



Report

of the European Ombudsman following his visit to the European Systemic Risk Board (ESRB) – OI/10/2012/EIS

The background to the visit

1. In May 2011, the European Ombudsman launched a programme of visits to the EU agencies with the aim of identifying and spreading best practices in their relations with citizens. Initially, the Ombudsman carried out three 'pilot' visits to the EU agencies in the United Kingdom, namely, the European Banking Authority, the European Medicines Agency and the European Police College. In October 2011, the Ombudsman visited the European Environment Agency in Copenhagen and, in November 2011, the European Monitoring Centre for Drugs and Drug Addiction and the European Maritime Safety Agency in Lisbon. In February 2012, the Ombudsman visited the European Centre for the Development of Vocational Training in Thessaloniki and, in May 2012, the European Foundation for the Improvement of Living and Working Conditions in Dublin. In June 2012, the Ombudsman visited the European Police Office and Eurojust in The Hague, and in July 2012 the European Network and Information Security Agency in Heraklion. These visits were followed by visits to Frontex in Warsaw and to the European Chemicals Agency in Helsinki in October 2012¹.

2. By letter of 29 May 2012, the Ombudsman informed the European Systemic Risk Board ('ESRB') that, in the framework of his programme of visits to agencies, he intended to visit it on 14 June 2012.

3. The ESRB is responsible for the macro-prudential oversight of the financial system within the European Union. It is part of the European System of Financial Supervision ('ESFS'), the purpose of which is to ensure supervision of the Union's financial system. The secretariat of the ESRB is provided by the European Central Bank (ECB). The ESRB was set up through Regulation 1092/2010² of the European Parliament and of the Council with a view to rebuilding trust in the financial system after the financial crisis began. In accordance with the Regulation, the ESRB contributes to the prevention or mitigation of systemic risks to financial stability in the Union that arise from developments within the financial system. It takes into account macroeconomic

¹ Information on previous visits to the EU agencies is available on the following page of the Ombudsman's website: www.ombudsman.europa.eu/activities/visits.faces

² Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ 2010 L 331, p. 1.



developments, so as to avoid periods of widespread financial distress, and it also contributes to the smooth functioning of the internal market.

4. The Ombudsman sent the ESRB a draft agenda with the specific issues he wished to discuss. In addition, the Ombudsman informed the ESRB that, in response to a commitment he had undertaken following a request by the Assembly of Agency Staff Committees ('AASC'), he intended to meet the ESRB's Staff Committee during his visit.

The visit

5. The meeting took place at the ESRB's premises on 14 June 2012. The Ombudsman was accompanied by Mr Ian Harden, Secretary-General, and Mr Bernhard Hofstötter, Acting Head of Unit. The ESRB was represented by Mr Francesco Mazzaferro, Head of the ESRB Secretariat, who was accompanied by Mr Guillaume Leclercq, Principal Official and Mr Michael Schneider, Legal Subject Specialist. In addition, the following staff members of the ECB were present at the visit: Mr Roman Schremser, Deputy Director-General of the Secretariat and Language Services; Ms Regina Schüller, Head of Press and Information Division; Ms Marcia Fonseca, Principal Human Resources Expert, Human Resources Operations; and Ms Beatrix Wiesner, Senior Human Resources Expert, Human Resources Policies and Staff Relations.

6. At the beginning of the meeting, the Ombudsman provided information on the purpose and context of his visit to the ESRB. He clarified that he carries out his visits to agencies of the EU on the basis of his competence to conduct own-initiative inquiries. An own-initiative inquiry implies, among others, that the usual procedural guarantees concerning such inquiries apply. These include the Agency's right to request the Ombudsman to treat information and documents on a confidential basis, in accordance with Articles 5.1, 5.2 and 14.2 of the Ombudsman's Implementing Provisions³.

7. Following the Ombudsman's introductory remarks, the ESRB Secretariat presented its position on the subjects identified by the Ombudsman in his letter of 29 May 2012. Each presentation was followed by a discussion and a question and answer session.

8. The following issues constituted the object of discussion between the Ombudsman and the ESRB's management:

- A. The ESRB's initial contacts with the public;
- B. Transparency, dialogue and accountability;
- C. Selection and recruitment;
- D. Tenders and contracts;
- E. Conflicts of interest.

