BoA-D-2024-05

D E C I S I O N

given by

the
BOARD OF APPEAL
OF THE EUROPEAN SUPERVISORY AUTHORITIES

on

the request for public access to documents

in the appeal case brought by

NOVIS Insurance Company, NOVIS Versicherungsgesellschaft, NOVIS Compagnia di Assicurazioni, NOVIS Poisťovňa a.s. ("NOVIS")
[Appellant]

against

The European Insurance and Occupational Pensions Authority (EIOPA)
[Respondent]

APPEAL under Article 60 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council (the "ESAs Regulations")

Board of Appeal
Michele Siri (President and Co-Rapporteur)
Margarida Lima Rego (Vice President)
Gerben Everts
Christos Gortsos
Geneviève Helleringer
Carsten Zatschler (Co-Rapporteur)

Place of this decision: Paris

Date: 30 July 2024

Summary

The Appellant is an insurance company established in Slovakia and was directly supervised by Národná banka Slovenska (Slovak National Bank, "NBS") until its authorisation to conduct insurance business was withdrawn by the NBS with effect on 5 June 2023. The case concerns a request for public access to documents, based on Regulation No 1049/2001, by which the Appellant seeks public disclosure of nine documents held by EIOPA relating to a procedure under Article 17 of the EIOPA Regulation.

Regulation No 1049/2001 lays down specific rules for the right to access to documents enshrined in the EU Treaties and the Charter of fundamental rights and it aims to provide the widest possible access to documents. Even though, in principle, all documents of the institutions should be accessible to the public, certain public and private interests are protected by way of exceptions. The Regulation relies on a '*rule versus exception*' system: the rule is disclosure, and the exception is non-disclosure. Moreover, where only part of a document is covered by an exception, the Regulation requires partial access to be given to those parts which are not covered by an exception. In parallel, EU institutions and agencies are required to protect the confidential data of all entities, including business secrets.

EIOPA refused access to the entirety of the documents requested, invoking three of the exceptions provided for in Regulation No 1049/2001, namely the protection of court proceedings (second indent of Article 4(2)); the protection of inspections, investigations and audits (third indent of Article 4(2)); and the protection of EIOPA's decision-making process (second sub-paragraph of Article 4(3)). In addition, EIOPA considered that access to the requested documents had to be denied because they contained confidential information protected from disclosure pursuant professional secrecy obligations.

The Board of Appeal concludes that, at least as regards two of the documents, containing the final recommendation under Article 17(3) of the EIOPA Regulation, EIOPA's interpretation of the public access exceptions and of the obligation of professional secrecy were too wide and it appears that at least partial access should have been provided. As regards the remaining seven documents, the Board finds that there may well be good reasons to refuse access in order to protect the proper functioning of the European System of Financial Supervision ("ESFS"). The Board concurs with EIOPA that there must be a "safe space", comprising all supervisory authorities that are part of the ESFS, where all potential options and ideas can be put on the table and be freely discussed without needing to worry that they will be made public. It is nevertheless for EIOPA to examine to what extent partial access should have been granted in the light of the considerations set out in the present decision of the Board of Appeal.

On the basis of these considerations, the Board of Appeal has decided to allow the appeal and remit case to EIOPA for the adoption of an amended decision.

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1 By its Notice of Appeal, dated 5 December 2023, NOVIS Insurance Company, NOVIS Versicherungsgesellschaft, NOVIS Compagnia di Assicurazioni, NOVIS Poisťovňa a.s., ("**NOVIS**") appeals against the decision of the European Insurance and Occupational Pensions Authority ("**EIOPA**") EIOPA-23-684 of 6 September 2023 refusing to grant public access pursuant to Regulation (EC) No 1049/2001[1] to documents produced in the context of an EIOPA investigation in accordance with Article 17 of the EIOPA Regulation[2] into the conduct of the Národná banka Slovenska (Slovak National Bank, "**NBS**"), as national competent authority ("**NCA**") and direct supervisor of NOVIS (the "**Contested Decision**").

I – Background to the dispute

2 NOVIS, an insurance company established in Slovakia, has been active in several markets within the European Union (EU) and the European Economic Area, including in Slovakia, Germany, Italy, Austria, the Czech Republic and Iceland. As an insurance company registered in Slovakia, NOVIS was under the direct supervision of the NBS as the NCA.

A – *Article 17 proceedings*

3 During 2022, EIOPA conducted an investigation pursuant to Article 17(2) of the EIOPA Regulation into the conduct of the NBS relating to the supervision of NOVIS in accordance with the Solvency II Directive.[3]

4 The investigation resulted in EIOPA producing, on 22 April 2022, a final investigation report[4] and, subsequently, its Board of Supervisors addressing a recommendation, dated 16 May 2022, to the NBS pursuant to the first sub-paragraph of Article 17(3) of the EIOPA Regulation.[5] A summary of that recommendation was published on EIOPA's website on 19 May 2022.[6] According to the published summary, which did not identify NOVIS by name, a Slovakian insurance company under the supervision of the NBS as home supervisor had been non-compliant with Solvency II rules in relation to technical provisions, capital requirements, investments and system of governance over the past years. While the NBS had adopted several measures to remedy the situation, EIOPA considered the steps insufficient and decided to launch a breach of Union law investigation. The investigation concluded that the NBS had failed to take the necessary corrective measures defined by the Solvency II Directive in a timely

[1] 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, 31.5.2001, pp. 43-48.
[2] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ 2010 L 331, 15.12.2010, pp. 48-84, as amended by Regulation (EU) No 2175/2019 and currently in force.
[3] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (recast), OJ L 335, 17.12.2009, pp. 1-155, as in force.
[4] See document 4 as listed in paragraph 12 below.
[5] EIOPA-BoS-22-293; see documents 7-8 as listed in paragraph 12 below.
[6] At: https://www.eiopa.europa.eu/eiopa-issues-recommendation-narodna-banka-slovenska-2022-05-19_en.

and proportionate manner to address the firm's non-compliance and recommended that the NBS consider whether it had effectively exhausted the list of proportionate possible supervisory options or whether there was "an alternative supervisory choice that would be proportionate to the long duration and gravity of non-compliance". According to EIOPA's recommendation, the NBS should take the necessary steps and measures pursuant to the Solvency II Directive which "should result in either a structural and sustainable recovery of all infringements, or if appropriate or mandatory, a withdrawal of firm's authorisation".

5 On 27 May 2022, the NBS announced, pursuant to the second sub-paragraph of Article 17(3) of the EIOPA Regulation, an integrated supervisory strategy and initiated several supervisory actions, including the launch of a sanctioning procedure against NOVIS, in partial compliance with the EIOPA recommendation.[7]

6 Taking into account EIOPA's recommendation of 16 May 2022 and considering that the NBS was not fully compliant with the Solvency II Directive, the European Commission on 13 September 2022 issued a formal opinion pursuant to Article 17(4) of the EIOPA Regulation ordering the NBS to take the necessary measures to fully comply with that legislative act. Details of that opinion were published on the Commission's website on the same day.[8]

7 According to the Commission's press release, the Commission welcomed the actions taken by the NBS which had announced an integrated supervisory strategy and initiated several supervisory actions, including the launch of a sanctioning procedure against the insurer. The Commission however noted that "as long as no decisive supervisory measures" were taken, the NBS was in its opinion not compliant with the Solvency II Directive. For those reasons, the Commission considered that the NBS "should make additional efforts, in particular to finalise the sanctioning procedure and adopt final conclusive supervisory actions that ensure compliance with Union law".

8 After a first-instance decision by the Financial Market Supervision Unit of the NBS of 31 October 2022, the Banková rada Národnej banky Slovenska (Banking Board of the NBS) on 1 June 2023 withdrew NOVIS's authorisation to conduct insurance business with effect of 5 June 2023.[9]

9 On 16 June 2023, NOVIS announced that it was preparing legal action with suspensive effect against the NBS's withdrawal decision of 1 June 2023 and, on 28 August 2023, NOVIS further announced that it had submitted an appeal against the NBS's withdrawal decision on 4 August 2023.

B – *Request for access to documents*

10 On 30 June 2023, NOVIS addressed an application for public access to documents to EIOPA, in accordance with Article 2(1) of Regulation No 1049/2001 "as well as pursuant to the relevant provisions of the Charter and the [TFEU]".

[7] See document 9 as listed in paragraph 12 below.
[8] At: https://ec.europa.eu/commission/presscorner/detail/es/ip_22_5496.
[9] https://nbs.sk/vyroky/18575

11 That application was received by EIOPA on 3 July 2023 and was dealt with on the basis of Regulation No 1049/2001.

12 In its initial reply pursuant to Article 7(1) of Regulation No 1049/2001, dated 24 July 2023, EIOPA identified nine documents of relevance to NOVIS's application, which it listed as follows:

1.	17.03.2022	EIOPA-22-235 EIOPA_Draft investigation report
2.	05.04.2022	NBS' Opinion on the draft investigation report (EIOPA-22-235)
		Annex_NBS opinion on the draft report EIOPA-22-235 of 05 April 2022 No 100-000-340-384 [same as the preceding document but with different title]
3.	04.04.2022	Overview of infringements
4.	22.04.2022	EIOPA_Final investigation report_22 April 2022
5.	27.04.2022	NBS Opinion on draft recommendation
6.	27.04.2022	Annex to NBS Opinion on draft recommendation.doc
		EIOPA-BoS-22-284_NBS response_Annex. pdf [same as the preceding document but with different title]
7.	16.05.2022	EIOPA-BoS-22-293_EIOPA Recommendation
8.	16.05.2022	EIOPA-BoS-22-293_EIOPA Recommendation_SK
9.	27.05.2022	NBS confirmation of compliance with BoS recommendation (EIOPA-BoS-22-293)

13 By its initial reply, EIOPA refused access to the entirety of these documents, invoking three of the exceptions provided for in Article 4 of Regulation No 1049/2001, namely the protection of court proceedings (second indent of Article 4(2)); the protection of inspections, investigations and audits (third indent of Article 4(2)); and the protection of EIOPA's decision-making process, even after a decision had been taken (second sub-paragraph of Article 4(3)). EIOPA also concluded that NOVIS had not identified any specific circumstances establishing an overriding public interest in disclosure, as provided for in Article 4(2) and (3) of Regulation No 1049/2001, and also itself could not identify an overriding public interest.

14 In addition, EIOPA considered that access to the requested documents had to be denied because they contained confidential information protected from disclosure pursuant to Article 70 of the EIOPA Regulation.

