eba European Banking Authority — ESMA European Securities and Markets Authority — eiopa European Insurance and Occupational Pensions Authority

11 March 2024

BoA-D-2024-02

D E C I S I O N

given by

the JOINT BOARD OF APPEAL

OF THE EUROPEAN SUPERVISORY AUTHORITIES

in the appeal case brought by Euroins Insurance Group AD [the Appellant]

Against

the European Insurance and Occupational Pensions Authority (EIOPA) [Respondent]

APPEAL under Article 60 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council (the "ESAs Regulations")

Board of Appeal:

Michele Siri (President and Co-Rapporteur)
Christos Gortsos (Vice President and Co-Rapporteur)
Gerben Everts
Geneviève Helleringer
Margarida Lima Rego
Carsten Zatschler

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Summary

Herewith, you will find the decision by the (Joint) Board of Appeal of the European Supervisory Authorities. The Board of Appeal, composed of six independent members, was responsible for making the decision on this specific case.

The Board of Appeal was informed that the competent national supervisory authority in Romania has withdrawn the operating license of the Appellant's subsidiary insurance undertaking in that Member State of the European Union (EU) and has decided to initiate bankruptcy procedures in respect of that subsidiary.

As a follow up, the Appellant filed a complaint with the European Insurance and Occupational Pensions Authority (EIOPA). Specifically, the Appellant objected against the individual decision of EIOPA's Chairperson not to start an investigation into the alleged breach or non-application of Union law regarding the withdrawal of the license of a subsidiary insurance undertaking of the Appellant.

The Board of Appeal has concluded that the Appellant's complaint, irrespective of its possible merits, is directed against a decision which is not challengeable.

Firstly, EIOPA's power to initiate an investigation is, according to the case-law of the General Court, of an entirely discretionary nature.

As such, EIOPA can refuse to investigate, notably because it sees no grounds to initiate an investigation, because it believes the complaint can be better dealt with by other means, or simply because it believes that its limited resources are best applied elsewhere. The Board of Appeal is mindful of the imperatives of good administrative governance and recognises that EIOPA's discretion must be protected, including to avoid dealing with an excessive volume of investigations. Crucially, this decision by EIOPA's Chairperson is not only discretionary, but is also not subject to review by the General Court or by the Board of Appeal.

Furthermore, by application of the wider EU case-law, the reviewability of discretionary decisions relating to refusals to initiate investigation/infringement procedures is limited. In such cases, the interested parties requesting the opening of the procedure do not have procedural rights to be informed, or heard, and, therefore, the decision not to undertake an investigation is not an appealable act.

Secondly, EIOPA determined that, considering the list of factors set out in its Rules of Procedure (which were adopted based on the EIOPA Regulation), no investigation should be initiated as a matter of discretion. This is not a decision subject to review by the Board of Appeal, according to the case-law of the General Court and the Court of Justice of the EU. The Board of Appeal's competence is limited by Article 60(1) of the EIOPA Regulation. A decision on the part of EIOPA not to initiate an investigation falls outside that competence to the extent that it does not constitute a decision taken on the basis of any of the provisions of Article 17 of the EIOPA Regulation.

The Board of Appeal also considered whether there are factual and legal circumstances at issue in the case at hand, which differ from those at issue in previous relevant Board of Appeal decisions and relevant case-law, and which might, thus, justify distinguishing the position of the Appellant and potentially lead to a different conclusion on the admissibility of an appeal. No such circumstances were detected.

Finally, this decision of the Board of Appeal clarifies that, pursuant to the EIOPA Regulation, whilst the Board has the power either to confirm a decision of EIOPA that is contested by an appellant or remit the case to EIOPA's Board of Supervisors, which is the leading body in EIOPA's governance structure, the Board of Appeal does not have the power to order EIOPA to re-assess an appellant's request to open an investigation.

1. This is the decision of the Board of Appeal of the European Supervisory Authorities ("**ESAs**") (the "**Board of Appeal**") on the Appeal filed by Euroins Insurance Group AD ("**Euroins**" or "the Appellant"), pursuant to Article 60 of the Regulation of the European Parliament and of the Council of 24 November 2010 establishing the European Insurance and Occupational Pensions Authority[1] ("**EIOPA Regulation**" and "**EIOPA**", respectively). This Regulation is in force as amended twice and most recently by Article 2 of Regulation (EU) 2019/2175 of the co-legislators of 18 December 2019,[2] which is of significant importance for the case at hand in view of the amendments introduced in Article 17(2).

2. By the first ground of appeal, the Appellant requests the annulment of the Decision given by the EIOPA Chairperson on 19 September 2023 (the **"Contested Decision"**). This Decision rejected the Appellant's request of 4 August 2023 to EIOPA to initiate an investigation in accordance with Article 17 of the EIOPA Regulation regarding an alleged breach of Union law by the Romanian Financial Supervisory Authority (Autoritatea de Supraveghere Financiară, "**ASF**") in relation to the withdrawal of the authorisation of *Euroins Romania Asigurare – Reasigurare S.A.*, a subsidiary company of the Appellant ("Euroins Romania").

3. By the second ground of appeal, and, as alleged, as consequence of the first, the Appellant requests the Board of Appeal to order EIOPA to re-assess the Appellant's request to open an investigation regarding a potential breach of European Union law by ASF.

I – Factual background to the dispute

4. Euroins Romania was an insurance undertaking with its head office established in Romania and supervised (on a solo basis) by ASF. Following a process which started on 26 October 2022, when ASF issued its Permanent Control Report no. 10102 recording the "differences" found from comparing the information that resulted from the statements concluded with the reinsurers with the reports sent to ASF by Euroins Romania and then escalated,[3] by Decision No 262 of 16 March 2023[4] ASF has withdrawn the authorisation of Euroins Romania to pursue insurance activities (the "**Withdrawal Decision**") and, *inter alia*, has decided to initiate winding-up (bankruptcy) procedures in respect of Euroins Romania.[5]

5. The Withdrawal Decision was notified, *inter alia*, to EIOPA on the following day (17 March) in accordance with Article 25a of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and

[1] Regulation (EU) No 1094/2010, OJ 2010 L 331, pp. 48-83). This legislative act has applied (in principle) from 1 January 2011 (Article 82).

[2] OJ L 334, 27.12.2019, pp. 1-145. This Regulation (EU) has applied from 1 January 2020 (Article 7).

[3] Notice of Appeal, paragraphs 9-17.

[4] ASF registration no. VPA/2175/17.03.2023.

[5] The request for the commencement of the bankruptcy procedure was filed by ASF with the Bucharest Tribunal on 10 April 2023; the latter ruled in favour of the bankruptcy request and commenced bankruptcy proceedings against Euroins Romania on 9 June 2023 (see paragraphs 25 and 33 of the Notice of Appeal).

Reinsurance (recast) (the “**Solvency II Directive**”).[6] Decision No 262 was published on the same day in the Romanian Official Journal and, thus, became publicly available.

6. On 24 March 2023, by letter addressed to EIOPA’s Chairperson, the Appellant and Eurohold Bulgaria AD claimed the following: (i) the ASF’s Withdrawal Decision is in violation of the Solvency II Directive and of Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing the former;[7] (ii) the ASF’s actions and behaviour violate the general EU administrative principles; (iii) the actions of ASF are disproportionate; and (iv) the actions taken by ASF against Euroins Romania had been mutually contradictory. EIOPA responded to this letter on 20 April 2023, outlining how it intended to proceed.[8]

7. The Appellant and Eurohold Bulgaria AD sent additional letters to, *inter alia*, EIOPA on 5, 6 and 19 April 2023, reiterating their concerns regarding the ASF’s Withdrawal Decision. EIOPA responded to these letters on 20 April 2023 as well, outlining the course of action undertaken.[9] This also included the technical assessment carried out by EIOPA, which was contained in its Report of 28 March 2023, entitled “EIOPA’s assessment of the valuation of technical provisions gross and net of reinsurance for the motor third party liability portfolio of Euroins Romania (…)”.[10] This Report was shared with ASF and the Bulgarian Financial Services Commission (Комисия за финансов надзор, “FSC”) in its capacity as group supervisor and addressed the various claims contained in the Appellant’s letters.[11]

8. By letter of 7 August 2023, the Appellant and Eurohold Bulgaria AD reiterated their concern in relation to the general compliance of ASF’s actions with Union law, pointing to alleged breaches of Article 32 of the Solvency II Directive on the prohibition of refusal of reinsurance contracts and Article 250(1), point (c) thereof on the prior consultation with the group supervisor (namely FCS) with regard to major sanctions, as well as of Guideline 2 of EIOPA Guidelines on Supervisory review process. In that respect, they submitted a request to EIOPA to initiate an investigation in accordance with Article 17 of the EIOPA Regulation regarding an alleged breach of Union law.