³ www.ombudsman.europa.eu/resources/provisions.faces



The Ombudsman's findings and suggestions

(A) The ESRB's initial contacts with the public

9. One of the Ombudsman's fundamental tasks is to ensure that the EU administration is open, service-minded and efficient in handling contacts with citizens. The relevant basic principles are laid down in the European Code of Good Administrative Behaviour ('the Code'). The European Ombudsman often receives complaints alleging lack of service-mindedness and efficiency. This suggests that the EU administration is still faced with challenges in this area. When appropriate, the European Ombudsman tries to find a rapid solution to complaints that concern grievances arising from citizens' initial contacts with the administration. In such circumstances, the Ombudsman's services usually contact the relevant agency or body by telephone.

10. In his letter dated 29 May 2012, the Ombudsman informed the ESRB that all the EU agencies had agreed to adopt the Code at a meeting of the heads of the agencies held in Lisbon in October 2008. However, the ESRB's website contained no reference to the Code and, therefore, the Ombudsman sought additional information on how the ESRB has implemented this decision. Moreover, the Ombudsman asked how the ESRB ensures that its staff members comply with the principles laid down in the Code.

11. In its reply, the ESRB Secretariat first made clear that it does not consider itself to be an EU agency, but a body of the ECB with no legal personality, the ECB providing logistical, budgetary and human resources support to it. Furthermore, the ESRB has never been invited to meetings with other EU agencies. The ESRB pointed out that it is part of the European system of financial supervision and that the ECB's administrative procedures apply to its activities. Also, the Commission does not consider the ESRB to be an agency; otherwise the ECB would be hosting an agency, which was not part of the political deal setting up the ESRB. Mr Harden pointed out that, apart from the executive agencies, there is no definition of an agency in EU law and that the recently established European Banking Authority, for example, although not having the word 'agency' in its name, seeks to be part of the network of agencies. Mr Harden also acknowledged the ESRB's very close relationship with the ECB and assured the ESRB that the Ombudsman's visit takes this fact into account. In conclusion, the representatives of the ESRB and the Ombudsman agreed that the question of whether or not the ESRB is an agency does not make any difference for the purposes of the present own-initiative inquiry.

12. As regards the substance of the Ombudsman's question, the ESRB Secretariat underlined that it deals with inquiries from the public and from the media. To date, no complaints against the ESRB have been lodged with the Ombudsman. There are about 40 contacts from the public each month, and the ESRB has a policy of 'immediate response'. The ESRB then asked the Ombudsman about the role of the Code. The latter replied that the Code is a compendium of principles of good administration. He then asked the ESRB representatives whether the ESRB is minded to adhere to the Code. The ESRB representatives replied that only its General Board could decide to do so. There was therefore a need for discussion. The Ombudsman subsequently asked whether the ECB has its own Code of Conduct. The ESRB's representatives explained that the issue is technically complex, but also pointed out that, formerly, there used to be a Code of Conduct for the ECB Staff, which has now



been incorporated into the staff rules. Finally, the Ombudsman explained the difference between legality and good administration.

13. The Ombudsman welcomes the ESRB's policy of providing an immediate response. He also encourages the ESRB to take the necessary steps to adhere to the Code. In this respect, he considers that the ESRB's commitment to the principles set out in the Code could also be made visible to Union citizens and, therefore, suggests that it provide a link to the Code on its website.

(B) Transparency, dialogue and accountability

14. The Ombudsman attaches great importance to the need to promote transparency and to increase accountability in the EU administration. This requirement is reflected in, among others, the EU legislation on public access to documents, which expressly mentions the Ombudsman as a review body. It is also reflected in the Ombudsman's extensive powers of investigation, which enable him thoroughly to clarify the facts and issues which arise during his inquiries.

