



Afgørelse i sag 1564/2020/TE om Den Europæiske Tilsynsmyndighed for Forsikrings- og Arbejdsmarkedspensionsordningers afslag på offentlig adgang til afstemninger og drøftelser i tilsynsrådet om udkast til reguleringsmæssige tekniske standarder

Afgørelse

Sag 1564/2020/TE - **Indledt den** 29/09/2020 - **Afgørelse af** 18/05/2021 - **Den vedrørte institution** Den Europæiske Tilsynsmyndighed for Forsikrings- og Arbejdsmarkedspensionsordninger (Løst af institutionen) |

Sagen vedrørte Den Europæiske Tilsynsmyndighed for Forsikrings- og Arbejdsmarkedspensionsordningers (EIOPA's) afslag på offentlig adgang til afstemningsresultaterne og tilhørende begrundelser vedrørende tilsynsrådets afgørelse om et udkast til en reguleringsmæssig teknisk standard for sammensatte og forsikringsbaserede investeringsprodukter til detailinvestorer.

Ombudsmanden undersøgte sagen og kom til den foreløbige vurdering, at udkast til reguleringsmæssige tekniske standarder, der vedtages af EIOPA's tilsynsråd, og eventuelle dokumenter vedrørende vedtagelsen heraf udgør vigtige elementer i processen for Europa-Kommissionens vedtagelse af den efterfølgende delegerede retsakt. I denne forbindelse var Ombudsmanden ikke overbevist af de argumenter, som EIOPA fremførte til støtte for at give afslag på aktindsigt, og hun var indledningsvis af den opfattelse, at EIOPA burde udlevere de ønskede oplysninger.

EIOPA reagerede positivt på Ombudsmandens foreløbige vurdering. EIOPA forpligtede sig til at udlevere de ønskede oplysninger og sikre, at fremtidige referater af tilsynsrådets møder indeholder relevante oplysninger om tilsynsrådsmedlemmernes afstemninger vedrørende afgørelser om lovgivningsdokumenter. Ombudsmanden glædede sig over EIOPA's svar og de foranstaltninger, der var truffet, og afsluttede undersøgelsen.

Background to the complaint

1. The European Insurance and Occupational Pensions Authority (EIOPA) is one of three European Supervisory Authorities responsible for financial oversight at the EU level. Within this structure, EIOPA's role is to " *protect public values such as the stability of the financial system, the transparency of markets and financial products* ". [1]
2. One of EIOPA's tasks is to develop 'draft regulatory technical standards' (draft RTSs), which



further develop, specify and/or determine rules set out in legislation. Draft RTSs are subsequently adopted by the European Commission as 'regulatory technical standards' in the form of a delegated act. [2]

3. On 23 July 2020, the complainant requested public access to documents related to EIOPA's adoption of a draft RTS on packaged retail and insurance-based investment products. The draft RTS in question concerned the standardised information contained in the 'key information document', which must be made available to retail investors, so that they can understand and compare the economic and legal features of packaged retail and insurance-based investment products.

4. The complainant asked EIOPA for the voting results and related reasoning of its Board of Supervisors' decision on the draft RTS in question. More generally, the complainant took the view that details of votes held on "*legislative matters*" by EIOPA's Board should be made public.

5. EIOPA refused access to the requested documents.

6. The complainant asked EIOPA to review its decision, by making a so-called 'confirmatory application'.

7. On 11 September 2020, EIOPA confirmed its initial decision to refuse access, based on the following reasons:

- The requested documents are protected by Article 4(1)(a), fourth indent, of the EU rules on public access to documents, [3] which concerns the protection of the financial policy of the Union in the insurance and occupational pensions sector. EIOPA explained that its Board members must act independently and objectively and may not be subject to any form of public or private influence. This would only be possible in a "*safe space*", shielding members from "*undue external influence*".

- The requested documents are protected by Article 4(3) of the EU rules on public access to documents, which concerns the protection of the decision-making process. Individual votes and the reasoning of Board members are for "*internal use as part of the Board's deliberations*". Such information falls under the obligation of professional secrecy, laid down in Article 70 of the EIOPA Founding Regulation. The Board of Supervisor's Rules of Procedure provide that Board proceedings are confidential. [4]

- Voting records contain personal data, which is protected by Article 4(1)(b) of the EU rules on public access to documents.

- EIOPA took the view that it is the exclusive and definitive role of the Commission to adopt regulatory technical standards and that EIOPA's Board does not take part in the Commission's legislative process.