9. By the Contested Decision (of 19 September 2023[12]) EIOPA notified the Appellant that a breach of Union law investigation against ASF under Article 17 of the EIOPA Regulation would not be appropriate and justified. Accordingly, EIOPA closed the Appellant’s request without opening an investigation.

[6] OJ L 335, 17.12.2009, pp. 1-155, as in force.

[7] OJ L 12, 17.1.2015, pp. 1-797, as in force.

[8] EIOPA-23-286.

[9] EIOPA-23-308.

[10] EIOPA-23-149.

[11] According to this Report, EIOPA’s estimation of the deficiency of the net best estimate for the motor third-party liability business of Euroins Romania at the reference date of 30 September 2022 ranged between 550 million to 581 million euro.

[12] EIOPA-23-719.

II – Procedure, forms of order sought and contention by the parties

10. As noted,[13] by its appeal of 20 November 2023, the Appellant requires the Board of Appeal:

- to annul the Contested Decision; and

- consequently, to order EIOPA to re-assess the Appellant's request to open an investigation regarding a potential breach of Union law by ASF.

11. On 22 November 2023, the President of the Board of Appeal gave the following directions:

(a) EIOPA shall respond to the admissibility of the appeal within three weeks of service of the Notice of Appeal. The deadline for filing this response expires accordingly on 13 December 2023.

(b) The Appellant will reply to EIOPA's Response within three weeks. The deadline for filing this reply expires accordingly on 3 January 2024.

Both parties were also invited to communicate to the Board of Appeal by 8 January 2024 if they intend to make oral representations. In accordance with Article 18(10) of the Rules of Procedure of the Board of Appeal (as in force[14]), in the absence of oral representations, the Board will consider the appeal on the basis of the written material provided by the parties.

12. Within the deadline set, on 12 December 2023, EIOPA submitted its Response on the admissibility of the appeal. EIOPA holds the view that, in view of the case-law of the General Court and of the Court of Justice cited therein and the consistent approach taken in similar cases before the Board of Appeal, the appeal does not comply with the requirements of admissibility of appeals under Article 60(1) of the EIOPA Regulation, requesting, thus, the Board of Appeal to dismiss the Appeal in its entirety as inadmissible.[15] Furthermore, EIOPA asserts that the Board of Appeal has no jurisdiction to order EIOPA to re-assess the Appellant's request to open an investigation regarding a potential breach of European Union law by ASF.[16]

13. By communication sent on 9 January 2024, the Appellant requested the Board of Appeal, for several legitimate reasons, to grant an extension to 12 January 2024 to respond and stated they do not intend to make oral representations. The extension was granted, and the Appellant submitted its Response on that date. In this context, the Appellant asserts that, contrary to EIOPA's allegations in the response to the Appellant's notice of appeal, the appeal is admissible considering that the Challenged Decision represents a decision under Article 60(1) of the EIOPA Regulation, interpreted in light of the original intention of the legislator and of recital (58) in the preamble to the EIOPA Regulation. In particular, in Section I of their Response, the

[13] See paragraphs 2-3 above.

[14] BoA 2020 01.

[15] EIOPA's Response, paragraphs 40-45.

[16] *Ibid.*, paragraph 44. EIOPA did not express an intention to make oral hearings.

Appellant raises the following in relation to the admissibility of the appeal, further developing on the argumentation set out in the Notice of Appeal.[17]

14. *First*, the Appellant considers that, in analysing the legal nature of the Challenged Decision, "*the essential factor is the effects it produces, not its form or name*",[18] citing a Decision of the Board of Appeal of 2014.[19]

15. *Second*, the Appellant asserts that ASF failed to comply with the provisions of Article 250(1), point (c) of the Solvency II Directive, mainly because the ASF has not informed the College of Supervisors of Euroins Insurance Group AD and acted discretionarily, even though the conditions set out in Article 250(2) thereof (i.e., urgency) were not met. In the Appellant's view, the ASF also failed to act in accordance with Article 32(1) of said Directive unjustifiably refusing the reinsurance agreement concluded by Euroins Romania on grounds directly related to the financial soundness of the reinsurer.[20]

16. *Third*, the Appellant claims that the Challenged Decision meets the two necessary conditions set out in the EIOPA Regulation, namely: (a) its effects are binding; and (b) it affects the interests of the Appellant, as it influences its legal position. In light of that, the Appellant concludes that the Challenged Decision satisfies the requirements related to: (i) directly affecting Euroins; and (ii) leaving no discretion with regard to its implementation.[21]

17. Furthermore, in Sections II-IV of their Response, which are based on argumentation set out in the Notice of Appeal,[22] the Appellant asserts the following:[23]

18. *First*, EIOPA failed to restore order after ASF breached the Solvency II Directive since it "*refused to open an investigation against the ASF without providing a legal ground and the reasoning behind such an approach, thus failing to give effect to the powers granted to it by the Solvency II Directive and to verify if the ASF acted in fact in compliance with the provisions of Solvency II Directive*".[24]

19. *Second*, EIOPA exceeded its competence issuing the Contested Decision, claiming, *inter alia*, that EIOPA:

- "*has infringed Article 17 of the EIOPA Regulation and Article 296 [TFEU] by failing to state the reasons for its refusal to open an investigation;*

[17] Notice of Appeal, Section III. 1, paragraphs 36-53.

[18] Paragraphs 5 and 8 of the Appellant's Response.

[19] BoA-2014-05, paragraph 47. See on this further paragraph 77 below.

[20] Paragraph 7 of the Appellant's Response.

[21] *Ibid*, paragraphs 4 and 9.

[22] Notice of Appeal, Sections III.2 – III.4, paragraphs 54-77.

[23] Paragraphs 10-14, 15-32 and 33-46, respectively of the Appellant's Response.

[24] *Ibid*, paragraph 14.

- *has infringed Article 17 of the EIOPA Regulation and the principle of good administration by failing to conduct a proper and impartial examination of the complaint;*
- *has infringed Article 17 of the EIOPA Regulation and the principle of proportionality by failing to take into account the seriousness and the impact of the alleged breach of the Solvency II Directive by the ASF;*
- *has infringed Article 17 of the EIOPA Regulation and the principle of equal treatment by applying different standards and criteria to the complaints submitted by different insurance undertakings; and*
- *has infringed Articles 47 and 52 of the Charter by depriving the Plaintiff of its right to effective judicial protection and its right to an effective remedy.*"[25]

Euroins concludes from this that:

"(…) *we cannot agree with the position of EIOPA that the Board of Appeal has no competence to order EIOPA to make use of its discretionary power. On the contrary, the Plaintiff considers that this role specifically was granted to the Board of Appeal in order to avoid authoritarian or excessive approach of the authority.*"[26]

20. *Third*, EIOPA does not provide in the Contested Decision reasoning for refusal to open an investigation, asserting, *inter alia*, the following:

"*The Challenged Decision does not include any explanation or justification for EIOPA's conclusion that the issues raised in the Plaintiff's complaint do not warrant the opening of an investigation.*" "*The Challenged Decision does not refer to any legal or factual basis for EIOPA's assessment of the complaint and its contacts with the ASF. [It] does not indicate how EIOPA applied the criteria set out in Article 17(2) of the EIOPA Regulation, which provide that EIOPA may initiate an investigation where there are serious indications of a breach or non-application of the Solvency II Directive by the competent authority of a Member State.*" "*Moreover, the Challenged Decision does not address the specific allegations made by the Plaintiff regarding the ASF's failure to comply with the Solvency II Directive, nor does it acknowledge the evidence and arguments submitted by the Plaintiff in support of its complaint.*"[27]

[25] *Ibid*, paragraph 20.

[26] *Ibid*, paragraph 32.

[27] *Ibid*, paragraphs 33-35.

