

Decision of the European Ombudsman closing the inquiry into complaint 1561/2014/MHZ against the European Banking Authority (EBA)

Decision

Case 1561/2014/MHZ - **Opened on** 13/10/2014 - **Decision on** 06/07/2015 - **Institution concerned** European Banking Authority (No maladministration found) |

The case concerned a delay by the European Banking Authority (EBA) in dealing with the complainant's request for the EBA to investigate an alleged breach of EU law by the Estonian Financial Supervisory Authority. The Ombudsman inquired into the issue and found that the EBA was able to justify its delay, for the most part. For this reason, and also because the EBA apologised for the delay and undertook to improve its procedure, the Ombudsman did not find maladministration. Since, in the course of the inquiry, the EBA established internal deadlines for dealing with similar requests, the Ombudsman encouraged it to formalise these deadlines by amending its Rules of Procedure. She thus closed the case with a further remark.

The background to the complaint

1. The complaint concerns an Estonian Bank ('the Estonian Bank').
2. On 21 May 2013, a law firm representing the complainant (among other Requesters) submitted to the European Banking Authority (the 'EBA') a request ('the Request') to investigate under Article 17 of Regulation (EU) 1093/2010 [1] the Estonian Financial Supervisory Authority ('the Estonian Authority') with regard to an alleged breach of EU Directive 2007/44/EC [2] .
3. The Requesters alleged that the Estonian Authority failed to assess properly the suitability of the acquisition of the majority of the shares in the Estonian Bank by the Bank X and its parent company Y and failed to supervise that acquisition adequately. This resulted in direct control of the share capital by the former and indirect control by the latter. In this respect, the Requesters considered that the deposits and capital of customers of the Estonian Bank are not secure and the information covered by banking secrecy is not safe.
4. On 23 May 2013, the EBA confirmed receipt of the Request and undertook to look into the matter and inform the Requesters of the next steps in due course. Between June and December 2013, there was an exchange of correspondence between the EBA and the



Requesters. The EBA consistently acknowledged receipt of the correspondence and supplementary evidence. On each occasion, the EBA informed the Requesters that they would be informed shortly about the investigation process and the next steps (but no reasons were given for the delay).

5. On 15 January 2014, the EBA informed the law firm that the Request was deemed admissible in accordance with the then EBA Internal Processing Rules on Investigation regarding Breach of Union Law [3] .

6. Eight months later, the EBA had still not decided whether it intended to investigate the Estonian Authority. The complainant turned to the European Ombudsman.

The inquiry

7. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

1) The EBA failed to deal properly with the Request;

2) The EBA should take action in response to the Request and inform the complainant of that action without further delay.

8. When opening the inquiry, the Ombudsman asked the EBA to inform her about the deadlines imposed internally for each step in the procedure when it deals with similar requests under Article 17 of Regulation 1093/2010.

9. In the course of the inquiry, the Ombudsman received the opinion of the EBA on the complaint and, subsequently, the comments of the complainant in response to the EBA's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Alleged failure to deal properly with the Request and the related claim

Arguments presented to the Ombudsman

10. The complainant argued that the EBA had failed to act within a reasonable time and had failed to give reasons for its delay. The Request was submitted in May 2013 and it was not until January 2014 that the EBA decided on its admissibility. Furthermore, up to the date of the complaint to the Ombudsman (8 September 2014), the EBA had not informed the complainant of its decision as to whether it intended to open an investigation following the Request or to close the Request without opening an investigation.



11. The complainant pointed out that the 2012 EBA Rules of Procedure, which were applicable at the time the Request was submitted, distinguish between three phases of the process of handling a request: (i) the decision on admissibility; (ii) the decision on whether or not to initiate an investigation, and (iii) the investigation.

12. These Rules of Procedure do not provide for a time frame within which the EBA should reach a decision in phases (i) and (ii). Consequently, the general rules on reasonable time apply. The complainant submitted that the time periods of eight months for dealing with the Request's admissibility and over eight months for deciding on whether to open an investigation cannot be considered to amount to "reasonable time". This is all the more so if one takes into account the fact that both these decisions are "*of a technical nature*".