8. Dissatisfied with EIOPA's reply, the complainant turned to the Ombudsman on 16 September 2020.

The Ombudsman's preliminary assessment

9. In her preliminary assessment, [5] the Ombudsman considered that draft RTSs, as adopted by EIOPA's Board of Supervisors, and any documents related to their adoption,



constitute important elements of the process for the adoption of the corresponding delegated act by the Commission. The Ombudsman came to this preliminary assessment after finding that, while the Commission formally endorses draft RTSs “ *in order to give them binding legal effect* ”, [6] the substantive work on regulatory technical standards is done by EIOPA, save in very exceptional circumstances. [7]

10. The Ombudsman confirmed that the documents requested by the complainant reveal which Board members, that is, which national supervisory authorities, voted for or against the draft RTS (or abstained) and why. She took the view that the public disclosure of the requested documents is likely to enhance the democratic nature of the Union by enabling the public, including the complainant, to scrutinise the reasons put forward by national supervisory authorities for their vote on the draft RTS in question. She emphasised that understanding which positions the different representatives of Member States take is vital in a democratic system that is accountable to its citizens.

11. The Ombudsman considered her preliminary assessment to be anchored in EU law - in the EU Treaties and the EU rules on public access to documents - as interpreted by the Court of Justice of the EU.

12. She noted that the EU Treaties grant every citizen “ *the right to participate in the democratic life of the Union* ”. [8] Therefore, EU decisions must be taken “ *as openly and as closely as possible to the citizen* ”. [9] This prerogative is considered particularly important when EU institutions are acting in their “ *legislative capacity* ”, [10] as the possibility for citizens to scrutinise and be made aware of all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights. [11]

13. The EU rules on public access to documents provide that not only acts adopted by the EU legislature, but also, more generally, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding, must be considered “ *legislative documents* ” and must be made, subject to valid exceptions, directly accessible to the greatest possible extent. [12] The EU rules on public access to documents specify that “ *legislative capacity* ” includes the EU institutions’ activity under their delegated powers, such as the adoption of delegated acts. [13] The Court of Justice has further broadened the understanding of documents that should benefit from the wider access granted to “ *legislative documents* ”. The Court held that such wider access should also be granted to documents, which are not, strictly speaking, drafted by an institution when acting in its legislative capacity [14] but which contain “ *information constituting important elements of the EU legislative process* ”. [15] The Court found that the disclosure of such documents is “ *likely to increase the transparency and openness of the legislative process as a whole* ”. [16]

14. The Ombudsman took the preliminary view that this reasoning applies to the documents at issue in this inquiry. She therefore concluded that the documents in question should benefit from the wider access granted to “ *legislative documents* ” and that the exceptions laid down in the EU rules on public access to documents must be applied all the more restrictively when such documents are at stake .



15. In refusing access, EIOPA invoked several exceptions in the EU rules on public access to documents.

16. The Ombudsman considered that the main argument [17] invoked by EIOPA to refuse public access to the requested documents, namely to shield its Board members from external pressure, so as to allow them to act independently and objectively, was not convincing.

17. She noted that the expression by EU citizens of their views on draft laws is an integral part of the exercise of their democratic rights. The expression of such views cannot be understood to constitute undue external pressure. Rather, it is something to be welcomed and even encouraged. [18]

18. In any event, the Ombudsman considered that the arguments put forward by EIOPA on even the existence of external pressure remained vague and of a general nature. [19] Even if the existence of such external pressure were to be demonstrated, however, it remained unclear how the capacity of EIOPA's Board to act in a fully independent manner and exclusively in the Union interest would be seriously undermined by such pressure.

19. The Ombudsman further considered that EIOPA cannot avail itself of its Board's Rules of Procedure, which provide that all Board proceedings are confidential, [20] to deny public access to documents if primary or secondary EU law requires their disclosure.

20. Finally, as regards EIOPA's argument that the requested documents contain personal data, the Ombudsman considered that any concerns as regards the protection of personal data could be resolved by redacting names, (email) addresses, telephone numbers and signatures from the documents before they are disclosed.

21. In view of this preliminary assessment, the Ombudsman concluded that EIOPA should have granted (partial) public access to the voting results and related reasoning concerning its Board of Supervisors' decision on the draft RTS in question .

EIOPA's reply to the Ombudsman's preliminary assessment

22. In its reply, EIOPA agreed with the Ombudsman's preliminary assessment that draft RTSs, as adopted by EIOPA's Board of Supervisors, and any documents related to their adoption, constitute important elements of the process for the adoption of the corresponding delegated act by the Commission and that they therefore contain information constituting important elements of the EU legislative process.

23. Based on this, EIOPA agreed to disclose the requested information. Going forward, EIOPA also committed to ensuring that future minutes of its Board of Supervisors contain appropriate information on members' votes concerning decisions on legislative documents – i.e. regulatory and implementing technical standards. In this regard, EIOPA committed to undertaking the necessary amendments to the Rules of Procedure of its Board of Supervisors.

