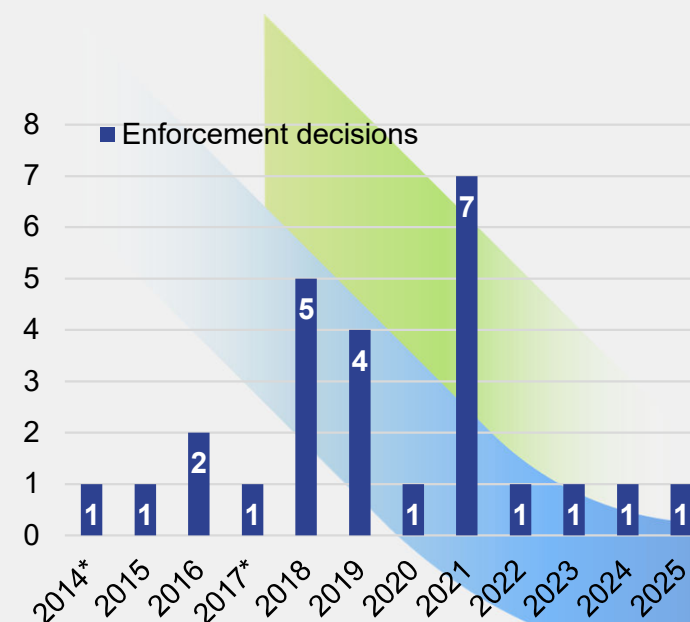
Setting the scene

- For over 10 years, ESMA was the only European Supervisory Authority ('ESA') with direct supervisory and enforcement powers.



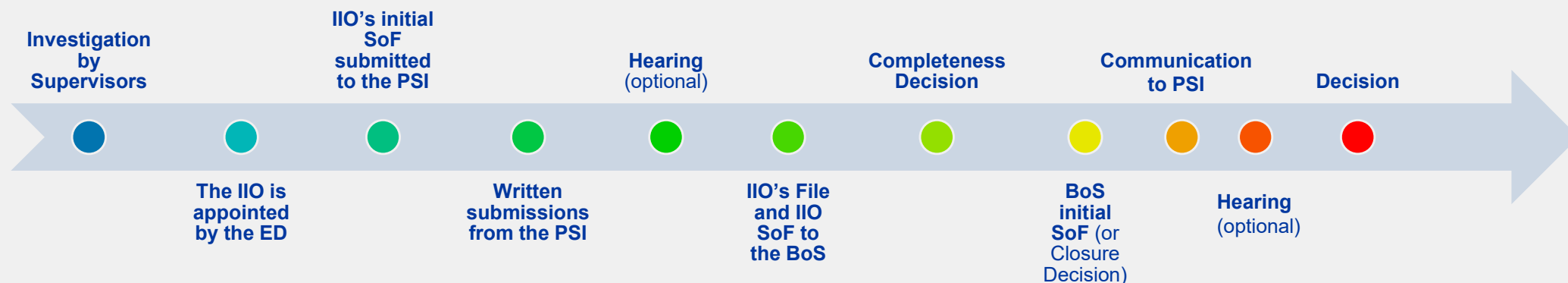
21 of 26 enforcement decisions were imposed on CRAs (81%) and 5 on TRs (19%).

Since 2014, there have been 20 enforcement actions, some cases led to several decisions.



* One decision concerning two entities.

Overview of ESMA's Enforcement process



- Supervisors identify and refer potential breaches to an Independent Investigating Officer (IIO), appointed from the Enforcement Unit.
- A Statement of Findings ('SoF') is submitted to the person(s) subject to investigation ('PSI'). The final SoF is later submitted to the Board of Supervisors ('BoS'), the decision-making body, which takes the sanction decision.
- The Board of Appeal ('BoA') is the first appeal body to ESMA's sanctioning decisions.

