

EUROPEAN CENTRAL BANK

DECISION OF THE EUROPEAN CENTRAL BANK

of 3 June 2004

concerning the terms and conditions for European Anti-Fraud Office investigations of the European Central Bank, in relation to the prevention of fraud, corruption and any other illegal activities detrimental to the European Communities' financial interests and amending the Conditions of Employment for Staff of the European Central Bank

(ECB/2004/11)

(2004/525/EC)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Whereas:

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) ⁽¹⁾, and in particular Article 4(1) and 4(6) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular Article 12.3 and Article 36.1 thereof,

Having regard to the contribution of the General Council of the European Central Bank (ECB) in accordance with the fifth indent of Article 47.2 of the Statute,

Having regard to the opinion of the Staff Committee of the ECB,

(1) Regulation (EC) No 1073/1999 (hereinafter the OLAF Regulation) provides that the European Anti-Fraud Office (hereinafter the Office) is to initiate and conduct administrative fraud investigations (hereinafter internal investigations) within the institutions, bodies, offices and agencies established by or on the basis of the EC and Euratom Treaties for the purpose of fighting fraud, corruption and any other illegal activities detrimental to the European Communities' financial interests. Pursuant to the OLAF Regulation, internal investigations may concern serious matters relating to the discharge of professional duties such as to constitute a dereliction of the obligations of members of the staff of such institutions, bodies, offices and agencies liable to result in disciplinary or, as the case may be, criminal proceedings, or an equivalent failure to discharge obligations on the part of members of institutions and bodies, heads of offices and agencies or members of the staff of institutions, bodies, offices or agencies not subject to the Staff Regulations of officials and the Conditions of Employment of other servants of the European Communities (hereinafter the Staff Regulations).

(2) For the ECB such professional duties and obligations, in particular the obligations relating to professional conduct and professional secrecy, are laid down in (a) the Conditions of Employment for Staff of the European Central Bank, and (b) the European Central Bank Staff Rules, and (c) Annex I to the Conditions of Employment concerning the Conditions of Short-term Employment, and (d) the European Central Bank Rules for Short-term Employment; and further guidance is given in (e) the Code of Conduct of the European Central Bank ⁽²⁾, and (f) the Code of Conduct for the members of the Governing Council ⁽³⁾ (together referred to hereinafter as the ECB conditions of employment).

⁽¹⁾ OJ L 136, 31.5.1999, p. 1.

⁽²⁾ OJ C 76, 8.3.2001, p. 12.

⁽³⁾ OJ C 123, 24.5.2002, p. 9.