III – Legal framework

A. EIOPA's competence and discretion in relation to investigations regarding breach of Union law

Article 17 of the EIOPA Regulation

21. Article 17 of the EIOPA Regulation is entitled "Breach of Union law". The "three-step mechanism" established therein, further described in paragraph 30 below, based on the considerations set out in recital (26).[28]

22. Article 17(1) and (2), first sub-paragraph of the EIOPA Regulation, which is of relevance for the case at hand and is in force after the amendments inserted in 2019 by Article 1 of Regulation (EU) No 2019/2175, reads as follows:

"*1. Where a competent authority has not applied the acts referred to in Article 1(2) or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15, in particular by failing to ensure that a financial institution satisfies the requirements laid down in those acts, the Authority shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article.*"

"*2. Upon request from one or more competent authorities, the European Parliament, the Council, the Commission, the relevant Stakeholder Group, or on its own initiative, including when this is based on well-substantiated information from natural or legal persons, and after having informed the competent authority concerned, the Authority shall outline how it intends to proceed with the case and, where appropriate, investigate the alleged breach or non-application of Union law.*"[29]

23. According to the text of Article 17(1) of the EIOPA Regulation, the procedure laid down therein is activated (only) if it is alleged that a national competent authority ("**NCA**") has either not applied the acts referred to in Article 1(2) – including the Solvency II Directive[30] – (including the regulatory and implementing technical standards adopted by EIOPA and the other two ESAs, namely the European Banking Authority ("**EBA**") and the European Securities and Markets Authority ("**ESMA**")) in accordance with Articles 10-15 of the EIOPA Regulation, or has applied them in a way which appears to be a breach of Union law.

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[28] On the interpretation of this recital by the Court of Justice, see further paragraph 53 below.

[29] The initial phrasing of this sub-paragraph was as follows: "*2. Upon request from one or more competent authorities, the European Parliament, the Council, the Commission or the relevant Stakeholder Group, or on its own initiative and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law.*"

[30] Only the provisions of Title IV on the reorganisation and winding-up of insurance undertakings are exempted.

24. Pursuant then to Article 17(2),[31] any natural or legal person can address to EIOPA a request to open investigations if an NCA, allegedly, has breached or has not applied Union law. Article 17(2) is a critical element of the governance of the European System of Financial Supervision ("ESFS"). It confers upon EIOPA the power to initiate investigations of potential breaches or non-application of Union law by NCAs and to take specific courses of action where it finds such a breach or non-application. It helps both to support the single rulebook, as well as supervisory coordination and convergence, and to provide interested parties with a means of raising their concerns if, in those parties' view, an NCA is in breach of, or has not correctly applied Union law. In relation to Article 17(2), three aspects require a closer look:

25. *First*, in principle and notwithstanding EIOPA's own-initiative jurisdiction (discussed just below), the interested parties who can formally "request" EIOPA to initiate an investigation are expressly (and exhaustively) mentioned in Article 17(2): one or more NCAs, the European Parliament, the Council, the Commission, and the relevant Stakeholder Group (i.e., the Insurance and Reinsurance Stakeholder Group and the Occupational Pensions Stakeholder Group referred to in Article 37 of the EIOPA Regulation). Only these entities may formally request an investigation; natural and legal persons are not included in that list.

26. *Second*, EIOPA has an "own-initiative jurisdiction" to initiate an investigation. Even though "natural and legal persons" that are not expressly mentioned in Article 17(2) do not have standing to request EIOPA to initiate an investigation thereunder, such persons can still bring potential breaches or non-application of Union law by NCAs to EIOPA's attention and address a request that it exercises its own-initiative jurisdiction. In particular, under the amended Article 17(2), EIOPA can open an investigation on its own initiative "*including when this is based on well-substantiated information from natural or legal persons*", after having informed the NCA (the "**Article 17 investigation**").

27. *Third*, Article 17(2) endows EIOPA with discretionary powers to initiate (or not) an investigation either on the basis of a request by the entities expressly mentioned in Article 17(2) or under its "own initiative jurisdiction". The initial text of Article 17(2) provided that EIOPA "***may investigate** the alleged breach or non-application of Union law*". Upon the reform by Regulation (EU) No 2019/2175 these discretionary powers were further structured, since the text of Article 17(2) now provides that EIOPA "*shall outline how it intends to proceed with the case and, where appropriate, investigate the alleged breach or non-application of Union law*".

28. Under both the initial and the amended drafting, even the entities expressly mentioned in Article 17(2) may merely request EIOPA to initiate an investigation in case of an alleged non-application or incorrect application (breach) by an NCAs of Union law (including the acts referred to in Article 1(2)), but they cannot force it to do so. In accordance with the amended Article 17(2), EIOPA is required to "*outline how it intends to proceed with the case*". Still, EIOPA is not required to initiate an investigation but is (anymore) required to investigate potential breaches of Union law by NCAs albeit "***where appropriate***". Even though the drafting

[31] In the rest of this Decision, any reference made to Article 7(2) of the EIOPA Regulation should be read as referring to its first sub-paragraph.

of Article 17(2) is not totally clear on this,[32] the general thrust is that EIOPA's obligation to "*outline how it intends to proceed with the case*" also applies where "well-substantiated information" by natural and legal persons has been received.

29. Taking into account the above-mentioned, Article 17 of the EIOPA Regulation is a critical element of EIOPA's governance arrangements, supporting, *inter alia*, the EIOPA's objective, namely "*to protect the public interest by contributing to the (...) stability and effectiveness of the financial system, for the Union economy, its citizens and businesses*", as well as the delivery of its task to contribute to the consistent application of legally binding Union acts by various means.[33] However, EIOPA is not a "supervisory authority" in the meaning asserted by the Appellant;[34] the *direct* supervision of insurance undertakings, including the withdrawal of their operating license, is the exclusive competence and responsibility of NCAs pursuant to the relevant rules of the Solvency II Directive.[35]

30. In this respect, pursuant to the "three-step mechanism" set out in Article 17 of the EIOPA Regulation[36] for dealing with breaches of EU law NCAs in their supervisory activities (to allow for a "*proportionate response to instances of incorrect or insufficient application of Union law*"), even if EIOPA would decide to open an investigation, its power is to issue a (legally non-binding) Recommendation requiring the NCA to take the necessary action to comply with Union law (step 1). Then, if the NCA would not follow EIOPA's Recommendation, the Commission may issue a formal Opinion taking into account EIOPA's Recommendation (step 2). Finally, if the NCA's non-compliance were to persist, further power is given to EIOPA, as a last resort, to directly address a Decision to a financial market participant under specific strict conditions, which prevails over previous decisions taken by the NCA on the same matter (step 3). Under none of the steps of the mechanism, including the initiation of an investigation, does EIOPA become a *direct* supervisor in the insurance sector.

EIOPA's Rules of Procedure for investigation of breach of Union law

31. On the legal basis of Articles 17 and 41(2) of the EIOPA Regulation, the EIOPA's Board of Supervisors adopted, on 14 June 2014, a Decision on its "Rules of Procedure on Investigations Regarding Breach of Union law" ("**the Rules of Procedure**"). These have been amended three times (on 25 June 2014, 20 December 2017, and 31 January 2020, in the latter case to take into account the amendments to Article 17 by Regulation (EU) No 2019/2175) and then again on 14

[32] The recitals in the preamble to Regulation (EU) No 2019/2175 are silent on this point.

[33] EIOPA Regulation, Articles 1(5) and 8(1), point (b), respectively.

[34] See Appellant's response dated 12 January 2024, paragraph 39.

[35] See also the (above-mentioned, under paragraph 6) response of EIOPA of 20 April 2023 to the Appellant's letter dated 24 March 2023.

[36] EIOPA Regulation, Article 17(3)-(7). See also recitals (27)-(28).

June 2023, which constitutes the version of the Rules of Procedure in force.[37] These entered into force on 15 June 2023,[38] hence, they apply in the case at hand.

32. In accordance with Article 1 (on the scope and application), the Rules of Procedure 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*". By reflecting Article 17(2) of the EIOPA Regulation, Article 2(1) provides that "Requests" to investigate an alleged breach or non-application of Union law by an NCA may be made by one or more competent authorities, the European Parliament, the Council, the European Commission, or the relevant Stakeholder Group ("Requester"), while Article 2(2) sets out that 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.[39] Article 2(4) expressly then specifies that EIOPA shall respond to a Request by outlining how it intends to proceed with the case pursuant to these Rules. Pursuant to this provision, read in conjunction with recital (3) and Article 2(1)-(2), the Rules commit EIOPA to outlining how it intends to proceed, regardless of who initiates a Request.

33. Article 3(1)-(2) of the Rules of Procedure sets out the means by which the Request must be sent to EIOPA and provides that for a Request to be admissible, it shall (cumulatively) fulfil two criteria: set out a clear grievance explaining how a competent authority has not applied the acts referred to in Article 1(2) of the EIOPA Regulation, or has applied them in a way which appears to be a breach of Union law (…), in particular a failure of a competent authority to ensure that a financial institution satisfies the requirements laid down in those acts; and not fall into any of the categories set out in Annex I. Furthermore, Article 3(3) imposes on EIOPA to examine Requests with a view to arriving at a decision as whether a Request is admissible within six months from the date of its receipt.

