

## THE CHAIRPERSON

Ms Emily O'Reilly  
European Ombudsman  
Rue Wiertz  
B-1-47 Brussels  
Belgium

31 May 2021

### **Subject: EBA Reply to Complaint 615/2021/MAS**

Dear Ms O'Reilly,

I refer to your letter of 29 April 2021 opening an inquiry into a complaint concerning the EBA's decision pursuant to Regulation (EC) No 1049/2001 not to disclose the voting records for the decisions of the EBA Board of Supervisors in two cases concerning alleged breaches of Union law.

My understanding is that your inquiry concerns the substance of the EBA's decision not to disclose the relevant voting records, rather than the process followed by the EBA in reaching that decision, and I wish to outline the EBA's position accordingly.

To begin with, I would like to emphasise as clearly as possible that the EBA fully embraces a high standard of transparency and accountability in relation to the conduct of its Board, just as it does across all other areas of work.

In addition, I am sure that you will agree that it follows from the EBA's mandate to investigate possible breaches of Union law in order to ensure the correct and full application of Union law, that the EBA must always safeguard the conditions necessary for effective decision-making by the Board in investigation cases. It is in the public interest that the EBA does so. As I will explain, the EBA has aimed to pursue that key objective in tandem with – and not at the expense of – preserving an appropriate level of transparency in relation to the conduct of the Board.

The EBA has taken note of your recent decision in Case 1564/2020/TE concerning EIOPA's practice regarding disclosure of voting rights on draft regulatory technical standards (RTSs). Like EIOPA, the EBA has discussed this matter within its Board of Supervisors and will be publishing the voting records in respect of the future decisions on the adoption of regulatory and implementing technical standards. In doing so, we understand that your preliminary assessment in Case 15664/2020/TE referred to the case law of the Court of Justice of the European Union (CJEU) emphasizing wider access to disclosure of legislative documents, stressing the Court's holding that wider access should also be granted to documents which are not, strictly speaking, drafted by an institution when acting in its legislative



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capacity but which contain *“information constituting important elements of the EU legislative process”*, and that the Court has found that the disclosure of such documents is *“likely to increase the transparency and openness of the legislative process as a whole”*.

The present case concerns the breach of Union law process which involves an investigation into the actions of a particular competent authority and their compliance with existing Union law. This process can only result in EBA recommendations and Commission formal opinions to the competent authority concerned and, in certain circumstances where a competent authority continues not to comply, to decisions addressed to a competent authority or an individual financial institution. It is not carried out with a view to the potential adoption of legislative initiatives by the Commission and does not otherwise form part of the basis for the legislative action of the EU. It is therefore clear that there is no such nexus between the EBA Board’s decision-making on breach of Union law investigations and the Union’s legislative process. Accordingly, the EBA considers that documents resulting from that process are not legislative documents, and that the principle that wider access should be granted to documents where EU bodies are acting in their legislative capacity does not apply to the breach of Union law investigations process.

Regarding our commitment to openness and transparency, the EBA’s established practice is to maintain a number of transparency mechanisms in relation to the conduct of the Board’s activities. For example, to ensure accountability and transparency, we publish the rules of procedure for Board meetings and for the conduct of EBA breach of Union law investigations and also the EBA’s conflict of interest rules which apply to Board members in order to ensure their responsibility to act solely in the interests of the Union. Regarding the conduct of individual Board meetings, including meetings on breach of Union law investigations, the EBA systematically publishes detailed meeting minutes which disclose the views and positions taken by Board members and the reasons supporting the outcome of the Board’s deliberations. The EBA has done so in relation to the two breach of Union law investigations which are the subject of your present inquiry. As you note, one set of minutes was inadvertently not available on our website and this has now been rectified and communicated to the requester. As mentioned above, the EBA has also now committed to publishing voting records for future decisions of the Board of Supervisors on adoption of regulatory and implementing technical standards.

I believe that the EBA has therefore shown a high level of transparency in regard to the decisions made by its Board in the two breach of Union law cases in this instance, namely the Pilatus case in 2018 and the Danske Bank case in 2019.

In the context, then, of the EBA’s dual commitment to preserving effective decision-making in BUL cases together with a high level of transparency, I am concerned that the additional disclosure of individual Board members’ votes would have a significant undesirable impact on the decision-making process in a manner that does not serve the public interest. It would, in particular, create conditions for significant external pressure to be placed on Board members, thereby undermining 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 (Regulation (EU) No 1093/2010).