- (3) The OLAF Regulation provides in Article 4(1) that in relation to protecting the European Communities' financial interests and fighting fraud and any other illegal activities detrimental to the European Communities' financial interests, the Office 'shall carry out administrative investigations within the institutions, bodies, offices and agencies'; and in Article 4(6) that each institution, body, office and agency is to adopt a decision which 'shall in particular include rules concerning: (a) a duty on the part of members, officials and other servants of the institutions and bodies, and managers, officials and servants of offices and agencies, to cooperate with and supply information to the Office's servants; (b) the procedures to be observed by the Office's employees when conducting internal investigations and the guarantees of the rights of persons concerned by an internal investigation'. In accordance with Community case-law, the Office may open an investigation only on the basis of sufficiently serious suspicions⁽¹⁾.
- (4) The OLAF Regulation provides (second paragraph of Article 4(1)) that internal investigations should be conducted subject to the rules of the Treaties, in particular the Protocol on privileges and immunities of the European Communities, and with due regard for the Staff Regulations. Internal investigations by the Office are also subject to Article 6(2) of the Treaty on European Union and to other principles and fundamental rights common to the Member States and recognised by the Court of Justice, such as, for instance, the confidentiality of legal advice (legal privilege).
- (5) Internal investigations are carried out in accordance with the procedures set out in the OLAF Regulation and in decisions adopted by each institution, body, office or agency to implement it. In adopting this implementing decision, it is incumbent on the ECB to justify any restrictions on internal investigations affecting the specific tasks and duties entrusted to the ECB by Articles 105 and 106 of the Treaty. Such restrictions should ensure, on the one hand, the confidentiality necessary for certain ECB information and, on the other hand, implement the legislator's intention of reinforcing the fight against fraud. Other than for these specific tasks and duties the ECB should be treated, also for the purpose of the present decision, as a public entity similar to other Community institutions and bodies.
- (6) In exceptional cases, the circulation outside the ECB of some of the confidential information held by the ECB to perform its tasks could seriously undermine the ECB's functioning. In such cases, the decision on granting the Office access to information or transmitting information to it will be taken by the Executive Board. Access will be granted to information that is more than one year old in areas such as monetary policy decisions, or operations related to the management of foreign reserves and interventions on foreign exchange markets. Restrictions in other areas such as data received from prudential supervisors regarding the stability of the financial system or individual credit institutions and information regarding the security features and technical specifications of current and future euro banknotes do not have a temporary limit. Although such information, the circulation of which outside the ECB could seriously undermine the ECB's functioning, has been circumscribed in this Decision to specific areas of activity, it is necessary to provide for the possibility of adapting the Decision to any unforeseen developments to ensure that the ECB continues to fulfil the tasks assigned to it by the Treaty.
- (7) This Decision takes into account the fact that the members of the ECB's Governing and General Councils who are not also members of the ECB's Executive Board exercise, in addition to their ESCB functions, national functions. Exercising such national functions is a matter for national law which falls outside the scope of the internal investigations of the Office. This Decision therefore applies only to the professional activities of such persons undertaken in their capacity as members of the ECB's governing bodies. To the extent that members of the General Council are potentially concerned by internal investigations of the Office, this Decision has been drawn up with the benefit of contributions received from such members.
- (8) Article 38.1 of the Statute provides that members of the governing bodies and the staff of the ECB are required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy. Under Article 8 of the OLAF Regulation, the Office and its employees are subject to the same conditions of confidentiality and professional secrecy as those applying to ECB staff under the Statute and the ECB conditions of employment.
- (9) Under Article 6(6) of the OLAF Regulation, the national competent authorities support the Office in its investigations of the ECB in conformity with national provisions. The Government of the Federal Republic of Germany and the ECB are signatories to a Headquarters Agreement, dated 18 September 1998⁽²⁾, which implements the Protocol on the privileges and immunities of the European Communities in respect of the ECB and contains provisions regarding the inviolability of the ECB's premises, archives, communications, and on the diplomatic privileges and immunities of the members of the ECB's Executive Board.

⁽¹⁾ Case C-11/00 Commission of the European Communities v European Central Bank, [2003] ECR I-7147.

⁽²⁾ Federal Official Journal (Bundesgesetzblatt) No 45, 1998 of 27.10.1998 and No 12, 1999 of 6.5.1999.

- (10) Pursuant to Article 14 of the OLAF Regulation, any official or other servant of the European Communities may submit to the Director of the Office a complaint against an act adversely affecting them committed by the Office as part of an internal investigation, in accordance with the procedures laid down in Article 90(2) of the Staff Regulations. By analogy the same procedures should apply to complaints submitted to the Director of the Office by ECB employees or members of an ECB decision-making body and Article 91 of the Staff Regulations should apply to decisions taken regarding such complaints,

HAS DECIDED AS FOLLOWS:

Article 1

Scope of application

This Decision applies to:

- members of the ECB's Governing and General Councils, in matters related to their function as members of such ECB decision-making bodies,
- members of the ECB's Executive Board,
- members of the governing bodies or any member of staff of the national central banks, who participate in the meetings of the ECB's Governing and General Councils as alternates and/or accompanying persons in matters related to this function,

(hereinafter jointly referred to as participants in the decision-making bodies), and

- permanent or temporary ECB members of staff, who are subject to the ECB conditions of employment,
- persons working for the ECB other than on the basis of an employment contract, in matters related to their work for the ECB,

(hereinafter jointly referred to as ECB employees).

