

EBA/DC/2014/100

14 July 2014

Decision of the European Banking Authority adopting Rules of Procedure for Investigation of Breach of Union Law

The Board of Supervisors

Having regard to Regulation (EU) No 1093/2010 of the European Parliament and of the Council establishing the European Banking Authority (the "Regulation" and "EBA"), in particular Article 17 thereof,

Whereas

- (1) Article 17 of the Regulation provides for the EBA to investigate 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) Although initiating investigations remains within the EBA's discretion, 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.
- (3) According to Article 41(1) of the Regulation, the Board of Supervisors may provide for the delegation of certain tasks. In order to meet the very short timescales provided in the Regulation for carrying out an investigation and making any necessary recommendations to competent authorities, initiating investigations or closure of the Request without initiating an investigation should be determined by the Chairperson, whereas the panel established in accordance with Article 41(1a) of the Regulation should close an investigation,

Has decided as follows:

Chapter 1 – Scope

Article 1 - Scope and application of the Rules of Procedure

This Decision sets out the Rules of Procedures for applying Article 17 of the Regulation on investigating breaches of Union law. They shall apply to Requests to investigate received by the EBA as well as, to the extent relevant, own initiative investigations 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 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 the EBA 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.
- (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 complained of.
- (4) The EBA shall determine whether or not further action should be taken on a Request in accordance with these Rules of Procedure.

Article 3 - Submission of a Request and admissibility criteria

- (1) Requests shall be sent to the EBA via the EBA's website, by electronic mail, by post or by fax. The relevant contact details shall be defined by the Executive Director and may be updated periodically. Requests shall be made in one of the official languages of the Union.
- (2) To be admissible, a Request shall:
 - (i) 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, in particular a failure of a competent authority to ensure that a financial institution satisfies the requirements laid down in those acts; and
 - (ii) not fall into a category set out in Annex 1.

Article 4 – Preliminary enquiry

The Chairperson may invite the competent authority concerned, the Requester or any other legal or natural person to provide information within a specified period. This specified period should not normally exceed ten working days.

Article 5 – Preliminary determinations

On the basis of the information in the EBA's possession and, if relevant, the expiry of the specified period in Article 4, the Chairperson shall determine:

- (i) whether the Request is admissible applying the criteria of admissibility in Article 3(2) and Annex 1; and

- (ii) in case the Chairperson determines that a Request is admissible and as a matter of the Chairperson's discretion taking into account the non-exhaustive list of factors in Annex 2, whether an investigation should be initiated.

Article 6 – Closure of the Request without opening an investigation

- (1) If the Chairperson proposes to close the Request due to his or her determination that (i) the Request is inadmissible; or (ii) the Request is admissible but an investigation should not be initiated, the Chairperson shall inform the Alternate Chairperson of his/her proposal on the basis of anonymised information.
- (2) If the Alternate Chairperson objects to the Chairperson's proposal within five working days, the Chairperson shall review his/her position. In case of disagreement, the Chairperson shall request the advice of the Management Board on the basis of anonymised information.
- (3) In the event that the Chairperson closes the 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. 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 7 - 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 Alternate Chairperson about the proposal on the basis of anonymised information.
- (2) If the Alternate Chairperson objects to this proposal within five working days, the procedure in Article 6(2) shall apply.
- (3) The Chairperson shall inform the Requester and the competent authority concerned of the initiation of an investigation.
- (4) The date of this communication to the Requester and the competent authority concerned shall be considered to be the date of the initiation of the EBA's investigation.

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.
- (2) The Chairperson may request additional information from the competent authority concerned in accordance with Article 17(2) of the Regulation.

- (3) The Chairperson may request additional information from any other relevant legal or natural person.
- (4) The Chairperson shall set clear deadlines for the transmission of information.
- (5) The methodology applied across investigations by investigating staff shall be consistent.

Article 9 - Composition, appointment and convocation of the panel

- (1) Upon initiation of an investigation, the Chairperson shall convoke an independent panel pursuant to Article 41(1a) of the Regulation (“Panel”), to determine whether to close the investigation without adopting a recommendation or, in the event that a breach of Union law by the competent authority is established, to submit a draft recommendation to the Board of Supervisors.
- (2) The Panel shall be composed of the Chairperson and of six members of the Board of Supervisors who are not representatives of the competent authority alleged to have breached Union law and who have neither any interest in the matter nor direct links to the competent authority concerned. The latter may be replaced by one of four substitute members fulfilling the requirements set forth in the first sentence of this paragraph.
- (3) The Panel shall be the same as that provided for and disciplined in the EBA Decision on the Rules of Procedure for the settlement of disagreements between competent authorities¹. Article 2 paragraphs (2) to (8) and Article 3 of that Decision shall apply *mutatis mutandis*.
- (4) When the Chairperson convenes the Panel upon the initiation of an investigation, he/she shall provide the investigation report, including the EBA’s staff assessment and conclusions on the case.
- (5) When the Chairperson convenes the Panel pursuant to Article 12(2) of these Rules of Procedure, he/she shall provide the formal opinion issued by the Commission and any other document of relevance.

Article 10 - Closure of an investigation without issuing a recommendation

In the event the Panel closes the investigation without issuing a recommendation, the Requester and the competent authority concerned shall be informed of the reasons by the Chairperson. The Chairperson also shall inform the Requester 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 Panel concludes that there has been a breach of Union law, the Chairperson shall inform, in accordance with Article 39 of the Regulation, the competent authority concerned about the proposal of draft recommendation before its submission to the Board of Supervisors. The Chairperson shall state the period within which the competent authority concerned may express its views.