Procedural safeguards

IIO

- Must not be/have been involved in the direct/indirect supervision/registration process of the PSI concerned
- Must perform his/her functions independently from BoS/ESMA
- Must not participate in the deliberations of BoS or in any other way intervene in the decision-making process of BoS
- **In practice:**
 - Experienced lawyer from Enforcement Unit
 - Clear separation between the different stages; needed interactions included in the file

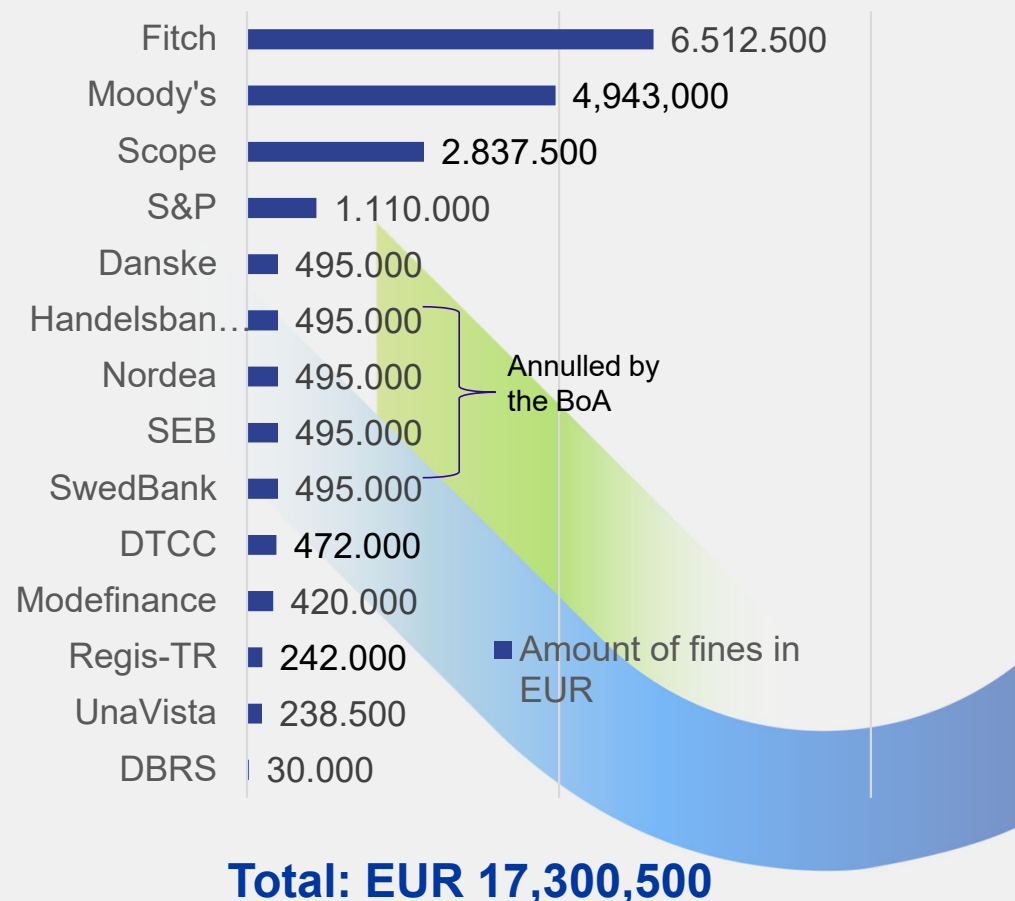
PSI

- Has the right to be heard before the IIO and the BoS;
- Has the right to request access to the file;
- Has the right to be supported by legal counsel.
- **In practice:**
 - Comments usually received in written, though IIO and BoS can hold an oral hearing

Outcome of enforcement cases

- Based on the IIO's file and PSI's submissions, the BoS makes a final decision on
 - whether any infringement has been committed, and
 - the sanctions to be imposed: supervisory measure and/or fine (if negligence/intent is found).
- ESMA has no discretion when issuing fines (though some newer regulations are % turnover based).
- Proportionality is built into the regulations: generally, base amount tied to turnover and adjusted with mitigating/aggravating factors.
- PPPs have never been imposed so far.