34. The procedure on the "Closure of the case without opening an investigation" is governed by Article 5 of the Rules of Procedure. Article 5(1) stipulates that the Chairperson may close the case without initiating an investigation if he/she considers that the Request: (i) is inadmissible; or (ii) it is admissible, but an investigation should not be initiated as a matter of discretion, taking into account the non-exhaustive list of the positive and negative investigation factors included in Annex II.

35. Pursuant to Article 5(2) of the Rules of Procedure, where the case is closed by the Chairperson without initiating an investigation (pursuant to Article 5(1)), the fact that the Request has been closed and the reasons for closing the case shall be notified to the Requester

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[37] EIOPA-BoS-11-017-REV4 (at: https://www.eiopa.europa.eu/system/files/2023-06/2023_06%20EIOPA-breach-union-law-RoP.pdf).

[38] Rules of Procedure, Article 21.

[39] Pursuant to recital (4) in the preamble to the Rules of Procedure and in accordance with Article 41(1) of the EIOPA Regulation, the Board of Supervisors has delegated to the Chairperson the power to take decisions on initiating investigations in order to meet the very short timescales provided in the EIOPA Regulation for carrying out an investigation and making any necessary recommendations to competent authorities.

and, if the NCA concerned has been notified of the Request, to that authority. Furthermore, 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. Finally, in accordance with Article 5(3), first sentence of the Rules, EIOPA shall, in principle, examine Requests with a view to arriving at a decision to open an investigation or close the case within six months from the date of receipt of the Request.

B. The right of appeal to the Board of Appeal under Article 60(1) of the EIOPA Regulation and the Board of Appeal's powers under Article 60(4)-(5)

36. The Board of Appeal is part of the governance structure of EIOPA[40] (and the other two ESAs) of which it is a joint body under their founding Regulations[41]). Its members are required to be independent in making their decisions and undertake to act independently, impartially and in the public interest.[42]

37. Article 60 of the EIOPA Regulation is in force as (slightly) amended by Regulation (EU) No 2019/2175. Pursuant to Article 60(1), any natural or legal person, including competent authorities, may appeal against a decision of EIOPA referred to, *inter alia*, in Article 17, which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person. In this respect, the second sentence of recital (58) considers that, to effectively protect the rights of parties, and for reasons of procedural economy, parties should be granted a right of appeal to a Board of Appeal where EIOPA has decision-making powers. Accordingly, the issue arises whether and under what conditions a decision not to open an investigation is a "decision of EIOPA" as referred to in Article 17 and thus subject to an appeal before the Board of Appeal.

38. In accordance with Article 60(4), first sentence of the EIOPA Regulation, "*[i]f the appeal is admissible, the Board shall examine whether it is well founded*." This provision is further specified in Article 9(1) of the Rules of Procedure of the Board of Appeal, pursuant to which, if the respondent contends that the appeal is not admissible under Article 60 of the ESAs Regulations, the Board shall determine whether it is admissible before examining whether it is well founded under Article 60(4).

39. Furthermore, under Article 60(5) of the EIOPA Regulation, the Board of Appeal has the power either to confirm the decision taken by the competent body of EIOPA or remit the case to that competent body. If the case is remitted, the EIOPA's competent body shall be bound by the decision of the Board and shall adopt an amended decision regarding the case concerned.

[40] EIOPA Regulation, Article 6, point (5).

[41] *Ibid*, Article 58(1).

[42] *Ibid.*, Article 59(1) and (6).

IV – Case-law of the CJEU on the admissibility of an appeal before the Board of Appeal against a decision under Article 17 of the ESAs Regulations on breach of Union law

40. The key question of admissibility in this appeal is whether, and to what extent, a "Requester" (in the meaning of Article 2(2) of the Rules of Procedure, including a legal or natural person which has provided EIOPA with "*well-substantiated information*"[43]) can appeal to the Board of Appeal the conclusion reached by EIOPA's Chairperson to close the request without opening an investigation "*as a matter of discretion, taking into account the non-exhaustive list of factors included in Annex II*" (in accordance with Article 5(1), point (ii) of the Rules[44]).

41. In this respect, it is important to take into account the rulings of the General Court and the Court of Justice in three cases, which were addressed, respectively, to the three ESAs. It is noted that the two former cases were dealt with before the amendment of Article 17(2) of the EIOPA Regulation by Regulation (EU) No 2019/2175.

A. The General Court's and the Court of Justice's rulings in Cases T-660/14 and C-577/15 P (*SV Capital OÜ v EBA*)

42. The issue whether such an appeal can be taken to the Board of Appeal has been previously addressed by the Board of Appeal, initially in its Decision of 24 June 2013 in the appeal case *SV Capital OÜ v EBA*.[45] This Decision, as regards the admissibility by the Board of Appeal of an appeal from a determination by the EBA not to initiate an Article 17 investigation following a request by an entity not specifically identified in Article 17(2), was appealed to the General Court and subsequently to the CJEU, which confirmed the ruling of the General Court.

43. In its ruling of 9 September 2015 in Case T-660/14, *SV Capital v EBA*,[46] the General Court raised the issue of admissibility of its own motion. As regards the discretionary nature of the power of the EBA to initiate an Article 17 investigation and the related (in)admissibility of an appeal to the Court to annul a determination by the EBA not to initiate an investigation, relevant are paragraphs 46-50. The General Court also raised of its own motion in paragraphs 60-72 a plea relating to the Board of Appeal's lack of competence to decide on the appeal brought before it against a decision of the EBA not to initiate an investigation under Article 17.[47]

44. On appeal, the Court of Justice, with its judgment of 14 December 2016 in Case C-577/15 P, *SV Capital v EBA*,[48] upheld the General Court judgment.[49]

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[43] See paragraph 32 above.

[44] See paragraph 34 above.

[45] BoA-2013-008.

[46] EU:T:2015:608.

[47] See paragraphs 42-45 of the Board of Appeal's Decision of 21 July 2022 in case *"C" v EBA* (BoA-D-2022-01).

[48] EU:T:2016:947.

[49] Court of Justice's judgment, paragraphs 34-42.

45. On the basis of the General Court's judgment in the *SV Capital v EBA* case, the following conclusions can be drawn as already established by the Board of Appeal in its case *C v EBA*:

46. *First*, as regards the EBA's (and thus all ESAs') powers to initiate investigations under Article 17(2) of the EBA Regulation, as it stood even before its amendment by Regulation (EU) No 2019/2175, it confirmed that these are discretionary. This applies both when EBA receives a request from one of the entities expressly mentioned in Article 17(2) as having standing to request such an investigation (i.e., NCAs, the European Parliament, the Council, the Commission, and the Banking Stakeholder Group) and when it acts on its own initiative thereunder.[50]

47. *Second*, the relevant Article 17 decisions relate to decisions related to a request for opening an investigation made by one of the entities expressly mentioned in Article 17(2) as having standing to request such an investigation. Any natural or legal person requesting EBA to take an investigation but not having standing to make such a request is thus not an addressee of such a decision. Furthermore, the relevant Article 17 decisions also relate to the Recommendations or Decisions that, under Article 17(3) and (6), respectively,[51] may be addressed by EBA to the relevant NCA or relevant financial institutions upon completion of an Article 17 investigation.[52]

48. *Third*, in relation to the Board of Appeal's competence, it confirms that any determination by EBA under Article 17(2) that does not meet the above conditions cannot be appealed to the Board. Such a determination does not fall within the scope of Article 60(1), which confers jurisdiction on the Board by providing that an appeal may be taken to it "*against a decision of the Authority referred to [inter alia] in Article 17*." Thus, the Board lacks competence to review an EBA's determination not to initiate an investigation upon its own initiative.[53]

49. *Finally*, pursuant to this judgment, which reflects wider EU case-law, where an EU institution or body has a discretion which excludes the right for individuals to require it to adopt a specific position, persons who have lodged a complaint do not have the right to bring an action before EU courts against a decision to take no further action on their complaint, since that possibility is confined to persons having procedural rights comparable to those they might have in the case of a procedure under Council Regulation (EC) No 1/2003. Furthermore, an applicant who is not one of the entities expressly mentioned in Article 17(2) cannot be equated to complainants benefiting from procedural rights which may be enforced before the EU courts and, thus, the case-law relating to the rejection of, or decisions to take no further action on, complaints brought by interested parties under Council Regulation (EC) No 659/1999 of 22 March 1999 is not applicable in this case.[54]

[50] General Court's judgment, paragraph 47.