13. In its reply, the EBA submitted detailed information about the manner in which it dealt with the Request in chronological order, as follows:

- The Request submitted on 21 May 2013 was supplemented by several additional letters dated, respectively, 3 June 2013 (with annexed documents); 12 August 2013; 9 October 2013, and 27 November 2013 (with annexed documents).
- The EBA contacted the Estonian Authority on 3 February 2014 and requested its views on the alleged breach of Directive 2007/44. In its reply of 24 February 2014, the Estonian Authority stated that the matter had been extensively dealt with in previous years.
- In the meantime, on 17 February 2014, the complainant informed the EBA that its preliminary assessment had been leaked to the press. On 4 April 2014, the complainant informed the EBA of a national judicial decision related to the Request. In response, the complainant was informed that a 'preliminary enquiry' with the Estonian Authority was made and that this enquiry was ongoing.
- On 11 April 2014, the EBA requested additional information and supporting evidence from the Estonian Authority.
- On 29 April 2014, the complainant submitted additional information on relevant developments in Estonia. Subsequently, the EBA informed the complainant that due to the complexity of the matter, the numerous documents in the file, its limited resources and the required translations, it needed more time to assess the Request and decide whether to open an investigation against the Estonian Authority under Article 17 of Regulation 1093/2010.
- On 3 June 2014, the Estonian Authority submitted a further reply (to which many documents were annexed), which was subsequently assessed and analysed by the EBA.
- On the date of the reply to the Ombudsman (19 December 2014), the EBA completed its assessment. It issued a decision expressing its intention to close the Request and not to open an investigation under Article 17 of Regulation 1093/2010. That same day, it sent a letter to the complainant to that effect.

14. The EBA noted that it had corresponded regularly with the complainant. It pointed out, however, that it had received "*a very substantial amount of complex factual information which it had to consider in order to determine how to proceed.*" Moreover, "*during the summer*", the EBA needed to reallocate resources to a complex and urgent investigation into the failure of Z national authorities to make protected deposits available to depositors. Given the consequences



for depositors in the Z banks concerned, the EBA prioritised that investigation, leading to unplanned delays in dealing with pending requests.

15. In reply to the Ombudsman's specific request for information (point 8 above), the EBA noted that its Legal Unit "*has recently established*" [4] a process for tracking complaints/requests using a particular 'project management tool'. The EBA explained that "[t] his establishes initial deadlines for each complaint based on acknowledging complaints immediately, carrying out an initial review of the complaint within two weeks and, unless that analysis leads to the request being closed at that stage, a fuller analysis ... within a further three and a half months and informing the requestor of the EBA's analysis within a further month." These timeframes are adjusted according to the nature of the submitted requests, in particular their complexity, the extent to which enquiries have to be made to competent authorities, the timeliness of their responses and the need to prioritise requests over the other work carried out by the Legal Unit. Ultimately, the aim is to provide a requester with an assessment within one year of receiving the request, whilst keeping him/her duly up to date.

16. The EBA attached to its reply a copy of its letter to the complainant dated 19 December 2014. In that letter, it informed the complainant that it is " *minded to close [the Request] and not to open an investigation under Article 17 of Regulation (EU) 1093/2010*", and provided detailed reasons for its decision. The EBA concluded that the Request should be closed because the complainant had provided no substantial evidence which led it to believe that " *the breach, if and where proved, would undermine the foundations of the rule of law, absent any systemic character or any aspect entailing a breach of human rights or of other fundamental freedoms*". It went on to state there was no evidence that the Estonian Authority had failed to carry out its supervisory responsibilities. The EBA found that, after uncovering the financially distressed situation of the X, the Estonian Authority acted in a way which appears to have been aimed at ensuring the soundness of the Estonian Bank. Moreover, the matters at issue produced significant litigation before the Estonian administrative and civil courts which involved the Estonian Authority.

The complainant was invited to submit " *any new information of relevance*" that could justify further examination of the case within four weeks. Otherwise, the EBA would close the complainant's Request in a definite manner.

The EBA apologised to the complainant for the time it had taken to analyse the Request. It explained that this was due to " *a combination of the very substantial workload which limits the resource that we can assign to considering such requests*" and the need which arose during the summer to prioritise other requests concerning the lack of access for depositors to their deposits in two Z banks. It stated that it " *will endeavour to ensure that more regular updates are provided on progress in examining such requests in future*."

