

# Rules of Procedure on investigations regarding breach of Union law

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**DECISION**  
**ADOPTING THE RULES OF PROCEDURE**  
**ON INVESTIGATIONS REGARDING BREACH OF UNION LAW**

The Board of Supervisors of the European Insurance and Occupational Pensions Authority,

Having regard to Regulation (EU) No 1094/2010 of the European Parliament and of the Council establishing the European Insurance and Occupational Pensions Authority (the "Regulation" and "EIOPA", respectively), in particular Article 17 and Article 41(2) thereof,

Having regard to the Decision of the EEA Joint Committee No 200/2016 of 30 September 2016 amending Annex IX (Financial Services) to the EEA Agreement (2017/277)<sup>1</sup>,

Whereas,

- (1) Article 17 of the Regulation provides for EIOPA 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) Article 6 of the Multilateral Memorandum of Understanding on cooperation, information exchange and consultation between the EFTA Surveillance Authority and the European Supervisory Authorities provides for the framework of collaboration actions under Article 17 of the Regulation as incorporated in the EEA Agreement.
- (3) Although decisions on initiating investigations into the alleged breach or non-application of Union law remain within EIOPA'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 EIOPA's own-initiative investigations.
- (4) According to Article 41(1) of the Regulation, the Board of Supervisors may provide for the delegation of certain decisions. 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, decisions on initiating investigations should be taken by the Chairperson,

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<sup>1</sup> OJ L46, 23.02.2017, p. 13.

Has adopted this decision:

Chapter I  
SCOPE

**Article 1 - Scope and application of the Rules of Procedure**

These Rules of Procedure set out the procedures for applying Article 17 of the Regulation on investigating breaches of Union law. They shall apply to requests to investigate received by EIOPA as well as, to the extent relevant, to own-initiative investigations in the absence of a request.

Chapter II  
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 by a competent authority ("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 EIOPA by any legal or natural person based on well substantiated information (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. EIOPA shall respond to a Request by outlining how it intends to proceed with the case in accordance with these Rules of Procedure.

**Article 3 - Submission of a Request and admissibility criteria**

1. Requests shall be sent to EIOPA by electronic mail, by post or by fax, or otherwise, as indicated on EIOPA's website. The relevant contact details shall be defined by the Executive Director and shall be published on EIOPA's website. 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 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) not fall into one of the categories set out in Annex I.

#### **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 Request without opening an investigation**

1. The Chairperson may close the Request without initiating an investigation where he/she considers that:
  - (i) the Request is inadmissible; or
  - (ii) the Request is admissible but an investigation should not be initiated as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex II.
2. In the event that the Chairperson closes the Request without initiating an investigation, the fact that the Request has been closed and the reasons for closing the case shall be notified to the Requester and, if the competent authority concerned has been notified of the Request, to that authority. If the Requester is a natural or legal person, 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 III

#### INVESTIGATION OF AN ALLEGED BREACH OR NON-APPLICATION OF UNION LAW

#### **Article 6 - 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 Vice-Chairperson about the proposal to initiate an investigation.
2. If the Vice-Chairperson objects to this proposal within five working days, the Chairperson shall review his/her position.
3. If the Vice-Chairperson approves the proposal to initiate an investigation, the Chairperson shall arrange for the establishment of a panel, as provided for in Article 41(2) of the Regulation.
4. Immediately after the establishment of the panel, the Chairperson shall submit the Request, if any, and a report on the preliminary findings to the panel for its information. If necessary, the Chairperson may arrange for a teleconference to provide them with further information.
5. The Requester and the competent authority concerned shall be informed of the initiation of an investigation.

6. The date of this communication to the competent authority concerned shall be considered to be the date of the initiation of EIOPA'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 or from other competent authorities 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, reasonable deadlines for the transmission of information.
5. The methodology applied across investigations by investigating staff shall be consistent.
6. The Chairperson shall regularly inform and, if necessary, consult the panel on the investigation progress.

#### **Article 8 - Conclusion of the investigation**

1. The Chairperson shall submit to the panel an investigation report setting out the findings and conclusions on: (i) whether there has been a breach of Union law, including a relevant draft recommendation; or (ii) whether to close the investigation without issuing a recommendation. The investigation report shall contain the response of the competent authority to EIOPA's investigation.
2. The panel shall approve or review, if necessary, the investigation report, including the draft recommendation; or decide to close the investigation.

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

If the panel closes the investigation without issuing a recommendation, the Chairperson shall inform the Requester and the competent authority concerned of the reasons for closing the investigation. Where the Requester is a natural or legal person, 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 – Agreement on compliance actions**

Where deemed appropriate to resolve a breach of Union law, the Chairperson – at the stage of the preliminary enquiry, or the panel – at the stage of the investigation shall engage with the competent

authority concerned in an attempt to reach agreement on actions necessary for the competent authority to comply with Union law.

