The European Banking Authority's (EBA) 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

Correspondence - 16/07/2021
Case 615/2021/TE - **Opened on** 29/04/2021 - **Decision on** 07/02/2022 - **Institution concerned** European Banking Authority (No further inquiries justified) |

Mr José Manuel Campa Chairman European Banking Authority (EBA)

Strasbourg, 16/07/2021

Complaint 615/2021/TE

Subject: The European Banking Authority's (EBA) 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

Dear Mr Campa,

On 28 April 2021, I opened an inquiry into the above complaint. In May, EBA provided my Office with copies of the requested confidential documents and sent its written reply on the complaint. On 29 June 2021, the complainant provided his comments on EBA's reply, which I attach to this letter. I have now concluded that, for the purposes of my inquiry, it would be useful to receive EBA's views on my preliminary assessment of the matters raised.

The inquiry concerns an alleged lack of transparency in how EBA's Board of Supervisors discusses and votes on Breach of Union Law (BUL) recommendations. EBA refused public access to the voting records of its Board of Supervisors on alleged breaches of Union law by national supervisory authorities in two instances (Pilatus Bank and Danske Bank). The complainant considers that such records should be disclosed as a matter of principle. Moreover, the complainant is concerned that the Board members representing the supervisory authorities that had allegedly breached Union law participated in the relevant

votes, thus constituting a conflict of interest.

My inquiry so far has focussed on (1) whether the national supervisory authorities concerned participated in the votes on the two BUL recommendations in question, and (2) whether the documents in question - the voting records - should be disclosed under Regulation 1049/2001.

As my preliminary assessment regarding the first point contains information from the confidential documents that EBA shared with us, it is included in a confidential annex to this letter.

In relation to the second point, my inquiry has identified the following concerns that I bring to your attention.

I understand that EBA agrees with the conclusions of my previous inquiry [1] into the European Insurance and Occupational Pensions Authority (EIOPA), which concerned the transparency of votes and debates of EIOPA's Board of Supervisors in relation to draft regulatory technical standards. I welcome that EBA committed to publishing the voting records in respect of future decisions on the adoption of regulatory and implementing technical standards.

At the same time, I understand that EBA considers that 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*" . Therefore, EBA takes the view that documents resulting from that process are not 'legislative documents' within the meaning of Regulation 1049/2001 and that the principle of wider access does not apply.

I would first like to emphasise that Regulation 1049/2001 applies to *all* documents held by the institutions. [2] Regulation 1049/2001 is based on the assumption that " *openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system* ". [3] Access to documents can be restricted only if one (or several) of the exhaustive exceptions in Regulation 1049/2001 apply. [4]

In refusing access, EBA seems to be relying on the exception in Article 4(3), second paragraph, of Regulation 1049/2001, which concerns the protection of an institution's decision-making process. [5] EBA takes the view that disclosing individual Board members' votes on BUL recommendations would have a " *significant undesirable impact on the decision-making process in a manner that does not serve the public interest* ". It argues that disclosure of voting records would create significant external pressure on Board members, especially from the financial sector and other stakeholders, which 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 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 . However, 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. [6]

The complainant requested access to voting records in relation to two decision-making processes *that have ended* . EBA's arguments as to how disclosure of the voting records at issue could result in significant pressure being placed on Board members, in relation to these two decision-making processes or in relation to potential future decision-making processes, remain vague and of a very general nature.

Based on the documentation I have received so far, I am therefore not convinced that EBA has " *established with certainty* " the existence of significant external pressure on its Board members, if the voting records in relation to the two BUL recommendations were to be disclosed. Furthermore, even if the existence of such external pressure were to be demonstrated, it is unclear to me how the capacity of the Board of Supervisors to act in a fully independent manner and exclusively in the Union interest would be seriously undermined by such pressure.

In this context, the complainant has raised the issue of 'internal' pressure from other members of the Board of Supervisors who may be the addressees of BUL recommendations. The likelihood of such internal pressure materialising risks being greater if voting records are kept confidential, as Board members' votes are then not subject to public scrutiny.