15. In view of the above considerations, the Ombudsman noted in his letter to the ESRB that Article 7(1) of Regulation 1096/2010⁴ provides that the Secretariat must "*ensure the application of ECB Decision ECB/2004/3*", which includes provisions on public access to ECB documents. The website of the ESRB contains a link to Decision ECB/2004/3, as well as a link to Decision ESRB/2011/5⁶ of the European Risk Board on public access to ESRB documents. According to Article 1 of Decision ESRB/2011/5, this decision "*sets out the practical arrangements for the application of Decision ECB/2004/3 to ESRB documents. The rules specified in Decision ECB/2004/3 applying to the granting by the European Central Bank (ECB) of access to ECB documents shall apply mutatis mutandis to the granting by the ESRB of access to ESRB documents, subject to the adaptations specified in this Decision*".

16. In his letter to the ESRB, the Ombudsman asked the following specific questions:

- a) *On the basis of the provisions based on Decision ECB/2004/3 and Decision ESRB/2011/5, what is the ESRB's interpretation of the 'dual' legal status of ESRB documents, in the light of Article 15 TFEU? How does the ESRB deal in practice with requests for public access to documents? What are its guidelines and/or practical arrangements for handling such requests? Please provide examples, such as the main correspondence in the ESRB's handling of the last three requests for public access to documents. (The substance of the ESRB's decision in these examples will not be examined, as this is not the purpose of this visit.)*

⁴ Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, OJ 2010 L 331, p. 162.

⁵ Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3), OJ 2004 L 80, p. 42, as amended by Decision of the European Central Bank ECB/2011/6, OJ 2011 L 158, p. 37.

⁶ Decision of the European Systemic Risk Board of 3 June 2011 on public access to European Systemic Risk Board documents (ESRB/2011/5), OJ 2011 C 176, p. 3.



- b) *Does the ESRB produce an annual report (internal or external) on its handling of public access to documents?*
- c) *Does the ESRB operate, or intend to operate, a public register of documents? In the affirmative, what is the relation with the section "Documents" on its website? Will this section be expanded?*
- d) *The ESRB handles a vast amount of information and data. Its website is user-friendly and contains a large volume of data, publications and information relating to the ESRB's main activities, more particularly in the section "Documents". How does the ESRB deal with requests for information? Please provide information concerning the feedback the ESRB's services receive from users and stakeholders regarding access to information.*

17. In reply to the above questions relating to access to documents, the ESRB Secretariat first underlined that it has not yet received any requests for public access to ESRB documents. In principle, documents have to be marked as ECB or ESRB documents. There are thus no 'hybrid' documents. The Ombudsman subsequently asked how the ESRB proceeds if someone turns to the ECB and asks for access to ESRB documents. The ESRB Secretariat explained that there are no practical examples in this regard, because no such requests have been made to date. However, the ECB would transfer such a request to the ESRB. The ESRB Secretariat gave the following practical example of a request for access to a third party document, which was made to the Council: when a member of the public requested access to a document held by the Council, the ESRB was consulted out of courtesy, because it was the author of that document.

18. As regards the issue of a public register of documents, the ESRB Secretariat replied that it has no such register; also the ECB is not yet subject to an obligation to operate a public register of documents. Furthermore, there are a number of delicate issues the ESRB is dealing with, such as risk analyses, which cannot be made public. However, once a public register becomes mandatory, the ECB and the ESRB will treat it as a pressing matter. The Ombudsman stated that his office is ready to share its experience in this regard. The Ombudsman also clarified that his approach is a vigilant one, but not a 'maximum transparency' approach when dealing with documents containing confidential information. The ESRB Secretariat then pointed out that the fourth subparagraph of Article 15(3)⁷ of the Treaty on the Functioning of the EU ('TFEU') exempts policy documents of the ECB and the European Investment Bank ('EIB') from having to be accessible to the public. In this regard, Mr Harden emphasised that the Ombudsman has signed a Memorandum of Understanding with the EIB⁸, and as regards transparency policy, encourages the EIB to see the fourth subparagraph of Article 15(3) TFEU as an opportunity to establish its own rules on access.

19. The ESRB Secretariat then explained that it is important to avoid unfortunate situations, and if a register is so comprehensive that access to everything can be requested, the consequence is that documents no longer get registered. This, on the other hand, destroys the memory of an institution. In this regard, the nature of the institution should be taken into account and it

⁷ "The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks."

