

**Decision of the Board of Supervisors  
concerning the  
Internal Processing Rules on Investigation  
regarding 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 EBA Regulation provides for the EBA to investigate non-application by competent authorities of the acts referred to in Article 1(2) of the EBA Regulation, or their application in a way which appears to be a breach of Union law.
- (2) Although decisions on opening investigations remain within the EBA's discretion, these Rules should set out admissibility criteria in relation to requests to open investigations that are received from third parties, and factors that the EBA will take into account when considering potential investigations.
- (3) According to Article 41(1) of the EBA Regulation, the Board of Supervisors may provide for the delegation of certain decisions. In order to meet the very short timescales provided in the EBA Regulation for carrying out an investigation and making any necessary recommendations to competent authorities, decisions on opening investigations should be taken by the Chairperson.

**Has adopted this decision:**

CHAPTER 1 - SCOPE

**Article 1 - Scope of the Rules**

- 1.1. This Decision sets out the procedures for applying Article 17 of the EBA Regulation on investigating breaches of Union law.

## CHAPTER 2 – PRELIMINARY ASSESSMENT ON THE ADMISSIBILITY OF A REQUEST

### **Article 2 - The Informer**

- 2.1. Requests to investigate an alleged breach or non-application of Union law may be made by one or more competent authorities, the European Parliament, the Council, the European Commission, or the relevant stakeholder group (further referred to as the “Informer”).
- 2.2. EBA’s Chairperson may also initiate investigations on his/her own initiative, in particular taking into account any request made to EBA by any person (referred to as a “Informer”) pointing to measures or practices indicating breach or non-application of Union law by a competent authority.
- 2.3. Informers 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.

### **Article 2A – Methods of submitting a request**

- 2.4. Requests shall be sent to EBA via 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. Applications shall be made in one of the official languages of the Union.

The EBA may invite the “Informer” to provide all information necessary for a preliminary assessment of the allegation.

### **Article 2B - Criteria for admissibility**

- 2.5. To be admissible, a request shall concern the application of acts referred to in Article 1(2) of the EBA Regulation, including the technical standards established in accordance to Article 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.

A request shall not be admissible if it falls into a category set out in Annex 1.

### **Article 2C - Decision on admissibility**

- 2.6. The EBA’s Chairperson shall determine whether requests received are admissible on the basis of the criteria of admissibility set out in Article 2B.

- 2.7. The EBA's Chairperson shall inform the EBA's Alternate Chairperson about his/her decision on the admissibility of the request on the basis of an anonymised information.
- 2.8. If the EBA's Alternate Chairperson does not object to this decision within five working days, the EBA's Chairperson shall inform the Informer accordingly.
- 2.9. If the EBA's Alternate Chairperson objects to this decision within five working days, the EBA's Chairperson shall review his/her position. In case of disagreement, he/she shall request the advice of the Management Board on the basis of anonymised information.
- 2.10. In case of a negative decision, the EBA's Chairperson shall inform the Informer of any possible alternative forms of redress, such as recourse to national courts, the European Ombudsman, a national ombudsman or any other national or international complaints procedure.
- 2.11. In case of a positive decision, the EBA's Chairperson shall inform the Informer on his/her decision of admissibility of the request.
- 2.12. The EBA shall maintain a record of admissible requests.

## CHAPTER 3 – INVESTIGATION OF AN ALLEGED BREACH OR NON-APPLICATION OF EU LAW

### **Article 3 - Initiation of the investigation**

- 3.1. The EBA's Chairperson shall inform the concerned competent authority on his/her decision of admissibility of the request and, where necessary, invite the competent authority to provide information within a specified period. This deadline should not normally exceed 10 working days.
- 3.2. Following receipt of all necessary information from the competent authority concerned, or expiry of the specified period, the EBA's Chairperson shall decide whether to initiate an investigation, having regard to the non-exhaustive list of factors set out in Annex 2.
- 3.3. The EBA's Chairperson shall inform the EBA's Alternate Chairperson about his/her decision to initiate an investigation or not on the basis of anonymised information.
- 3.4. If the EBA's Alternate Chairperson does not object to this decision within 3 working days, the EBA's Chairperson shall inform the Informer and the relevant competent authority about his/her decision in writing.

- 3.5. If the EBA's Alternate Chairperson objects to this decision within 3 working days, the EBA's Chairperson shall review his/her position. In case of disagreement, he/she shall request the advice of the Management Board on the basis of anonymised information.
- 3.6. The date of the letters to the Informer and the concerned competent authority shall be considered the date of the initiation of the EBA's investigation.
- 3.7. Where appropriate, the EBA's Chairperson shall inform the Informer of any possible alternative forms of redress, such as recourse to national courts, the European Ombudsman, a national ombudsman or any other national or international complaints procedure.
- 3.8. The EBA's Chairperson shall report regularly to the Board of Supervisors on decisions taken to initiate an investigation.