17. In his observations on the EBA's reply dated 27 February 2015, the complainant considered that the EBA should have decided to investigate the alleged breaches of EU law by the Estonian Authority and not to close the Request. Indeed, on 19 February 2015, an Estonian court of first instance confirmed serious breaches of both Estonian and EU law by the X. This



ruling cast doubts on the correctness of the Estonian Authority's submissions to the EBA and confirmed that the X is not a suitable controlling shareholder of the Estonian Bank. On 16 January 2015, the complainant and other Requesters replied to the EBA's letter and, on 27 February, forwarded a copy of the Estonian court judgment to the EBA. The complainant argued that, in any event, his complaint to the Ombudsman did not seek to obtain a decision from the Ombudsman on the merits of the Request but on whether the EBA handled the Request within a reasonable time.

18. The complainant agreed that the subject matter of the Request was complex and that the EBA needed to gather evidence. In his view, however, the EBA had not handled the matter in the most efficient way possible. When deciding on whether to initiate an investigation (the second phase of the proceedings), the EBA seems to have started to focus on matters that should have been analysed during the third phase (the investigation). The second phase should not have entailed a detailed investigation of the facts on which the Request was based, whereas the EBA's letter of 19 December 2014 suggests that such a detailed investigation had taken place. Instead, according to the complainant, the EBA should merely have determined whether the Request fulfilled the criteria set out in Annex 2 of the Rules of Procedure.

The Ombudsman's assessment

19. As rightly pointed out by the complainant, the former and current EBA Rules of Procedure for Investigation of Breach of Union law do not provide for time limits for the EBA to take (i) decisions on the admissibility of requests and (ii) decisions on whether an investigation should be initiated. However, the principles of legitimate expectations and legal certainty require the EBA to act within a reasonable time when dealing with requests. This requirement corresponds to a procedural fundamental right enshrined in Article 41 of the Charter of Fundamental Rights of the EU which requires that the "*affairs [of every person be] handled ... within a reasonable time*".

20. As the EU courts have held on several occasions, the assessment of whether the period in question was reasonable should take place in light of the circumstances specific to the case, such as the complexity of the case, the conduct of the parties or supervening procedural matters [5].

21. As regards its decision on the admissibility of the Request, the Ombudsman considers that the EBA was not able to justify why it took eight months to reach its decision. First, as rightly argued by the complainant, the criteria of admissibility established in Article 2.5 and Annex 1 of the EBA 2012 Rules of Procedure, which apply to the present case, are of a technical nature and do not appear to require several months to be dealt with [6]. Moreover, while the additional information which the complainant sent to the EBA on 3 June, 6 October and 27 November 2013 could indeed have been relevant for the assessment of whether the investigation should be initiated, it was certainly irrelevant for the decision on admissibility in the light of the criteria listed in Annex 1. The Ombudsman also notes that all the documents which the complainant annexed to his correspondence were translated into English.



22. On the other hand, the Ombudsman considers justified the time it took the EBA to decide on the next procedural step, namely the preliminary determination that the Request should be closed without opening an investigation.

23. The Ombudsman points out that both the 2012 and 2014 Rules of Procedure indicate that this step is comparable to an investigation, albeit of a preliminary nature. Indeed, Article 3 of the 2012 Rules of Procedure, which provides for the possibility to contact the competent authority concerned, is entitled "Initiation of the investigation". Article 4 of the 2014 Rules of Procedure is even more explicit. It provides for the possibility to contact the competent authority concerned, the requester or any legal or natural person for information at the stage of the determination whether the investigation should be initiated. It is entitled ' **Preliminary enquiry** ' [7] . Moreover, Annex 2 distinguishes between the positive and negative investigation factors which need to be determined before taking a decision as to whether the request should be closed or an investigation launched. The nature of these factors (in particular positive investigation factors), requires a thorough assessment of the facts, the law and the information provided by the competent authority and the requesters [8] .

24 . The Ombudsman notes that during the period of eleven months between 15 January 2014 (the date of the decision on admissibility) and 19 December 2014 (the date of the decision expressing the intention to close the Request without opening an investigation) the EBA twice asked the Estonian Authority for explanations (on 3 February and 11 April) and had several exchanges with the Requesters. The Ombudsman also acknowledges that the EBA had to analyse the replies of the Estonian Authority, obtain translations of the documents provided by that authority and deal with complex and voluminous evidence. Moreover, by giving priority to the Z file over the Request, the EBA acted within the limits of its discretion regarding the organisation of its internal work.