15 On 16 August 2023, EIOPA registered NOVIS's confirmatory application for access to the documents at issue.

16 On 6 September 2023, EIOPA adopted the Contested Decision in response to the confirmatory application, confirming its decision to refuse access to the documents requested on the basis of the grounds linked to the exceptions to the right of access provided for in the second and third indents of Article 4(2) and on the basis of Article 4(3) of Regulation No 1049/2001, as identified in the initial reply, as well as Article 70 of the EIOPA Regulation.

II – Legal context

A – *Treaties and Charter of Fundamental Rights*

17 Article 1(2) of the Treaty on European Union (TEU) records that this Treaty "*marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen*".

18 Article 15 of the Treaty on the Functioning of the European Union (TFEU) provides:

"*1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.*

[...]

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

[...]"

19 Article 339 TFEU provides:

"*The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.*"

20 Article 41(1) and (2) of the Charter of Fundamental Rights of the European Union (the "**Charter"**), entitled "*Right to good administration*", provides as follows:

"*1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions."

21 Article 42 of the Charter, entitled "*Right of access to documents*", provides as follows:

"*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.*"

B – *EIOPA Regulation*

22 Recitals 26 to 28 of the Preamble to the EIOPA Regulation state:

"*(26) Ensuring the correct and full application of Union law is a core prerequisite for the integrity, transparency, efficiency and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial institutions in the Union. A mechanism should therefore be established whereby [EIOPA] addresses instances of non-application or incorrect application of Union law amounting to a breach thereof. That mechanism should apply in areas where Union law defines clear and unconditional obligations.*

(27) To allow for a proportionate response to instances of incorrect or insufficient application of Union law, a three-step mechanism should apply. First, [EIOPA] should be empowered to investigate alleged incorrect or insufficient application of Union law obligations by national authorities in their supervisory practice, concluded by a recommendation. Second, where the competent national authority does not follow the recommendation, the Commission should be empowered to issue a formal opinion taking into account [EIOPA]'s recommendation, requiring the competent authority to take the actions necessary to ensure compliance with Union law.

(28) Third, to overcome exceptional situations of persistent inaction by the competent authority concerned, [EIOPA] should be empowered, as a last resort, to adopt decisions addressed to individual financial institutions. That power should be limited to exceptional circumstances in which a competent authority does not comply with the formal opinion addressed to it and in which Union law is directly applicable to financial institutions by virtue of existing or future Union regulations."

23 Article 17 of the EIOPA Regulation provides EIOPA with a mechanism for dealing with breaches of Union law by the NCAs in their supervisory activities. Article 17(1)-(7) of the EIOPA Regulation set up a three-step mechanism for that purpose as described in the (just above-mentioned) Recitals 27 and 28.[10]

24 Article 17 of the EIOPA Regulation is worded as follows:

"*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, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15, in particular by failing to ensure that a financial*

[10] Order of 24 June 2016, *Onix Asigurări*, T-590/15, EU:T:2016:374, paras 5, 52, and see regarding the equivalent provisions of the ESMA Regulation, order of 10 August 2021, *Jakeliūnas v ESMA*, T-760/20, EU:T:2021:512, para 28.

institution satisfies the requirements laid down in those acts, [EIOPA] shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article.

2. *Upon request from one or more competent authorities, the European Parliament, the Council, the Commission, the relevant Stakeholder Group, or on its own initiative, including when this is based on well substantiated information from natural or legal persons, and after having informed the competent authority concerned, [EIOPA] shall outline how it intends to proceed with the case and, where appropriate, investigate the alleged breach or non-application of Union law.*

   Without prejudice to the powers laid down in Article 35, the competent authority shall, without delay, provide [EIOPA] with all information which [EIOPA] considers necessary for its investigation, including with regard to how the acts referred to in Article 1(2) are applied in accordance with Union law.

   Without prejudice to the powers laid down in Article 35, [EIOPA] may, after having informed the competent authority concerned, address a duly justified and reasoned request for information directly to other competent authorities whenever requesting information from the competent authority concerned has proven, or is deemed to be, insufficient to obtain the information that is deemed necessary for the purpose of investigating an alleged breach or non-application of Union law.

   The addressee of such a request shall provide [EIOPA] with clear, accurate and complete information without undue delay.

2a. *Without prejudice to powers under this Regulation, and before issuing a recommendation as set out in paragraph 3, [EIOPA] shall engage with the competent authority concerned where it considers such engagement appropriate in order to resolve a breach of Union law, in an attempt to reach agreement on actions necessary for the competent authority to comply with Union law.*

3. *[EIOPA] may, not later than 2 months from initiating its investigation, address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law.*

   The competent authority shall, within ten working days of receipt of the recommendation, inform [EIOPA] of the steps it has taken or intends to take to ensure compliance with Union law.

4. *Where the competent authority has not complied with Union law within 1 month from receipt of [EIOPA]'s recommendation, the Commission may, after having been informed by [EIOPA], or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law. The Commission's formal opinion shall take into account [EIOPA]'s recommendation.*

   The Commission shall issue such a formal opinion no later than 3 months after the adoption of the recommendation. The Commission may extend this period by 1 month.

   [EIOPA] and the competent authorities shall provide the Commission with all necessary information.

5. *The competent authority shall, within ten working days of receipt of the formal opinion referred to in paragraph 4, inform the Commission and [EIOPA] of the steps it has taken or intends to take to comply with that formal opinion.*

6. *Without prejudice to the powers of the Commission pursuant to Article 258 TFEU, where a competent authority does not comply with the formal opinion referred to in paragraph*

4 of this Article within the period specified therein, and where it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, [EIOPA] may, where the relevant requirements of the legislative acts referred to in Article 1(2) of this Regulation are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring it to take all necessary action to comply with its obligations under Union law, including the cessation of any practice.

The decision of [EIOPA] shall be in conformity with the formal opinion issued by the Commission pursuant to paragraph 4.

7. Decisions adopted in accordance with paragraph 6 shall prevail over any previous decision adopted by the competent authorities on the same matter.

When taking action in relation to issues which are subject to a formal opinion pursuant to paragraph 4 or to a decision pursuant to paragraph 6, competent authorities shall comply with the formal opinion or the decision, as the case may be.

8. In the report referred to in Article 43(5), [EIOPA] shall set out which competent authorities and financial institutions have not complied with the formal opinions or decisions referred to in paragraphs 4 and 6 of this Article."

25 Article 39 of the EIOPA Regulation, entitled "*Decision-making procedures*", provides in its second paragraph that EIOPA is to inform any addressees of a decision of its intention to adopt a decision, providing that addressee with an opportunity of expressing its views. Furthermore, Article 39(6) of that Regulation requires decisions of EIOPA taken pursuant to, notably, Article 17 of that Regulation to be made public, subject to certain safeguards. Article 39(2) of the EIOPA Regulation – unlike Article 39(6) thereof – is expressly made applicable *mutatis mutandis* to recommendations pursuant to the first sub-paragraph of Article 17(3) of the EIOPA Regulation.

26 Article 70(1) of the EIOPA Regulation provides as follows:

"*Members of the Board of Supervisors, and all members of the staff of [EIOPA], including officials seconded by Member States on a temporary basis, and all other persons carrying out tasks for [EIOPA] on a contractual basis, shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased.*"

27 Article 72 of the EIOPA Regulation provides that Regulation No 1049/2001 is to apply to documents held by EIOPA.

C – *Regulation No 1049/2001 on public access to documents*

28 The aim of Regulation No 1049/2001 is to improve the transparency of the decision-making process at EU level by implementing the right of access to documents under the first sub-paragraph of Article 15(3) TFEU and enshrined in Article 42 of the Charter.[11]

[11] Judgment of 12 July 2022, *Nord Stream 2 v Parliament and Council*, C-348/20 P, EU:C:2022:548, para 134.

29 Article 1 of Regulation No 1049/2001, entitled "*Purpose*", provides, in paragraphs (a) and (b) thereof:

"*The purpose of this Regulation is:*

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council [of the European Union] and Commission (hereinafter referred to as "the institutions") documents provided for in Article [15 TFEU] in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, […]".

30 Article 2 of Regulation No 1049/2001 is entitled "*Beneficiaries and scope*". Article 2(1) provides that any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, "*has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation*". Pursuant to Recital (8) of the Preamble to Regulation No 1049/2001, all agencies established by the institutions should also apply the principles laid down therein. Furthermore, Article 2(4), first sentence requires, without prejudice to the exceptions and rules for sensitive documents, documents to be "*made accessible to the public either following a written application or directly in electronic form or through a register*".

31 Article 4 of Regulation No 1049/2001, entitled "*Exceptions*", provides, in paragraphs 1 to 4 and 6 thereof:

"*1. The institutions shall refuse access to a document where disclosure would undermine the protection of:*

(a) the public interest as regards:

- *public security,*
- *defence and military matters,*
- *international relations,*
- *the financial, monetary or economic policy of the Community or a Member State;*

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- *commercial interests of a natural or legal person, including intellectual property,*
- *court proceedings and legal advice,*
- *the purpose of inspections, investigations and audits,*

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the

institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

[...]

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released."

32 Article 12(1) and (3) provides:

"*1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.*

[...]

3. Where possible, [...], notably documents relating to the development of policy or strategy, should be made directly accessible."

III – Procedure

33 Following NOVIS's Appeal of 5 December 2023, EIOPA lodged its Response on 10 January 2024. The written procedure was complemented by a Reply by NOVIS on 31 January 2024 and a Rejoinder by EIOPA on 14 February 2024.

34 A hearing was held on 5 April 2024 and was, in accordance with requests from both NOVIS and EIOPA, held in camera, with only the parties' representatives attending.

35 At the hearing, EIOPA accompanied its oral submissions with an 8-slide Power Point presentation. In response to a question from the Board of Appeal, NOVIS confirmed that it had no objection to the inclusion of the presentation in the case file. However, as the presentation had not been circulated in advance of the hearing, the Board of Appeal gave NOVIS the opportunity of submitting its observations in writing on that presentation, which NOVIS did by letter of 16 April 2024.

36 EIOPA in its written closing statement of 30 April 2024 requested that NOVIS's observations on the presentation should, due to their excessive length, be disregarded and excluded from the case file to the extent that they were broader in scope than intended by the Board. The

observations were just over 6 pages in length excluding cover page and introduction, and according to EIOPA's calculation comprised roughly 2 750 words.

37 The Board of Appeal does not consider that NOVIS's observations, while comprehensive, in their scope go beyond commenting on the slides themselves and therefore remain within the intended framework, so that there are no grounds that would warrant them being partially disregarded or excluded from the case file. The Board has therefore decided to retain them in full in the case file.