[51] On Article 17(3) and (6) of the EIOPA Regulation, see paragraph 30 above.

[52] General Court's judgment, paragraphs 71-72.

[53] *Ibid*., paragraph 72, last sentence.

[54] *Ibid*., paragraphs 48-49.

B. The General Court's Order in Case T-590/15 (*Onix Asigurări SA v EIOPA*)

50. The second relevant ruling is the Order of the General Court of 24 June 2016 in Case T-590-15, *Onix Asigurări SA v EIOPA*.[55] In this, the General Court has, *inter alia*, extensively (paragraphs 49-58) dealt with the discretion of EIOPA to initiate investigations under Article 17(2) of the EIOPA Regulation, in line with its ruling in the *SV Capital v EBA* case.

51. The Order of the General Court, which was delivered before the amendment of Article 17(2) of the EIOPA Regulation by Regulation (EU) No 2019/2175, is in line with its judgment in the *SV Capital v EBA* case but goes beyond that. In particular:

52. *First*, it reaffirmed its position that the powers of EIOPA under Article 17(2) of the EIOPA Regulation are discretionary, including when it acts on its own initiative thereunder and, thus, EIOPA was under no obligation to act under Article 17.[56]

53. *Second*, it clearly links the above consideration with Article 1(6) of the EIOPA Regulation on the EIOPA's objective, as well as with recital (26),[57] stating that the aim of the three-step mechanism set out in Article 17 is not to provide individual protection or redress in disputes between a natural or legal person and an NCA.[58]

54. *Third*, and on the basis of the above, the lodging of a complaint such as that made by the Applicant does not create any "special legal relationship" between him and EIOPA and cannot oblige EIOPA to initiate an investigation under Article 17(2). Thus, EIOPA's refusal to initiate such a procedure on its own initiative was not capable of affecting the interests of the Applicant by bringing about a distinct change in his legal position, since the EIOPA's refusal decision does not produce binding legal effects and, ultimately, cannot be classed as an act open to challenge.[59]

C. The General Court's Order in Case T-760/20 (*Jakeliūnas v ESMA*)

55. In its most recent Order of 10 August 2021 in Case T-760/20, *Jakeliūnas v ESMA*,[60] the General Court considered inadmissible a complaint against a decision by ESMA not to open an investigation. The General Court considered, for the first time, the amended drafting of Article 17(2) in the light of Regulation (EU) No 2019/2175 and concluded that, from the wording requiring the authority to "*state how it intends to deal with the case and, where appropriate,*

[55] ECLI:EU:T:2016:374.

[56] General Court's Order, paragraphs 52-54.

[57] See paragraph 21 above.

[58] General Court's Order, paragraphs 52 (first sentence) and 55.

[59] *Ibid*., paragraphs 56-58.

[60] ECLI:EU:T:2021:512.

investigate", ESMA enjoyed a discretion in deciding whether to open an investigation and, by way of consequence, the decision not to undertake an investigation is not an appealable act.[61]

V – Application by the Board of Appeal of the related rulings of the EU courts

56. The interpretation of the General Court was previously applied by the Board of Appeal in the context of EBA's Article 17 jurisdiction in its Decision of 7 January 2016 in the case *Andrus Kluge and Others v EBA*[62] in the following manner:

> (24) Persons other than the entities listed can (and do) ask the EBA to open "own initiative" investigations, and (as in this case) the EBA may accept the complaint as admissible, and make subsequent enquiries, but it follows from the decision of the General Court that they have no right of appeal to the Board of Appeal against the Authority's decision in that regard.

57. Further to the ruling of the General Court in the *SV Capital v EBA* case, the Board of Appeal confirmed this approach as regards ESMA's Article 17 jurisdiction in its Decision of 10 September 2018 in case *B v ESMA*:[63]

> (44) The main ground of the Court's decision (…) is that the appellant was not one of the entities expressly referred to in article 17(2) of the Regulation that is entitled to request an investigation, and that consequently the Board of Appeal had no jurisdiction to hear its appeal against the refusal of the relevant authority (in that case the EBA) to do so.
>
> (46) The practical effect of the decision is to limit appeals against decisions of the [ESAs] (…) to investigate or not to investigate alleged breaches or non-applications of Union law to [NCAs], the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group. The fact that the Authority may initiate investigations on its own initiative does not affect this conclusion. The instant case is concerned with the jurisdiction of the Board of Appeal to hear an appeal from a determination by the ESMA Chairperson not to undertake an Article 17 investigation. In order to consider this appeal, the Board must apply relevant EU law, including the SV Capital rulings, consider its previous Decisions, and assess the application by ESMA of the Rules in this case.

58. A similar approach was taken by the Board of Appeal in its Decision of 9 October 2020 in case *Howerton v ESMA*,[64] finding that:

> (15) A second, and concurrent, reason of inadmissibility stems from the case-law of the Court of Justice. The court, in its judgments of 9 September 2015, T-660/14 SV Capital OÜ v EBA (…) and, on appeal, of 14 December 2016, SV Capital OÜ v EBA (…) clarified that a decision adopted by one of the ESAs (in that case, the [EBA]; but the same principle applies in the present case, where the relevant ESA is ESMA) not to initiate a proceedings under Article 17 is an act which is not reviewable

[61] General Court's Order, paragraphs 29-30.

[62] BoA 2016 01.

[63] BoA D 2018 02.

[64] BoA D-2020-01.

by the Board of Appeal. Thus, even assuming that the Contested Conclusion were to be considered a decision to the effect of Article 17 and Article 60 of Regulation (EU) No 1095/2010 (as the Board of Appeal believes it is not), the Contested Conclusion could not be appealed before the Board of Appeal.

59. In that case, decided after the entry into force of the amendments to Article 17(2) of the EIOPA Regulation by Regulation (EU) No 2019/2175, the Board of Appeal, without addressing the change in wording, proceeded on the basis that the principles set out in the General Court's *SV Capital v EBA* judgment applied, and that a conclusion by ESMA not to initiate proceedings under Article 17 was an act which was not reviewable by the Board. This was confirmed in the Board of Appeal's Decision of 9 October 2020 in case *Howerton v EIOPA*.[65]

60. The same approach was taken by the Board of Appeal in its Decision of 12 March 2021 in case *"A" v ESMA*[66] and, more recently, in its (above-mentioned) Decision of 21 July 2022 in case *"C" v EBA*.[67]

VI – Specific consideration of the circumstances of the case at hand

61. The key question raised in the case at hand is whether the circumstances of the case fall within the framework set by the *SV Capital*, *Onix* and *Jakeliūnas* rulings and, thus, whether the precedent set by these rulings must be applied to dismiss the case, or whether the factual or legal circumstances require otherwise. For the reasons stated below, the Board of Appeal considers that there are no reasons to deviate from these rulings and from subsequent precedents of the Board, as discussed in the previous sections of this decision.

62. This appeal raises interconnected issues relating to two questions of admissibility: the *first* relates to the admissibility of, and the related procedures governing requests to EIOPA, in accordance with Article 17(2) of the EIOPA Regulation and the related provisions of the EIOPA Rules of Procedure, to initiate an investigation relating to an alleged breach or non-application of Union law by ASF; the *second* relates to the admissibility of an appeal to the Board of Appeal, in accordance with Article 60(1) of the EIOPA Regulation, against a determination by EIOPA's Chairperson not to initiate an investigation under Article 17(2) on foot of a request by an entity not expressly mentioned in that Article.

63. In the case at hand, EIOPA has examined the Appellant's request with a view to both arriving at a decision as to whether it is admissible and a decision to open an investigation or close the case within the six-month deadlines from the date of its receipt set out in Articles 3(3) and 5(3)

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[65] BoA D-2020-02, paragraph 8.

[66] BoA D-2021-02.

[67] BoA-D-2022-01. On the considerations of the Board of Appeal that the amendments introduced to Article 17(2) of the ESAs' Regulations (in that case the EBA Regulation) by Regulation (EU) 2019/2175 are not conducive to a different conclusion from the one adopted by the CJEU in the *SV Capital* case (hence, under the initial text of the EBA Regulation), see paragraphs 80-88 of its Decision of 21 July 2022. Some of the above-mentioned Decisions of the Board of Appeal are further discussed below, as appropriate.

of the Rules of Procedure. Furthermore, in the Contested Decision of 19 September 2023, EIOPA notified the Appellant of the fact that their request has been closed and the reasons for closing the case and informed the Appellant of the available appropriate alternative forms of redress, as required by Article 5(2) of the Rules.