## **Article 4 - Investigation**

- 4.1. Where an investigation has been opened, the EBA's Chairperson shall be responsible for investigating the alleged breach or non-application of Union law.
- 4.2. The EBA's Chairperson may request additional information from the Informer and/or the competent authority concerned in accordance to Article 17 (2) of the EBA Regulation.
- 4.3. The EBA's Chairperson may request additional information from any other relevant person.
- 4.4. The EBA's Chairperson shall set clear deadlines for the transmission of information.
- 4.5. The methodology applied across investigations by investigating staff shall be consistent.

## **Article 5 - Conclusion of the investigation**

- 5.1. Within five weeks of initiating an investigation, the EBA's Chairperson shall decide whether there has been a breach of Union law or whether to close the request.
- 5.2. The EBA's Chairperson shall consult the Alternate Chairperson before taking his/her conclusion.
- 5.3. If the EBA's Alternate Chairperson objects to this conclusion within 3 working days, the EBA's Chairperson shall review his/her position. The Chairperson shall make the views of the Alternate Chairperson available to the Board of Supervisors in the investigation report accompanying his/her draft recommendation (see further Article 5B), or in his/her report on the closure of admissible requests (see further Article 5A).

## **Article 5A - Closure of an investigation without issuing a recommendation**

- 5.4. The Informer and the competent authority shall be informed of the reasons for closing the investigation. Where appropriate, the EBA's Chairperson shall inform the Informer of any possible alternative forms of redress, such as recourse to national courts, the European Ombudsman, a national ombudsman or any other national or international complaints procedure.

- 5.5 The EBA's Chairperson shall report regularly to the Board of Supervisors on the closure of admissible requests received.

#### **Article 5B - Breach or non-application of Union law**

- 5.5. If the EBA's Chairperson concludes that there has been a breach of Union law, he/she shall inform, in accordance with Article 39 of the EBA Regulation, the competent authority concerned about the draft recommendation before its adoption by the Board of Supervisors. He/She shall state the period within which the competent authority concerned may express its views.
- 5.6. The draft recommendation shall:
- set out the action necessary to comply with Union law;
  - state the reasons on which it is based; and
  - set a deadline within which the competent authority shall comply with it and report on compliance to the EBA's Chairperson.
- 5.7. After hearing the views of the competent authority concerned, the EBA's Chairperson shall take a decision on whether to proceed further. The draft recommendation, including the views of the affected competent authority is submitted to the Board of Supervisors for decision.
- 5.8. The Board of Supervisors shall take the final decision on the draft recommendation on the basis of the investigation report, the comments provided by the authority concerned and a written assessment on the comments brought forward by the competent authority concerned.
- 5.9. The competent authority concerned has ten working days to inform the Chairperson on 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 6 - Individual decision addressed to financial institutions**

- 6.1. 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.
- 6.2. 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 EBA's Chairperson shall, where

relevant, 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 EBA's Chairperson shall only propose this individual decision, if:

- 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
  - the relevant requirements of the acts referred to in Article 1(2) of the EBA Regulation are directly applicable to financial institutions.
- 6.3. 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.
- 6.4. The EBA's Chairperson shall inform the financial institution in accordance with Article 39 of the EBA Regulation. Article 5.5.-5.7.-5.8.-5.9. shall apply *mutatis mutandis*.
- 6.5. A copy of the final decision shall be provided to the competent authority concerned and to the Commission.

## CHAPTER 5 – MONITORING AND PUBLICATION

### **Article 7 - Compliance with the EBA's individual decision**

- 7.1. The EBA's Chairperson shall take any necessary steps to monitor whether recipients of recommendations, formal opinions and individual decisions comply and shall report regularly to the Board of Supervisors.

### **Article 8 - Publication**

- 8.1. 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.

- 8.2. 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 5 and 6 of these Rules.

## CHAPTER 6 – FINAL PROVISIONS

### **Article 9 – The EBA Staff**

- 9.1. The EBA's Chairperson shall be assisted on legal and policy issues by EBA staff.

### **Article 10 - Confidentiality**

- 10.1 If the Informer 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.
- 10.2. The Rules governing confidentiality in accordance with Article 70 of the Regulation and with the EBA's Rules on Professional Secrecy and Confidentiality<sup>1</sup> which lays down practical arrangements for the implementation of the Regulation, shall apply to these proceedings.

### **Article 11 - Conflict of interest**

- 11.1. 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 5 of these Rules or at any earlier stage of the process (Article 2C and Article 3) if the conflict of interest is identifiable notwithstanding the anonymised information.
- 11.2. 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 5 of these Rules or at any earlier stage of the process if the conflict of interest is identifiable notwithstanding the anonymised information.



## **Article 12 - Executive Director**

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

## **Article 13 - Entry into force**

13.1. This decision enters into force the day following its adoption.

Done at London, on 5 July 2012

Andrea Enria  
Chairperson of EBA  
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 EBA 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 with regard to which the EBA has adopted a clear, public and consistent position, which shall be communicated to the Informer.

## **Annex 2**

### **Investigation factors**

#### *Positive 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 pattern of complaints indicates systematic incorrect application);
- The alleged breach may have a significant, direct impact on EBA's objectives concerning: 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 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 EBA's means (peer review, mediation, ...);
- The request appears frivolous or vexatious.