

## **Report of the European Ombudsman's inspection meeting 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**

Correspondence - 19/11/2020

**Case** 1564/2020/TE - **Opened on** 29/09/2020 - **Decision on** 18/05/2021 - **Institution concerned** European Insurance and Occupational Pensions Authority ( Settled by the institution ) |

**COMPLAINT** : 1564/2020/TE

**Case title** : 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

**Date** : Friday, 23 October 2020

**Location** : Remote meeting via Webex

### **Participants**

*European Insurance and Occupational Pensions Authority*

- Legal Expert - Public access to documents
- Coordinator for public access to documents
- Head of the Corporate Support Department and EIOPA's Internal Control Coordinator

*European Ombudsman*

- Ms Tanja Ehnert, Case handler, Directorate of Inquiries
- Mr Markus Spoerer, Inquiries officer, Directorate of Inquiries
- Trainee case handler

### **Purpose of the meeting**



The purpose of the meeting was to allow the Ombudsman's inquiry team better to understand (1) the role of the European Insurance and Occupational Pensions Authority (EIOPA) in the process for the adoption of draft regulatory technical standards and (2) EIOPA's reasons for refusing public access to the requested information relating to the draft regulatory technical standards under Regulation 1049/2001 [1] .

## **Introduction and procedural information**

The meeting took place remotely via Webex on 23 October 2020 from 10:00h to 11:35h.

The Ombudsman's inquiry team opened the meeting by setting out the purpose of the meeting and outlining the legal framework applicable to meetings and inspections held by the Ombudsman's Office.

In particular, the inquiry team explained that it will draw up a report on the meeting and that EIOPA will have the opportunity to review the report before it is sent to the complainant. The inquiry team informed EIOPA that it should signal any confidential information and that such information will not be disclosed to the complainant without the prior agreement of EIOPA.

## **Information exchanged**

The Ombudsman's inquiry team briefly introduced the matters raised in the complaint. It invited EIOPA to answer three sets of questions: (i) on the role of EIOPA in the adoption process of draft regulatory technical standards (draft RTSs); (ii) on the composition of its Board of Supervisors ('BoS'); and (iii) on the reasons underlying EIOPA's decision to refuse public access to the documents in relation to the draft RTSs, as requested by the complainant under Regulation 1049/2001.

## **On the role of EIOPA in the adoption process of draft regulatory technical standards and the composition of its Board of Supervisors ('BoS')**

EIOPA's representatives explained that EIOPA is an agency with specific technical competencies and expertise, which assists the European Commission in the adoption of draft RTSs and only where explicitly empowered by Union law. EIOPA's role in this process is limited to the development of draft RTSs and their approval by the BoS. The adoption of the RTSs is the Commission's prerogative.

The procedure for the development of draft RTSs is set out in Article 10 of EIOPA's Founding Regulation [2] . The development of draft RTSs by EIOPA is finalised through their approval by the BoS and submission to the Commission for adoption. In accordance with Article 289(3) TFEU, EIOPA's draft RTSs do not constitute legislative acts as they are not approved by EIOPA



under any of the legislative procedures laid down in paragraphs 1 or 2 thereof. Moreover, the draft RTSs approved by the BoS do not have binding effects as compared with the final act of the Commission adopting the draft RTSs.

EIOPA's representatives explained that following the development of draft RTSs, they are submitted for a public consultation, along with the underlying impact assessment. Thereafter, the draft RTSs are processed subject to the public consultation input and are approved by the BoS. The draft RTSs are then submitted to the Commission, which is responsible for adopting them. The Commission enjoys full discretion in this regard, as it may adopt the draft RTSs fully, partially or with amendments, or reject them. Where the Commission intends not to adopt draft RTSs, or to adopt them in part or with amendments, it coordinates with EIOPA before proceeding with the final adoption.

The final RTSs adopted by the Commission are legally binding in their entirety, directly applicable in the Member States and published in all official EU languages in the Official Journal of the European Union. EIOPA's representatives emphasised that the Authority's process for approval of draft RTSs is of a *sui generis* nature and does not form part of the Commission's delegated rule-making. EIOPA does not have the power to adopt such acts.

EIOPA's representatives also emphasised the relevance of the information published on the Authority's website. The outcome of the meetings of the BoS, including the collegiate vote of the BoS on the items voted upon is published on the website through the BoS minutes, which constitute a comprehensive record of the proceedings of the BoS meetings.

Moreover, the outcome of the public consultations on draft RTSs is also published on EIOPA's website through a final report, which includes information on how EIOPA addressed each comment submitted via the public consultation and the text of the approved draft RTSs.

