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11 September 2017

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# Decision of the European Banking Authority adopting rules of Procedure on Professional Secrecy for Non-Staff, and repealing the Decision of the Management Board of 12 January 2011 on Professional Secrecy (EBA DC 004)

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## The Management Board

### Having regard to

Having regard to the Treaty on European Union, and in particular Article 4(3) thereof,

Having regard to the Treaty on the Functioning of the European Union, and in particular and 339 thereof,

Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC<sup>1</sup> (the 'EBA Regulation' and 'the EBA'), as subsequently amended, in particular Articles 2(4), 41, 42 and 70 thereof,

### Whereas:

- (1) Ensuring the EBA's independence from undue influence from other government, regulatory or administrative bodies and authorities, as well as from private sector operators and external stakeholders, and preserving high standards of professional secrecy with respect to all Non-Staff involved in the EBA's activities are crucial for the EBA's credibility and reputation.
- (2) All Non-Staff involved in the EBA's activities should abide by the duty of professional secrecy, which entails the obligation not to disclose information received in this official capacity, unless it is explicitly permitted or publicly available.

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1. OJ L331, 15.12.2010, p. 12.

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- (3) The EBA's Board of Supervisors may establish internal committees or panels for specific tasks attributed to it and may provide for the delegation of certain clearly defined tasks and decisions to internal committees or panels (typically known as "EBA working groups").
- (4) The Members of the Board of Supervisors are entitled to elect from among themselves members of the EBA's working groups, as well as to nominate a representative to any EBA working group.
- (5) Legislation referred to in Article 1(2) of the EBA Regulation provide for their own professional secrecy arrangements.
- (6) Members of the Board of Supervisors and the Management Board should respect the level of classification of the Board proceedings and information provided thereat. For this purpose, guidance ensuring the proper handling of EBA Information at national level may be produced.
- (7) By the same token, persons appointed by the Members of the Board of Supervisors to an EBA working group should also respect the confidentiality of the documents and information they have been granted access to. In the event a Member to an EBA working group fails to abide by this duty, his/her replacement may be sought.
- (8) Members of the Board of Supervisors, including their officially nominated Alternates, Non-Voting Members and Observers to the Board of Supervisors are required to submit a declaration on confidentiality and commitment whereby they declare the awareness of their obligations, as set out in the EBA's Conflict of Interest Policy for Non-staff (EBA DC 103).
- (9) Sharing EBA documents and information internally within the national competent authorities (NCAs) may be necessary for working purposes and should remain at the discretion and under the responsibility of the Members of the Board of Supervisors.
- (10) Should the obligation of professional secrecy be breached by a person who is subject to this decision, the EBA should be able to take proportionate action in order to minimise the possibility that such a breach occurs again. For this purpose, the EBA's Board of Supervisors Members should be held responsible for any unauthorised disclosure of EBA Information, originating from their respective authorities, except for an unauthorised disclosure that might have originated from another relevant national authority, as referred to in Article 40, paragraphs (4), (5) and (6) of Regulation (EU) No 1093/2010.
- (11) In line with Article 68(1) of Regulation (EU) 1093/2010, EBA staff, including the Chairperson and Executive Director of the EBA, is subject to the Staff Regulations of Officials of the European Union and Conditions of Employment of Other Servants of the European Union (the Staff Regulations). Article 17 of the Staff Regulations enshrines the principle of professional secrecy and Annex IX to those Regulations provides for disciplinary proceedings in case of breach of the professional secrecy duty.