#### **Article 11 - Breach or non-application of Union law**

1. If the panel endorses the investigation report concluding that there has been a breach or non-application of Union law, along with the relevant draft recommendation, the Chairperson shall inform, in accordance with Article 39 of the Regulation, the competent authority concerned about 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; and
  - (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 take a decision on whether to proceed further and, if so, shall make any revision to the draft recommendation considered necessary.
4. In case the panel decides 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 adoption in accordance with Article 44(4) of the Regulation.
5. If the Board of Supervisors adopts a decision to address a recommendation to the competent authority concerned, in accordance with Article 17(3) of the Regulation, that 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 IV

#### FINANCIAL INSTITUTIONS

#### **Article 12 - Individual decision addressed to financial institutions**

1. EIOPA 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.

The Chairperson shall provide the panel with the formal opinion of the Commission including any other relevant document.
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 V MONITORING AND PUBLICATION

### **Article 13 – Publication**

1. A decision addressed to a financial institution shall be published on EIOPA'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 the financial institution 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. EIOPA shall publish such details as are appropriate in respect of any recommendation that has been addressed to a competent authority under these rules, after duly taking into consideration the constraints as referred to in Article 13(1). 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, EIOPA 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 VI  
FINAL PROVISIONS

**Article 14 - EIOPA Staff**

The Chairperson and the Panel shall be advised on legal and policy issues by EIOPA 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 shall be carried out *inter alia* in accordance with Regulation (EU) 2018/1725 of the European Parliament and of the Council<sup>2</sup>.
2. Where information on a breach or non-application of Union law is provided anonymously or confidentially by reporting persons, EIOPA shall process it in accordance with Article 17a of the Regulation and its internal rules.
3. The Rules of Procedure governing confidentiality in accordance with Article 70 of the Regulation and EIOPA's rules on professional secrecy which lay down practical arrangements for the implementation of the Regulation shall apply to these proceedings.

**Article 16 - Conflict of interest**

1. The Chairperson, shall propose the nomination only of such candidates for members of the panel who:
  - (i) are not representatives of the competent authority alleged to have breached/not applied Union law;
  - (ii) have no interest in the matter of the investigation; and
  - (iii) have no direct links to the competent authority concerned.
2. The Chairperson shall ensure that none of the situations under paragraph 1 applies to any panel member. The Chairperson shall propose to the Management Board to nominate one of its members in place of the Vice-Chairperson where any of the situations under paragraph 1 applies to him/her. If a member of the Management Board is in any of the situations under paragraph 1, he/she shall be excluded from the consultation of the Management Board on the composition of the panel.

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<sup>2</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

## **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 decisions taken under this procedure and shall report that information annually to the Board of Supervisors on the basis of anonymised information.

## **Article 18 - Requests concerning breach of the EEA Agreement**

These Rules of Procedure shall apply to investigations of an alleged breach or non-application 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(5), the Chairperson shall inform the EFTA Surveillance Authority of the initiation of an investigation.
4. For the purpose of Article 11(1), the Chairperson shall also inform the EFTA Surveillance Authority about the draft recommendation before its submission to the Board of Supervisors.
5. For the purpose of Article 11(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 EIOPA and the EFTA Surveillance Authority of the steps that it has taken or intends to take to ensure compliance with the EEA Agreement.
6. Article 12(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 EIOPA's recommendation or, where new developments require it, may prepare a draft formal opinion to be submitted to the EFTA Surveillance Authority, on his/her 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 EFTA Surveillance Authority, inform EIOPA and the EFTA Surveillance Authority of the steps it has taken or intends to take to comply with that formal opinion".
7. In Article 12 references to a decision shall be understood as references to a draft prepared by EIOPA and to be adopted by the EFTA Surveillance Authority.
8. Article 12(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.”

9. Article 12(5) shall not apply.
10. For the purpose of Article 13, EIOPA shall coordinate publication of any decision with the EFTA Surveillance Authority.
11. The Rules of Procedure of EIOPA’s Board of Supervisors shall apply to take decisions in accordance with Articles 11 and 12.

#### **Article 19 – Communications**

Competent authorities shall be invited to agree to written and oral communications being in the working language of EIOPA for the purposes of preliminary enquiries and breach of Union law investigations where possible.

#### **Article 20 — Executive Director**

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

#### **Article 21 — Entry into force**

This decision enters into force the day following its adoption.

Done at Frankfurt am Main, on 14 June 2012

Amended at Frankfurt am Main, on 25 June 2014

Amended at Frankfurt am Main, on 20 December 2017

Amended at Frankfurt am Main, on 31 January 2020

For the Board of Supervisors

Gabriel Bernardino

Chairperson

[signed]

## ANNEX I

### **Inadmissible Requests**

A request is inadmissible if:

- it fails to set out a grievance based on well substantiated information;
- 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 EIOPA has already informed the Requester of its position or has adopted a clear, public and consistent position.

## ANNEX II

### 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 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 a significant, direct impact on EIOPA'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 with 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.