Nevertheless, EIOPA does not disclose the individual votes of members of its BoS as those votes do not have any decision-making effects on their own. Moreover, the BoS members do not enjoy individual decision-making powers in relation to any of EIOPA's powers and tasks. Instead, the Authority discloses the BoS collegial vote that, legally, is the only decision-making act of the BoS with regard to EIOPA's tasks and powers. The collegiate vote also constitutes the "*EU view*" (as opposed to any national view) on a particular matter, following exchanges during debates in the BoS. Therefore, EIOPA's representatives stressed that it is only the final BoS collective vote – the "*EU view*" – for which all BoS members are equally accountable – irrespective of the way they voted – that counts. The current disclosure practice allows for suitable transparency of EIOPA's proceedings, while protecting Board members from undue external influence and thus preserving the independence of its BoS.

The Ombudsman's inquiry team noted that EIOPA's argument that its Board "*does not take part in the Commission's legislative process by any means*" is an important element of its confirmatory decision. The inquiry team is aware that EIOPA does not have the power to adopt delegated acts. This power is reserved to the Commission.



Having said that, the Court of Justice of the EU has recently broadened the definition of a “*legislative document*” under Article 12(2) of Regulation 1049/2001. Regulation 1049/2001 provides 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. [3] Regulation 1049/2001 specifies that “*legislative capacity*” includes the EU institutions’ activity under their delegated powers, [4] such as delegated rule-making by the Commission.

For instance, in case C-57/16 P *ClientEarth v. Commission*, the Court considered that an impact assessment, which is not, strictly speaking, drafted by an institution when acting in a legislative capacity, still constitutes “*information constituting important elements of the EU legislative process*”. [5] To come to that conclusion, the Court examined the purpose of impact assessments, which it considered to lie in informing the Commission’s legislative proposal. The Court concluded that, as the disclosure of impact assessments is “*likely to increase the transparency and openness of the legislative process as a whole*”, [6] the reasons underlying the principle of a wider access to legislative documents are also valid for documents drawn up in the context of an impact assessment procedure. [7]

In this context, the Ombudsman’s inquiry team asked the EIOPA representatives about the nature of the documents requested by the complainant, that is, the votes and debates of its Board of Supervisors on draft RTSs.

EIOPA’s representatives replied that they consider the requested information not to fall within the definition of “*legislative documents*” under Regulation 1049/2001. The information in question does not have the same characteristics as a document adopted within the scope of a legislative procedure. In fact, the votes and individual reasoning are procedural vehicles rather than the type of information examined by the Court and found to constitute important elements of the EU legislative process recognised as such by the TFEU. In addition, EIOPA publishes all such information in relation to draft RTSs on its website, i.e. the draft RTSs, the impact assessment, the outcome of the public consultations and the approved draft RTSs. Furthermore, EIOPA’s representatives reiterated that draft RTSs are not legally binding and cannot be enforced. In addition, they can be subject to further changes. The final draft of EIOPA is a sound basis for the Commission to start the adoption process of a delegated act.

## On the composition of EIOPA’s BoS

The Ombudsman’s inquiry team then asked about the composition of the Authority’s BoS. EIOPA’s representatives explained that the BoS is composed of the heads of national supervisory authorities responsible for insurance and occupational pension supervision from across the 27 EU Member States (voting members) and the 3 EEA EFTA States (non-voting members). In Member States, where more than one authority is responsible for the supervision of these sectors, those authorities agree on a common representative.



In addition, a Commission representative participates as a non-voting member, as do representatives of the EFTA surveillance authority, the ESRB, the EBA and ESMA. Except for the representatives of the Commission, the ESRB, the EBA and ESMA, the BoS members participate in the confidential discussions. Only the heads of the supervisory authorities from the 27 EU Member States may vote, including the Chairperson – in relation to decisions taken by simple majority votes. The principal decision-making rule is that the BoS, while striving for consensus, takes its decisions by simple majority of its voting members, unless a qualified majority or a three-quarters majority is required.

EIOPA representatives emphasised that the members of the BoS are listed on the Authority's website and in the minutes of the meetings.

## On the reasons underlying EIOPA's decision to refuse public access to the documents requested by the complainant under Regulation 1049/2001

The Ombudsman's inquiry team noted that the Authority invoked, among others, the exception in Article 4(1)(a) of Regulation 1049/2001 to refuse public access to the requested documents and asked EIOPA to explain how the documents' disclosure would undermine the financial policy of the EU.

