Решение относно отказа на Европейския банков орган да предостави публичен достъп до гласуването и разискванията на Съвета на надзорниците относно предполагаемо нарушение на правото на ЕС от страна на националните надзорни органи (случай 615/2021/TE)

Решение
Случай 615/2021/TE - **Открит на** 29/04/2021 - **Решение от** 07/02/2022 - **Засегната институция** Европейски банков орган (Няма основания за допълнителни проверки)
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Жалбата се отнася до отказа на Европейския банков орган (ЕБО) да предостави публичен достъп до записите от гласуването на своя Съвет на надзорниците (Съвета) по две проектопрепоръки относно нарушенията на правото на Съюза (НПС). Препоръки относно НПС могат да бъдат направени след разследвания от страна на ЕБО на потенциални нарушения на правото на ЕС от страна на националните надзорни органи. Въпросните проектопрепоръки относно НПС, адресирани до надзорните органи на Малта, Дания и Естония, се отнасят до предполагаемо изпиране на пари от малтийската Pilatus Bank и естонския клон на датската Danske Bank.

Жалбоподателят твърди също така, че е налице конфликт на интереси, тъй като той подозира, че членовете на съвета, представляващи националните надзорни органи на Малта, Дания и Естония, са участвали в съответните гласувания.

В отговор на предварителната оценка на случая, извършена от омбудсмана, ЕБО публикува двата въпросни записа от гласуването. Омбудсманът приветства тази стъпка и счита, че с оповестяването на документите ЕБО е разрешил този аспект на жалбата. Омбудсманът е на мнение, че оповестяването на такива записи от гласуването помага да се гарантира, че членовете на Съвета на ЕБО действат независимо и в интерес на ЕС. Тя насърчава ЕБО да прави това в бъдеще.

По въпроса за конфликта на интереси проверката на документи от екипа за проверки на омбудсмана показа, че въпросните членове на съвета действително са гласували дали ЕБО следва да издаде препоръка на BUL относно съответните им надзорни органи. Въпреки че ЕБО заяви, че действащите към онзи момент правила не предвиждат изключване от гласуване на нито един член на Съвета, омбудсманът счита, че изискването да се действа независимо и в интерес на ЕС означава, че членовете на Съвета не е трябвало да гласуват.

Тъй като през януари 2020 г. ЕБО прие нов процедурен правилник за своя Съвет и нова политика относно конфликтите на интереси за лица, които не са служители, което изглежда предотвратява повторното възникване на конфликт на интереси, омбудсманът счита, че на този етап не са оправдани по-нататъшни проверки. Поради това тя приключи проверката, като отново приветства значителния напредък, постигнат в резултат на готовността на управителните органи на ЕБО да възприемат по-голяма прозрачност.

Background to the complaint

1. The European Banking Authority (EBA) is responsible for the regulation and supervision of the EU banking sector. The EBA does not supervise banks directly, but rather seeks to ensure that Member State banking authorities carry out their supervisory tasks properly.

2. The EBA can, in this context, investigate potential breaches of EU law by national supervisory authorities and issue Breach of Union Law (BUL) recommendations to the national supervisory authorities concerned. [1] The investigation involves the convening of a panel, which comprises the EBA Chair and six other members of the Board of Supervisors from Member States whose authorities are not concerned by the investigation. To date, the EBA has launched two investigations into potential breaches of EU law by national banking supervisory authorities, related to alleged money laundering by the Maltese Pilatus Bank and the Estonian branch of the Danish Danske Bank.

3. The EBA's Board of Supervisors (hereinafter the 'Board'), which comprises the heads of the national supervisory authorities of all EU Member States, then decides, on the basis of a simple majority, whether a BUL recommendation should be issued.

4. In relation to Danske Bank, the proposal for a BUL recommendation was rejected by the Board in April 2019. The published minutes of the relevant meeting do not indicate which arguments were raised by individual Board members, how individual Board members voted and whether the members of the Board representing the national authorities under investigation voted. In the case concerning Pilatus Bank, a BUL recommendation was issued in July 2018. No minutes of this meeting of the Board were originally published.