38 The Board of Appeal operates within a procedural framework that is in general open to the use by parties of supporting materials such as Power Point presentations, charts, chronologies or skeleton arguments. Where such materials are used, it is important that the other parties to the proceedings be given a full opportunity of commenting on them. For that reason, it is usually desirable for materials intended to be relied upon at a hearing to be served on other parties a sufficient amount of time (i.e., at least one working day) before the hearing itself. Where that is not done, the Board considers it appropriate to accord other parties a possibility of presenting their observations in writing after the hearing, while not straying beyond the matters covered in the materials in question or amounting to a new set of written observations. A flexible approach is appropriate bearing in mind that submissions of this type, necessarily being presented after the hearing, normally cannot be the subject of follow-up questions or requests for clarification from members of the Board.

39 As the parties did not have an opportunity of making oral closing statements during the hearing, it was agreed that they should be afforded the opportunity of making closing statements in writing. Written closing statements of 1 500 words in length were duly filed by both parties on 30 April 2024, resulting in the appeal being lodged as of that date for the purposes of Article 20 of the Rules of Procedure of the Board of Appeal[12] and Article 60(2) of the EIOPA Regulation.

IV – Forms of order sought

40 NOVIS requests that the Board of Appeal to:

- repeal the Contested Decision and to remit the matter back to EIOPA; and
- order EIOPA to fully bear the costs of the proceedings.

41 EIOPA requests that the Appeal be dismissed as unfounded and that the costs of the proceedings, including any legal representation costs by EIOPA be borne by NOVIS.

42 Both NOVIS and EIOPA moreover request in accordance with Article 26 of the Board of Appeal's Rules of Procedure that all submissions and annexes received by the Board of Appeal in connection with the procedure be handled confidentially.

[12] At: https://www.eiopa.europa.eu/system/files/2021-01/boa-rules-of-procedure-2020.pdf.

V – Admissibility

43 The Appeal is admissible to the extent that the Contested Decision was adopted on the basis of Article 8 of Regulation No 1049/2001. That is uncontested between the parties.

44 Article 60 of the EIOPA Regulation confers jurisdiction on the Board of Appeal to hear appeals, notably, against any decision taken by EIOPA in accordance with the Union acts referred to in Article 1(2) of the EIOPA Regulation. That provision in turn requires EIOPA to act within the powers conferred by the EIOPA Regulation itself, which in its Article 72(1) provides for the applicability of Regulation No 1049/2001 to documents held by EIOPA. In addition, Article 72(3) of the EIOPA Regulation includes an express reference to the Board of Appeal's competence.

45 To the extent that NOVIS maintains in its arguments in rebuttal that its application to access the relevant documents was not limited to Regulation No 1049/2001, it should be pointed out that the Board of Appeal does not have jurisdiction to rule on compliance by EIOPA with the Charter on matters which do not feature among the legal bases mentioned in Article 60 of the EIOPA Regulation.

46 It is true that the Board of Appeal is bound to ensure compliance with the Charter in the context of appeals against decisions falling within its jurisdiction under Article 60 of the EIOPA Regulation.

47 The Board of Appeal must therefore interpret Regulation No 1049/2001 notably in the light of the right of access to documents enunciated in Article 42 of the Charter. By virtue of Article 52(2) of the Charter, rights recognised by the Charter for which provision is made in the Treaties are however to be exercised under the conditions and within the limits defined by the Treaties. Article 15(3) TEU makes provision for the right of access to documents and to the effect that the general principles and limits on grounds of public or private interest governing this right of access to documents are to be determined by the European Parliament and the Council by means of regulations. Regulation No 1049/2001 was in turn adopted in order to lay down those general principles and limits, as recorded in its fourth Recital.

48 The right of access to the file provided for in Article 41(2)(b) of the Charter is by contrast distinct and independent from the right of access to documents provided for in Regulation No 1049/2001. The right of access to file is an individual right accruing to every person as part of the right to have his or her affairs handled impartially and fairly by Union institutions and agencies.

49 In the context of an application for public access to documents pursuant to Regulation No 1049/2001, any specific personal interest on the part of the applicant is irrelevant, and also cannot constitute an overriding *public* interest. Therefore, the fact that NOVIS asserts its fundamental rights as based, for example, on its right of access to its file pursuant to Article 41(2)(b) of the Charter, cannot advance its application under Regulation No 1049/2001. Such

individual rights of an applicant cannot be exercised by having recourse to the mechanisms for public access to documents implemented by Regulation No 1049/2001.[13]

50 Accordingly, any application from NOVIS based on Article 41(2)(b) of the Charter with no connection with the legal bases of Article 60 of the EIOPA Regulation does not give rise to a right of appeal to the Board of Appeal. Such claims fall within the jurisdiction of the EU Courts by virtue of Article 61(1) of the EIOPA Regulation. While it may not be possible to challenge a refusal of access to the file in isolation where that refusal forms part of an ongoing preliminary administrative procedure,[14] at any rate after a final decision is adopted it should be possible for an applicant to either challenge the decision adopted at the outcome of that procedure as being vitiated by the refusal of access to the file[15] or, where that is not possible, as the case may be, request access to the file based directly on Article 41(2)(b) of the Charter.

51 In the light of these considerations, the Board of Appeal will limit itself to an assessment of the grounds of appeal as they have a direct link with Regulation No 1049/2001 as the basis for the Contested Decision.

VI – Legal assessment

52 It is appropriate in the first instance to set out the general principles underpinning the framework for access to documents under Regulation No 1049/2001 as set out in the case-law and then consider the interrelationship between that framework and the protection of confidential information under Article 70 of the EIOPA Regulation concerning professional secrecy, before turning to the application of those principles to the documents at issue.

A – *The framework for access to documents pursuant to Regulation No 1049/2001*

53 Regulation No 1049/2001 seeks, as indicated in Recital 4 of the Preamble and Article 1, to give the public a right of access to documents which is as wide as possible.

54 Pursuant to Recital 11 of the Preamble to Regulation No 1049/2001, even though, in principle, all documents of the institutions should be accessible to the public, certain public and private interests should be protected by way of exceptions. Notably: "*The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks.*"

55 When EIOPA is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001.

[13] Judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paras 48 and 52, and of 27 April 2023, *Aeris Invest v ECB*, C-782/21 P, EU:C:2023:345, paras 39-40.
[14] Judgment of 4 October 2018 in *Daimler v Commission*, T-128/14, EU:T:2018:643, paras 67-68.
[15] *Ibid*., Judgment of 4 October 2018 in *Daimler v Commission*, T-128/14, EU:T:2018:643, paras 72-74.

56 In view of the objectives pursued by Regulation No 1049/2001, those exceptions must be interpreted and applied strictly.[16]

57 As regards the exceptions laid down in Article 4(2) of Regulation No 1049/2001, the examination to be undertaken by EIOPA when it is asked to disclose a document must be carried out in three stages:[17]

- First, EIOPA must satisfy itself that the document which it is asked to disclose does indeed relate to one of the protected categories and, if so, it must decide which parts of it are actually concerned and may, therefore, be covered by that exception.

- Second, EIOPA must examine whether disclosure of the parts of the document in question which have been identified as relating to one of the protected categories 'would undermine the protection' of that advice, that notion having to be interpreted by reference to the purpose and general scheme of the rules of which it forms part. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.

- Third, if EIOPA takes the view that disclosure of a document would undermine the protection as defined above, it must ascertain whether there is any overriding public interest justifying disclosure despite the fact that one of the protected interests would be undermined. One of the relevant public interests consists in the advantages stemming from increased openness, which guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

58 If EIOPA decides to refuse access to a document which it has been asked to disclose, it must explain how access to that document could specifically and effectively undermine the interest protected by an exception relied on by it. It is, in principle, open to EIOPA to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. However, it is incumbent on EIOPA to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose.[18]

59 In essence, Regulation No 1049/2001 relies on a '*rule versus exception*' system. The rule is disclosure, and the exception is non-disclosure.[19]

[16] Judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, para 36.
[17] See, by analogy judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paras 37-45.
[18] Judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paras 49-50.
[19] See opinion of Advocate General Bobek of 6 October 2021 in *Nord Stream 2 v Parliament and Council*, C-348/20 P, EU:C:2021:831, para 125.

B – *The relationship between the protection of confidential information under Article 70 of the EIOPA Regulation and the applicability of Regulation No 1049/2001 under Article 72 of the EIOPA Regulation*

60 EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, which is a general principle of EU law, to which concrete expression is given, inter alia, in Article 339 TFEU[20] and Article 41(2)(b) of the Charter, to protect the confidential data of all entities, including business secrets.

61 Article 70 of the EIOPA Regulation can be seen as a further concretisation, in the context of secondary EU law, of this general principle of professional secrecy and reflects the concern expressed in Recital (62) of the Preamble to that Regulation that "*it is essential that business secrets and other confidential information be protected*", and that "*the confidentiality of information made available to [EIOPA] and exchanged in the network of supervisory authorities should be subject to stringent and effective confidentiality rules.*"

62 Simultaneously, Article 72(1) of the EIOPA Regulation provides, in line with the desire expressed in Recital (64) of the Preamble to that Regulation to ensure the transparent operation of EIOPA, that Regulation No 1049/2001, which according to its Article 1(a) aims to provide the "*widest possible access to documents*", is to apply to documents held by EIOPA.

63 As appears from Recital (1) of the Preamble to Regulation No 1049/2001, that Regulation reflects the intention expressed in the second paragraph of Article 1 TEU to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. Furthermore, pursuant to Recital (2) of the same Preamble, the right of public access to documents of the institutions is related to their democratic nature. That core EU objective is also reflected in Article 15(1) TFEU, which provides that the institutions, bodies, offices and agencies of the EU are to conduct their work as openly as possible, that principle of openness also being expressed in Article 10(3) TEU and in Article 298(1) TFEU.[21] Finally, Article 15(3) TFEU and Article 42 of the Charter enshrine the right of access to documents.

64 In its *Baumeister* judgment,[22] the Court of Justice had an opportunity of clarifying the scope of the professional secrecy obligations, and the notion of "*confidential information*" in the context of the Markets in Financial Instruments Directive ("**MiFID**").[23] It held that the effective monitoring within that framework requires that both the supervised entities and the competent authorities can have confidence that the confidential information provided will, in principle,

[20] Judgment of 15 July 2021, *Commission v Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, para 109 and the case-law cited.

[21] Judgment of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, para 74 and the case-law cited.

[22] Judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464.

[23] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ 2004 L 145, 30.4.2004, pp. 1-44. This legislative act has been repealed, with effect from 3 January 2018, by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (OJ L 173, 12.6.2014, pp. 349-496, "**MiFID II**"). Article 76 of MiFID II reflects (almost *verbatim*) Article 54 MiFID.

remain confidential.[24] That case concerned Article 54 of MiFID, entitled "*professional secrecy*", which – even if its wording differs in some respects from that of Article 70 of the EIOPA Regulation – is concerned with analogous issues, also in the context of financial undertakings. In particular, the core prohibition enunciated by both provisions is drafted in largely identical terms and requires that "*confidential information*" received in the course of their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form such that individuals cannot be identified.