A. Admissibility of the appeal against the Contested Decision in the factual and legal circumstances of the instant case

64. The case at hand deals with the Board of Appeal's jurisdiction to hear an appeal on a determination made by EIOPA' Chairperson, as outlined in the Contested Decision not to initiate an "Article 17 investigation". In particular, it deals with the question whether, and to what extent, a Requester, as defined in Article 2(2) of the Rules of Procedure, can appeal to the Board of Appeal against the determination made by EIOPA's Chairperson to close the request without opening an investigation as a matter of discretion.[68]

65. In considering this appeal, the Board must apply relevant EU law, including the *SV Capital*, *Onix* and *Jakeliūnas* and consider its previous decisions.

66. As discussed,[69] pursuant to Article 60(4) of the EIOPA Regulation and Article 9(1) of the Rules of Procedure of the Board of Appeal, the Board must determine whether an appeal is admissible before examining whether it is well founded. In the case at hand, EIOPA has submitted that the appeal is not admissible.[70]

67. EIOPA's exercise of its discretion under Article 17(2) of the EIOPA Regulation and its application of the Rules of Procedure that structure that discretion are of relevance to this appeal. However, the key aspect to be determined relates to whether or not the Board of Appeal has jurisdiction to hear this appeal. Previous Board Decisions and the *SV Capital* rulings suggest that an appeal does not lie to the Board from a determination by an ESA not to initiate an investigation under Article 17(2) on the basis of a complaint by an entity not expressly mentioned in that Article as having standing to make such a request.

68. Nevertheless, the Board of Appeal has also considered whether there are factual and legal circumstances at issue in the case at hand, which, to a certain extent, are different from those at issue in previous relevant Board decisions and in the *SV Capital* and *Jakeliūnas* rulings and which might, thus, distinguish the position of the Appellant and so lead to a different conclusion on the admissibility of an appeal concerning the Contested Decision that determined not to initiate an investigation according to Article 5 of the Rules of Procedure.

[68] Rules of Procedure, Article 5(1), point (ii).

[69] See paragraph 38 above.

[70] Response of EIOPA dated 12 December 2023, paragraphs 40 and 45.

Conditions set out in relation to the request to investigate a breach of EU law and in particular on the admissibility of the appellant's complaint

69. As EIOPA also acknowledges in the Contested Decision, the Appellant made clear allegations that ASF may have breached certain of its obligations under the Solvency II Directive, and namely Article 32 on the prohibition of refusal of reinsurance contracts and Article 250(1), point (c) on the prior consultation with the group supervisor with regard to major sanctions. Thus, it is undisputed as well that the threshold admissibility conditions applied by EIOPA under Article 17(1) of its founding Regulation were met.[71] It is also uncontested that these admissibility criteria were met from the review of the Notice of Appeal.

EIOPA's discretionary powers

70. Notwithstanding the above-mentioned on the admissibility of the appellant's complaint, the Board of Appeal notes that EIOPA's powers under Article 17(2) of its founding Regulation, as further framed by the procedure established by the Rules of Procedure, are discretionary and the admissibility of a complaint does not imply *per se* that an investigation follows. This discretion is reflected in Article 17(2), whereby EIOPA is only required to investigate potential breaches of Union law by NCAs "*where appropriate*". It is further reflected in Article 1 of the Rules of Procedure, which provides that these Rules apply to requests to investigate received by EIOPA, as well as, "*to the extent relevant*", to own initiative investigations, and in Article 5(1), point (ii), according to which the Chairperson of EIOPA can, if a request is admissible, determine that an investigation should not be initiated "*as a matter of discretion*", taking account of the non-exhaustive list of (positive and negative) investigation factors in Annex II.

71. The case-law of the General Court and the Court of Justice in the *SV Capital*, *Onix* and *Jakeliūnas* cases confirmed that the decision to initiate an investigation is a matter of discretion. In particular, in the *Onix* case the General Court reaffirmed its position that the discretionary character of EIOPA's powers, including when it acts on its own initiative, linking this consideration with Article 1(6) on the EIOPA's objective, as well as with recital (26),[72] stating that the aim of the three-step mechanism set out in Article 17 is not to provide individual protection or redress in disputes between a natural or legal person and an NCA.[73]

72. Furthermore, the General Court confirmed in its *Onix* order that the submission of a request under Article 17(2) of the EIOPA Regulation by a natural or legal person does not create any "special legal relationship" between the requester and EIOPA and cannot oblige EIOPA to initiate an investigation thereunder. Accordingly, EIOPA's refusal decision to initiate such a procedure on its own initiative is not capable of affecting the interests of the Applicant by

[71] Of relevance in this respect is also Annex II of the Rules of Procedure.

[72] See paragraph 21 above.

[73] General Court judgment, paragraphs 54-55.

bringing about a distinct change in their legal position, since the refusal decision does not produce binding legal effects and, ultimately, cannot be classed as an act open to challenge.[74]

73. In the case at hand, EIOPA notified the Appellant that, after having carefully and thoroughly assessed the application of the related provisions of the Solvency II Directive, and in particular (of the contested) Articles 32 and 250 thereof:

"*Based on the information and evidence available to us, we concluded that the ASF acted within its supervisory mandate (discretion) provided in Article 144(1) of Solvency II when withdrawing Euroins Romania's authorisation. Moreover, the ASF's decision not to carry prior consultation with the [FSC] of Bulgaria and other supervisors in the college of supervisors was justified as the ASF had discretion to consider the urgency and whether consultation could jeopardise the effectiveness of its decision. In addition, we took note that there is an ongoing court proceeding in Romania against the withdrawal decision of ASF*".

74. The Board of Appeal further notes that the determination by EIOPA's Chairperson not to open an investigation under Article 5 of the Rules of Procedure broadly relates to Article 17(2) of the EIOPA Regulation, even though the Appellant is not included in the list of entities expressly mentioned therein, and that the Appellant is the addressee of the Contested Decision.

75. It is not contested that the request to EIOPA was admissible under the EIOPA Regulation and the Rules of Procedure (as discussed[75]), and that the Appellant has a clear and understandable factual interest in EIOPA initiating an investigation, as well as in appealing against the determination by EIOPA's Chairperson not to open an investigation for the purposes of Article 60(1) of the EIOPA Regulation. However, the fundamental question is whether such factual interest translates into a right for the appellant to appeal before the Board of Appeal the determination made by EIOPA that an investigation should not be initiated. As stated in the following paragraphs, the answer to this is a negative one.

76. For the sake of completeness, the Board of Appeal also notes that application of the *SV Capital* rulings reflects wider EU case-law on the limited reviewability of discretionary decisions relating to refusals to initiate investigation/infringement procedures. As already noted, in the *SV Capital* case the General Court held that, according to settled case-law, developed in the context of actions for annulment of Commission decisions refusing to initiate infringement proceedings, where an EU institution or body is not bound to initiate a procedure. It has a discretion, which excludes the right for individuals to require it to adopt a specific position, it is not open to persons who have lodged a complaint to bring an action before the EU courts against the discretionary decision to take further action on their complaint. That possibility would only arise if those persons had procedural rights, comparable to those in the case of a procedure under Council Regulation (EC) No 1/2003, enabling them to require that institution or body to inform them and to grant them a hearing.[76]

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[74] *Ibid*., paragraphs 56-58.

[75] See paragraph 69 above.

[76] General Court judgement in the *SV Capital v EBA* case, paragraph 46.

77. The Board of Appeal has consistently applied the principle stated by the General Court and confirmed by the Court of Justice in its subsequent cases.[77] It is further noted that in its decision of 7 January 2016 in the *Kluge v EBA* case, the Board held that the rules of procedure for investigation of breach of Union law adopted by EBA in 2014 did not give persons different from the "qualified" entities listed in Article 17(2) a right of appeal because

"*the General Court refer[red] expressly to the internal processing rules in paragraph 7 of the [SV Capital] decision and it follows that the rules were not regarded by the Court as extending rights of appeal which would not otherwise exist*".[78]

Scope of jurisdiction of the Board of Appeal under Article 60(1) of the EIOPA Regulation

78. The Appellant is a legal person, and the Contested Decision is directly addressed to the Appellant, as required by Article 60(1) of the EIOPA Regulation. Thus, under that Article it has right to lodge an appeal against a decision of EIOPA referred to Article 17.