24. EIOPA made four additional observations on the Ombudsman's preliminary assessment:



- First, EIOPA noted that it already publishes all *substantive* documents in view of the potential adoption of legislative documents, [21] including the non-adopted draft RTS in question. However, EIOPA accepts the Ombudsman's assessment that also *procedural* documents, such as voting records, may be covered by the definition of 'legislative documents'. In this context, EIOPA reiterated that its Board of Supervisors adopts decisions in a collegial manner and that any appeal against such a decision would target the collegiate decision rather than the individual votes cast by the Board's members.
- Second, EIOPA noted that the independence of its Board is enshrined in Article 42 of the EIOPA Founding Regulation. EIOPA therefore aims at ensuring concrete guarantees of independence that protect its Board members from undue interferences and repercussions after they have expressed views or cast a vote.
- Third, EIOPA clarified that it did not argue that the confidentiality of the requested information stems from the Board of Supervisor's Rules of Procedure. Instead, EIOPA argued that the Rules of Procedure are implementing the general confidentiality regime under Article 70 of the EIOPA Founding Regulation (professional secrecy). In this respect, EIOPA invoked relevant case-law to the effect that the professional secrecy requirement may effectively act as a separate exception allowing for nondisclosure, independently from the exceptions laid down in the EU rules on public access to documents.
- Fourth, the EIOPA Founding Regulation does not require EIOPA to share the individual votes of Board members even with the European Parliament, which shows the Union's acknowledgment of the sensitivity of this information.

The Ombudsman's assessment

25. The Ombudsman welcomes EIOPA's positive reply to her preliminary assessment.

26. By disclosing the information requested by the complainant and by committing to ensure that future minutes of its Board of Supervisors contain appropriate information on members' votes concerning decisions on legislative documents, EIOPA resolved the complaint.

Conclusion

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

The Ombudsman welcomes the steps taken by the European Insurance and Occupational Pensions Authority in reply to the concerns set out in her preliminary assessment. By disclosing the information requested by the complainant and by committing to ensure that future minutes of its Board of Supervisors contain appropriate information on members' votes concerning decisions on legislative documents, EIOPA resolved the complaint.

The complainant and the European Insurance and Occupational Pensions Authority will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 18/05/2021



[1] Recital 10 of Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority):
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R1094> (hereafter: 'EIOPA Founding Regulation')

[2] The procedure is set out in Article 10 of the EIOPA Founding Regulation.
<https://www.eiopa.europa.eu/sites/default/files/publications/administrative/esa-regulation.pdf>

[3] Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents:
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049>

[4] Article 6(1) of the Rules of Procedure of EIOPA's Board of Supervisors, available here:
https://www.eiopa.europa.eu/sites/default/files/publications/administrative/bos-rules_of_procedure.pdf

[5] Letter from the European Ombudsman to EIOPA of 28 January 2021, available here:
<https://www.ombudsman.europa.eu/en/correspondence/en/137470>

[6] Recital 22 of the EIOPA Founding Regulation.

[7] As a rule, "[t]he Commission may not change the content of a draft regulatory technical standard prepared by EIOPA without prior coordination with the Authority", see Article 10 of the EIOPA Founding Regulation.

[8] Article 10 of the Treaty on European Union (TEU).

[9] Articles 1 and 10(3) TEU.

[10] Recital 6 of Regulation 1049/2001.

[11] See, to that effect, judgments of the Court of 1 July 2008, Sweden and Turco v Council, C-39/05 P and C-52/05 P, para. 46:
<http://curia.europa.eu/juris/liste.jsf?num=C-39/05&language=en>, and of 17 October 2013, Council v Access Info Europe, C-280/11 P, para. 33:
<http://curia.europa.eu/juris/liste.jsf?num=C-280/11&language=EN>.

[12] Article 12(2) and Recital 6 of Regulation 1049/2001.

[13] Recital 6 of Regulation 1049/2001.

[14] Judgment of the Court (Grand Chamber) of 4 September 2018, ClientEarth v Commission, C-57/16, para. 86:
<http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en>.



[15] para. 91.

[16] para. 92.

[17] More details on EIOPA's arguments are included in the report on the inspection meeting, which took place on 23 October 2020. The report is available here: <https://www.ombudsman.europa.eu/en/report/en/135314>

[18] As the Court stated, “[i]f citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information”, Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, Emilio de Capitani v European Parliament, Case T α 540/15, para. 98, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=200551&pageIndex=0&doclang=en&>

[19] While the Court has acknowledged that the protection of the decision-making process from targeted external pressure *may* constitute a legitimate ground for restricting access to documents, it has also emphasised that the reality of such external pressure “*must be established with certainty*” and that “*evidence must be adduced to show that there was a reasonably foreseeable risk*” for the decision in question to be substantially affected by that external pressure, Case T α 144/05, Pablo Muñiz v. Commission, ECLI:EU:T:2008:596, para. 86, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=74008&pageIndex=0&doclang=en&> ; Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, Emilio de Capitani v European Parliament, Case T α 540/15, para. 99.

[20] Article 6(1) of the Rules of Procedure of EIOPA's Board of Supervisors, available here: https://www.eiopa.europa.eu/sites/default/files/publications/administrative/bos-rules_of_procedure.pdf

[21] Such as impact assessments, consultation papers and feedback, stakeholder advice and final reports on any technical standards.