65 The Board of Appeal considers that, in particular, the following conclusions of the Court of Justice in its *Baumeister* judgment regarding Article 54 of MiFID are transposable by analogy to Article 70 of the EIOPA Regulation:[25]

- the fact that Article 70(2) of the EIOPA Regulation explicitly refers to "confidential information" only and not, generically, to "information", implies that a distinction should be drawn between confidential information and other information that is not confidential; thus, not all information held in a supervision file, including correspondence with other bodies, could automatically be considered to be covered by the obligation of professional secrecy;[26]

- the notion of "confidential information" must in principle be taken as covering information which (cumulatively) meets two conditions: (i) it is not public, and (ii) its disclosure is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the European System of Financial Supervision ("**ESFS**"),[27] which includes notably information relating to the supervision methodology and strategy employed by the competent authorities;[28] and

- Article 70 of the EIOPA Regulation must be taken as exhaustively listing the specific cases where, exceptionally, the general prohibition of disclosure of confidential information does not preclude their communication or use.[29]

66 A material distinction between the two legislative acts is that, whereas the EIOPA Regulation is directly applicable and seeks to set out precisely the framework within which EIOPA is to operate, MiFID was a Directive, addressed to the Member States, who accordingly had the discretion to decide how to deal with information other than "*confidential*" information. Member States in particular remained free to decide to extend the protection against disclosure to the entire contents of the supervision files of the competent authorities or, conversely, to permit access to information that was in the possession of the competent authorities which was

[24] Judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, para 31 and case-law cited.
[25] The General Court used the same approach in its judgment of 1 June 2022, *Aeris Invest*, T-628/17, EU:T:2022:315, at paras 370-373, 383-388 and 391, concerning Article 88 of Regulation 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, (OJ 2014 L 225, 30.7.2014, pp. 1-90, as in force, SRMR).
[26] Judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paras 25, 34 and 46.
[27] *Ibid*., para 35.
[28] *Ibid*., paras 35 and 56.
[29] *Ibid*., para 38.

not "*confidential*".[30] By contrast EIOPA enjoys no such residual rulemaking powers. Article 72 of the EIOPA Regulation makes specific reference to Regulation No 1049/2001, which is applicable to documents held by EIOPA, thus removing any discretion as regards how information other than "*confidential*" information is to be dealt with by EIOPA.

67 There is moreover a degree of overlap between Article 70 of the EIOPA Regulation and the exceptions covered by Article 4 of Regulation No 1049/2001, which require institutions to refuse disclosure under the circumstances set out therein:

– on the one hand, the protection of commercial interests of natural or legal persons, as referred to by the Court of Justice at paragraph 35 of its *Baumeister* judgment, is one of the bases precluding the institution or authority concerned from disclosing a document pursuant to the first indent of Article 4(2) of Regulation No 1049/2001 (which is not invoked in the present case);

– on the other hand, issues regarding the proper functioning of supervision or monitoring as referred to by the Court of Justice at paragraph 35 of its *Baumeister* judgment can be subsumed under the protection of the purpose of investigations pursuant to the third indent of Article 4(2), as well as of the decision-making process, pursuant to Article 4(3) of Regulation No 1049/2001.

68 Given that both the exceptions from public disclosure laid down in Regulation No 1049/2001 and the protection of professional secrecy as interpreted by the Court of Justice at paragraph 35 of its *Baumeister* judgment in principle fall to be applied to documents held by EIOPA and serve overlapping purposes, it is desirable that they be interpreted in a way that is consistent with each other.[31]

69 The only notable distinction in this respect is that Articles 4(2) and 4(3) of Regulation No 1049/2001 can in certain circumstances require disclosure where there is an "*overriding public interest*", whereas the exceptions from the principle of professional secrecy must, in accordance with the principles underlying the Court of Justice's *Baumeister* judgment, be taken to be exhaustively listed in Article 70 of the EIOPA Regulation. As *lex specialis*, that Article 70 must thus be considered as displacing the possibility of relying on any overriding public interest and instead limiting the cases of disclosure of information deemed "*confidential*" to those listed therein.[32]

70 It is in the light of these considerations that the legal framework falls to be applied to the documents at issue.

[30] *Ibid*., para 44.

[31] See, by analogy, judgments of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, para 84, and of 1 September 2021, *Homoki v Commission*, T-517/19, EU:T:2021:529, para 56.

[32] See, by analogy, judgments of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, para 46, and of 6 October 2021, *Aeris Invest v ECB*, T-827/17, EU:T:2021:660, para 196; the latter provides that a specific and individual examination of each item of information concerned is necessarily required, which cannot be circumvented by the application of a general presumption of confidentiality.

C – *Application to the documents at issue*

71 It is appropriate to begin with considering the extent to which the obligation of professional secrecy pursues objectives not specifically addressed by the exceptions in Regulation No 1049/2001 invoked by EIOPA preclude disclosure of the documents at issue. The exceptions invoked will then be dealt with in turn, interpreted consistently with the notion of "*confidential*" information as interpreted in the *Baumeister* judgment.

1. <u>Obligation of professional secrecy</u>

72 EIOPA has submitted that all nine documents identified, as listed in paragraph 12 of this decision, constitute in their entirety confidential information for the purposes of Article 70 of the EIOPA Regulation. NOVIS has contested that view.

Professional secrecy in relation to information concerning the applicant itself

73 In the Contested Decision, EIOPA's conclusion that all nine documents were confidential was based, first, on the consideration that all the documents at issue contain "*specific granular, non-aggregate, commercial and financial data about a financial institution (NOVIS), not presented in summary form.*"

74 This argument must be rejected, as NOVIS's own information is by definition not "confidential information" via à vis itself, and EIOPA also cannot oppose to an applicant requesting the granting of public access to documents the confidentiality of information relating to that applicant itself. By necessary implication, an application for public access pursuant to Regulation No 1049/2001 in respect of information concerning the applicant must be taken as involving a waiver of confidentiality in relation to that applicant as disclosure pursuant to Regulation No 1049/2001 indeed produces *erga omnes* effects involving disclosure to the public at large, as EIOPA has correctly pointed out. Where doubts arise on the part of EIOPA as to whether an applicant appreciates and intends these consequences of requesting public access, it is open to EIOPA to request separate written confirmation of the waiver of confidentiality. However, EIOPA cannot categorically oppose to a party professional secrecy to protect that party's own confidential information.

75 Moreover, EIOPA has rightly not even invoked the protection of commercial interests of natural or legal persons as precluding the disclosure pursuant to the first indent of Article 4(2) of Regulation No 1049/2001.

Professional secrecy in relation to information concerning the NBS and the proper functioning of supervision

76 In addition, second, EIOPA considered that the information at issue meets the "*confidentiality test*" set out by the Court of Justice at paragraph 35 of its *Baumeister* judgment[33] in that it

[33] See the second indent of paragraph 65 above.

constitutes non-public material exchanged between EIOPA and the NBS for the purposes of an investigation and their disclosure would affect adversely:

– the interests of the NBS, in particular in the light of the explicitly and publicly stated intention of NOVIS to take legal action against the NBS's decision to withdraw its authorisation; disclosure would therefore compromise the principle of equality of arms between the parties by putting the NBS at disadvantage in the context of such legal proceedings; and

– EIOPA's ability "*to generally trigger a proportionate response to instances of incorrect application or non-application of Union sectoral legislation, in particular the Solvency II Directive, in view of ensuring the proper functioning of the supervisory system provided thereunder.*"

77 Having regard to the overlap between Article 70 of the EIOPA Regulation and the exceptions covered by Article 4 of Regulation No 1049/2001, as well as the desirability that both sets of provisions be interpreted in a way that is consistent with each other,[34] it is appropriate to deal with these submissions in the context of the examination of the corresponding exceptions of Article 4 of Regulation No 1049/2001.

2. Protection of court proceedings

78 Pursuant to the second indent of Article 4(2) of Regulation No 1049/2001, access to a document is to be refused where disclosure would, *inter alia*, undermine the protection of court proceedings, unless there is an overriding public interest that would justify disclosure of the document at issue.

79 In the Contested Decision, EIOPA relied on the fact that NOVIS had announced that it would consider legal steps against the decision of the NBS to withdraw NOVIS's authorisation to conduct insurance business. EIOPA referred to "*the legal character of the BUL investigation, the specific dynamics of the sui generis follow-up procedure of the NBS and its independent follow-up findings leading to the adoption of the withdrawal decision*", as it would be likely that a preliminary ruling on questions of the application of the Solvency II Directive would be sought at a later time. EIOPA concludes that the disclosure of the relevant documents would "*seriously compromise the equality of arms between the parties by putting EIOPA at disadvantage in relation to a related preliminary ruling proceeding in which EIOPA could participate.*"

80 As a preliminary point, in the context of the procedural framework set up by Articles 7 and 8 of Regulation No 1049/2001, it is indeed, as EIOPA submits, only the decision to reject a confirmatory application that is a reviewable act for the purposes of Article 263 TFEU.[35] The moment in time to be taken into account for the purposes of assessing the Appeal is therefore the date of the rejection of the confirmatory application, i.e., the time of adoption of the

[34] See paragraph 68 above.

[35] Judgment of 26 January 2010, *Internationaler Hilfsfonds v Commission*, C-362/08 P, EU:C:2010:40, paras 53-54, and Order of 15 February 2012, *Internationaler Hilfsfonds v Commission*, C-208/11 P, EU:C:2012:76, paras 30-31.

Contested Decision. The fact that by that time NOVIS had publicly stated its intention of challenging the NBS' decision to withdraw its authorisation can thus be relevantly taken into account in assessing the need to protect court proceedings.

81 It however also follows from the broad definition of the notion of "document", as set out in Article 3(a) of Regulation No 1049/2001, as well as from the existence and wording of the exception in the second indent of Article 4(2) relating to the protection of court proceedings, that the EU legislature did not intend to exclude the institutions' litigious activities from the right of access to documents per se, but only under specific circumstances and prerequisites, namely in case disclosure would actually undermine the specifically protected interest.[36]

82 In accordance with the case-law, the protection of court proceedings requires, in particular, that the principle of equality of arms is observed and that the sound administration of justice and the integrity of court proceedings are guaranteed.[37] The integrity of court proceedings and the principle of equality of arms between the parties could be seriously compromised if parties were to benefit from privileged access to internal information belonging to the other party and closely connected to the legal aspects of pending or potential but imminent proceedings.[38] A distinction must be drawn in this respect between the protection of EIOPA as author of some of the nine documents concerned, namely documents 1, 3, 4, 7 and 8, as listed in paragraph 12 of this decision above, (dealt with under a, below), and the protection of the NBS as the source of documents 2, 5, 6 and 9 (dealt with under b, below).

a) Protection of potential court proceedings involving EIOPA

83 In the case of a document drawn up by an EU institution or other body, the General Court has held in its *Veritas* judgment[39] that the undermining of the principle of equality of arms and of the ability of the body concerned to defend itself can be brought to bear only in the context of proceedings in which it takes part, that is to say, proceedings taking place in principle before the EU Courts.