⁸ <http://www.ombudsman.europa.eu/activities/cooperation.faces/en/3809/html.bookmark>



should thus be borne in mind that the ECB and ESRB are very different from the EIB.

20. The discussion then turned to the existing rules on access to documents and whether they offer adequate protection. In this regard, the ESRB Secretariat explained that it is sometimes very difficult to establish the severity of a risk in advance. For example, as far as the ECB is concerned, disclosing the technical specifications of bank notes clearly constitutes a risk. In other fields of the ECB's responsibility, it can be less straight forward to assess the concrete impact of disclosure. In any event, the ECB is prudent in applying exceptions and always seeks to give reasons for its positions that are as detailed as possible.

21. In response to the ESRB's comments, the Ombudsman explained that trust is indeed important, and that the adequacy of reasoning in decisions on requests for access is a key issue when seeking a reasonable approach. In this respect, proactivity in drafting documents is of particular relevance. Thus, already at the drafting stage, one should bear in mind that access may be requested at some point. Documents could also be structured in such a way that the main text could be made public without further hesitation, while more sensitive issues could be included in an annex, if possible. The ESRB Secretariat replied that, as regards the access issue, it can issue warnings or recommendations in a public or private form, and it is indeed important that there be no leakage.

The Ombudsman's findings and suggestions as regards (B)

22. The Ombudsman congratulates the ESRB on its website, which is user-friendly, easy to navigate and informative. He also applauds the fact that the homepage of the ESRB's website, as well as information on its functions, is available in all 23 official languages. By greeting citizens who visit the website in their own language and by explaining its functions to them, the ESRB demonstrates clearly that it recognises that all citizens of the European Union have a legitimate interest in its work.

23. The ESRB has adopted a proactive approach to the dissemination of information, principally through online publications, and should be applauded in that respect.

24. The Ombudsman notes that it follows from Article 15 TFEU that, with a view to promoting good governance and ensuring the participation of civil society, the institutions, bodies, offices and agencies of the EU should conduct their work as openly as possible. To this end, many EU bodies have already started publishing an annual report on their handling of requests for public access to documents and created a public register of their documents, which is also foreseen in Article 6 of Regulation 1049/2001⁹.

25. In light of the above, the ESRB could consider (a) creating a dedicated page on its website which would identify the rules applicable to requests for access to documents and the responsible contact person, (b) producing an annual

⁹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.



report on its handling of requests for public access to documents, once it starts receiving such requests, and (c) establishing a public register of its documents.

(C) Selection and recruitment

26. With regard to the substance of selection and recruitment decisions, the Ombudsman takes an approach similar to that of the Court of Justice of the EU. This means, among others, that he recognises the administration's wide discretionary powers in selecting its staff. With regard to the procedural aspects of selection and recruitment, the Ombudsman has very actively worked to increase transparency in EU recruitment. His efforts have, for instance, led to enhanced transparency regarding the names of members of selection boards, and more detailed evaluation sheets providing candidates with a better insight into how they were assessed.

27. The Ombudsman asked the ESRB to provide clarifications on the following issues:

- a) *How does the ESRB ensure an effective communication with candidates in selection procedures concerning the status of their applications and/or the outcome of the selection procedure?*
- b) *Are the names of selection board members known to candidates? To what extent does the ESRB provide candidates with access to the assessments of their applications?*
- c) *To what extent does the ESRB seek quicker and less formal means to resolve disputes about selection and recruitment decisions than the ones foreseen in Article 90 of the Staff Regulations?*
- d) *Does the ESRB systematically inform candidates in its correspondence that they may complain to the Ombudsman, as provided for in Article 19 of the above-mentioned Code of Good Administrative Behaviour?*
- e) *The ECB's website, where the ESRB's website leads to, contains the following statement: "Before applying, please consider whether your qualifications are commensurate with the vacancy. Indiscriminately applying for vacancies might reflect on your credibility." What does this statement imply in practical terms?*

28. The ESRB Secretariat explained that it completely depends on the ECB rules for recruitment matters too. As regards the composition of Selection Boards, candidates invited to attend an interview are informed of the identity of the members of the board. There is no consistent practice regarding how much in advance this information is provided. However, the ECB has experienced the danger that candidates might try to contact the board, if such information were to be provided too early. Moreover, the ESRB pointed out that a problem of putting pressure on board members might arise: candidates might exercise pressure when it is easy to find the contact details of members of Selection Boards on the internet or in the telephone directory. The ECB receives about 200 applications for each post it publishes.