¹ EBA/DC/2014/091 of 20 February 2014.

- (2) The draft recommendation shall:
 - (i) set out the action necessary to comply with Union law;
 - (ii) state the reasons on which it is based; and
 - (iii) set a deadline within which the competent authority shall comply with it and report on compliance to the Chairperson.
- (3) After hearing the views of the competent authority concerned, the Panel shall determine whether to proceed further and, if so, shall make any revisions to the draft recommendation considered necessary.
- (4) Where the Panel determines to proceed further, the Chairperson shall submit the draft recommendation, the investigation report and the views of the competent authority concerned to the Board of Supervisors for decision.
- (5) Where the Board of Supervisors agrees to address a recommendation 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 to ensure compliance with Union law. The Chairperson shall inform the Commission and the Board of Supervisors accordingly.

Chapter 4 - Financial Institutions

Article 12 - Individual decision addressed to financial institutions

- (1) The EBA shall provide any necessary assistance to the Commission in relation to any formal opinion the Commission proposes to issue in case of non-compliance by the competent authority in accordance with Article 17(4) of the Regulation.
- (2) If the Commission issues a formal opinion to a competent authority and the competent authority concerned has not complied with the formal opinion within the specified time, the Chairperson shall, where relevant, convoke the Panel in order to propose to the Board of Supervisors an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law. The decision may require the cessation of any practice. The Panel shall only propose this individual decision, if:
 - (i) 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
 - (ii) The relevant requirements of the acts referred to in Article 1(2) of the Regulation are directly applicable to financial institutions.
- (3) The decision 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 institution shall express its views and the legal remedies available.
- (4) The Chairperson shall inform the financial institution in accordance with Article 39 of the Regulation. Article 11(1), 11(3) and 11(4) shall apply mutatis mutandis.

- (5) A copy of the 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 institution shall be published on the EBA's website and shall state the identity of the financial institution concerned and the main content of the decision, unless such publication is in conflict with the legitimate interests of financial institutions in the protection of their 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) The EBA shall publish such details as are appropriate in respect of any recommendation that has been addressed to a competent authority under these Rules of Procedure. 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, the EBA shall set out which competent authorities and financial institutions have not complied with the formal opinions, recommendations or decisions referred to in Articles 11 and 12 of these Rules of Procedure.

Chapter 6 - Final provisions

Article 14 - EBA Staff

The Chairperson shall be advised on legal and policy issues by the EBA staff.

Article 15 – Confidentiality

- (1) If the Requester is an individual, disclosure of his/her identity and of information submitted by him/her to the competent authority concerned is subject to the individual's prior agreement and must comply, inter alia, with European Parliament and Council Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.
- (2) The Rules governing confidentiality in accordance with Article 70 of the Regulation and with the EBA's Rules on Professional Secrecy and Confidentiality² which lay down practical arrangements for the implementation of the Regulation, shall apply to these proceedings.

² EBA DC 004 Decision on Professional Secrecy and Confidentiality.

Article 16 - Conflict of interest

- (1) The Alternate Chairperson shall be replaced by a member of the Management Board, nominated by the Management Board, in case of a conflict of interest with regard to the conclusion of the investigation as provided in Article 11 of these Rules of Procedure or at any earlier stage of the process if the conflict of interest is identifiable notwithstanding the anonymised information.
- (2) If a member of the Management Board has a conflict of interest in the issue, he/she shall not be nominated to replace the Alternate Chairperson or to participate in the advice of the Management Board requested according to Article 6(2) of these Rules of Procedure or at any earlier stage of the process if the conflict of interest is identifiable notwithstanding the anonymised information.
- (3) The member of the Management Board and/or the Board of Supervisors representing the competent authority to which the draft recommendation is addressed shall assess whether it is appropriate to participate in the decisions referred to in these Rules of Procedure.

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

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

Article 18 — Executive Director

The Executive Director shall establish the necessary internal procedures for the implementation of this Decision.

Article 19 — Entry into force

The Decision EBA DC 054 of 5th July 2012 concerning the Internal Processing Rules on Investigation regarding Breaches of Union Law is repealed and replaced by this Decision.

This Decision enters into force the day following its adoption.

Done at London, 14 July 2014

[signed]

Andrea Enria

Chairperson
For the Board of Supervisors

Annex 1

Inadmissible Requests

A request is inadmissible if:

- it is anonymous, fails to show the address of the sender or shows an incomplete address;
- it fails to set out a grievance;
- it sets out a grievance which is outside the scope of the acts referred to in Article 1(2) of the Regulation
- it fails to refer, explicitly or implicitly, to a competent authority to which the alleged breach of Union law may be attributed;
- 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;
- it sets out a grievance which is materially the same as one for which the EBA has already informed the Requester of its position or has adopted a clear, public and consistent position.

Annex 2

Positive Investigation factors

- The alleged breach undermines the foundations of the rule of law (for example, systemic infringements, breaches of human rights or fundamental freedoms);
- The alleged breach concerns a repeated infringement (for example a pattern of complaints indicating systematic incorrect application, interpretation, practice or approach of the competent authority concerned) or a general policy approach;
- The alleged breach may have significant, direct impact on EBA's objectives concerning: contributing to the short, medium and long-term stability and effectiveness of the financial system, functioning of the internal market; integrity, transparency, efficiency and orderly functioning of financial markets; preventing regulatory arbitrage and promoting equal conditions of competition; and enhancing customer protection.

Negative Investigation factors

- 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;
- The Request is more suitable to be dealt by other means (for example peer review, mediation);
- The Request appears frivolous or vexatious;
- 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.