5. On 5 February 2021, the complainant made a request for public access to details of the votes of the Board on the two proposed BUL recommendations. The complainant also asked that, in the future, the EBA should release details of all votes of the Board of Supervisors on " *legislative matters* ", including BUL recommendations. In support of this view, the complainant referred to the Ombudsman's preliminary assessment in case 1564/2020/TE, [2] which concerned public access to the voting results and debates related to a decision of the European Insurance and Occupational Pensions Authority's (EIOPA) Board on a draft Regulatory Technical Standard in July 2020.

6. The EBA refused to grant the complainant access to the voting records. It added that it does not hold further details of the Board's discussions, apart from the published meeting minutes.

7. The complainant asked the EBA to review its decision, by making a 'confirmatory application'.

8. On 25 March 2021, the EBA confirmed its initial decision to refuse access to the voting records. To this end, the EBA stated that disclosing the voting records would undermine the EBA's decision making, [3] and specifically that disclosing individual Board members' votes on BUL recommendations would create the conditions for significant external pressure on Board members, especially from the financial sector and other stakeholders. This pressure would " *undermin[e] their ability to act independently and objectively in the sole interest of the Union in accordance with their obligations under Article 42 of the EBA's founding regulation* ". The EBA emphasised that it has put in place other measures to increase transparency, such as public consultations.

9. The EBA further noted that, as BUL investigations are " *not carried out with a view to the potential adoption of legislative initiatives by the Commission and do not otherwise form part of the basis for the legislative action of the EU*" , documents resulting from that process would not fall under the definition of 'legislative documents' in Regulation 1049/2001. [4] Therefore, the principle of wider access to legislative documents would not apply. This would distinguish this case from the Ombudsman's inquiry into the adoption of a draft Regulatory Technical Standard by EIOPA's Board.

10. Finally, the EBA took the view that the complainant had not demonstrated an overriding public interest in disclosure.

11. Dissatisfied with the EBA's reply, the complainant turned to the Ombudsman.

The inquiry

12. The Ombudsman inquired into whether the EBA:

- wrongly refused public access to the voting records on the two BUL recommendations; and
- wrongfully allowed the national supervisory authorities addressed by the two BUL recommendations to participate in the votes regarding those BUL recommendations, thus giving rise to conflicts of interest.

13. As a first step in her inquiry, the Ombudsman asked the EBA to inspect the records of the two votes and to provide a written reply on the complaint. [5]

14. In May 2021, the EBA provided the Ombudsman with the requested documents and its written reply. [6] The Ombudsman also received the complainant's comments on the EBA's reply.

15. In July 2021, the Ombudsman asked the EBA to reply to her preliminary assessment of the complaint. [7] The EBA replied to the Ombudsman's preliminary assessment on 28 October 2021, [8] and the complainant provided his comments on that reply on 6 December 2021.

1. Public access to the two voting records

The Ombudsman's preliminary assessment

16. In her preliminary assessment, the Ombudsman first welcomed the EBA's commitment to publishing the voting records in respect of future decisions on the adoption of Regulatory Technical Standards, in line with the conclusions of her previous inquiry into EIOPA. [9]

17. The Ombudsman recalled that Regulation 1049/2001 applies to *all* documents held by the institutions, [10] whether they are legislative in nature or not, and that access can be restricted only if one (or several) of the exhaustive exceptions apply. [11]

18. In this context, the Ombudsman noted that she was not convinced by the EBA's arguments to refuse access to the two voting records at issue in this inquiry. Rather, the Ombudsman considered that the EBA had not " *established with certainty* " [12] the existence of significant external pressure on Board members. Even if the existence of such pressure were to be demonstrated, she considered it unclear how the capacity of the Board to act in a fully independent manner and exclusively in the EU interest would be seriously undermined by such pressure.