Article 2

Duty to cooperate with the Office

Without prejudice to the relevant provisions of the Treaty, of the Protocol on the privileges and immunities of the European Communities and of the Statute, and subject to the procedures laid down in the OLAF Regulation and to the rules laid down in this Decision, participants in the decision-making bodies and ECB employees shall fully cooperate with the Office's agents carrying out an internal investigation and shall lend any assistance required for the investigation.

Article 3

Duty to report any information about illegal activity

1. ECB employees who become aware of evidence which gives rise to a presumption of the existence of possible cases of fraud, corruption or any other illegal activity affecting the European Communities' financial interests, or of serious matters affecting such financial interests and relating to the discharge of professional duties such as to constitute a dereliction of the obligations of an ECB employee or of a participant in the decision-making bodies, liable to result in disciplinary or, as the case may be, criminal proceedings, shall without delay provide either the Director Internal Audit, the senior manager in charge of their business area, or the member of the Executive Board who is primarily responsible for their business area with such evidence. The latter persons shall without delay transmit the evidence to the Director General Secretariat and Language Services. ECB employees must in no way suffer inequitable or discriminatory treatment as a result of having communicated the information referred to in this Article.

2. Participants in the decision-making bodies who become aware of evidence as referred to in paragraph 1 shall inform the Director General Secretariat and Language Services or the President of the ECB.

3. When the Director General Secretariat and Language Services or, where appropriate, the President of the ECB receives evidence in accordance with paragraphs 1 or 2, they shall, subject to Article 4 of this Decision, transmit it without delay to the Office and inform the Directorate Internal Audit and, where appropriate, the President of the ECB.

4. In cases in which an ECB employee or a participant in the decision-making bodies has concrete evidence supporting the suspicion of the existence of a case of fraud or corruption or any other illegal activity within the meaning of paragraph 1, and, at the same time, has justified reasons to consider that the procedure foreseen in the above paragraphs would prevent in that specific case a proper reporting of such evidence to the Office, they may report directly to the Office without being subject to Article 4.

Article 4

Cooperation with the Office with regard to sensitive information

1. In exceptional cases, in which the circulation of certain information outside the ECB could seriously undermine the ECB's functioning, the decision on whether to grant the Office access to such information or to transmit such information to it will be taken by the Executive Board. This shall apply to information concerning monetary policy decisions, or operations related to the management of foreign reserves and interventions on foreign exchange markets, provided that such information is less than one year old, data received by the ECB from prudential supervisors regarding the stability of the financial system or individual credit institutions or information concerning the euro banknotes' security features and technical specifications.

2. Any such decision of the Executive Board shall take all relevant aspects into account, such as the degree of sensitivity of the information required by the Office for the investigation, its importance for the investigation and the seriousness of the suspicion as presented by the Office, by the ECB employee or a participant in the decision-making bodies to the President of the ECB, and the degree of risk for the ECB's future functioning. If access is not granted, the decision shall state the reasons. With regard to data that the ECB receives from prudential supervisors on the stability of the financial system or individual credit institutions, the Executive Board may decide to grant the Office access, unless the relevant prudential supervisor considers that disclosing the information concerned will put the stability of the financial system or the individual credit institution at risk.

3. In very exceptional cases concerning information related to a particular area of ECB activity, of equivalent sensitivity to the categories of information referred to in paragraph 1, the Executive Board may provisionally decide not to grant the Office access to such information. Paragraph 2 shall apply to such decisions which shall be valid for a maximum of six months. Thereafter, the Office shall be granted access to the information concerned, unless the Governing Council has in the meantime amended the present Decision by adding the category of information concerned to the categories covered by paragraph 1. The Governing Council shall state its reasons for amending this Decision.

Article 5

Assistance from the ECB in internal investigations

1. When initiating an internal investigation of the ECB, the Office's agents shall be granted access to the ECB's premises by the manager in charge of ECB security upon production of a written authorisation showing their identity, their capacity as agents of the Office, and the written authority issued by the Director of the Office indicating the subject matter of the investigation. The President, the Vice-President and the Director Internal Audit shall be informed immediately.