79. Whether an appeal can lie or not to the Board of Appeal depends on the scope of its jurisdiction, as set out in Article 60(1) of the EIOPA Regulation. Accordingly, even when the Board recognises the factual interest of an appellant in EIOPA opening an investigation, critical is whether or not this determination comes within the scope of Article 60(1).

80. Thus, central to this appeal is the Board of Appeals' jurisdiction over "Article 17 decisions" pursuant to Article 60(1) of the EIOPA Regulation. It follows from the admissibility of the Appellant's request to EIOPA under the Rules of Procedure that its request for opening an investigation is relevant as regards the exercise by EIOPA of its own-initiative powers under Article 17(2) as it concerns allegations that "*an [NCA] has not applied the acts referred to in Article 1(2) or has applied them in a way which appears to be a breach of Union law (...)*".[79]

81. While the Board of Appeal recognises the factual interest of the Appellant in EIOPA opening an investigation, in light of the *SV Capital rulings*, the Board is of the view that in this appeal EIOPA's determination not to open an investigation does not come within the scope of Article 60(1) of the EIOPA Regulation. The Appellant has not established that the Contested Decision is a decision within the scope of the Board of Appeal's jurisdiction under Article 60(1) in accordance with the *SV Capital* rulings. According to these rulings, and as already discussed,[80] the Board's jurisdiction under Article 60 as regards Article 17 decisions is limited to decisions: (i) regarding the opening of an investigation following a request by an NCA, the European Parliament, the Council, the Commission and the relevant Stakeholder Group and addressed to

[77] See paragraphs 56-60 above. In this respect, the Board of Appeal notes that its Decision of 2014 (BoA-2014-05), reference to which is made in the Appellant's Response (paragraphs 5 and 8) and according to which, in analysing the legal nature of a Challenged Decision, the essential factor is the effects it produces, not its form or name (BoA-2014-05, paragraph 47), was taken well before the rulings of the EU Courts. Thus, reference to that Board's decision is not accurate as, since then, the Board was bound by these rulings.

[78] Board of Appeal Decision *Kluge v EBA* (BoA 2016 01), paragraphs 33-35.

[79] Rules of Procedure, Article 3(2), point (i).

[80] See paragraph 47 above.

these entities in accordance with Article 17(2); and/or (ii) on the foot of any subsequent action by EIOPA where an investigation is opened, either Recommendations addressed to NCAs or Decisions addressed to financial institutions pursuant to Article 17(3) and (6), respectively.

82. The Board of Appeal agrees with EIOPA that the Contested Decision is not such a decision adopted on the basis of Article 17(2) and, hence, cannot be challenged in accordance with Article 60(1) as interpreted by the General Court and the CJEU in the *SV Capital* rulings.

83. The Appellant has argued that the appeal is admissible under Article 60(1) without any reference to the EU case-law that relates to the present case and was discussed above, either in its Notice of Appeal or in its Response of 12 January 2024.[81] The Board of Appeal notes, however, that its decisions as regards its jurisdiction must follow settled EU case-law as this applies to the specific facts before it. In the case at hand, the Board finds that the circumstances raised by the Appellant do not allow for a dis-application of the *SV Capital* rulings.

84. The Appellant has not raised any arguments which would support a different conclusion.

B. On the Appellant's request to the Board of Appeal to order EIOPA to re-assess the Appellant's request to open an "Article 17 investigation"

85. The Appellant contests the position of EIOPA[82] that the Board of Appeal has no competence "to order EIOPA" to make use of its discretionary power. In addition, the Appellant considers that this role specifically was granted to the Board of Appeal "***in order to avoid authoritarian or excessive approach of the authority***."[83]

86. In relation to the first point raised by the Appellant, the Board of Appeal notes that, in accordance with **Article 60(5)** of the EIOPA Regulation,[84] the Board has the power either to confirm the Contested Decision or remit the case to EIOPA's Board of Supervisors. Thus, it does not have the statutory power to order EIOPA to re-assess the Appellant's request to open an Article 17 investigation. Accordingly, even if the Board would have not confirmed the Contested Decision, the only course of action available to the Board would have been to remit the case to the EIOPA's Board of Supervisors, which would be bound by the Board's decision and would have to adopt an amended decision regarding the case at hand.

87. In relation to the second assertion it is merely stated there is no specific provision in the legislative framework (not even in a recital) indicating that EIOPA has been conferred upon such a task.

[81] See Notice of Appeal, paragraphs 36-53 and Appellant's response dated 12 January 2024, paragraph 39.

[82] Response of EIOPA dated 19 December 2023, paragraph 44.

[83] See paragraph 19 above.

[84] See paragraph 39 above.

VII – The decision

88. On the grounds developed above, the Board of Appeal unanimously confirms the Contested Decision and decides that the appeal is inadmissible because it is directed against a decision which is not challengeable.

The original of this Decision is signed by the Members of the Board of Appeal in electronic format, as authorised by Article 22.2 of the Rules of Procedure and countersigned by hand by the Secretariat.

The original of this Decision is signed by the Members of the Board of Appeal in electronic format and countersigned by hand by the Secretariat.

Michele Siri (President, Co-Rapporteur)
(SIGNED)

Christos Gortsos (Vice President)
(SIGNED)

Gerben Everts
(SIGNED)

Geneviève Helleringer
(SIGNED)

Margarida Lima Rego
(SIGNED)

Carsten Zatschler (Co-Rapporteur)
(SIGNED)

On behalf of the Board of Appeal Secretariat

Adrien Rorive
(SIGNED)

A signed copy of the decision is held by the Secretariat

Date of the decision: 11.03.2024.

Publication of the decision after verifications in accordance with Articles 23 and 24(2) of the Rules of Procedure: 19.03.2024.

European Banking Authority — EIOPA European Insurance and Occupational Pensions Authority — ESMA European Securities and Markets Authority

BoA-O-2024-03

O R D E R

given by

the
BOARD OF APPEAL
OF THE EUROPEAN SUPERVISORY AUTHORITIES

on
a request not to publish the decision

in the appeal case brought by

Euroins Insurance Group AD
[Appellant]

against

The European Insurance and Occupational Pensions Authority (EIOPA)
[Respondent]

Board of Appeal
Michele Siri (President and Co-Rapporteur)
Christos Gortsos (Co- Rapporteur)
Gerben Everts
Geneviève Helleringer
Margarida Lima Rego
Carsten Zatschler

Place of this order: Paris

Date: 24 June 2024

1. The Board of Appeal has carefully considered the request from the Appellant dated 19 March 2024 not to disclose, directly or indirectly, Decision BoA-D-2024-02 in its entirety, including any related summary.

2. However, pursuant to Article 60(7) of the EIOPA Regulation, Decisions of the Board of Appeal must be made public by EIOPA. This is reaffirmed in the Board of Appeal's Rules of Procedure. There is no exception to this rule.

3. The Board of Appeal fully acknowledges the significance of maintaining confidentiality and understands the need to ensure that nothing beyond the realm of public knowledge is divulged, to the fullest extent possible. At the same time, however, Article 60(7) of the EIOPA Regulation also requires that decisions of the Board of Appeal be reasoned. Therefore, it is essential to include in the Decision all relevant contextual information, insofar as it is part of the justification thereof. Omitting pertinent context may render the Decision narrower or hinder its comprehension.

4. In this respect, the Board of Appeal has taken into account:

   a) Article 24(2) of the Rules of Procedure of the Board of Appeal (on the redaction of information from the published decision); and

   b) Article 26 of the Rules of Procedure of the Board of Appeal (on the confidential treatment of a document or information contained in a document to be filed and/or served in connection with proceedings before the Board of Appeal).

5. The party exceptionally requesting confidential treatment of information has the burden of proof to produce evidence to establish the truth of facts needed to satisfy the Board of Appeal that its request is grounded and should therefore be upheld.

6. In the case at hand, the Appellant claims that Decision BoA-D-2024-02 contains or may be construed as containing certain information that is commercially sensitive and the publication of which could harm the competitive advantage, reputation, and market position of the Appellant; would adversely affect their competitive position; expose them to potential market abuse; and compromise their business strategy and their relations to their stakeholders.

7. However, the Board of Appeal has found that the Appellant has not discharged the burden of proof applicable to its claims. Consequently, the Appellant considers, in the first place, that publication of BoA-D-2024-02 would entail the dissemination of confidential information with respect to its own legal strategy in challenging the illegal acts of the national authority.