29. Concerning access to the assessments of candidates' answer sheets, the ESRB Secretariat confirmed that the ECB grants access to the results of that assessment. Candidates are informed of the review procedures at their disposal, that is, (i) the possibility of bringing a formal complaint in accordance with its



own Staff Rules and the possibility of an Administrative Review, possibly followed by a Grievance request to the President, (ii) the right to lodge a complaint with the Ombudsman, and (iii) the possibility of bringing a case before the Civil Service Tribunal. There is no reference to the Ombudsman in vacancy notices or letters rejecting applications, but such information is provided when a candidate raises the issue of remedies. The ECB is currently in the process of setting up a new e-recruitment system.

30. In response to the Ombudsman's specific question (e), referred to in point 27 above, the ESRB Secretariat explained that the statement does not have any implications for the assessment of a candidate's application. However, it was introduced in response to the fact that some candidates apply indiscriminately for posts ranging from traineeships to the post of Director, and was inspired by a similar statement on the United Nations' website. The Ombudsman pointed out that more felicitous language could be used in such statements so as better to reflect a culture of service, in which language is of particular relevance. The ESRB Secretariat emphasised that such a statement also needs to be in conformity with the law.

The Ombudsman's findings and suggestions as regards (C)

31. The Ombudsman welcomes the fact that the ESRB discloses the names of Selection Board members to candidates invited to attend interviews. The Ombudsman has consistently taken the view that the right to keep secret the individual views of selection board members is not the same as keeping their identities secret¹⁰. The approach is also in line with the Court of Justice's case-law on the matter.

32. As regards the issue of informing candidates of the review procedures at their disposal, the Ombudsman notes that, according to the ESRB Secretariat, there is no reference to the Ombudsman in vacancy notices or letters rejecting applications, but such information is provided when a candidate specifically raises the issue. In this respect, the Ombudsman takes the view that providing sufficient information on remedies at an early stage would clearly be useful and in conformity with good administrative practice, so as to ensure that the information reaches all candidates and not only those who specifically raise the issue. Accordingly, the Ombudsman suggests that the ESRB consider requesting the ECB to include information on remedies also in vacancy notices and letters rejecting applications.

33. Concerning the aforesaid statement on the website of the ECB, which the ESRB's website leads to, the Ombudsman again points out that, in line with the views he expressed during his visit, the ESRB could request the ECB to consider rephrasing it, so as to render it more citizen-friendly.

¹⁰ Decision of the European Ombudsman closing his inquiry into complaint 2586/2010/(ML)TN against the European Personnel Selection Office (EPSO). See also decision of the European Ombudsman closing his inquiry into complaint 3115/2009/RT against the European Commission; special report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures (1004/97/(PD)GG); decision of the European Ombudsman on complaint 674/2004/(MF)PB against the European Commission and the European Personnel Selection Office.



(D) Tenders and contracts

34. At the review level, disputes in relation to tender decisions and contractual relationships are most commonly dealt with by the courts. However, over the years, a significant proportion of the Ombudsman's cases has concerned these areas as well. In relation to tenders, the Ombudsman draws inspiration from the Court of Justice's approach, which is to recognise the administration's broad discretionary powers in assessing the substantive aspects of tender proposals, while carefully checking whether it gave valid and adequate reasons for its decisions and whether it adequately respected applicable procedures and information rights. In relation to contractual disputes, the Ombudsman does not, as such, assess whether there is a breach of contract. He does, however, thoroughly examine whether the administration provided good reasons for its position, and also looks into the fairness of administrative actions or omissions.

35. In view of the above, the Ombudsman wished to be informed of how the ESRB handles disputes in relation to these areas.