19. The Ombudsman also expressed concerns about the issue of 'internal' pressure on Board members from other Board members that are the addressees of BUL recommendations. She considered that such internal pressure is more likely if voting records are kept confidential, as Board members' votes are then not subject to public scrutiny. In this context, the Ombudsman also referred to a recent special report of the European Court of Auditors, [13] which found " *written evidence of attempts to lobby panel members during the period when the panel was deliberating on a potential recommendation to the BoS* [Board of Supervisors]". [14]

20. In view of this preliminary assessment, the Ombudsman concluded that the EBA should grant public access to the two voting records in question.

21. The Ombudsman then made some broader observations concerning the nature and importance of BUL recommendations. [15] Based on these observations, she considered it consistent with recent case-law, [16] which has focused on the *purpose* of and *context* in which documents are drawn up, rather than on their formal status, that also documents related to the procedure for the adoption of BUL recommendations should benefit from the wider access granted to 'legislative documents'.

The EBA's reply to the Ombudsman's preliminary assessment

22. In reply to the Ombudsman's preliminary assessment, the EBA agreed to disclose the two voting records in question. It gave the following explanation:
- The EBA reiterated its view that disclosing individual votes risks increasing pressure on Board members " *in a way which impinges on their ability to act independently and objectively in the sole interests of the Union, as required by Article 42 of the EBA's founding regulation. This would seriously undermine the EBA's decision-making*" . It stated that Board members must be

free to express views without feeling constrained by any external expectations that national interests are followed. It noted that " *[t]his is a key distinction from a body such as the Council where representatives are there to reflect national political policies and priorities* ".
- Nevertheless, the EBA reassessed the existence of an overriding public interest in disclosure of the two voting records and concluded that it exists, **by exception and in these particular cases only** . It explained that in light of the European Court of Auditor's recent suspicions that there was lobbying, " *there is a unique public interest in scrutinising the conclusions of the European Court of Auditors in general and voting conduct of the EBA's members of the Board of Supervisors specifically".*

The Ombudsman's assessment

23. The Ombudsman welcomes the EBA's decision to follow her preliminary assessment and to release the two voting records. By taking this step, the EBA resolved this aspect of the complaint.

24. The Ombudsman notes, however, that:
- The EBA still insists that there is a risk that disclosure of voting records would increase external pressure on Board members, thus seriously undermining the EBA's decision making.
- The EBA does not agree that there is a general overriding public interest in disclosing all voting records related to BUL recommendations (rather, it considers the two cases at hand to be exceptional).

25. As regards the risk of increasing external pressure on Board members, the Ombudsman notes that the EBA is particularly concerned about " *external expectations that national interests are followed* ". The suggestion that representatives of national supervisory bodies that are designed and expected to be independent would not be capable of withstanding pressure to follow national interests is concerning and at odds with their legal obligation to act independently and in the EU interest, as required by Article 42 of the EBA Regulation.

26. BUL recommendations are essential tools in the enforcement of EU law in the banking sector. The impartiality of the adoption process for BUL recommendations should always be beyond any doubt.

27. As such, the Ombudsman's view is that confidentiality may render undue pressure even more likely, as there will be no public scrutiny of how Board members voted. As the Court put it in its *ClientEarth* judgment, in the context of the Commission's decision-making process, " *transparency ensures the credibility of that institution's action in the minds of citizens and concerned organisations and thus specifically contributes to ensuring that that institution acts in a fully independent manner and exclusively in the general interest. It is rather a lack of public information and debate which is likely to give rise to doubts as to whether that institution has fulfilled its tasks in a fully independent manner and exclusively in the general interest.* " [17]
2. Conflict of interest

The Ombudsman's preliminary assessment

28. The inspection of documents by the Ombudsman's inquiry team revealed that the supervisory authorities of Malta, Denmark and Estonia participated in the respective votes in 2018 (Pilatus Bank) and 2019 (Danske Bank). In her preliminary assessment, the Ombudsman considered that this constituted a conflict of interest.

29. The Ombudsman noted that, when the Board voted on the two BUL recommendations in question, the EBA Regulation did not include an **explicit** provision on conflicts of interest of Board members. However, she took the view that the concerned Board members' participation was **incompatible** with the EBA's overall mission [18] and the Regulation's requirement that voting members " *shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body* ". [19] The Ombudsman found that the existence of such conflicts of interest calls into question the impartiality of the work of the EBA and risks undermining public trust in its work.