I also note a recent special report of the European Court of Auditors, [7] 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]". [8] This seems to indicate that Board members are already subject to a certain (external and/or internal) pressure despite voting records being kept confidential. The risk is that Board members might be subject to pressure, while the general public is prevented from scrutinising how individual Board members voted and, thus, unable to hold them to account for their actions.

In view of the above, my preliminary assessment is that EBA's refusal to grant public access to the two voting records in question constituted maladministration.

Finally, I would like to share with you some broader observations concerning the nature of BUL recommendations, given EBA's argument that documents drawn up or received in the course of procedures for the adoption of BUL recommendations are not 'legislative documents' within the meaning of Regulation 1049/2001. EBA uses this argument to distinguish this case from my previous inquiry into EIOPA. [9]

Regulation 1049/2001 states 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 on the Member States, must be directly accessible to the greatest possible extent. [10]

'Recommendations' normally " *have no binding force* ". [11] However, recent case law of the Court of Justice has indicated that EBA's BUL recommendations cannot simply be disregarded. Indeed, in its judgment in *Balgarska Narodna Banka* of 21 March 2021, the Court held that

" *a national court must take into consideration a recommendation of the EBA adopted on the basis of that provision* [Article 17(3) of the EBA Regulation], *with a view to resolving the dispute before it, in particular in the context of an action seeking to establish the liability of a Member State for damage caused to an individual as a result of the non-application or incorrect or insufficient application of Union law giving rise to the investigation procedure which led to the adoption of that recommendation. Individuals harmed by the breach of Union law established by such a recommendation, even if they are not the addressees of the recommendation, must be able to rely on it as a basis for establishing, before the competent national courts, the liability of the Member State concerned for the breach of Union law in question* ". [12]

It follows that BUL recommendations create, at the very least, some concrete effects. They may be transformed into acts having legal effects at national level, given that national courts are *obliged* to take BUL recommendations into consideration when adjudicating on conflicts before them. In addition, individuals can also *rely* on them so as to establish the liability of Member States for breaches of Union law. It is thus beyond doubt that BUL recommendations are an important source of law and form an integral part of the EU Single Rulebook in the financial sector.

Moreover, EBA's BUL recommendations concern a process of significant public importance, as they play an essential role in the enforcement of EU law in the banking sector, including in cases of money laundering and terrorist financing. In turn, the decision of EBA's Board to adopt (or not to adopt) a BUL recommendation significantly affects the effectiveness of EU financial supervision.

In light of the above observations, I consider it consistent with recent case law, [13] 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'.

I would be grateful to receive EBA's views on my preliminary assessment set out above and in the confidential annex by **30 October 2021.** Please note that I am likely to send your reply and related enclosures to the complainant for comments [14] . When sharing your reply with the complainant, I would also like to communicate to the complainant the part of my preliminary assessment which is now contained in the confidential annex. Should you have any questions, please contact the responsible inquiries officer, Ms Tanja Ehnert (+32

228 46768; tanja.ehnert@ombudsman.europa.eu).

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

Yours sincerely,

Emily O'Reilly European Ombudsman

[1] 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: https://www.ombudsman.europa.eu/en/case/en/57775

[2] Recital 11 of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32001R1049

[3] Recital 2 of Regulation 1049/2001.

[4] Article 1 of Regulation 1049/2001.

[5] The exception 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* ".

[6] 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.

[7] 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

[8] Ibid, para. 78.

[9] Complaint 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:

https://www.ombudsman.europa.eu/en/case/en/57775

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

[11] Article 288 of the Treaty on the Functioning of the European Union.

[12] Judgment of the Court (Fourth Chamber) of 25 March 2021, BT v Balgarska Narodna Banka, Case C-501/18, para. 81.

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

[14] 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'. Encrypted emails can be sent to our dedicated mailbox eo-secem@ombudsman.europa.eu. Please contact eo-secem@ombudsman.europa.eu beforehand. Information and documents of this kind will be deleted from the European Ombudsman's files shortly after the inquiry has ended.