

Decision in case 357/2019/FP on the European Securities and Markets Authority's refusal to grant public access to documents relating to contacts with stakeholders

Decision

Case 357/2019/FP - Opened on 01/03/2019 - Decision on 29/11/2019 - Institution concerned European Securities and Markets Authority (Solution achieved) |

The case concerned a refusal by the European Securities and Markets Authority (ESMA) to grant the complainant public access to minutes and meeting records of contacts ESMA had with stakeholders regarding the EU's Markets in Financial Instruments legislation (generally referred to as MiFID). ESMA initially argued that no official minutes of these meetings existed.

The Ombudsman inquired into the issue and found that there were some internal notes drafted by staff members about those meetings. The Ombudsman therefore proposed that ESMA should assess each document individually and consider whether it could release them, either partially or in their entirety.

ESMA agreed to the proposal for a solution and partially released 8 documents. The Ombudsman then closed the case, with a suggestion for improvement regarding the records of meetings.

Background to the complaint

1. In July 2018, the complainant, an academic, submitted a request for public access to documents [1] to the European Securities and Markets Authority (ESMA).
2. On 31 October 2018, ESMA provided access to a substantial number of the documents requested by the complainant. However, it did not give any access to a series of documents, namely “ *minutes or any meeting records on the content of ESMA staff stakeholder contacts on MiFID [2] /MiFIR II [3] from October 2015 to December 2017* ”.
3. On the same day, the complainant requested ESMA to review its decision, by making a so-called “ *confirmatory application* ”.



4. ESMA then sent a clarification letter to the complainant, explaining that it had no formal system in place for recording its meetings with industry representatives and that the only documents produced in that context would be internal notes of members of staff, which were drafted to facilitate internal discussions at ESMA. On 14 December 2018, ESMA informed the complainant that it would not grant access to the requested documents.

5. Dissatisfied with ESMA's decision, the complainant contacted the European Ombudsman on 25 February 2019.

The Ombudsman's proposal for a solution

6. In the course of the inquiry, ESMA provided the Ombudsman with 38 documents falling within the scope of the request for “ *minutes or any meeting records of ESMA staff stakeholder contacts on MiFID/MiFIR II from October 2015 to December 2017*” .

7. These documents consisted of internal e-mails summarising the outcome of the stakeholder meetings. The content concerned a wide variety of issues. In the Ombudsman view, some of the content was clearly commercially sensitive. [4]

8. The Ombudsman found, however, that several of the requested documents contained information of a general nature which, *prima facie*, did not appear to be commercially confidential.

9. The Ombudsman therefore proposed that ESMA “**should make an individual assessment of the relevant documents and decide which can be released, either partially or in their entirety**”.

The Ombudsman's assessment after the proposal for a solution

10. ESMA accepted the Ombudsman's proposal for a solution and conducted an individual review of the 38 documents. It informed the Ombudsman that, in doing so, it had carefully balanced the principles of transparency and professional secrecy.

11. Following a consultation with 10 stakeholders and after an individual review of the documents, ESMA decided to partially disclose 8 out of the 38 documents identified.

12. The Ombudsman welcomes ESMA's positive response to the Ombudsman's proposal and the thorough individual review it conducted of all the relevant documents. This included documents which had not previously been identified .

13. The Ombudsman notes ESMA's balanced approach to its review and welcomes the partial disclosure of the 8 documents. She recognises the need to protect appropriately the commercial



interests of third parties.

14. The complainant indicated, in his comments on ESMA's response to the Ombudsman's solution proposal, that he considers ESMA has taken too restrictive an approach to disclosure and given undue weight to the objections of third parties. However, he did not specifically contest the redactions made by ESMA.

15. The Ombudsman found that ESMA publishes, on the ESMA online library, information on meetings with external stakeholders. [5] The "ESMA Staff Stakeholder contacts" is a document that provides information on the date of the meeting, the entity met and the main topic discussed; however it omits any reference to the existence of a more detailed record of the meeting.

16. In this regard, the Ombudsman notes that the possibility of exercising the right of public access to documents would be facilitated by indicating, in that document, whether a detailed record of the meeting exists (for example, minutes or notes.)

17. The Ombudsman emphasises that identifying the existence of a detailed record of a meeting does not imply that it would necessarily be disclosable to the public. Appropriate exceptions to the public right of access may apply, as in the present case.

18. In the light of her assessment, and ESMA's response to her solution proposal, the Ombudsman has decided to close the case on the basis that the solution was achieved. She also makes a suggestion for improvement for ESMA to consider.

Conclusion

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

The European Securities and Markets Authority accepted the Ombudsman's proposal for a solution and granted partial access to the requested documents.

Suggestion for improvement

The European Securities and Markets Authority should include in its information for the public (online library) an indication whether detailed records of its meetings with stakeholders exist.

The complainant and ESMA will be informed of this decision .

Emily O'Reilly



European Ombudsman

Strasbourg, 29/11/2019

[1] In accordance with Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN>.

[2] Standing for “ *Markets in Financial Instruments Directive* ”: Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text.

[3] Standing for “ *Markets in Financial Instruments Regulation* ”: Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

[4] In accordance with Article 4(2), first indent of Regulation 1049/2001.

[5] Information on ESMA Staff stakeholder contacts (from the second quarter of 2016 onwards) can be found in ESMA's online library in the form of an overview of the meetings per quarter of the year, at the following link:

<https://www.esma.europa.eu/databases-library/esma-library/%2522staff%2520stakeholder%2520contacts%2522>
[Link]