30. At the same time, the Ombudsman noted that the EBA Regulation was amended in January 2020 to include an explicit provision on conflicts of interest. Its amended Article 42 now **requires** concerned national supervisory authorities to abstain from participating in the discussion and votes in relation to agenda items when in a conflict of interest situation. [20] To implement the amended Article 42, the EBA adopted new Rules of Procedure for its Board, which contain provisions on conflicts of interest, [21] and a new Conflict of Interest Policy for non-staff, which explicitly defines employment by a competent authority, which is the named addressee of a proposed EBA measure issued under Article 17 of the EBA Regulation, or which is in the same Member State as such a named addressee, as one source of a conflict of interest . [22]

31. The Ombudsman invited the EBA to comment on whether it considers that the Board's revised Rules of Procedure and EBA's new Policy on Conflicts of Interest are sufficiently robust to prevent such conflict of interest situations from arising in the future.

The EBA's reply to the Ombudsman's preliminary assessment

32. In its reply, **the EBA disagreed with the Ombudsman's preliminary assessment.**

33. First, the EBA noted that, in the case of Pilatus Bank, the Maltese Board member was an employee of the Maltese Financial Supervisory Authority, not the Maltese Financial Intelligence Unit, which was the competent authority concerned in that case.

34. Second, the EBA took the view that the EBA Regulation, at the time of the two votes, did not provide for " *any exceptions to the ability of voting members of the Board of Supervisors to be excluded from voting* ", and that the European Commission provided clear advice that it was not the intention in drafting the legislation that members should be excluded from voting " *in any case* ". In more detail, the EBA explained that:

- When preparations for the establishment of the three European Supervisory Authorities were taking place, they sought the advice of the Commission whether their rules of procedure could exclude Board members from voting on matters where they were considered to have a conflict of interest, as the matter was not clearly regulated in the three founding regulations.
- The relevant Directorate-General of the Commission advised that it was not the intention in drafting the legislation that any Board member should be excluded from voting in any case.
- Recognising the importance of this topic, the EBA nevertheless adopted more limited conflict of interest provisions to manage conflicts where a member's alternate would not be equally affected by the conflict and so voting would not be completely excluded.

35. In light of these explanations, the EBA concluded that it " *acted responsibly in establishing what was possible under its founding regulation and took steps to manage conflicts of interests so far as was compatible with the legislation in force at the time of the BUL cases* ".

The Ombudsman's assessment

36. The Ombudsman does not consider that the EBA's clarification regarding the addressee of the BUL recommendation in the Pilatus Bank case alters her preliminary assessment on the existence of a conflict of interest. The EBA states that the Maltese Board member is an employee of the Maltese Financial Supervisory Authority (MFSA), whereas the Maltese Financial Intelligence Unit (FIAU) was the addressee of the BUL recommendation.

37. The EBA seems to imply that if a different national authority than the one represented in EBA's Board was addressed by a BUL recommendation, no conflict of interest situation could arise.

38. The Ombudsman understands that the risk of a conflict of interest arises from the incentive of Board members to protect **national interests** . This risk arises where the BUL recommendation is sent to the national authority represented in the Board or to another authority of the same Member State.

39. This is recognised in the EBA's new Conflict of Interest Policy for non-staff, which explicitly defines the employment by a competent authority, which is the named addressee of a proposed EBA measure issued under Article 17 of the EBA Regulation, " *or which is in the same Member State as such a named addressee* ", as one source of a conflict of interest . [23]

40. On the EBA's second argument - that the matter was not clearly regulated in the founding regulations of the three European Supervisory Authorities before January 2020 and that the EBA had received clear advice from the Commission in this regard - the Ombudsman notes the following.

41. The EBA does not argue that the EBA Regulation, before its amendment in January 2020, **prevented** the EBA from excluding Board members from voting when in a conflict of interest situation. Rather, the EBA takes the view that the matter was not clearly regulated.