- (12) The EBA is in a position to investigate possible breaches of the Staff Regulations by its own staff, however, the EBA's investigative powers remain limited when it comes to the enquiry of possible breaches of the Staff Regulations that would be committed by staff of other EU bodies participating to its activities.
- (13) Similarly, the EBA is not in a position to take any direct action against a staff member of an NCA. The EBA is only empowered to recommend action against those individuals in so far as they participate in an EBA working groups or act in the capacity of advisers to the Members and Observers of the Board of Supervisors and the Management Board. The EBA's action is limited to recommending a change of the NCA representative in the EBA working groups to the concerned Board Member.
- (14) While the administration of the enquiry is the responsibility of the Chairperson, the approval of the enquiry report including the recommendations for possible remedial measures is the competency of the Management Board. The Board of Supervisors takes the final decision on the remedial measures.
- (15) Sincere co-operation between the EBA and the NCA represented in the Board of Supervisors, ensuring inter alia the flow of appropriate and reliable information between them, is important as regards ensuring robust governance and the safeguarding of the obligations stemming from Regulation (EU) 1093/2010 and in particular that of professional secrecy.

#### **Has decided as follows:**

##### **Article 1 – Subject Matter and Scope**

1. This Decision lays down the EBA's internal rules of procedure and the practical arrangements for implementing the confidentiality rules enshrined in Article 70 of Regulation (EU) No 1093/2010.
2. This Decision is applicable to Members of the Board of Supervisors and the Management Board, namely:
  - (a) Voting and EEA EFTA Members of the Board of Supervisors, including Permanent Representatives, and all their Alternates, as well as Voting Members of the Management Board, with the exception of the EBA's Chairperson, and their Alternates;
  - (b) Non-Voting Members to the Board of Supervisors, with the exception of the EBA's Chairperson, and their Alternates;
  - (c) any representatives of competent authorities referred to in Article 40(4), (5) and (6) of Regulation (EU) No 1093/2010;

- (d) Observers to the Board of Supervisors, and Observers to the Management Board, with the exception of the EBA's Executive Director.
3. Unless otherwise specified, it is also applicable to:
- (a) Members and Observers to the EBA working groups, all Standing Committee and Sub-Group Members, Participants and Observers, Project Managers, Moderators and Members of expert networks, including all of their alternates, with the exception of the EBA's staff, and
- (b) Advisers to the Members and Observers to the Board of Supervisors and the Management Board.

## Article 2 – Definitions

For the purposes of this Decision:

1. EBA Information means all oral or written information, including facts, data and any other matters, of which persons referred to in Article 1(2) and (3) acquire knowledge, directly or indirectly, as a result of their EBA activities whether or not contained in a document of any kind (electronic or on paper or any other medium) that is proprietary to or possessed by the EBA and it has not been made legally public. EBA Information is classified as “EBA REGULAR USE”, “EBA RESTRICTED USE” and “EBA CONFIDENTIAL USE” in accordance with the EBA Information Classification Policy. Accordingly, information classified as “PUBLIC” or information which has already been public is not in the scope of this decision.
2. Unauthorised Disclosure of EBA Information means the act of intentionally or unintentionally disclosing EBA Information to unauthorised recipients.

## SECTION II - GENERAL PRINCIPLES ON PROFESSIONAL SECRECY

### Article 3 – Professional Secrecy on EBA Information

1. Persons referred to in Article 1(2) and (3) of this Decision, shall not divulge any EBA Information received whilst performing their EBA duties to any natural or legal person whatsoever except:
  - (a) internally within the competent authorities on a need-to-know basis, taking the EBA's Information Classification Policy into account;
  - (b) as stipulated in Article 70(1) and (2) of Regulation (EU) No 1093/2010:
    - (i) for the enforcement of acts referred to in Article 1(2) of Regulation (EU) 1093/2010 and in particular for legal procedures for the adoption of decisions,
    - (ii) when it is necessary for the instruction of cases covered by criminal law;

- (c) when exchanging information with other national supervisory authorities, central banks, judicial authorities, national courts of auditors, and/or for parliamentary inquiries, in accordance with applicable legislation;
  - (d) when exchanging with national governments, on a need to know basis, and only to the extent necessary for these to be able to perform their functions:
    - (i) summaries of the EBA's policy activities;
    - (ii) information necessary for the determination of the annual budget of the NCA.
2. For any other situation, persons referred to in Article 1(2) and (3) shall seek the EBA's prior consent. In this event, disclosure of EBA Information could be permitted by the EBA's Chairperson on a case by case basis, taking into account the nature and classification of EBA Information to be disclosed as well as its potential impact and detriment for EBA.