2. The Directorate Internal Audit shall assist the Office in the practical organisation of investigations.

3. ECB employees and participants in the decision-making bodies shall supply any requested information to the Office's agents who are conducting an investigation, unless the requested information could be sensitive within the meaning of Article 4, in which case the Executive Board shall decide. The Directorate Internal Audit shall record all information supplied.

Article 6

Informing interested parties

1. Where the possible implication of an ECB employee or a participant in a decision-making body emerges, the interested party shall be informed rapidly as long as this would not be harmful to the investigation. In any event, conclusions referring by name to an ECB employee or participant in a decision-making body may not be drawn once the investigation has

been completed without the interested party having been enabled to express their views on all the facts relating to them, including any evidence existing against them. Interested parties have the right to remain silent, to refrain from incriminating themselves and to seek personal legal assistance.

2. In cases necessitating the maintenance of absolute secrecy for the purpose of the investigation and requiring the use of investigative procedures falling within the remit of a national judicial authority, compliance with the obligation to invite an ECB employee or participant in a decision-making body to express their views may be deferred for a limited period in agreement with the President or Vice-President.

Article 7

Information on the closing of the investigation with no further action taken

If, following an internal investigation, no case can be made out against an ECB employee or participant in a decision-making body against whom allegations have been made, the internal investigation shall be closed, with no further action taken, by decision of the Director of the Office, who shall inform the concerned ECB employee or participant in a decision-making body thereof in writing.

Article 8

Waiver of immunity

Any request from a national police or judicial authority regarding the waiver of the immunity from judicial proceedings of an ECB employee or a member of the Executive Board, Governing Council or General Council in possible cases of fraud, corruption or any other illegal activity detrimental to the European Communities' financial interests shall be transmitted to the Director of the Office for his opinion. The President or the Vice-President of the ECB shall decide on the immunity of ECB employees, and the Governing Council shall decide on the immunity of members of the Executive Board, Governing Council or General Council.

Article 9

Amendment of the Conditions of Employment for Staff of the ECB

The Conditions of Employment for Staff of the ECB are amended as follows:

1. the following sentence is added after the second sentence of Article 4(a):

'They shall be bound by the provisions contained in Decision ECB/2004/11 concerning the terms and conditions for European Anti-Fraud Office investigations of the European Central Bank, in relation to the prevention of fraud, corruption, and any other illegal activities detrimental to the European Communities' financial interests and amending the Conditions of Employment for Staff of the European Central Bank.';

2. the introductory sentence of Article 5(b) is replaced by the following:

‘(b) Unless otherwise foreseen in Decision ECB/2004/11 concerning the terms and conditions for European Anti-Fraud Office investigations of the European Central Bank, in relation to the prevention of fraud, corruption, and any other illegal activities detrimental to the European Communities’ financial interests and amending the Conditions of Employment for Staff of the European Central Bank, members of staff shall not without the prior permission of the Executive Board.’.

Article 10

Amendment of Annex I to the Conditions of Employment for Staff of the ECB

Annex I to the ECB’s Conditions of Employment concerning the Conditions of Short-term Employment is amended as follows:

1. the following sentence is added after the second sentence of Article 4:

‘They shall be bound by the provisions contained in Decision ECB/2004/11 concerning the terms and conditions for European Anti-Fraud Office investigations of the European Central Bank, in relation to the prevention of fraud, corruption, and any other illegal activities detrimental to the European Communities’ financial interests and

amending the Conditions of Employment for Staff of the European Central Bank.’;

2. the introductory sentence of Article 10(b) is replaced by the following:

‘(b) Unless otherwise foreseen in Decision ECB/2004/11 concerning the terms and conditions for European Anti-Fraud Office investigations of the European Central Bank, in relation to the prevention of fraud, corruption, and any other illegal activities detrimental to the European Communities’ financial interests and amending the Conditions of Employment for Staff of the European Central Bank, short-term contract employees shall not without the prior permission of the Executive Board.’.

Article 11

Final provision

This Decision shall enter into force on the day following its publication in the *Official Journal of the European Union*.

Done at Frankfurt am Main, 3 June 2004.

The President of the ECB

Jean-Claude TRICHET