84 In its *Philip Morris* judgments,[40] which have been extensively cited by both parties in the course of the proceedings, the General Court examined the extent to which the exception set out in the second indent of Article 4(2) of Regulation No 1049/2001 relating to, *inter alia*, the protection of court proceedings, applies to documents other than documents drawn up solely for the purposes of specific court proceedings, such as pleadings, i.e., the connection of which to court proceedings is looser.[41] The General Court considered that there were also documents other than the pleadings themselves whose disclosure is liable, in the context of specific proceedings,

[36] Judgments of 12 October 2022, *Saure v Commission*, T-524/21, EU:T:2022:632, para 43; and of 27 February 2015, *Breyer v Commission*, T-188/12, EU:T:2015:124, para 43 and the case-law cited; confirmed by the judgment of the Court of 18 July 2017, *Commission v Breyer*, C-213-/15 P, EU:C:2017:563.

[37] Judgment of 24 January 2024, *Veneziana Energia Risorse Idriche Territorio Ambiente Servizi SpA (Veritas) v Commission*, T-602/22, EU:T:2023:442, para 54, citing judgment of 6 February 2020, *Compañía de Tranvías de la Coruña v Commission*, T-485/18, EU:T:2020:35, para 38.

[38] Judgment of 6 February 2020, *Compañía de Tranvías de la Coruña v Commission*, T-485/18, EU:T:2020:35, para 42, and the case-law cited.

[39] Judgment of 24 January 2024, *Veneziana Energia Risorse Idriche Territorio Ambiente Servizi SpA (Veritas) v Commission*, T-602/22, EU:T:2023:442, para 70.

[40] Judgments of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483 and T-18/15, EU:T:2016:487.

[41] *Philip Morris v* Commission, T-18/15, para 60.

to compromise the principle of equality of arms between parties, which is a corollary of the very concept of a fair trial. That principle could in particular be seriously compromised if parties were to benefit from privileged access to internal information belonging to the other party which is closely connected to the legal aspects of pending or potential (but imminent) proceedings.[42]

85 In order for this exception to apply to this wider category of documents, it is necessary that the requested documents should have a relevant link either with a dispute pending before the EU Courts, in respect of which the institution or agency concerned is invoking that exception, or with proceedings pending before a national court, on condition that they raise a question of interpretation or validity of an act of EU law (such as the Solvency II Directive) so that, having regard to the context of the case, a reference for a preliminary ruling appears particularly likely.[43] Furthermore, pursuant to the General Court, the reference for a preliminary ruling must be reasonably foreseeable and not be purely hypothetical;[44] at the same time, no "actual risk" is required.

86 In its response to the Notice of Appeal,[45] EIOPA claims that it has identified the link between the investigation under Article 17 of the EIOPA Regulation and the (potential) court proceedings, this causality being sufficient for the purposes of the exemption under the second indent of Article 4(2) of Regulation No 1049/2001.

87 The Board of Appeal considers that, given the case-law of the EU Courts concerning the nature of recommendations adopted pursuant to the first sub-paragraph of Article 17(3) of the EIOPA Regulation, EIOPA cannot legitimately invoke the exception in relation to the protection of court proceedings to shield its (final) recommendation, i.e., documents 7 and 8, from public scrutiny on the basis of a fear that they might influence court proceedings. It in fact appears from the case-law that such recommendations, firstly, must be taken into account by national courts and, secondly, that the validity of recommendations can in principle be subject to judicial review in front of the Court of Justice. Both these mechanisms would be frustrated if EIOPA could refuse access to recommendations on the basis of a supposed need to protect court proceedings.

88 As regards the first point, in relation to an analogous breach of Union law procedure under Article 17 of the EBA Regulation,[46] the Court of Justice has held that, even if recommendations of the EBA based on Article 17(3) of the EBA Regulation are not intended to produce binding legal effects, and therefore cannot be challenged in the context of an action for annulment

[42] *Ibid.*, para 65.
[43] Judgments of 24 January 2024, *Veneziana Energia Risorse Idriche Territorio Ambiente Servizi SpA (Veritas) v Commission*, T-602/22, EU:T:2023:442, para 69, citing judgments of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paras 88-89; of 6 February 2020, *Compañía de Tranvías de la Coruña v Commission*, T-485/18, EU:T:2020:35, para 42, first and second sentences; and of 7 February 2018, *Access Info Europe v Commission*, T-852/16, EU:T:2018:71, para 67.
[44] Judgment of 7 February 2018, *Access Info Europe v Commission*, T-851/16, EU:T:2018:69, para 66.
[45] On p. 11, second indent.
[46] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ 2010 L 331, 15.12.2010, pp. 12-47, as in force. (the "**EBA Regulation**").

pursuant to Article 263 TFEU,[47] national courts must nevertheless take them into consideration, in particular in the context of a dispute arising out of an alleged non-application or incorrect application of Union law giving rise to the investigation procedure which led to the adoption of that recommendation.[48]

89 As regards the second point, according to the case-law, it is possible for individuals to also challenge the validity of recommendations issued pursuant to Article 17(3) of the ESA Regulations governing the European Supervisory Authorities ("**ESAs**", including EIOPA) by way of a preliminary reference to the Court of Justice. While Article 263 TFEU excludes the Court's review of acts having the nature of a recommendation in the context of an action for annulment, it follows from Article 19(3)(b) TEU and the first paragraph of Article 267(b) TFEU that the Court has jurisdiction to give preliminary rulings on the interpretation and validity of acts of the EU institutions and agencies, without any exception.[49]

90 It can be added that EIOPA has published a summary of its recommendation (i.e., documents 7 and 8) on its website.[50] This partial publication, as well as the decision to expressly permit disclosure of documents 2, 8 and 9 in the context of court proceedings pending in national courts between NOVIS and the NBS, is *prima facie* inconsistent with EIOPA's contention that those documents must in their entirety be precluded from disclosure in order to guarantee the protection of court proceedings. It is inconsistent to invoke the protection of court proceedings as a reason for not permitting public disclosure of documents while at the same time making those documents available to the very court in front of which the proceedings are supposed to be protected by that principle.

91 By contrast, as regards documents 1, 3 and 4, it is in principle conceivable that EIOPA's position in court proceedings could be undermined if, for example, the validity of its recommendation pursuant to the first sub-paragraph of Article 17(3) of the EIOPA Regulation were to be challenged and if those documents contained considerations which were at odds with the (final) recommendation adopted (documents 7 and 8). Similar concerns could arise if these documents relied on an interpretation of secondary EU law, such as the Solvency II Directive, different from that finally espoused in the recommendation, or expressed doubts regarding the strength of the legal reasoning, concerning the procedural basis or alternative views regarding the position adopted.

92 As the General Court held in its *Philip Morris* judgments, the principle of equality of arms requires that EU institutions and agencies should be able to defend their position in court proceedings without having regard to the positions taken internally concerning the legality of the various options envisaged in the context of the drawing up of an act concerned by the proceedings.[51] Accordingly, disclosure of such documents to the public while court proceedings concerning the interpretation and the legality of the act in question are pending could

[47] Judgment of 25 March 2021, *BT v Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, para 82. According to its Advocate General Campos Sánchez-Bordona, recommendations under Article 17(3) are also open to challenge by those concerned before the Board of Appeal, notwithstanding their non-final nature and lack of binding legal effects: see Opinion of 17 September 2020, EU:C:2020:729, paras 81-82.

[48] Judgment of 25 March 2021, *BT v Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paras 79-81.

[49] *Ibid.*, Judgment of 25 March 2021, *BT v Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paras 82-83 and 101.

[50] Paragraph 4 of this decision, above.

[51] Judgment of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paras 73, 97.

compromise the institution's or agency's defensive position and the principle of equality of arms, in so far as it would reveal the internal legal positions of its services on contentious issues although no similar obligation would be imposed on the other party.[52]

93 It must thus be assessed to what extent the content of documents 1, 3 and 4 is at odds with the recommendation finally adopted by EIOPA, or relied on an interpretation of secondary EU law, such as the Solvency II Directive, different from that finally espoused in the recommendation, or expressed doubts or alternative views regarding the position adopted.

b) Protection of court proceedings involving the NBS

94 It is in the context of its submissions in relation to professional secrecy that EIOPA has relied on the interests of the NBS, arguing that disclosure of the documents concerned would compromise the principle of equality of arms between the parties by putting the NBS at disadvantage in the context of legal proceedings.[53]

95 While EIOPA has not expressly invoked the exception relating to the protection of court proceedings in relation to the NBS, there appears to be no reason of principle why that exception should not be capable of application also to the NBS in relation notably to the protection of any proceedings brought against its decision to withdraw NOVIS's authorisation to conduct insurance business. Indeed, as EIOPA has submitted, the protection of Article 4(2) is not limited to proceedings before the EU Courts or to proceedings before the national courts that may lead to a preliminary ruling.[54]

96 In this respect, it would in principle have been incumbent on EIOPA by virtue of Article 4(4) of Regulation No 1049/2001 to consult the NBS with a view to assessing whether an exception to disclosure is applicable in relation to documents emanating from the NBS, unless it is clear that the document shall or shall not be disclosed. According to the case-law, consultation of the third party is, as a general rule, a precondition for determining whether the exceptions to the right of access provided for in Article 4(1) and (2) of Regulation No 1049/2001 are applicable in the case of third-party documents.[55] Even though it is not apparent that EIOPA has carried out such a consultation, in the context of which in particular the question of whether partial access to the documents concerned might have been explored with the NBS, there is no obstacle in principle to such a consultation being carried out in the context of a renewed assessment by EIOPA.