#### **Article 4 – Professional Secrecy on EBA Information on individual financial institutions**

Persons referred to in Article 1(2) and (3) of this Decision shall not divulge any EBA Information containing information or data relating to individual financial institutions received whilst performing their duties to any person or authority whatsoever except in summary or aggregate form, such that individual financial institutions cannot be identified, and only under the exceptions referred to in paragraphs (a) and (b) of Article 3(1).

#### **Article 5 – Operational safeguards applicable to EBA Information**

1. Notwithstanding the exceptions or conditions stipulated in Articles 3 and 4 of this Decision, persons referred to in Article 1(2) and (3) shall, in the performance of their duties:
- (a) observe confidentiality concerning the EBA's activities insofar as they would not already be in the public domain; in particular take extra care in casual, social, professional or other contact with journalists, financial institutions, credit institutions and individuals operating in the financial markets;
  - (b) be aware and observe the Information Classification Policy, according to which all information owned, used, created, acquired, held or maintained by the EBA is classified into one of the following confidentiality levels: 'PUBLIC', 'EBA REGULAR USE'; 'EBA RESTRICTED USE'; 'EBA CONFIDENTIAL USE';
  - (c) in case of doubt, seek guidance from the EBA as to whether EBA Information may be disclosed;
  - (d) inform the EBA should they become aware of any unauthorised disclosure of EBA Information.
2. In particular, persons referred to in Article 1(2) of this Decision shall, in the performance of their duties, ensure that:
- (a) their respective authorities ensure a level of protection equivalent to that of the EBA's as regards EBA Information; and

- (b) the staff of their respective authorities is made aware of and abide by the duty of professional secrecy towards the EBA, under Article 70(3) of Regulation (EU) No 1093/2010.

### **SECTION III - PROCEDURE FOR IDENTIFYING AND HANDLING POTENTIAL BREACHES OF PROFESSIONAL SECRECY**

#### **Article 6 – Decision to launch an enquiry**

1. In case the EBA becomes aware of an alleged unauthorised disclosure of EBA Information, the Chairperson of the Management Board, taking into account the nature and classification of EBA Information disclosed as well as its impact and detriment for the EBA, may launch an enquiry (also the “MB enquiry”).
2. If the Chairperson of the Management Board decides to launch an enquiry, he or she shall inform the Management Board about this event.
3. The enquiry shall be conducted by the Chairperson of the Management Board. The Chairperson may delegate this task to a Member of the Management Board.
4. The Chairperson of the Management Board or, in the case of delegation to one of its Members, the Member to whom the enquiry has been delegated, may be assisted by a staff member of the EBA. The EBA’s Executive Director shall appoint the Member of the EBA’s staff to assist in the MB enquiry.

#### **Article 7 – Conduct of the enquiry**

1. In carrying out the MB enquiry, the person to whom this task is assigned shall be granted the right to:
  - (a) have access to EBA documents and data which are relevant to the unauthorised disclosure of EBA information;
  - (b) have access to information from the competent authorities of the Member States in accordance with Articles 2(4) and 35 of Regulation (EU) No 1093/2010 and in particular from the NCA which is most relevant for the enquiry, including from its internal audit service;
  - (c) be provided with the necessary resource and technical assistance from the EBA’s staff and in particular from the EBA’s Information Technology Unit, Operations Department.
2. In case there are indications that the unauthorised disclosure of EBA Information could be attributed to one of the persons listed in Article 1(2) and (3), the Chairperson of the Management Board or its Member to whom the enquiry may have been delegated may directly invite the relevant person under Article 1(2) to provide information on the alleged unauthorised disclosure of EBA Information. Should these persons wish to reply, information

should be provided within a period not exceeding ten (10) working days. In case the unauthorised disclosure of EBA information originated from any representative of competent authorities referred to in Article 40(4),(5) and (6) of Regulation (EU) No 1093/2010, then this invitation shall be addressed to this person.