42. The Ombudsman agrees. There was no explicit provision on conflicts of interest in the EBA Regulation at the time of the two votes in 2018 and 2019. Nevertheless, as the Ombudsman pointed out in her preliminary assessment, she considers the participation of the concerned Board members incompatible with the EBA's overall mission and the Regulation's requirement that voting members *"shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body"*.

43. The EBA relies on advice from the relevant Directorate-General of the Commission on the issue. According to the EBA, the advice suggested that the EBA Regulation, before its amendment in January 2020, did not foresee *any* Board member to be excluded from voting in *any* case. Despite this advice, the EBA still put in place " *more limited conflict of interest provisions* ". These provisions were laid down in the Board's 2011 Rules of Procedure and stated that

" *Members shall disclose to the Board of Supervisors any conflict of interest which that member may have and is aware of before the resolution of a matter to which that conflict relates.* **No voting member may vote on a matter where that voting member has a material conflict** ". [24]

44. The EBA therefore does not seem to have followed the advice received in full, but introduced a distinction between material conflicts of interest, on the one hand, and institutional conflicts, on the other. It is difficult to see why the first type would exclude conflicted members from voting - and the latter not.

45. The Ombudsman notes, however, that the EBA Regulation was amended in January 2020 and that EBA has issued new Rules of Procedure for its Board and a new Policy on Conflicts of Interest for non-staff. The Board's new Rules of Procedure require conflicted individuals to abstain from participating in the discussion and voting on the relevant agenda item [25] (in line with the amended Article 42 of the EBA Regulation). These rules prevent similar conflict of interest situations reoccurring. Thus, no further inquiries into this aspect of the complaint are justified at this stage.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

By giving public access to the two voting records at issue in this inquiry, the EBA resolved the first aspect of the complaint.

As regards the second aspect of the complaint, as the EBA has now issued new rules of procedure for its Board, and a new policy on conflicts of interest for non-staff, which prevent a similar conflict of interest situation reoccurring, no further inquiries are justified at this stage.

The complainant and the European Banking Authority will be informed of this decision **.**

Emily O'Reilly European Ombudsman

Strasbourg, 07/02/2022

[1] Article 17 of Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority): https://eur-lex.europa.eu/eli/reg/2010/1093/ (hereafter: 'EBA Regulation').

[2] Letter from the European Ombudsman to the European Insurance and Occupational Pensions Authority (EIOPA) on its refusal to grant public access to the votes and debates of its Board of Supervisors on draft regulatory technical standards, 28 January 2021, available here: https://www.ombudsman.europa.eu/en/doc/correspondence/en/137470

[3] Article 4(3), second paragraph, of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1049 . The Article foresees that " *access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure* ".

[4] Article 12(2) of Regulation 1049/2001.

[5] Letter from the European Ombudsman to the European Banking Authority (EBA) on its refusal to grant public access to the votes and debates of its Board of Supervisors on an alleged breach of EU law by national supervisory authorities, 29 April 2021, available here: https://www.ombudsman.europa.eu/en/doc/correspondence/en/141161

[6] Letter from the European Banking Authority (EBA) to the European Ombudsman on its refusal to grant public access to the votes and debates of its Board of Supervisors on an alleged breach of EU law by national supervisory authorities, 31 May 2021, available here: https://www.ombudsman.europa.eu/en/doc/correspondence/en/143115

[7] The preliminary assessment of 16 July 2021 is available here: https://www.ombudsman.europa.eu/en/doc/correspondence/en/144519

[8] Reply from the European Banking Authority on its refusal to grant public access to the votes and debates of its Board of Supervisors on an alleged breach of EU law by national supervisory authorities, 28 October 2021, available here: https://www.ombudsman.europa.eu/en/doc/correspondence/en/148683

[9] Decision in case 1564/2020/TE on the European Insurance and Occupational Pensions Authority's refusal to grant public access to the votes and debates of its Board of Supervisors on draft regulatory technical standards, 18 May 2021, available here: https://www.ombudsman.europa.eu/en/decision/en/141969

[10] Recital 11 of Regulation 1049/2001.

