

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

Correspondence - 28/01/2021

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) |

Mr Fausto Parente

Executive Director

The European Insurance and Occupational Pensions Authority (EIOPA)

Strasbourg, 28/01/2021

Complaint 1564/2020/TE

Subject : 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

Dear Mr Parente,

On 23 October 2020, my inquiry team met [1] with representatives of the European Insurance and Occupational Pensions Authority (EIOPA) in the context of my inquiry into the above complaint. I have now concluded that it would be useful to receive a written reply from EIOPA to my preliminary assessment of matters raised in this complaint.

The inquiry concerns an alleged lack of transparency in how EIOPA's Board of Supervisors discusses and votes on draft regulatory technical standards (RTS). As a case in point, the complainant referred to EIOPA's refusal to grant public access to the voting results and related



reasoning concerning the Board of Supervisors' decision on the draft RTS amending Delegated Regulation (EU) 2017/653, which concerns packaged retail and insurance-based investment products. EIOPA refused public access to the requested documents based on several exceptions in Article 4 of Regulation 1049/2001. [2] My inquiry has identified the following concerns that I bring to your attention.

On the context and content of draft RTS

As one of the three European Supervisory Authorities in the European system of financial supervision, EIOPA's role is to “*protect public values such as the stability of the financial system, the transparency of markets and financial products*”. [3] The draft RTS in question concerns the standardised information contained in the so-called ‘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.

As a body with highly specialised expertise, EIOPA is tasked with the elaboration of draft RTSs. These draft RTSs are then endorsed by the Commission, in the form of delegated acts, “*in order to give them binding legal effect*”. [4] To this end, draft RTSs:

“ should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing best the daily functioning of financial markets. Draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation [...]”. [5]

As a rule, EIOPA's Founding Regulation provides that “[t]he Commission may not change the content of a draft regulatory technical standard prepared by EIOPA without prior coordination with the Authority.” [6] This suggests that, while the Commission formally endorses draft RTSs, the substantive work on RTSs is done by EIOPA, save in very exceptional circumstances.

In light of the above, I consider that draft RTSs, as adopted by EIOPA's Board of Supervisors, and any documents related to their adoption, constitute important - even essential - elements of the process for the adoption of the corresponding delegated act. It is relevant to note that the RTS in question seeks to determine the ‘key information’ that must be made available to retail investors, that is, to non-professional investors, so that these investors can make informed investment decisions. The RTS would have been legally binding in all EU Member States. Thus, the decision of EIOPA's Board of Supervisors **not** to adopt the draft RTS in question has an immediate effect on the transparency and comparability of packaged retail and insurance-based investment products.

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. I take 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 (negative) vote on the draft RTS in question. As Ombudsman, I have consistently taken the view that understanding which positions the different representatives of Member States take is vital in a democratic system that is accountable to its citizens.

This preliminary assessment is anchored in EU law - in the EU Treaties and Regulation 1049/2001 on public access to documents - as interpreted by the Court of Justice of the EU.

The EU Treaties grant every citizen “*the right to participate in the democratic life of the Union*” . [7] Therefore, EU decisions must be taken “*as openly and as closely as possible to the citizen*” . [8] This prerogative is considered particularly important when EU institutions are acting in their “*legislative capacity*” , [9] 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. [10]

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. [11] Regulation 1049/2001 specifies that “*legislative capacity*” includes the EU institutions’ activity under their delegated powers, such as the adoption of delegated acts. [12] 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 [13] but which contain “*information constituting important elements of the EU legislative process*” . [14] The Court found that the disclosure of such documents is “*likely to increase the transparency and openness of the legislative process as a whole*” . [15]

I take the preliminary view that this reasoning should apply to the documents at issue in this inquiry. As pointed out above, I consider that the public disclosure of the requested documents is likely to enhance the EU’s democratic nature by enabling the public to scrutinise the reasons put forward by national supervisory authorities for their vote on the draft RTS in question. As draft RTSs are prepared with a view to the potential adoption of a delegated act by the Commission, I consider that draft RTSs and any documents related to their adoption constitute ‘important elements’ of the process for the adoption of delegated acts.

In that regard, my preliminary assessment is that the documents in question should benefit from the wider access granted to “*legislative documents*” . The exceptions laid down in Article 4 of Regulation 1049/2001 must be applied all the more restrictively when such documents are at stake.