Amount of fines in EUR by entity and cumulated fine (2014-2025)



Publication

ESMA must disclose to the public

- Every fine and periodic penalty payment
- Supervisory measures, e.g. Public Notice (within 10 working days)

Transparency

- ESMA also publishes the Decision which contains the reasoning

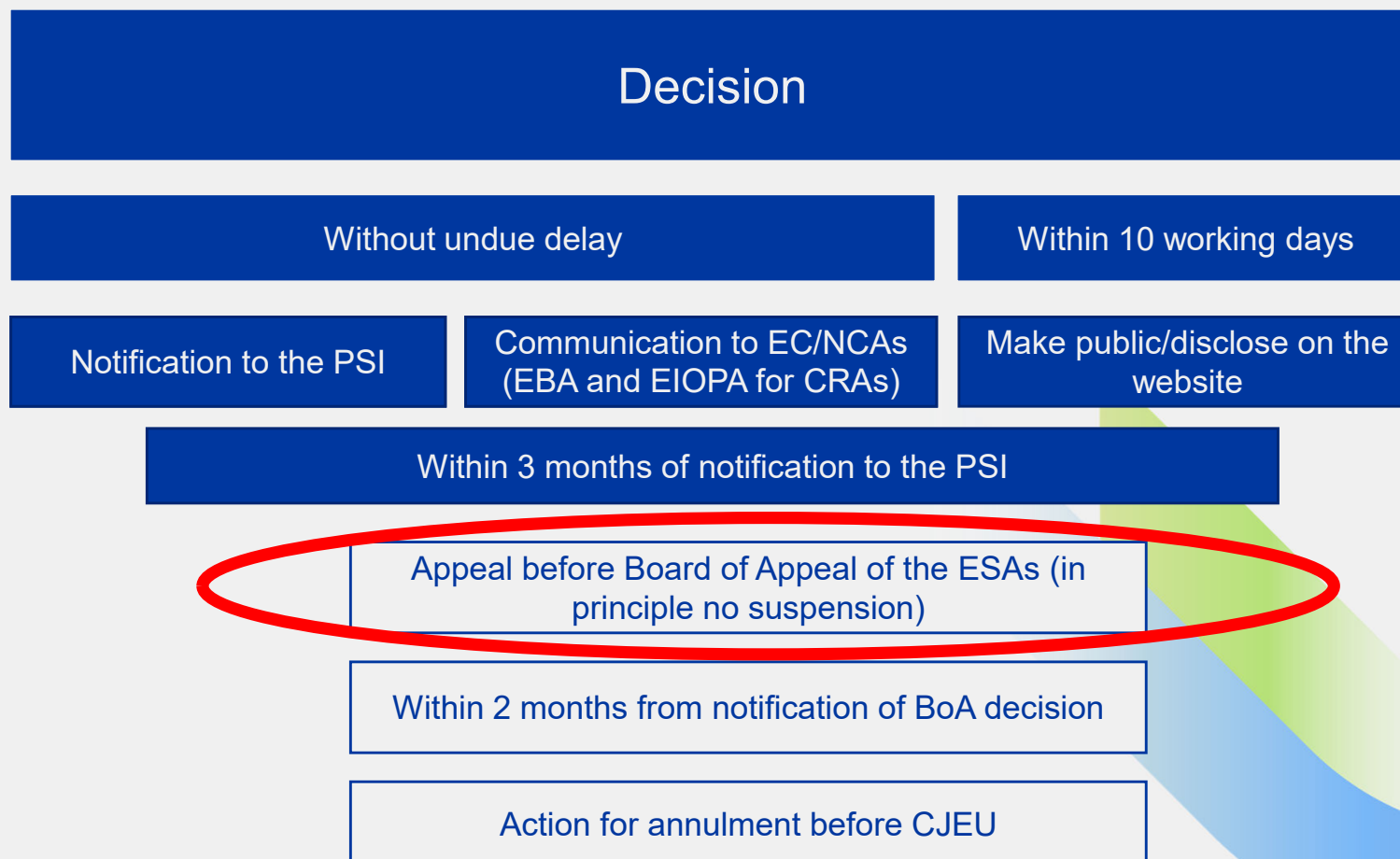
Limits to publication

- disclosure “would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved”
- “disclosure shall not contain personal data” (EMIR)

In practical terms

- ESMA invites the PSI to perform a confidentiality check
- Business secrets
- Personal data/rights of defence of third parties

Review by the Board of Appeal



Review by the Board of Appeal

Nordic Banks

BoA remitted decisions to ESMA (negligence was not established)

- BoA handled all four appeals together for **procedural efficiency** and held one hearing where each party made oral representations.
- A suspension request was denied.
- Very specific factual circumstances: BoS had found negligence while **IIO** had not.
- BoA's support of test for **negligence** as applied by ESMA in all previous relevant decisions, particularly regarding:
 - high standard of care required of financial services providers and CRAs; and
 - relevance of the CJEU case law developed in the context of competition law.

