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Ms Emily O'Reilly
European Ombudsman
Rue Wiertz
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EBA-2021-D-3684

28 October 2021

Subject: Complaint 615/2021/TE – EBA reply to preliminary assessment

Dear Ms O'Reilly,

I refer to your letter of 16 July 2021 and the preliminary assessment in your inquiry in relation to Complaint 615/2021/TE.

I would like to respond firstly to your preliminary assessment that the EBA has committed maladministration by not disclosing the voting records of the EBA Board of Supervisors' decisions in 2018 in the Pilatus breach of Union law (BUL) case and in 2019 in the Danske BUL case.

As my previous letter of 31 May 2021 emphasised, the EBA fully embraces a high standard of transparency and accountability in relation to the discussions and decision-making of the Board of Supervisors. BUL investigations are no exception to this. Two particular public interest considerations are at stake regarding decision-making in BUL investigations. One is to safeguard effective decision-making which ensures the application of Union law by competent authorities, and the other is the transparency of that decision-making. It is the responsibility of the EBA to maintain the best and fair balance of these two interests in its discretionary power, without constituting maladministration.

The EBA has found that balance by safeguarding the conditions necessary for effective decision-making by its Board of Supervisors for BUL cases in tandem with – and not at the expense of – our commitment to an appropriate level of transparency. The EBA's established transparency practices were followed in the Pilatus and Danske BUL cases, such as the publication of detailed meeting minutes which describe the views and positions of Board members. The EBA has therefore shown a high level of transparency in regard to the decisions made by its Board.

We have set out previously and consider it of paramount importance to underline the concerns expressed by Board members concerning the adverse effects of publishing individual votes on the independent functioning of the EBA in the interests of the Union. This will result in serious risk of increasing the existing pressures to influence them in the performance of their tasks in a way which

impinges on their ability to act independently and objectively in the sole interests of the Union, as required by Article 42 of the EBA's founding regulation. This would seriously undermine the EBA's decision-making.

To explain this, it is important to understand the EBA's governance. This is based on voting by the heads of the national public authority competent for the supervision of credit institutions in each Member State.

National experiences can inevitably impact on the views of Board members, and that is also part of the value that this national participation brings to the EBA's work. But to carry out the EBA's work effectively in finding European solutions to European issues, it is important that Board members are also free to express views without feeling constrained by any external expectations that national interests are followed. This is a key distinction from a body such as the Council where representatives are there to reflect national political policies and priorities and is why we place such importance on finding ways of ensuring that space is given to ensure the free expression of ideas and independence of decision-making which would be undermined if Board members felt constrained to represent national interests rather than assessing what they consider to be in the best interest of the Union.

In the light of your recent inquiry into issues concerning EIOPA's disclosure of voting records the EBA has decided to disclose voting records about the adoption of draft technical standards. This decision reflected the specific legal characteristics of draft technical standards as part of the legislative process.

The EBA is fully conscious of the need to consider whether there is an overriding public interest in disclosure, and that that public interest can vary over time. Taking account of subsequent developments including the publication in June of the European Court of Auditors' report mentioned in your preliminary assessment and the views expressed in your letter of 16 July 2021, the EBA has reassessed whether an overriding public interest can now be considered to exist. The EBA has concluded that it does, by exception and in these particular cases only.

In its Special Report 13/2021 the European Court of Auditors raises suspicions that there had been written evidence proving attempts to lobby the panel deliberating on its recommendation to the Board of Supervisors and that the Board of Supervisors ultimately rejected this recommendation. In light of this, there is a unique public interest in scrutinising the conclusions of the European Court of Auditors in general and voting conduct of the EBA's members of the Board of Supervisors specifically. Such public interest can be exceptionally considered as overriding and outweighing the fundamental risk of disclosure of voting records impeding efficient decision-making as described in the paragraphs above. The EBA will shortly be putting in place measures to address the concerns raised by the Court of Auditors and therefore the EBA would not expect a similar public interest to arise in future cases.

Accordingly, the EBA has now made public on its website¹ the voting records in both cases and transmitted those records to the complainant in the present inquiry. I trust this provides resolution in the present inquiry. I assure you that the EBA will continue to maintain a strong commitment to its responsibilities for the transparency and effectiveness of EBA decision-making.

I turn now to the separate preliminary assessment that the participation of the Maltese, Danish and Estonian Board members in the respective votes on the two BUL recommendations in 2018 (Pilatus Bank) and 2019 (Danske Bank) constituted maladministration. The preliminary assessment is that such participation in voting on BUL recommendations “*which concern the national supervisory authorities that such Board members represent*”, constitutes “*a clear conflict of interest*”.

Firstly, I should clarify that in the Pilatus case the Maltese Board member was an employee of the Maltese Financial Supervisory Authority, not the Maltese Financial Intelligence Unit which was the competent authority concerned in that case.

Secondly, I should address the broader assessment of maladministration.