On the application of the invoked exceptions in Article 4 of Regulation 1049/2001

EIOPA has invoked several exceptions in Article 4 of Regulation 1049/2001 to refuse public access to the requested documents, in particular:



- Article 4(3) concerning the protection of the decision-making process;
- Article 4(1)(a), fourth indent, concerning the protection of the financial policy of the EU in the insurance and occupational pensions sector; and
- Article 4(1)(b) concerning the protection of personal data.

I understand that the main reason [16] invoked by EIOPA to refuse public access to the requested documents, under Articles 4(1)(a) and 4(3) of Regulation 1049/2001, is to shield its Board members from external pressure, in order to allow them to act independently and objectively, free from any form of public or private influence, and to create an environment that enables frank discussion and serene decision making within the Board of Supervisors.

I have consistently taken the view 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. 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”. [17]

In any event, the arguments put forward by EIOPA on even the existence of external pressure remain vague and of a general nature. 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. [18]

Even if the existence of such external pressure were to be demonstrated, it is 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.

As regards the assertion that the disclosure of the documents would undermine the financial interests of the EU, EIOPA has not provided any explanation of how the financial interests of the EU could be undermined by the disclosure of the documents in question, besides emphasising the importance of protecting the independence and objectivity of its Board’s members. The argument that there is a need to protect the independence and objectivity of its Board’s members refers back to the above reasoning on the protection of the Board’s decision making from external pressure. As demonstrated in the above paragraphs, I have not identified convincing arguments to support the view that such external pressure exists or to support the view that any such external pressure (if it existed) would have negative effects on decision making.

EIOPA has also made reference to Article 6(1) of the Board of Supervisors’ Rules of Procedure, [19] which provides that all Board proceedings are confidential. In this context, I would like to emphasise that internal rules of procedure cannot take legal precedence over a Regulation. For



instance, any rules of procedure have to comply with the EU rules on access to documents. I therefore consider that EIOPA cannot avail itself of its Board's Rules of Procedure to deny public access to documents if primary or secondary EU law requires their disclosure.

Finally, as regards EIOPA's argument that the requested documents contain personal data as protected by Article 4(1)(b) of Regulation 1049/2001, I consider that any concerns as regards the protection of personal data can be resolved by redacting names, (email) addresses, telephone numbers and signatures from the documents before they are disclosed. I note that the complainant does not wish to have access to such information and, therefore, there is no need for me to examine if any such redactions would be justified.

In view of the above, my preliminary assessment is 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 amending Delegated Regulation (EU) 2017/653, in line with the considerations and principles explained above.

I would be grateful to receive EIOPA's views on my preliminary assessment set out above by **30 April 2021**. Please note that I am likely to send your reply and related enclosures to the complainant for comments [20] and that this request for reply is being sent to him. The responsible case handler is Ms Tanja Ehnert.

Thank you in advance for your cooperation on this important matter.

Yours sincerely,

Emily O'Reilly European Ombudsman

[1] The report on the inspection meeting is available here:
<https://www.ombudsman.europa.eu/en/report/en/135314> [Link]

[2] 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> [Link]

[3] 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> [Link] (hereafter: 'EIOPA Founding Regulation')

[4] Recital 22 of the EIOPA Founding Regulation.



[5] Recital 22 of the EIOPA Founding Regulation.

[6] Article 10 of the EIOPA Founding Regulation.

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

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

[9] Recital 6 of Regulation 1049/2001.

[10] 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>.

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

[12] Recital 6 of Regulation 1049/2001.

[13] 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>.

[14] para. 91.

[15] para. 92.

[16] 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> [Link]

[17] Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, *Emilio de Capitani v European Parliament*, Case T-540/15, para. 98, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=200551&pageIndex=0&doclang=en&mode=lst&dir=>
[Link]

[18] Case T-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&mode=lst&dir=>
[Link]; 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.

[19] The Rules of Procedure of EIOPA's Board of Supervisors are available here:

https://www.eiopa.europa.eu/sites/default/files/publications/administrative/bos-rules_of_procedure.pdf

[20] If you wish to submit documents or information that you consider to be confidential, and



which should not be disclosed to the complainant, please mark them 'Confidential'. Such documents can be sent through secure channels, such as Ares, CIRCABC or equivalent applications. The case handler can be contacted beforehand, if necessary.