Scope Ratings

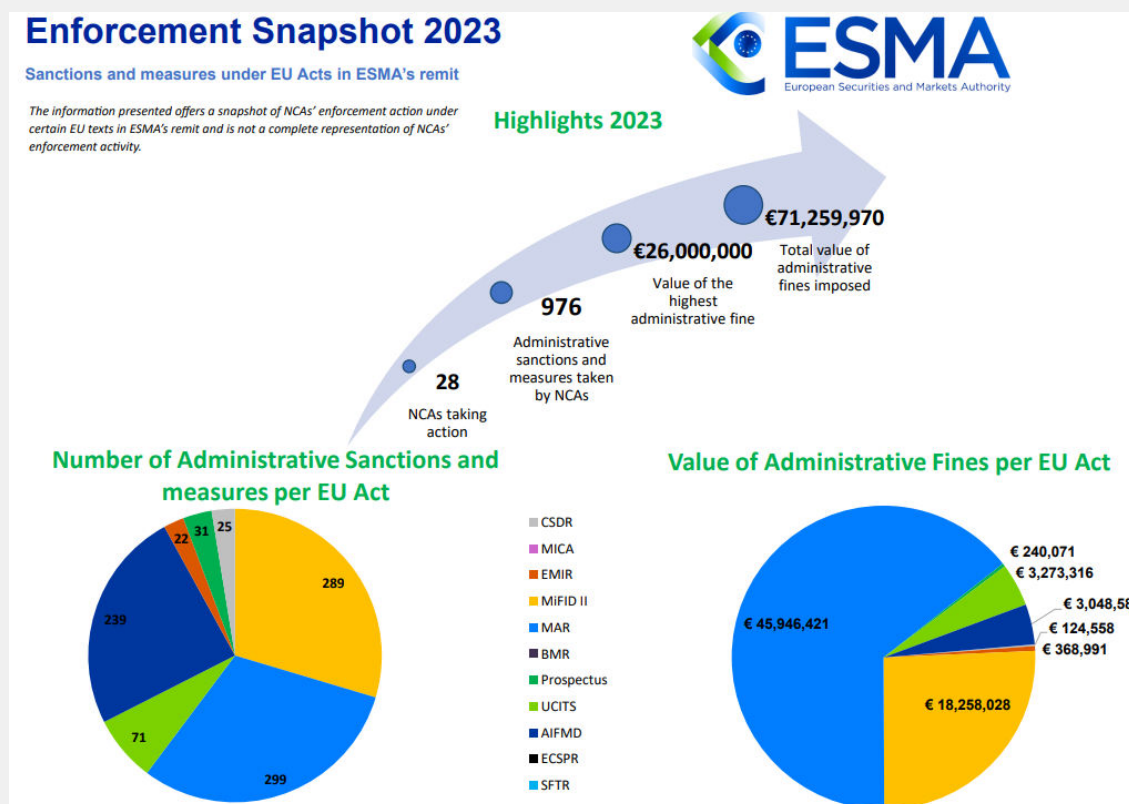
BoA upheld ESMA's decision in its entirety

- Regarding **negligence**, BoA reemphasised the high standard of care expected.
- **Doubt** regarding how to interpret a provision should benefit to the investigated entity.
- Principle of **proportionality** contained in several provisions of the CRA Regulation and ESMA does not have discretion to calibrate the fine (must apply the methodology set out in the CRA Regulation).
- BoA recognised ESMA's **margin of appreciation** as a specialist regulator and supervisor.
- BoA review is limited to verifying whether the BoS complied with all applicable procedural rules, duly stated its reasons, accurately stated the facts, and did not commit a manifest error of assessment or a misuse of powers.

Other ESMA's enforcement initiatives

Annual consolidated report on sanctions and measures

- To enhance transparency on national sanctions
- To foster enforcement convergence





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