I have described above the key provisions of the EBA’s founding regulation regarding composition and governance of the Board of Supervisors. The founding regulation did not provide for any exceptions to the ability of voting members of the Board of Supervisors to be excluded from voting at the time when the decisions on the BUL cases concerned in your inquiry were taken in 2018 and 2019.

Nevertheless, when preparations for the establishment of the ESAs were taking place, the question arose whether the rules of procedure of the European Supervisory Authorities could exclude Board members from voting on matters where they were considered to have a conflict of interest. As the matter was not clearly regulated in the founding regulations, the advice of the Commission was requested on this issue when preparing the rules of procedure of the future Boards of Supervisors and specifically on the possibility of excluding members of the Board of Supervisors from voting in BUL cases where the member in question was the head of supervision for the competent authority being investigated. The request for advice noted that exceptions in the Treaty provided for cases where Council members did not participate in votes by way of potential analogy.

The Commission’s response gave clear advice that it was not the intention in drafting the legislation that any member should be excluded from voting in any case, and that none of the discussions in the Council or Parliament led the Commission to believe that it was the legislator’s intention to do so. The Commission noted that Board members act in a personal capacity and do not represent any body, and

¹ Available at the following links:

https://www.eba.europa.eu/sites/default/documents/files/document_library/1022556/Danish%20FSA%20and%20Estonian%20FSA%20BUL%20Investigation%20-%20Record%20of%20the%20BoS%20vote.pdf and https://www.eba.europa.eu/sites/default/documents/files/document_library/Calendar/EBA%20Official%20Meetings/2018/Board%20of%20Supervisors%20teleconference%20call/BuL/1022557/Maltese%20FIU%20BUL%20Investigation%20-%20Record%20of%20the%20BoS%20vote%20by%20written%20procedure.pdf

Article 42 clearly excludes any instructions or influence on Board members from Member States or national supervisors.

This was strong, informed advice which clearly rejected the proposals under consideration. It made clear that, as a matter of law, Board members employed by national supervisory authorities the subject of investigations were not to be excluded from voting on those investigations. Recognising the importance of this topic, the EBA nevertheless adopted more limited conflict of interest provisions to manage conflicts where a member's alternate would not be equally affected by the conflict and so voting would not be completely excluded.

Support for this interpretation of the ESAs' founding regulations can be found in the changes to those regulations which applied from 1 January 2020. Following a Commission consultation on the ESAs' governance, the EBA itself recognised concerns around the challenges for independence of decision-making and issued an opinion² that "consideration should be given to limiting such [governance] adjustments to the areas in which the decision making process could turn out to be excessively complex or insufficiently independent, such as mediation or breach of Union law". The subsequent Commission proposal envisaged a reshaping of the ESAs' governance in this area which was ultimately not supported in the legislative discussions. Nevertheless, the independence requirements in Article 42 of the founding regulations were extended to expressly require Board members to abstain from participating in discussions and voting in the event of a conflict of interest. This provided the legislative support for removing the vote from a Board member and opened the door to a wider set of conflicts of interest being taken into account.

Once again, the Commission provided advice to the ESAs on the scope of this provision, noting that it encompasses "any interest which might be considered prejudicial to [the member's] independence". The Commission considered that this provision covered interests a person may have in their capacity as employee (including official) or function holder of an authority and that such a conflict could exist when an ESA deliberates and adopts a measure directed at an individual competent authority, and a member of the ESA's decision-making body is employed by or is a function holder of that authority.

Consequently, I believe that the EBA acted responsibly in establishing what was possible under its founding regulation and took steps to manage conflicts of interests so far as was compatible with the legislation in force at the time of the BUL cases. I would therefore hope that you will be persuaded that the EBA acted responsibly in seeking to define an appropriate approach for voting in BUL cases and that it did so in a manner that is consistent with good administration rather than the opposite.

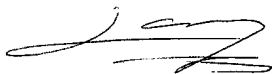
Your letter of 16 July also kindly invites me to comment on whether the EBA considers that the Board's rules of procedures and the EBA's new policy on conflicts of interest as revised in January 2020 "*are sufficiently robust to prevent such conflict of interest situations from arising in the future*". The EBA has

² [EBA/Op/2017/08](#)

fully implemented the January 2020 changes in its rules of procedure for the Board of Supervisors³ and its conflicts of interest policy⁴ and has, indeed, extended their application to voting standing committees. The need to declare conflicts of interest is a standing item on Board of Supervisors agendas and, in the light of Commission's advice on the new requirements which was discussed in the Board of Supervisors at the time, we consider that Board members and EBA staff are well-equipped to identify where such conflicts may arise.

In concluding, I trust that the present response and accompanying information will assist your inquiry and look forward to your response. In the meantime, the EBA stands ready to provide further input, should this be requested, and I assure you once again of the EBA's ongoing cooperation with you and your colleagues.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'José Manuel Campa', written in a cursive style.

José Manuel Campa

³ [Decision EBA/DC/2020/307](#), see in particular Article 6(2) to (8).

⁴ [Decision EBA/DC/2020/308](#), see in particular point (f) of Article 1.4.