97 It is apparent that also the NBS should in principle be able to defend its position in court proceedings without having regard to, or explaining, the positions taken in the context of the Article 17 investigation carried out by EIOPA. Therefore, unless a court considers those matters of relevance for proceedings and accordingly orders disclosure, parts of documents of the NBS

[52] *Ibid.*, para 98.
[53] See the first indent of para 76 above.
[54] Judgment of 3 October 2012, *Jurašinović v Council*, T-63/10, EU:T:2012:516, paras 58-60 and 65. According to para 58, "*no argument based on the wording of Article 4 can lead to the conclusion that the court proceedings referred to under the second indent of Article 4(2) are solely proceedings before the Courts of the European Union or the courts of the Member States*."
[55] *Ibid.*, Judgment of 3 October 2012, *Jurašinović v Council*, T-63/10, EU:T:2012:516, para 83 and the case-law cited.

that disclose that this NCA might initially have taken a different legal position from EIOPA are precluded from being disclosed pursuant to the second indent of Article 4(2) of Regulation No 1049/2001. It is therefore conceivable that parts of documents 2, 5 and 6 may be covered by this exception from the general duty of disclosure. Similarly, documents 3 and 4 authored by EIOPA, to the extent that they reproduce or respond to such legal positions of the NBS, may equally be covered by that exception if the disclosure of those documents were to in turn reveal an unsuccessful stance taken by NBS in the context of the EIOPA investigation.

98 The same conclusion applies pursuant to the obligation of professional secrecy incumbent on EIOPA by virtue of Article 70 of the EIOPA Regulation, which, as already set out at paragraph 65 above, does not proceed on the basis that all information held in a supervision file or exchanged between a competent authority and EIOPA should automatically be considered to be covered by the obligation of professional secrecy,[56] but rather applies in as far as relevant here to the extent that disclosure would affect adversely NBS' position in in court proceedings.

99 By contrast it is, *prima facie*, more difficult to see how document 9, entitled[57] "NBS confirmation of compliance with BoS recommendation" and dated 27 May 2023, i.e., nine days after the adoption of the EIOPA recommendation, would contain information liable to undermine the protection of court proceedings or need to be protected on the basis that its disclosure would adversely affect NBS' position in in court proceedings. Subject to verification by EIOPA, it appears at first sight unlikely that such a document would contain a legal position of the NBS that would be at odds with the EIOPA recommendation. It is only to the extent that this document makes, at least partially, reference to information contained in previous documents precluded from being disclosed pursuant to the second indent of Article 4(2) of Regulation No 1049/2001, that the latter provision would also cover document 9.

c) Interim conclusion concerning the protection of court proceedings

100 In the light of the above considerations, it appears that EIOPA was wrong to consider that documents 7, 8 and 9 are covered, in any event in their entirety, by the second indent of Article 4(2) of Regulation No 1049/2001 or the concurrent obligation of professional secrecy under Article 70 of the EIOPA Regulation.

101 This conclusion is, as pointed out a paragraph 90 above, corroborated by EIOPA's decision to publish a summary of its recommendation (i.e., documents 7 and 8) on its website and to expressly permit disclosure of documents 2, 8 and 9 in the context of court proceedings pending in national courts between NOVIS and the NBS. It is indeed inconsistent to invoke the protection of court proceedings as a reason for not permitting public disclosure of documents while at the same time making those documents available to the very court in front of which the proceedings are supposed to be protected by that principle.

102 On the other hand, to the extent that documents 1-6 contained considerations which were at odds with the final recommendation adopted, or which disclose that the NBS or EIOPA might initially have taken a different legal position from the one finally adopted in the

[56] Judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paras 25 and 46.
[57] It appears that the title given to the document does not fully reflect its contents to the extent that the NBS – at least in the Commission's view – complied only partially with the recommendation.

recommendation, the protection of court proceedings would require those documents to be treated confidentially.

3. Protection of the purpose of investigations

103 Pursuant to the third indent of Article 4(2) of Regulation No 1049/2001, access to a document is to be refused where disclosure would undermine the protection of, notably, the purpose of investigations, unless there is an overriding public interest that would justify disclosure of the document at issue. As an exception to the right of access to the institutions' documents under Regulation No 1049/2001, this provision must be interpreted and applied strictly.[58]

104 EIOPA is concerned about the need to protect future investigations pursuant to Article 17 of the EIOPA Regulation. Such investigations, according to EIOPA, essentially depend on the ability of the NCA concerned to provide supervisory information, which is predicated on the NCA's confidence that such information will be treated confidentially. Therefore, EIOPA fears that the prospect of NCAs seeing their supervisory information, explanations or assumptions disclosed – in part or in full – could in future lead them to censor the information they provide or to hold back sensitive supervisory information, which could undermine the effectiveness of the EIOPA's investigations. EIOPA is concerned that the prospect of any disclosure – even after an investigation is closed – runs the risk of adversely affecting the willingness of the NCAs to cooperate in EIOPA investigations.

105 EIOPA has in addition submitted that the general presumption of confidentiality, which is recognised by the case-law in the areas of State aid and competition law applies in the present case. According to EIOPA, the underlying logic of that case-law, namely the need to guarantee the smooth functioning of procedures in those areas and ensure that their objectives are not jeopardised by preventing the right of access from being used to circumvent the specific rules providing for limited access to the file, also applies to EIOPA's investigations pursuant to Article 17 of the EIOPA Regulation. In the contested decision itself, EIOPA had moreover considered these investigations to be comparable to EU pilot and infringements procedures governed by Article 258 TFEU, to which access to documents is not granted.

106 In addition, EIOPA has submitted that the documents in question are confidential and thus subject to its professional secrecy obligation pursuant to Article 70 of the EIOPA Regulation.

107 NOVIS submits in this regard that EIOPA is attempting to unduly extend the scope of the exception at issue beyond the protection of ongoing investigations. According to NOVIS, the scope of application cannot be extended by arguing that the effectiveness of future investigations might be affected in case of disclosure of the investigation documentation. In particular, the argument that third parties might otherwise be reluctant to cooperate in future investigations was rejected by the General Court in in Case T-344/08 *EnBW Energie Baden-Württemberg v Commission*.[59]

[58] Judgments of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, para 63; and of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, para 36.
[59] Judgment of 22 May 2012, *EnBW Energie Baden-Württemberg v Commission*, T-344/08, EU:T:2012:242, paras 125-126.

108 NOVIS also highlights that NCAs are obliged, by virtue of Articles 17(2) and 35(1)-(2) of the EIOPA Regulation, to provide EIOPA with all information which EIOPA considers necessary. The concern that the NCAs would censor the information they provide or to hold back sensitive supervisory information thus amounts to a supposition that these authorities would fail to comply with their information obligations under EU law, which EIOPA has advanced no evidence of.

109 The Board of Appeal finds in this regard that, while an investigation pursuant to Article 17 of the EIOPA Regulation is pending, EIOPA is justified in applying a general presumption that information shared with it by NCAs for the purposes of its investigation is covered by the protection established by the third indent of Article 4(2) of Regulation No 1049/2001,[60] subject to the right of interested parties to demonstrate that a given document is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned.[61]

110 The same protection may extend until it has been decided what follow-up action will be taken, notably by an NCA faced with an unfavourable outcome of an Article 17 investigation, in response to a recommendation by EIOPA pursuant to the first sub-paragraph of Article 17(3) of the EIOPA Regulation. It is true that, according to the case-law concerning different types of investigations, to allow that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided would in principle make access to the documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities. This would be contrary to the objective of guaranteeing public access to documents relating to any irregularities, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers.[62] Nevertheless, in the specific context of investigations carried out within the framework of Article 17 of the EIOPA Regulation, strict deadlines apply, which provide clarity on the timeline and prevent the moment when documents will be disclosed becoming dependent on discretionary action on the part of any of the authorities involved. In concrete terms, the second sub-paragraph of Article 17(3) of the EIOPA Regulation requires the NCA to inform EIOPA of the steps it has taken or intends to take in response to a recommendation within ten working days of receipt.[63]

111 However, after an investigation has been concluded and the NCA has decided on an (even incomplete[64]) follow-up action to be taken in accordance with the second sub-paragraph of Article 17(3) of the EIOPA Regulation, there appears no justification, for the sake of protecting

[60] See, by analogy, judgment of 1 September 2021, *Homoki v Commission*, T-517/19, EU:T:2021:529, paras 53-55, and the case-law cited.

[61] Judgments of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, para 62, and of 27 February 2014 *Commission v EnBW*, C-365/12 P, EU:C:2014:112, para 100.

[62] Judgments of 12 July 2023, *Eurecna v Commission*, T-377/21, EU:T:2023:398, paras 34-35, of 28 September 2022, *Agrofert v Parliament*, T-174/21, EU:T:2022:586, para 75, and 6 July 2006, *Franchet and Byk v Commission*, T-391/03 and T-70/04, EU:T:2006:190, paras 111-112.

[63] The same deadline applies also in relation to the adoption of a Commission's formal opinion pursuant to Article 17(5) of the EIOPA Regulation.

[64] See paragraph 5 of this decision above.

the purpose of investigations, for continuing to restrict public access to the documents concerned on account of the investigation itself.

112 While EIOPA argued in the contested decision that the public disclosure of the documents concerned would compromise future investigations and their objectives by revealing EIOPA's strategy and working methods, it has to be pointed out that the documents concerned have been shared with the target of the investigation, the NBS, as well as being circulated within the independent panel convened pursuant to Article 41(2) of the EIOPA Regulation (the "Panel") and ultimately the Board of Supervisors of EIOPA. If there were a fear that future investigations could be compromised by revealing EIOPA's strategy and working methods, it would be expected that confidentiality of that information would have to be ensured primarily *vis-à-vis* the potential targets of investigations, so that withholding public access can no longer serve that objective once the NCAs are aware of the strategy and working methods in question.

113 The Board of Appeal further considers it relevant, as NOVIS has pointed out, that within the framework of investigations pursuant to Article 17 of the EIOPA Regulation, Article 17(2) of the EIOPA Regulation imposes a legal obligation on NCAs to provide EIOPA without delay with all information which EIOPA considers necessary. This renders the conclusion of the General Court in Case T-344/08 *EnBW Energie Baden-Württemberg v Commission*, where the Commission's leniency programme in the field of competition law relied on undertakings coming forward <u>voluntarily</u> to share information,[65] applicable with even greater force.

114 In any event, contrary to what EIOPA has sought to argue, there can be no general presumption that NCAs would censor the information they provide or to hold back sensitive supervisory information because of the possibility of disclosure in accordance with Regulation No 1049/2001. Such a presumption would, as NOVIS has pointed out, amount to a general supposition that the NCAs would act in breach of their obligations under the EIOPA Regulation. In fact, if there were to be a worry that NCAs would shirk their legal information obligations, then, given the object and purpose of investigations pursuant to Article 17 of the EIOPA Regulation, which is – as its title indicates – to identify and deal with breaches of EU law committed by NCAs, an authority under investigation would already be under a much more compelling incentive to withhold information in order to dissimulate any breaches committed by it. A concern that the information at issue might also be disclosed to the public would in that context have to be considered as entirely secondary. For the system of enforcement established by Article 17 of the EIOPA Regulation to function, it must be assumed that NCA's will at all times fully comply with their legal obligations under Article 17(2) of that Regulation irrespective of any actual or hypothetical consequences for themselves or third parties.