This was recently confirmed by Board members when discussing the appropriate level of disclosure and the need to balance the interests of transparency and the risks that more detailed disclosure could affect the quality and openness of discussion within the Board. Board members were concerned that additional disclosure would in particular increase the national pressure on them from the financial sector and other stakeholders to adopt a particular position in those discussions and, ultimately, votes, creating a conflict with their obligation under Article 42(1) of Regulation (EU) No 1093/2010 to act independently and objectively in the sole interest of the Union as a whole. I would refer you, for example, to the comments at the meeting of the Board in February 2021 that are set out in the published minutes for that meeting<sup>1</sup>.

The existence of such pressure on supervisory bodies is well known and, as indicated above, the EBA has extensive transparency measures in place to address concerns, such as its open consultation process and public hearings, its registers of meetings with industry stakeholders and publication of annual declarations of conflicts of interests of EBA management and Board members. The EBA is of the opinion that the ability of Board members to act independently of national interests would be undermined by disclosing the content of discussions and votes without maintaining a degree of confidentiality for individual Board members, and the present level of disclosure achieves a good balance in order to avoid having a significant undesirable impact on the EBA's decision-making process by increasing the value in external stakeholders lobbying Board members. The EBA's founding regulation establishes the Board to act as a collegiate body, whereby decisions taken on breach of Union law investigations are to be made, and to be viewed as made, as decisions of the Board as a body rather than as decisions of its individual members. We would also have concern that any retroactive decision to disclose the votes of individual Board members would be prejudicial to their reasonable expectation that their deliberations would remain confidential to that extent and thereby undergird their continuing independence.

Reassurance that Board members do currently act in the interests of the Union can be taken from the fact that the EBA has adopted a number of recommendations and decisions in supervisory convergence matters, including in the Pilatus breach of Union law case to which your request refers. This itself demonstrates that the Board is willing and able in appropriate cases to adopt such measures under its governance framework. Moreover, the EBA has always maintained and applied a stringent policy to ensure the independence of Board members and to avoid conflicts of interest on their part in the exercise of the Board's decision-making functions – and indeed following amendments to the EBA's founding regulation which came into effect in January 2021 which further strengthen the

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<sup>1</sup> See paragraph 8 of the minutes of the Board of Supervisors meeting on 24/25 February 2021, published here: [https://www.eba.europa.eu/sites/default/documents/files/document\\_library/Calendar/EBA%20Official%20Meetings/2021/BOS%2024%20-%2025%20FEB%202021/973504/EBA%20BS%202021%20184%20%28Final%20Minutes%20-%20BoS%20conf%20call%2024%20and%2025%20February%202021%29.pdf](https://www.eba.europa.eu/sites/default/documents/files/document_library/Calendar/EBA%20Official%20Meetings/2021/BOS%2024%20-%2025%20FEB%202021/973504/EBA%20BS%202021%20184%20%28Final%20Minutes%20-%20BoS%20conf%20call%2024%20and%2025%20February%202021%29.pdf)

independence of its Board, this policy was substantively amended and enhanced and is publicly available on the EBA website.<sup>2</sup>

In summary, the EBA appreciates that there are two public interest considerations at stake when it comes to the conduct of breach of Union law investigations. One is the effective decision-making of the Board in the interests of ensuring the application of Union law by financial supervisors and financial institutions, and the other is the transparency of that decision-making. It is the responsibility of the EBA to maintain the best balance of those two interests, which I believe the EBA has done in the present case.

Finally, I would like to assure you of the EBA's ongoing good cooperation with you and your staff in this inquiry, and to underline again the EBA's full commitment to the public interest in protecting both effective decision-making in our breach of Union law investigations and a high level of openness and public transparency around the decisions taken by the EBA's Board in that important area of our activity.

Yours sincerely,

A solid black rectangular box used to redact the signature of José Manuel Campa.

José Manuel Campa

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<sup>2</sup> Namely EBA/DC/2020/308 which can be found on the EBA website here:

[https://www.eba.europa.eu/sites/default/documents/files/document\\_library/930903/EBA%20DC%202020%20308%20%28EBA%20COI%20Policy%20for%20non%20staff%29.pdf](https://www.eba.europa.eu/sites/default/documents/files/document_library/930903/EBA%20DC%202020%20308%20%28EBA%20COI%20Policy%20for%20non%20staff%29.pdf)