EIOPA's representatives noted that EIOPA is an EU body that communicates with a single European voice, which is the BoS collective voice and members of the BoS are called upon to act independently and objectively in the sole interest of the Union. The BoS takes decisions as a collegial body. In this context, it is essential to create an environment that enables frank discussion and serene decision-making, which is free from external influence that might be of a national or local, public or private nature. This environment is safeguarded by the non-disclosure of the individual votes and views of Board members, which are expressed during debates. EIOPA's representatives noted that case-law [8] recognises that the protection of the decision-making process from external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process. EIOPA adopted this approach from the very beginning of its operation.

EIOPA representatives further explained that members of the BoS are required to act independently from any public or private influence, in line with Article 42 of EIOPA's Founding Regulation. The Authority considers that the best way to ensure their independence is to protect its Board members through enforcing confidentiality of the BoS proceedings. If the requested documents were to be disclosed, this could interfere with EIOPA's decision-making process and distort the independence and frankness of the discussions. EIOPA's representatives further argued that the public interest in relation to the financial policy of the EU is to ensure independent decision-making, which enables national authorities to cooperate and exchange information based on a relationship of trust and mutual respect.

Nevertheless, as highlighted by EIOPA's representatives, the Authority has been applying a



transparent and legally compliant regime in relation to the BoS meetings and discussions held therein by publishing a comprehensive record of the proceedings of the BoS meetings on its website. EIOPA's representatives stressed that Article 43a of its Founding Regulation setting out the transparency requirements for the decisions adopted by the BoS does not impose an obligation on EIOPA to publish the abovementioned record, let alone the individual BoS votes or reasoning. Moreover, Article 43a does not even require from EIOPA to provide the European Parliament with the BoS individual votes and reasoning. This clearly shows that the Union legislature was very cautious about requiring EIOPA to publish sensitive information such as the individual votes and BoS members' reasoning. Nevertheless, EIOPA proactively ensured suitable level of transparency through a balanced approach.

The Ombudsman's inquiry team asked if the above rationale, that is, the protection of the decision-making process from targeted external pressure, applies also after the decision-making process has ended. EIOPA's representative indicated that, while the process might have ended for a specific item, the Board members continue to be exposed to the risk of external influence after the event and for as long as they act as BoS members. Therefore, BoS members need to be protected from any external influence and their independence must be preserved at any point during their BoS membership. Exposing individual views of Board members creates the risk that the overall decision-making process of EIOPA is harmed.

EIOPA's representatives also noted that individual votes and reasoning constitute confidential information as: (a) they are known only to a limited number of persons; (b) their disclosure is liable to cause serious harm to the BoS members by exposing them to unwarranted influence but also by putting at risk the supervisory cooperation between the BoS members; and (c) the BoS members' independence and supervisory cooperation and coordination, which are liable to be harmed by such a disclosure, are worthy of protection as they are imposed as mandatory requirements by law. Therefore, they constitute confidential information in accordance with Article 70 of EIOPA's Founding Regulation, Union case law and are protected as per Article 6(1) of the Rules of Procedure of the BoS. Moreover, EIOPA and its Board members are subject to professional secrecy under Article 70 of EIOPA's Founding Regulation.

The inquiry team acknowledged the need to balance the sensitive matters raised by EIOPA with the importance of a transparent decision-making process that allows EU citizens, like the complainant, to hold national supervisory authorities to account for their positions taken at EU level.

The Ombudsman's inquiry team then asked whether EIOPA had analysed the existence of an overriding public interest in disclosure of the requested documents under Article 4(3), second indent, of Regulation 1049/2001. EIOPA's representative stated that following an assessment of the applicant's allegation of an overriding public interest, EIOPA found that the complainant had failed to substantiate a clear and present overriding public interest. They added that, in line with relevant case law, the applicant should have provided proof of such an interest.

Additionally, EIOPA representatives pointed out that the voting record contains personal data that is protected under Article 4(1)(b) of Regulation 1049/2001.



## Conclusion of the meeting

The Ombudsman's inquiry team thanked EIOPA representatives for their time and for the explanations provided. The meeting then ended.

Brussels, 19 November 2020

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[1] 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> [Link]

[2] Regulation 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> [Link] [please

insert link to the consolidated version instead -

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02010R1094-20200101>]

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

[4] Recital 6.

[5] Case C-57/16 P *Client Earth v Commission*, ECLI:EU:C:2018:660, para. 91, available at:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=2BE5230D662ECA7BAF93F4C3ACEAF4D8?text=&docid=85487&doclang=en&mode=lst&dir=&occ=first&part=1&page=1> [Link].

[6] para. 92.

[7] para. 95.

[8] Case T-144/05, *Pablo Muñoz v. Commission*, ECLI:EU:T:2008:596, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=74008&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&page=1> [Link].