

EBA/DC/2016/174

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23 December 2016

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

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## **The Board of Supervisors of the European Banking Authority**

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", respectively), in particular Article 17 thereof,

### **Whereas:**

- (1) Article 17 of the Regulation provides for the EBA to investigate the 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, for reasons of transparency and legal certainty, 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 or, to the extent relevant, to EBA own initiative investigations.
- (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, it would be appropriate that initiating investigations should be determined by the Chairperson, whereas the panel established in accordance with Article 41(1a) of the Regulation should close an investigation that has been initiated,

### **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 that the EBA

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received as well as, to the extent relevant, to 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 Banking 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 which is the subject of the Request.
- (4) The EBA shall determine whether 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 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) A Request shall fulfill both of the following conditions:
  - (i) It shall 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 of the Regulation, in particular a failure of a competent authority to ensure that a financial institution satisfies the requirements laid down in those acts; and
  - (ii) It shall not fall into one of the categories 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.

### Article 5 - Closure of the case without opening an investigation

- (1) The Chairperson may close the case without initiating an investigation where he/she considers that either of the following applies:

- (i) the Request does not meet the requirements in Article 3 (2);
  - (ii) an investigation should not be initiated as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex 2.
- (2) Where the Chairperson closes the case without initiating an investigation in accordance with paragraph 1,
  - (i) the Requester shall be notified of the fact that the case has been closed and the reasons of such decision. 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;
  - (ii) if the competent authority concerned has been notified of the Request, that authority shall also be notified.

## Chapter 3 - Investigation of an alleged breach or non-application of Union law

### Article 6 - Initiation of the investigation

- (1) If the Chairperson determines that an investigation should be initiated, the Chairperson shall inform the Alternate Chairperson about the proposal to initiate an investigation.
- (2) If the Alternate Chairperson objects to this proposal within five working days, the Chairperson shall review whether to proceed with an investigation.
- (3) The Requester and the competent authority concerned shall be informed of the initiation of an investigation.
- (4) The date of this communication to the competent authority concerned shall be considered to be the date of the initiation of the EBA's investigation.

### Article 7 - 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 8 - 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 authorities<sup>1</sup>. 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 11 (2) of these Rules of Procedure, he/she shall provide the formal opinion issued by the Commission and any other document of relevance.

## Article 9 - Closure of an investigation without issuing a recommendation

If the Panel closes the investigation without issuing a recommendation, the Requester and the competent authority concerned shall be informed of the reasons. 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.

## Article 10 - 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 for the 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.
- (2) The draft recommendation shall contain all of the following:
  - (i) the action necessary to comply with Union law;
  - (ii) the reasons on which it is based;

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<sup>1</sup> EBA/DC/2014/091 of 20 February 2014.

- (iii) 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 propose the draft recommendation to the Board of Supervisors and shall make any revisions to the draft recommendation considered necessary.
- (4) Once the Panel proposes the draft recommendation, 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 concludes that there has been a breach of Union Law and agrees to address a recommendation to the competent authority concerned, in accordance with Article 17(3) of the Regulation, the competent 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 11 - 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) When Article 17 (6) of the Regulation applies, 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, where both of the following conditions are met:
  - (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 10(1), 10(3) and 10(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 12 - 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 10 and 11 of these Rules of Procedure.

## Chapter 6 - Final provisions

### Article 13 – EBA Staff

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

### Article 14 – 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 shall be carried in accordance, inter alia, with European Parliament and Council Regulation (EC) No 45/2001<sup>2</sup>.
- (2) The Rules governing confidentiality in accordance with Article 70 of the Regulation and with the EBA's Rules on Professional Secrecy and Confidentiality<sup>3</sup> which lay down practical arrangements for the implementation of the Regulation, shall apply to these proceedings.

### Article 15 - Conflict of interest

The Management Board, upon proposal of the Chairperson, shall nominate one of its members in place of the Alternate Chairperson where any of the following situations applies:

- (i) the alleged breach of Union Law concerns a competent authority of the Member

<sup>2</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council 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. OJ L 008, 12/01/2001, P. 0001–0022.

<sup>3</sup> EBA DC 004 Decision on Professional Secrecy and Confidentiality.

State of the Alternate Chairperson;

- (ii) the alleged breach of Union Law relates to an establishment of a credit institution in the Member State of the Alternate Chairperson;
- (iii) any other conflict of interest of the Alternate Chairperson is identified.

The Chairperson shall ensure that none of these situations applies to the proposed member of the Management Board.

#### **Article 16 - 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 17 - Requests concerning to an EEA EFTA State**

This Decision shall apply to investigations of an alleged breach of the EEA Agreement by a competent authority of an EEA EFTA State, and to requests to carry out such an investigation, with the following modifications:

- (1) References to Union law shall be understood as references to the EEA Agreement.
- (2) In Article 2(1), the Standing Committee of the EFTA States and the EFTA Surveillance Authority shall also be considered as 'Requesters'.
- (3) For the purpose of Article 6(3), the Chairperson shall inform the EFTA Surveillance Authority of the initiation of an investigation.
- (4) For the purpose of Article 8, the EFTA Surveillance Authority shall be an observer to the Panel.
- (5) For the purpose of Article 10(1), the Chairperson shall also inform the EFTA Surveillance Authority about the draft recommendation.
- (6) For the purpose of Article 10(5), the Chairperson shall provide a copy of the recommendation to the EFTA Surveillance Authority. The EEA EFTA competent authority concerned shall, within 10 working days of receipt of the recommendation, inform the EBA and the EFTA Surveillance Authority of the steps that it has taken or intends to take to ensure compliance with the EEA Agreement.
- (7) Article 11(1) shall be replaced with the following: "Where the Chairperson considers that the EEA EFTA competent authority has not complied with the EEA Agreement within 1 month from receipt of the recommendation, the Chairperson may ask the EFTA Surveillance Authority to issue a formal opinion on the basis of the EBA recommendation or, where new developments require it, may prepare a draft formal opinion to be submitted to the EFTA Surveillance Authority, on his own initiative or at the request of the EFTA Surveillance Authority. That draft formal opinion shall be based on the

recommendation and shall be adopted as a draft formal opinion by the Board of Supervisors. The EEA EFTA competent authority shall, within 10 working days of receipt of any formal opinion adopted by the Surveillance Authority, inform the EBA and the EFTA Surveillance Authority of the steps it has taken or intends to take to comply with that formal opinion.

- (8) In Articles 11(2) and 11(3), references to the Commission shall be understood as references to the EFTA Surveillance Authority and references to a decision shall be understood as references to a draft prepared by the EBA and to be adopted by the EFTA Surveillance Authority.
- (9) Article 11(4) shall be replaced with the following: “The Chairperson shall inform the EFTA Surveillance Authority, setting a time limit within which the EFTA Surveillance Authority may allow any natural or legal person, including an EEA EFTA competent authority, which is the addressee of the decision to be taken to express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter.”
- (10) Article 11(5) shall not apply.
- (11) For the purpose of Article 12, the EBA shall coordinate publication of any decision with the EFTA Surveillance Authority.
- (12) Rules of Procedure of the European Banking Authority Board of Supervisors, in particular Article 3.6, shall apply for taking decisions in accordance to Articles 8, 10 and 11.

#### **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/2014/100 of 14<sup>th</sup> July 2014 adopting Rules of Procedure for Investigation of Breach of Union Law is repealed and replaced by this Decision.

This Decision enters into force the day following its adoption.

Done at London, 23 December 2016.

*(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 concerns a repeated or systemic 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, guidelines);
- 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.