115 Finally, even if EIOPA in its submissions to the Board of Appeal no longer relied on this argument, it should be stated that there are marked differences between the procedure established under Article 17 of the EIOPA Regulation and the infringement procedure laid down in Article 258 TFEU. As a consequence, the case-law according to which the Commission is entitled to presume that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the

[65] Judgment of 22 May 2012, *EnBW Energie Baden-Württemberg v Commission*, T-344/08, EU:T:2012:242, para 70.

protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001,[66] is not transposable to the Article 17 procedure.

116 To highlight just a few distinctions, the infringement procedure under Article 258 TFEU is fundamentally an adversarial one, where the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Union law and, on the other, to avail itself of its right to defend itself against the objections formulated.[67] It is in those circumstances that the Court of Justice has considered that it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to avoid legal proceedings.[68]

117 By contrast, the Article 17 procedure, even if it is couched in terms of a "breach" of Union law and an "investigation" by EIOPA, is fundamentally a cooperative exercise carried out within the framework of the ESFS by bodies pursuing the same common objective, namely to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and effective and sufficient protection for the customers and consumers of financial services.[69] The aim of the "investigation" by EIOPA under Article 17(3) of the EIOPA Regulation is to arrive at a common understanding among the relevant supervisory authorities, constituting together the ESFS, as to how the Union rules are to be applied in a consistent manner. Both Article 2(4) and the second sub-paragraph of Article 17(2) of the EIOPA Regulation envisage that the parties to the ESFS are to cooperate with trust and full mutual respect and ensure the flow of appropriate and reliable information among them. The investigation, moreover, if initiated, leads to a "recommendation" on the part of EIOPA, which is by definition not a binding act.

118 It can also be pointed out that the procedure under Article 17 of the EIOPA Regulation is specifically expressed to be without prejudice to the powers of the Commission pursuant to Article 258 TFEU,[70] demonstrating that the two procedures are separate and complementary. This separate procedural option was not resorted to at all in the present case, in the light of the action taken by the NCA.

119 In the light of all of these considerations, the protection of investigations as laid down in the third indent of Article 4(2) of Regulation No 1049/2001 can no longer be invoked in relation to an investigation pursuant to Article 17 of the EIOPA Regulation once the NCA has, pursuant to the second sub-paragraph of Article 17(3), informed EIOPA of the steps it has taken or intends to take to ensure compliance with EU law.

[66] Judgments of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, para 65 and of 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, para 66.
[67] Judgment of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, para 62.
[68] *Ibid.*, para 63.
[69] Article 2(1), and 2(2)(b) and (f) of the EIOPA Regulation.
[70] *Ibid.*, Article 17(6), first sub-paragraph; see also Recital (30) of the Preamble.

120 This conclusion is without prejudice to any need to preserve to confidentiality of the documents concerned on the basis of the other provisions of Regulation No 1049/2001 or Article 70 of the EIOPA Regulation.

4. Protection of decision-making processes

121 Under the second sub-paragraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is to be refused even after the decision has been taken if disclosure of that document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

122 As noted at paragraph 67 above, there is a degree of overlap between the requirements of Article 70 of the EIOPA Regulation regarding professional secrecy and the protection of investigations as required by the second sub-paragraph of Article 4(3) of Regulation No 1049/2001. Furthermore, as stated in paragraph 68 above, it is desirable that the two provisions be interpreted in a way that is consistent with each other.

Notion of "internal use" for the purposes of Article 4(3) of Regulation No 1049/2001

123 The second sub-paragraph of Article 4(3) of Regulation No 1049/2001 is according to its wording applicable to documents drawn up "*for internal use*" and containing "*opinions for internal use as part of deliberations and preliminary consultations within the institution*" (underlining supplied).

124 NOVIS argues in this respect that the exchanges between EIOPA and the NBS must not be characterised as being for internal use, as EIOPA and the NBS are separate authorities for purposes of both the second sub-paragraph of Article 4(3) Regulation No 1049/2001 and the EIOPA Regulation. The communications between NCAs and EIOPA (or the Board of Supervisors constituted within EIOPA) are, according to NOVIS, external communications.

125 The Board of Appeal considers that, while EIOPA and the various NCAs are formally distinct bodies with separate legal personalities,[71] it is appropriate to take a functional approach when determining the scope of application of the second sub-paragraph of Article 4(3) of Regulation No 1049/2001, the overall objective of which is the protection of decision-making processes. The substance of the process is more important than the legal form of the participants.

126 As already described at paragraph 117 above, the Article 17 procedure is fundamentally a cooperative exercise carried out within the framework of the ESFS, by bodies forming part of the ESFS and pursuing the same common objective, cooperating with trust and full mutual respect.[72] Recital (7) of the Preamble to the EIOPA Regulation lamented a number of shortcomings in cooperation between and reach of NCAs and enunciates that the ESFS should be designed to overcome those deficiencies, and to provide a system in line with the objective

[71] Article 5(1) of the EIOPA Regulation provides that EIOPA is to be "*a Union body with legal personality*". The legal personality of NCAs is set out in national legislation.
[72] Article 2(4) of the EIOPA Regulation.

of a stable and single Union financial market, linking national supervisors within a strong Union network.

127 The ESFS was conceived against this background as an integrated network of national and Union supervisory authorities, leaving day-to-day supervision to the national level.[73] EIOPA's purpose and tasks consist in assisting competent national supervisory authorities in the consistent interpretation and application of Union rules and contributing to financial stability necessary for financial integration[74] and specifically include promoting supervisory convergence.[75]

128 EIOPA is therefore correct to consider that the documents exchanged between EIOPA and the NBS in the specific context of the Article 17 procedure must be qualified as internal documents for the purposes of the application of Article 4(3) of Regulation No 1049/2001 as they are internal to the ESFS, which for these purposes must be considered as a single functional entity.

129 This interpretation has the further advantage of allowing consistent interpretation with the requirements arising out of the protection of confidential information under Article 70 of the EIOPA Regulation. As set out at paragraph 65 above, one of the objectives of those requirements is the proper functioning of the ESFS.

Decision-making processes requiring protection

130 Article 4(3) of Regulation No 1049/2001 is intended to ensure that EU institutions and agencies are able to enjoy a space for deliberation in order to be able to decide as to policy choices to be made and potential proposals to be submitted.[76]

131 In the present case, this rule falls to be interpreted in the light of the prohibition on the disclosure of confidential information laid down in Article 70 of the EIOPA Regulation. That prohibition must be taken to apply, in accordance with the principles enunciated by the Court of Justice at paragraph 35 of its *Baumeister* judgment, as applicable in the present context, to information the disclosure of which is likely to affect adversely the proper functioning of supervision under the ESFS.

132 It should be recalled in this context that EIOPA and the NBS are both part of the ESFS, the main objective of which was set out in paragraphs 126 and 127 of this decision.[77] Supervisory authorities that are party to the ESFS are obliged to supervise financial institutions in accordance with the legislative acts referred to in Article 1(2) of the EIOPA Regulation, which notably includes the Solvency II Directive.[78] EIOPA in this respect has the task of contributing to the consistent application of those acts, by (*inter alia*) ensuring effective and consistent supervision of financial institutions.[79] An important overarching aim of the EIOPA Regulation

[73] *Ibid.*, Recital (8).
[74] *Ibid.*, Recital (16).
[75] *Ibid.*, Recital (10).
[76] Judgment of 20 January 2021, *Land Baden-Württemberg (Communications internes)*, C-619/19, EU:C:2021:35, para 46.
[77] Article 2(1), 2(2)(b) and (f) of the EIOPA Regulation.
[78] Article 2(5) of the EIOPA Regulation.
[79] *Ibid.*, Article 8(1(b).

consists in establishing a common supervisory culture and EIOPA is given a central role in this.[80]

133 Article 2(4) of the EIOPA Regulation provides that, in accordance with the principle of sincere cooperation pursuant to Article 4(3) TEU, the parties to the ESFS are to cooperate with trust and full mutual respect, in particular in ensuring the flow of appropriate and reliable information among them. The Court of Justice in its *Baumeister* judgment recognised that the smooth transmission of information in such a context requires that authorities can have confidence that the confidential information provided will, in principle, remain confidential, while at the same time not leading to the conclusion that all information held in a supervision file could automatically be considered to be covered by the obligation of professional secrecy.[81]

134 EIOPA has explained in this context that in particular the "supervisory information, explanations or assumptions" of the NCAs require protection. According to EIOPA, the documents at issue contain views and opinions of both EIOPA and the NBS for internal use, such as "notes, reasoning and analysis on supervisory data relating to an individual financial institution and on relevant national supervisory practices". EIOPA further explained that these views and opinions are based on strategic choices made by EIOPA in the context if its investigation and are an inherent element of the safe space of decision-making at EIOPA. EIOPA fears that their public disclosure, even if limited, would give the public unwarranted access to confidential supervisory expertise and would thus hamper the possibility for EIOPA to rely on such opinions. For this reason, any disclosure of the identified documentation would, according to EIOPA, seriously undermine the soundness, depth and independence of its decision-making process on such matters, in particular in the specific case, but also in the future.

135 These considerations are, according to EIOPA, particularly relevant for documents 1, 3 and 4, which constitute confidential expert or legal advice by EIOPA's internal services (document 3) and by the Panel (documents 1 and 4) to the Board of Supervisors of EIOPA.

136 These arguments relied upon by EIOPA in essence concern two distinct types of potentially confidential information, which fall to be considered separately, namely:

- preliminary views expressed in the deliberative process leading to the initiation of an investigation pursuant to Article 17(2) of the EIOPA Regulation, as well as the adoption of the final decision within the framework of the ESFS, *in casu* the recommendation pursuant to Article 17(3) of that Regulation, and

- confidential information concerning supervisory expertise, approaches or assumptions, which must be kept confidential in order to permit the proper functioning of supervision under the ESFS.

137 As regards the first type of information, the Board of Appeal considers that the decision-making process within the framework of the ESFS would indeed be liable to be undermined if preliminary views expressed in the deliberative process leading to the opening of an investigation or the adoption of recommendations or decisions, or tentative lines of enquiry not

[80] *Ibid.*, Articles 8(1)(b) and 29.
[81] Judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paras 25, 31-34 and 46.

further pursued, including internal assessments of support from the Board of Supervisors, were to be subject to public disclosure. This is the case at least to the extent that those preliminary views or tentative lines of enquiry were not followed and consequently are not reflected in the final recommendation or decision, or *a fortiori*, if they are at odds with the decision adopted. The Board concurs with EIOPA that there must be a "safe space", comprising all supervisory authorities that are part of the ESFS, where all potential options and ideas can be put on the table and be freely discussed without needing to worry that they will be made public.