8. The Appellant also considers, in the second place, that the publication could give the impression that the legality of the national competent authority's acts was already assessed by EIOPA and by a supervisory body like the Board of Appeal. In turn, this would weaken the Appellant's position before the national courts.

9. Based on the interests summarised above, the Appellant requires that the Board orders that Decision BoA-D-2024-02 is not published or, should the Board reject such a request, that certain information is redacted from the decision (see, to this effect, the Appellants' Applications of 19 March and 9 May 2024).

10. To support its requests, the Appellant also invokes the rules on professional secrecy that apply to EIOPA. In more detail, the Appellant refers to Article 70 of the EIOPA Regulation, Decision EIOPA-MB-17-039 "on professional secrecy", and Decision EIOPA-MB-14/034 concerning the protection of information systems and information collected, processed and stored by EIOPA.

11. EIOPA has submitted in this regard that Decision EIOPA-MB-17-039 "on professional secrecy" and Decision EIOPA-MB-14/034 concerning the protection of information systems and information collected, processed and stored by EIOPA, all of which are mentioned in the Appellant's request, do not apply to the Board of Appeal and its members, as the Board of Appeal Members are independent of EIOPA by virtue of Article 59 of the EIOPA Regulation.

12. Without it being necessary to rule on whether Article 59 of the EIOPA Regulation also displaces the operation of Article 70 of the EIOPA Regulation, the Board of Appeal considers, in agreement with EIOPA's submissions, that none of the information identified by the Appellant constitutes confidential information protected by the principle of professional secrecy.

13. Article 70 of the EIOPA Regulation can be seen as a further concretisation of the general principle of professional secrecy laid down in Article 339 TFEU (to which it explictitly refers). Simultaneously, Article 72(1) of the EIOPA Regulation provides, in line with the desire expressed in Recital (64) of the preamble to that regulation to ensure the transparent operation of EIOPA, that Regulation No 1049/2001, which according to its Article 1 aims to provide the "widest possible access to documents", is to apply to documents held by EIOPA. The classification of a document, such as the Contested Decision having given rise to the Decision BoA-D-2024-02 being classified as "EIOPA RESTRICTED USE" is not determinative in this regard.

14. In *Baumeister*,[1] the Court of Justice considered the notion of "confidential information" for the purposes of the principle of professional secrecy must in principle be taken as covering information which (i) is not public, and (ii) the disclosure of which is likely to adversely affect the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the monitoring or supervision being carried out by the authority holding that information.

15. In as far as the Appellant considers that the disclosure of the Contested Decision could prejudice its position in a range of pending court proceedings by revealing the stance taken by EIOPA as regards the question of whether the national competent authority ASF acted in breach of its obligations under Union law, it has to be considered that such information in fact appears to be relevant for the purposes of national proceedings, so that it would not be inappropriate for a national court to order disclosure thereof in any event.

16. In relation to a recommendation of the EBA based on Article 17(3) of the EBA Regulation at the outcome of the analogous breach of Union law procedure under Article 17 of the EBA Regulation,[2] the Court of Justice has held that, even if such recommendations are not intended to produce binding legal effects, and therefore cannot be challenged in the context of an action

[1] Judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, para 35.
[2] 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, OJ 2010 L 331, p. 12 (the "EBA Regulation").

for annulment pursuant to Article 263 TFEU,[3] national courts must nevertheless take them into consideration, in particular in the context of a dispute arising out of an alleged non-application or incorrect application of Union law giving rise to the investigation procedure which led to the adoption of that recommendation.[4]

17. Moreover, to the extent that the Appellant considers that the Decision BoA-D-2024-02 will incorrectly be understood as endorsing any findings of EIOPA to the effect that the ASF had fully complied with Union law in rendering its decision withdrawing Euroins' authorization, the Board of Appeal notes that the Appeal against the EIOPA decision was declared inadmissible. Thus, the Board did not take any position concerning the merits of the EIOPA decision. This suffices to dispel, as the present decision be made public, the concerns that the Board decision could be misinterpreted by other readers, including national courts. It is thus clear that the Board of Appeal could not have endorsed the EIOPA decision on the merits. Disclosure of that information thus cannot be considered likely to affect adversely the interests of Euroins within the meaning of the test set out in (the above-mentioned) pararaph 35 of the *Baumeister* judgment.

18. The Board of Appeal has further considered whether any other parts of Decision BoA-D-2024-02 would be likely to affect adversely the interests of Euroins within the meaning of that test, paying particular attention to the passages identified by Euroins in its request for redaction, but it has not been able to identify any of that information as confidential.

19. At the same time, an opportunity should be afforded to the Appellant to appeal to the General Court against a decision to disclose information considered confidential by the Appellant. The case-law has clarified that, where an undertaking claims that a document concerning it contains business secrets or other confidential information, the authority concerned must not communicate that document without first having completed various steps. First, the authority must give the undertaking in question an opportunity to state its views. Next, the authority is required to adopt a decision in that connection which contains an adequate statement of reasons on which it is based and which must be notified to the undertaking concerned. Finally, having regard to the extremely serious damage which could result from improper communication of a document containing business secrets or other confidential information, the authority must, before implementing its decision, give the undertaking an opportunity to bring an action before the EU Courts with a view to having the assessments made reviewed by it and to preventing disclosure of the document in question.[5]

20. It is therefore appropriate to delay publication of Decision BoA-D-2024-02 to a future date which affords the Appellant sufficient time to file an appeal against the present decision to the General Court and seek interim measures to supend the operation of this decision.

21. Accordingly, the Board of Appeal:

    (a) Dismisses the Euroins' request not to publish its Decision in its entirety as well as its request for redactions.

    (b) Determines that the full text of Decision BoA-D-2024-02 shall be published on 31 July 2024.

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[3] Judgment of 25 March 2021, *BT v Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, para 82; according to its Advocate General Campos Sánchez-Bordona, recommendations under Article 17(3) are also open to challenge by those concerned before the Board of Appeal, notwithstanding their non-final nature and lack of binding legal effects: see Opinion of 17 September 2020, EU:C:2020:729, paras 81-82.

[4] Judgment of 25 March 2021, *BT v Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paras 79-81.

[5] Judgment of 7 October 2014, Schenker v Commission, T-534/11, EU:T:2014:854, para 128, and case-law cited.

The original of this Decision is signed by the Members of the Board of Appeal in electronic format and countersigned by hand by the Secretariat.

Michele Siri (President, Co-Rapporteur)

(SIGNED)

Christos Gortsos (Vice President, Co-Rapporteur)

(SIGNED)

Gerben Everts

(SIGNED)

Geneviève Helleringer

(SIGNED)

Margarida Lima Rego

(SIGNED)

Carsten Zatschler

(SIGNED)

On behalf of the Board of Appeal Secretariat

Adrien Rorive

(SIGNED)

A signed copy of the order is held by the Secretariat

European Banking Authority | EIOPA European Insurance and Occupational Pensions Authority | ESMA European Securities and Markets Authority

BoA-O-2024-04

O R D E R

given by

the
PRESIDENT
OF THE BOARD OF APPEAL
OF THE EUROPEAN SUPERVISORY AUTHORITIES

on
a request not to publish the decision

in the appeal case brought by

Euroins Insurance Group AD
[Appellant]

against

The European Insurance and Occupational Pensions Authority (EIOPA)
[Respondent]

Board of Appeal
Michele Siri (President and Co-Rapporteur)
Christos Gortsos (Co- Rapporteur)
Gerben Everts
Geneviève Helleringer
Margarida Lima Rego
Carsten Zatschler

Place of this order: Paris

Date: 26 July 2024

1. By Order No BoA-O-2024-03 of 22 June 2024, the Board of Appeal ordered the publication of Decision No BoA-D-2024-2 on 31 July 2024.

2. On 22 July, the Board of Appeal was informed of a request from the President of the Court of First Instance to postpone publication in order to allow him to properly analyse and consider the application for interim measures to suspend the operation of Order No BoA-O-2024-03 pending before him.

3. The publication of Decision No BoA-D-2024-02, while desirable at some point in the near future, is not urgent. It is therefore appropriate to postpone its publication until 7 August 2024.

4. Accordingly, the President of the Board of Appeal orders:

   Notwithstanding the Order of the Board of Appeal No BoA-O-2024-03, the decision No BoA-D-2024-02 shall be published on 7 August 2024.

Michele Siri

President of the Board of Appeal of the European Supervisory Authorities

(SIGNED)

On behalf of the Board of Appeal Secretariat

Adrien Rorive

(SIGNED)

A signed copy of the order is held by the Secretariat