[11] Article 1 of Regulation 1049/2001.

[12] Judgment of the Court of First Instance (Seventh Chamber) of 18 December 2008, Pablo Muñiz v Commission of the European Communities, Case T¤144/05, para. 86; Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, Emilio de Capitani v European Parliament, Case T¤540/15, para. 99.

[13] European Court of Auditors, Special Report. EU efforts to fight money laundering

in the banking sector are fragmented and implementation is insufficient, July 2021: https://www.eca.europa.eu/Lists/ECADocuments/SR21_13/SR_AML_EN.pdf

[14] Ibid, para. 78. The ECA report relates to lobbying of "panel members" by Board members. Panel members are chosen from members of the Board to carry out an investigation and to make draft BUL recommendations to be submitted to the Board. A Board member from a Member State concerned by an investigation cannot be panel member in that investigation. Moreover, Board members from a Member State concerned by an investigation should not try to influence the outcome of a panel investigation. In the Ombudsman's view, the rationale for ensuring the independence of panel members when they investigation potential breaches of EU law, should also apply as regards voting by the Board of Supervisors. A Board member from a Member State concerned by an investigation should not vote on a BUL recommendation and should not lobby Board members voting on a draft BUL recommendation.

[15] The Ombudsman noted that BUL recommendations create, at the very least, some concrete effects and may be transformed into acts having legal effects at national level. She also noted the essential role of BUL recommendations in the enforcement of EU law in the banking sector.

[16] Judgment of the Court (Grand Chamber) of 4 September 2018, ClientEarth v Commission, C-57/16.

[17] Judgment of the Court (Grand Chamber) of 4 September 2018, ClientEarth v Commission, C-57/16, para. 104.

[18] Article 1(5) of the EBA Regulation.

[19] Article 42 of the EBA Regulation.

[20] Articles 42(3) and (4) of the EBA Regulation say:

" *3. Members of the Board of Supervisors, the Chairperson as well as non-voting representatives and observers participating in the meetings of the Board of Supervisors shall, before such meetings, accurately and completely declare the absence or existence of any interest which might be considered prejudicial to their independence in relation to any items on the agenda, and shall abstain from participating in the discussion of, and voting upon, such points.*

4. The Board of Supervisors shall lay down, in its rules of procedure, the practical arrangements for the rule on declaration of interest referred to in paragraph 3 and for the prevention and the management of conflict of interest ."

[21] Among others, they require that, *"[i]n case of existence of any interest in relation to any item of the agenda, the individual concerned ('conflicted individual') shall abstain from participating in the discussion of and voting upon that item."* See Article 6(4) of Decision of the European Banking Authority of 22 January 2020 concerning the Rules of Procedure of the Board of Supervisors:
https://www.eba.europa.eu/sites/default/documents/files/document_library/About%20Us/Legal%20Fram
.

[22] Article 1(3)(f) of Decision of the European Banking Authority of 22 January 2020 on the EBA's Policy on Independence and Decision Making Processes for avoiding Conflicts of Interest (Conflict of Interest Policy) for Non-Staff:
https://www.eba.europa.eu/sites/default/documents/files/document_library/930903/EBA%20DC%20202
.

[23] Article 1(3)(f) of Decision of the European Banking Authority of 22 January 2020 on the EBA's Policy on Independence and Decision Making Processes for avoiding Conflicts of Interest (Conflict of Interest Policy) for Non-Staff:
https://www.eba.europa.eu/sites/default/documents/files/document_library/930903/EBA%20DC%20202
.

[24] Article 16.3 of Decision adopting the Rules of Procedure of the European Banking

Authority Board of Supervisors, 12 January 2012 (emphasis added), available here:
https://www.eba.europa.eu/sites/default/documents/files/documents/10180/16082/167b40d9-6489-444
DC 001 %28Rules of Procedure EBA-BoS Rev5%29.pdf?retry=1

[25] Article 6.4.