25. In light of the foregoing, the Ombudsman concludes that although the EBA was not able to justify why it took eight months to decide on the admissibility of the Request, it was able to provide an explanation for the fact that it took eleven months (starting from the date of the decision on admissibility) to reach its preliminary decision that the Request should be closed without opening an investigation. For this reason and also because, in its letter sent to the complainant on 19 December 2014, the EBA (i) apologised for the delay, and (ii) undertook " *to ensure that more regular updates are provided on progress in examining requests in the future* ", the Ombudsman does not find an instance of maladministration .

27. Finally, the Ombudsman notes with approval that at present, the EBA applies the following internal deadlines: a maximum of **five months** starting from the date of receipt of a request within which to decide on the admissibility of a request and a maximum of **one year** starting from the date of receipt of a request within which to decide on whether to open an investigation or close the request.

Conclusion



On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

Given that the EBA has apologised for the unwarranted delay that occurred in handling the complainant's request and undertook " to ensure that more regular updates are provided on progress in examining requests in the future ", the Ombudsman does not find maladministration in this case.

The complainant and the EBA will be informed of this decision.

Further remark

The EBA could consider formalising the initial deadlines established by the EBA's project management tool by amending its 2014 Decision adopting Rules of Procedure for Investigation of Breach of Union law accordingly.

Emily O'Reilly Strasbourg, 06/07/2015

[1] Regulation (EU) 1093/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ 2010 L 331, p.12.

Article 17 "Breach of Union law" provides:

"1. Where a competent authority has not applied the acts referred to in Article 1(2) , or has applied them in a way which appears to be a breach of Union law, ... the Authority shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article .

2: Upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the Banking Stakeholder Group, or on its own initiative, and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law ."

[2] Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector, OJ 2007 L 247, p. 1.

[3] Decision of the EBA EBA/DC/2012/054, of 5 July 2012. These rules were replaced on 14 July 2014 by the EBA Decision adopting Rules of Procedure for Investigation of Breach of Union Law (EBA/DC/2014/100). The substance of the rules did not change significantly.



[4] No date was provided.

[5] Joint Cases T-431/10 and T-560/10 *Nencini v Parliament*, judgment of 4 June 2013, not yet published in the ECR, paragraphs 43 and 44 and the case-law cited therein; Case C-50/12 *P Kendrion v Commission*, judgment of 26 November 2013, not yet published in the ECR, paragraph 96.

[6] Article 2. 5 of the 2012 Rules of Procedure: "*To be admissible, a request shall concern the application of acts referred to in Article 1(2) of the EBA Regulation, including the technical standards established in accordance to Article 10 to 15, in particular a failure of a competent authority to ensure that financial institution satisfies the requirements laid down in those acts. A request shall not be admissible if it falls into a category set out in Annex 1.*" Annex 1 provided for six clear conditions of inadmissibility. The request is considered inadmissible if (i) it is anonymous, fails to show the address of the sender or shows an incomplete address; (ii) no grievance is indicated; (iii) the grievance is outside the scope of the Regulation; (iv) there is no indication of a competent authority to which the alleged breach of EU law may be attributed; (v) it concerns the acts /omissions of a private person or body; (vi) the grievance is materially the same as one which has already been dealt with by the EBA.

[7] Article 3.1 of the 2012 Rules of Procedure provides that the EBA's Chairperson shall, where necessary, invite the competent authority to provide information within a specified period. Article 4 of the 2014 Rules of Procedure, entitled 'Preliminary enquiry', provides that the Chairperson may invite the competent authority concerned, the Requester or any other legal or natural person to provide information. Article 3.2 of the 2012 Rules of Procedure provides that, following receipt of all necessary information, the Chairperson should decide whether to initiate an investigation, having regard to the non- exhaustive list of factors set out in Annex 2.

[8] Annex 2 of the 2012 of the Rules of Procedure (Annex 2 of the 2014 Rules of Procedure is almost identical) provides as follows:

" Positive [investigation] factors: The alleged breach undermines the foundations of the rule of law (for example, systemic infringements, breaches of human rights or fundamental freedoms) The alleged breach concerns a repeated infringement ...; The alleged breach may have significant, direct impact on EBA's objectives concerning: functioning of the internal market; integrity, transparency; efficiency and orderly functioning of financial markets; preventing regulatory arbitrage and promoting equal conditions of competition; and enhancing customer protection.

Negative [investigation] factors: The request is more suitable to be dealt with by another person or body ...; the Request is more suitable to be dealt with by other means (for example peer review, mediation); the Request appears frivolous or vexatious ."