36. The ESRB Secretariat replied that since it does not have legal personality, all tenders and contracts are also taken care of by the ECB. There is only one exception to that rule, namely, the members of the Advisory Scientific Committee, which, pursuant to Decision ESRB/2011/2¹¹, are selected according to the ESRB rules. However, pursuant to Article 6(4) of that Decision, the indemnities and the reimbursement of expenses are handled by the ECB. The list of the members of the committee is available on the ESRB's website¹². So far, no disputes appear to have arisen with regard to the Advisory Scientific Committee.

(E) Conflicts of interest

37. Conflicts of interest arise when persons who work for the public administration may be perceived as having an inappropriate personal interest in a matter with which they are dealing. Such conflicts need to be handled appropriately in order to ensure objective decision-making, and to enhance the public's trust in the administration. Recent events and cases show that the EU administration does not enjoy the public's full confidence in relation to this issue.

38. The Ombudsman asked the ESRB to provide information on the concrete measures it takes *in order to avoid conflicts of interest in relation to:*

a) recruitment of staff, including senior staff; and

b) current and former staff members, notably regarding external activities during and after their service at the ESRB.

¹¹ Decision of the European Systemic Risk Board of 20 January 2011 on the procedures and requirements for the selection, appointment and replacement of the members of the Advisory Scientific Committee of the European Systemic Risk Board (ESRB/2011/2), OJ 2011 C 39, p. 10.

¹² http://www.esrb.europa.eu/pub/pdf/other/list_of_ASC_members.pdf?c3f18132d296d08aec79dbc47032037e



39. In its reply, the ESRB explained that the staff members of the ECB are bound by the rules on professional secrecy and there is no cooling-off period except for Board Members. There is a Code of Conduct for the ESRB.

40. In the Ombudsman's view, as far as the ESRB is concerned, the above position raises concerns. The Ombudsman has stated on several occasions that EU institutions, bodies, offices and agencies should do their utmost to avoid not only actual but also apparent conflicts of interest, in order to maintain public trust and confidence in their activities and to protect their staff from unjustified suspicion. It should be noted that in its recently published Special Report No 15/2012¹³, the European Court of Auditors also recommended that certain agencies improve their conflict of interest policies and procedures. In line with these considerations, it would clearly be appropriate if the ESRB were to adopt concrete measures on conflict of interest issues in order to comply with its legal obligations. In this regard, it could develop templates for the Declarations of Interest of its senior staff members and ensure that these declarations are made available on its website.

Summary of the Ombudsman's suggestions

41. The ESRB informed the Ombudsman that the ECB is responsible for the ESRB's recruitment matters and tenders and contracts. On the basis of his visit and the information which the ESRB provided him with, the Ombudsman makes the following suggestions:

a) The ESRB could take the necessary steps to adhere to the Code. In this respect, the ESRB's commitment to the principles set out in the Code could also be made visible to Union citizens by providing a link to the Code on its website.

b) The ESRB could consider (a) creating a dedicated page on its website which would identify the rules applicable to requests for access to documents and the responsible contact person, (b) producing an annual report on its handling of requests for public access to documents, once it starts receiving such requests, and (c) establishing a public register of its documents.

c) The ESRB could request the ECB to consider rephrasing the statement "[b]efore applying, please consider whether your qualifications are commensurate with the vacancy. Indiscriminately applying for vacancies might reflect on your credibility" on the website of the ECB, to which the ESRB's website leads. Although the Ombudsman understands that the statement is intended to be helpful, its wording could be changed so as to render it more citizen-friendly.

d) The ESRB could request the ECB to consider including information on remedies available to candidates also in vacancy notices and letters rejecting applications.

e) The ESRB could adopt concrete measures on conflict of interest issues in order to comply with its legal obligations. In this regard, it could develop templates for the Declarations of Interest of its senior staff members and ensure that these Declarations of Interest are made available on its website.

¹³ <http://eca.europa.eu/portal/pls/portal/docs/1/18686746.PDF>



I would appreciate if the ESRB could report back to me by 31 May 2013 on its follow-up to the suggestions listed above.

A handwritten signature in black ink, which appears to read 'N. Diamandouros', is written over a horizontal line.

Nikiforos Diamandouros

Done in Strasbourg on 26 -02- 2013