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EIOPA REGULAR USE

EIOPA-21/266
16 April 2021

Response to the European Ombudsman's preliminary assessment in the inquiry 1564/2020/TE

Dear Ms O'Reilly,

I refer to your letter of 28 January 2021 enclosing your preliminary assessment in the inquiry 1564/2020/TE concerning EIOPA's refusal to grant public access to the votes and debates of its Board of Supervisors on draft regulatory technical standards.

EIOPA welcomes the European Ombudsman's continuous endeavours to enhance the democratic nature of the Union and its accountability. EIOPA truly supports those objectives taking into account its legal framework.

EIOPA considered in detail the arguments and views raised in the preliminary assessment. Indeed, EIOPA's Board of Supervisors already agreed to implement an enhanced transparency approach bolstering the European Ombudsman's continued pursuit for transparency of the Union decision-making process in relation to legislative documents.

There are still a few observations that are worthwhile mentioning.

1) First, I would like to reassure you that EIOPA already publishes all substantive, documents in view of the potential adoption of legislative documents, such as impact assessments, consultation papers and feedback, stakeholder advice and final reports on any technical standards, including the non-adopted draft RTS amending Delegated Regulation (EU) 2017/653. This is what we understand to constitute the general concept behind the Court's reasoning in Case C-57/16¹. Nevertheless, we accept your wider conclusion that this group of documents includes also procedural documents not explicitly covered by the judgement, such as the Members' votes in relation to Board's decisions concerning technical

¹ Paragraphs 85, 86 and 89 thereof.

standards – which normally contain opinions for internal use as part of deliberations and preliminary consultations within EIOPA.

In this respect, I draw your attention on EIOPA's founding Regulation (EU) No 1094/2010, which requires the members of EIOPA's Board of Supervisors (the Board) to adopt decisions in a collegial manner². The Board, as such, acts as a collegiate body – i.e. decisions are those of the Board in its entirety rather than those of its individual Board members. No minority opinion of the Board members is given and, indeed, the Board members are collectively responsible for their decision, including those who did not support it.

The Board's collegial vote constitutes the Board's sole decision-making act in respect of any EIOPA statutory task and competence. It is this only formal collegiate act, as opposed to the Member's individual votes, that produces legal effects and binds EIOPA vis-à-vis any third parties and/or its Members of the Board of Supervisors. In this respect, any appeal against such a decision would target the collegiate decision rather than the individual votes cast by the Board's Members. EIOPA recalls that individual Board Members do not enjoy individual decision-making powers in relation to any of EIOPA's statutory tasks.

2) Second, the independence of the Board is enshrined in Article 42 of Regulation (EU) 1049/2010. From a general independence perspective, the Court has ruled that '[...] the term "independence" normally means a status which ensures that the [Board] can act completely freely, without taking any instructions or being put under any pressure'.³

Thus, independence entails, in essence, that the [Board] is insulated from other entities whose action may be driven by other kinds of interests than those pursued by [the Board]. To that effect, the [Board] must enjoy [...] concrete guarantees of independence that protect it against undue interferences that could prevent it from carrying out its tasks and fulfilling its mission⁴.

The Court has further held that the core of independence [...] is 'decision-making independence': [i.e.] to be allowed to make a decision in the individual case impartially, without taking any instructions beforehand and fearing any repercussions after the decision.⁵

In line with this interpretation of the Court, EIOPA aims at ensuring concrete guarantees of independence that protect its Members from undue interferences and repercussions after they have expressed views or cast vote.

3) Third, EIOPA did not argue that the confidentiality of the requested information stems from its internal rules of procedure and that those have precedence over Regulation (EC) 1049/2001. Instead, EIOPA argued that the internal rules of procedure are implementation of the general confidentiality regime under Article 70 of the EIOPA Regulation. In this respect, EIOPA invoked relevant case-law to the effect that the professional secrecy requirements protecting confidential information may effectively act as a separate exception allowing for non-disclosure, independently from the exceptions laid down in Regulation (EC)

² Recital 53 and Article 44 of Regulation (EU) No 1094/2010.

³ C-518/07 Commission v Germany, paragraph 18.

⁴ Case C-530/16 Commission v Republic Poland, paragraph 31.

⁵ Ibid para 33.

1049/2001⁶. Moreover, EIOPA invoked further case-law⁷ to justify the confidentiality of the votes and reasoning concerning Board's decisions.

4) Last, I would like to recall EIOPA's proactive approach to disclosing a comprehensive and meaningful record of the Board's meeting proceedings not only to the European Parliament, as required by law⁸, but also with the general public. I also note that the law does not require from EIOPA to share the individual votes of the Board members even with the European Parliament, which shows the Union legislator's acknowledgment of the sensitivity of this information.

That being said, EIOPA weighed up all of the abovementioned arguments against the rationale and the views set out in your letter, aiming at ensuring the most appropriate involvement of the public in EIOPA's decision-making process in relation to the legislative documents identified in your preliminary assessment.

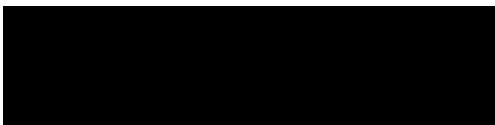
As a result, EIOPA acknowledges that draft regulatory technical standards, as adopted by the Board of Supervisors, and any documents related to their adoption constitute important elements of the process for the adoption of the corresponding delegated act and that they thus contain information constituting important elements of the EU legislative process. Consequently, EIOPA is pleased to inform you that it will share the requested information with the complainant in the coming days.

Going forward, EIOPA will furthermore ensure that its Board's minutes contain appropriate information on the Members' votes concerning decisions on legislative documents – i.e. regulatory and implementing technical standards. In this perspective, EIOPA will undertake the necessary amendments to the Rules of Procedure of the Board of Supervisors.

I hope that EIOPA's intention to grant the complainant with access to the requested information, and the additional solutions proposed address satisfactorily the issues set out in your preliminary assessment and foster the swift resolution of the complaint at hand.

Do not hesitate to get in touch with me if you have further questions.

Yours sincerely,



⁶ To the extent the professional secrecy requirements may apply more widely than the commercial interest exception to protect against disclosure, refusal to disclose a requested document may not be regarded as a breach of the Regulation (EC) No 1049/2001 as the CJEU has recognised that the right of access to documents under the Regulation (EC) No 1049/2001 may be limited or excluded by other Union law: Case T-376/03 Hendrickx v Council, paragraph 55.

⁷ Case C-15/16 Baumeister, paragraph 35 and Case T-198/03, Bank Austria, paragraph 71.

⁸ Article 43a of Regulation (EU) No 1094/2010.