3. After the conclusion of the MB enquiry, the Chairperson of the Management Board or its Member to whom the enquiry may have been delegated, shall adopt a report on its factual findings. Before the adoption, a draft version of the report shall be made available to the persons invited to provide information under paragraph 2 in order for them to be given the opportunity to present their views, perform an accuracy check and provide additional information, as the case may be, on corrective measures already put in place (or planned) in order to prevent future leaks of EBA Information from happening at the concerned NCA. Should they wish to respond, their reply shall be provided in writing within a period not exceeding ten (10) working days.
4. The Management Board shall duly consider any reply received, and shall finalise its report. In doing so, it may recommend for the Board of Supervisors' consideration that specific remedial measures be put in place.
5. These remedial measures may consist of the following components:
  - (a) Measures to be decided upon by the EBA, such as:
    - (i) temporary restriction of the NCA concerned to have access to EBA Information in the particular EBA working group from which the EBA Information subject to the unauthorised disclosure originated;
    - (ii) any other measure that would be deemed appropriate and available under Union Law.
  - (b) An action plan to be recommended to be undertaken at the NCA concerned, which may consist of:
    - (i) the enquiry according to national law provisions of the alleged unauthorised disclosure of EBA Information, if not yet initiated;
    - (ii) possible preventative measures, such as the introduction of new internal procedures and/or arrangements at national level to safeguard professional secrecy in as far as EBA Information is concerned;
    - (iii) appointment of a new representative to an EBA working groups from which EBA Information subject to the unauthorised disclosure might have originated;
    - (iv) any other action that would be deemed appropriate and available under national law, such as recourse to internal audit services.

## **Article 8 – Board of Supervisors’ Review and Follow-up**

1. The Management Board may decide to present the outcome of the MB enquiry along with the proposed remedial measures to the Board of Supervisors for information and/or decision. The identity of the person and the national competent authority liable for the unauthorised disclosure of EBA Information will be revealed, in order to create awareness and further impede any future possible recurrence of such an unauthorised disclosure of EBA Information. This revelation shall take place at the Board of Supervisors and is not meant to be or become public.
2. In case the Management Board decides to refer the outcome of the MB enquiry to the Board of Supervisors, the person identified in Article 7(2) shall be invited to present his/her views before the Board of Supervisors during the discussion of this item.
3. In case a remedial action plan to be implemented at NCA level is recommended by the Board of Supervisors, the concerned NCA shall report on the implementation at national level no later than three months after their adoption. Based on this update, and if satisfied, the Board of Supervisors shall lift any other preventive measures recommended by the EBA under Article 7(5)(b).

## **Article 9 – Conflict of interest**

1. When performing their duties, under this decision, Management Board Members shall refrain from potentially exposing themselves to conflicts of interests and are expected to particularly observe the Management Board’s Decision adopting a policy on Independence and Decision Making Processes for avoiding Conflicts of Interest (Conflict of Interest Policy) for Non-staff of 29 September 2014 (EBA DC 103).
2. Management Board Members and the EBA’s staff involved, are required to confirm that there is no conflict of interest with respect to the case examined, before assuming their tasks according to this decision.
3. If a Management Board Member declares an interest in this context, or if his/her respective authority is mentioned in the case at hand, then this Management Board Member shall be restricted from participating to the deliberations on this subject or from being assigned the MB enquiry.
4. If a member of the EBA’s staff declares an interest in this context, then he/she should be substituted.

## **SECTION IV – GENERAL PROVISIONS**

### **Article 10 – Data Protection**

Persons subject to this decision shall respect the requirements relating to processing of personal data under Regulation (EC) No 45/2001 when handling and disclosing EBA Information.

### **Article 11 – Repeal**

From the entry into force of this Decision, the Decision of the Management Board of 10 January 2011 on Professional Secrecy and Confidentiality (EBA DC 004) shall be repealed. References in other legal instruments to that Decision shall be construed as references to this Decision.

### **Article 12 – Entry into force**

This Decision shall enter into force the day after its adoption and shall be made public.

Done at London, 18.09.2017

(signed)

Andrea Enria

Chairperson

For the Management Board