138 Documents 1-6 are in principle likely to contain such preliminary views in that they in essence comprise exchanges of drafts between EIOPA and the NBS, as well as preparatory documents of EIOPA leading to the adoption of the recommendation pursuant to Article 17(3) of the EIOPA Regulation (documents 7 and 8).

139 At the same time, it appears inherently unlikely that the entirety of these documents is constituted by such preliminary views which were not further pursued or rejected before the finalisation of the recommendation. By contrast, to the extent that the documents at issue contain considerations or facts underpinning the recommendation, that information in principle falls to be disclosed, unless one of the other exceptions from public disclosure applies.

140 It is also evident that considerations relating to the safe space for deliberations are not applicable to documents 7 and 8, comprising the final position taken on the basis of those deliberations in, respectively, the English and Slovak versions of the EIOPA recommendation. Similarly, these considerations do not apply to document 9, which contains the NBS's confirmation of compliance with the EIOPA recommendation.

141 As regards the second type of information, i.e., that concerning supervisory expertise, approaches or assumptions, the Board of Appeal takes in principle as a starting point that such information should not, normally, be kept confidential as this would run counter to the overarching principle that supervision should be carried out in a transparent and predictable manner. That principle is reflected in Recitals (25), (26), (51) and (64) of the Preamble to the EIOPA Regulation, as well as in Article 31 of the Solvency II Directive. In other words, considerations relating to the proper functioning of supervision under the ESFS in principle tend to militate in favour of providing public access to supervisory expertise, approaches or assumptions.

142 EIOPA itself stressed the requirement of transparency regarding supervisory approaches in its "Criteria for the independence of supervisory authorities",[82] adopted pursuant to Article 8 (1) of the EIOPA Regulation. In relation to Principle 2, which states that "*Supervisory authorities should conduct their tasks in a transparent and accountable manner*", paragraph 2.10 established as specific criteria of transparency that supervisory authorities should disclose, notably, "*the general criteria and methods, including the tools used in the supervisory review process*" and "*the objectives of the supervision and its main functions and activities*". That disclosure is further expressly required in paragraph 2.11 to be "*sufficient to enable a comparison of the supervisory approaches adopted by the supervisory authorities.*"

[82] "Criteria for the independence of supervisory authorities", published on 13 September 2021, at: https://www.eiopa.europa.eu/publications/criteria-independence-supervisory-authorities_en .

143 While it cannot be excluded that there are instances where supervisory expertise, approaches or assumptions must be kept confidential in order to protect the proper functioning of supervision within the ESFS, there thus cannot be any presumption to that effect and, in the light of the Principles it has itself laid down, EIOPA is required to explain why it considers that in particular circumstances, supervisory expertise, approaches or assumptions should be kept confidential.

144 In any event, while all of the documents at issue might in principle contain information relating to supervisory expertise, approaches or assumptions that should be kept confidential, it appears unlikely that the entirety of any of these documents should be made up of such information.

145 In the light of these considerations, it must be concluded that EIOPA's assessment of the confidential nature of the documents at issue was, at least as regards documents 7 and 8, vitiated by an interpretation of Article 4(3) of Regulation No 1049/2001 and of the obligation of professional secrecy which was too wide.

5. Partial disclosure

146 Pursuant to Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions set out in that Article, the remaining parts of the document are to be released.

147 According to settled case-law, examination of partial access to a document must be carried out in the light of the principle of proportionality.[83] It is clear from the wording of Article 4(6) of Regulation No 1049/2001 that an institution or agency is required to consider whether it is appropriate to grant partial access to requested documents and to confine any refusal to information covered by the relevant exceptions. The institution or agency must grant such partial access if the aim pursued in refusing access could be achieved if it merely redacted the passages which might harm the public interest to be protected.[84]

148 At the same time, according to the case-law, the institutions are entitled to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant.[85] That principle was notably held to operate where the documents that are the subject of the request for access are covered in their entirety by an exception from disclosure, and the remaining parts concern only salutations and trivial logistic information.[86]

149 Regarding the possibility of granting partial access, EIOPA considered in the Contested Decision that any redacted version "*would be devoid of purpose in view of the scope of the present application for access to documents considering the vast volume of redactions to be made*". EIOPA concluded that in the present case, there is no sense in granting partial access, "*which would be limited to insignificant phrases, headlines, etc.*". EIOPA furthermore states

[83] Judgment of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, para 83; see also, to that effect, judgment of 6 December 2001, *Council v Hautala*, C-353/99 P, EU:C:2001:661, paras 27 and 28.
[84] Judgments of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, para 50, and of 12 September 2013, *Besselink v Council*, T-331/11, EU:T:2013:419, para 84; see also, to that effect, judgment of 6 December 2001, *Council v Hautala*, C-353/99 P, EU:C:2001:661, para 29.
[85] Judgment of 15 September 2016, *Herbert Smith Freehills v Council*, T-710/14, EU:T:2016:494, para 80.
[86] *Ibid*., para 81.

that NOVIS does not set out why it should be meaningful to disclose the irrelevant unredacted parts of the documents.

150 NOVIS contests this position and maintains that the reasons for refusing partial access to the documents are generalized and insufficient. Contrary to what EIOPA seems to suggest, it is also not the applicant's obligation to explain why disclosure of the documents is legally required and permissible. Rather, it is EIOPA's obligation to justify and provide reasons why access should be refused, which entails the obligation to explain why partial disclosure would not be possible either.

151 Even if one or more exceptions from the right of public access applies, it is in principle incumbent on EIOPA to verify in the light of the considerations set out above whether partial disclosure would not be possible before refusing to grant public access in its entirety. While EIOPA has stated that it has carried out an assessment to determine whether partial disclosure might be granted, it appears from the Contested Decision and the submissions of EIOPA that it had too broad a view of the scope of application of at least some of the exceptions. This appears to be the case in relation to professional secrecy covering information concerning the applicant itself, the protection of court proceedings, and the protection of the purpose of investigations. Its assessment may accordingly have been flawed, which is impossible for the Board of Appeal to verify in the absence of itself ordering the production of the documents at issue. In the procedural context at hand, such a step would however not appear to have been warranted, as further explained at paragraph 158 below.

D – *Conclusion of the Legal Assessment*

152 On the basis of the reasons given above, the Board of Appeal considers that the Contested Decision is vitiated by errors of law and assessment as regards the refusal to even partially disclose, in any event, documents 7 and 8.

153 EIOPA thereby took a more extensive than warranted approach to the application of the exceptions provided for in Regulation No 1049/2001, as well as to the protection of professional secrecy as laid down in Article 70 of the EIOPA Regulation.

154 The complete refusal of access to documents 7 and 8, containing the recommendation emanating from its investigation under Article 17(3) of the EIOPA Regulation, was inconsistent with EIOPA's decision to publish some details of that recommendation on its website on 19 May 2022.[87] In particular, according to the published information, EIOPA had taken the view that an insurance company under the direct supervision of the NBS had been non-compliant with rules of the Solvency II Directive (as transposed into Slovak law), namely in relation to technical provisions, capital requirements, investments and system of governance over the past years, and that the steps taken by the NBS to remedy the situation had been insufficient. At the very least, the parts of documents 7 and 8 containing that information should therefore have been subject to disclosure in response to NOVIS's access request.

155 It will moreover be necessary for EIOPA to carry out a renewed examination of all of the documents at issue in the light of the interpretation provided by the Board of Appeal in the

[87] See paragraph 4 above.

present decision in order to determine to what extent partial access to those documents can be provided pursuant to Article 4(6) of Regulation No 1049/2001.

156 As set out above, the following considerations apply in that context:

(1) To the extent that the obligation of professional secrecy pursuant to Article 70 of the EIOPA Regulation is applicable on the basis that disclosure of particular confidential information is likely to affect adversely the interests of a specific natural or legal person, that obligation cannot be relied upon to refuse public access to documents at the request of that same natural or legal person (paragraph 74 above).

(2) The protection of court proceedings pursuant to the second indent of Article 4(2) of Regulation No 1049/2001, interpreted in the light of Article 70 of the EIOPA Regulation, requires that, while court proceedings in relation to the Article 17 proceedings are pending or are likely to be brought in national or EU courts:

– access to documents 1, 3 and 4 must be withheld notably to the extent that they are liable to disclose considerations which were at odds with the final recommendation adopted, that they relied on an interpretation of EU law, such as the Solvency II Directive, different from that finally espoused in the recommendation, or if they expressed doubts regarding the strength of the legal reasoning, concerning the procedural basis or alternative views regarding the position adopted (paragraph 91 above); and

– access to documents 2, 5 and 6, as well as documents 3 and 4, must be withheld notably to the extent that they are liable to disclose that the NBS initially took a different legal position from EIOPA in the context of the Article 17 investigation (paragraph 97 above).

(3) The protection of investigations as laid down in the third indent of Article 4(2) of Regulation No 1049/2001 can no longer be invoked in relation to an investigation pursuant to Article 17 of the EIOPA Regulation once the NBS has informed EIOPA of the steps it has taken or intended to take to ensure compliance with EU law (paragraph 119 above).

(4) The protection of the decision-making process pursuant to the second sub-paragraph of Article 4(3) of Regulation No 1049/2001, interpreted in the light of Article 70 of the EIOPA Regulation, requires that access to all nine documents at issue must be withheld if and to the extent that they are liable to seriously undermine the decision-making process of EIOPA and the NBS, adversely affecting the proper functioning of supervision under the ESFS. That may be the case to the extent that information:

– contains preliminary views expressed in the deliberative process leading to the opening of the investigation or the adoption of the recommendation, including internal assessments of support from the Board of Supervisors (paragraph 137 above); or

– must be kept confidential in order to permit the proper functioning of supervision under the ESFS (paragraph 143 above).

157 As documents 2, 5, 6 and 9 emanate from the NBS, Article 4(4) of Regulation No 1049/2001 and Article 2(4) of the EIOPA Regulation moreover require that EIOPA should consult with the NBS with a view to assessing to what extent the public disclosure is possible.

158 For the sake of completeness, the Board of Appeal did not consider it necessary to order the production of the documents at issue to examine them itself. It is true that, according to the case-law, when an applicant challenges the lawfulness of a decision refusing him or her access to a document on the basis of one of the exceptions provided for by Article 4 of Regulation No 1049/2001, claiming that the exception relied on was not applicable to the document requested, the EU Courts are obliged to order production of the document and to examine it if they are to ensure the applicant's judicial protection.[88] This case-law is based on reasoning according to which, if it has not itself consulted the document concerned, a court will not be in a position to assess in the specific case whether access to that document could validly be refused on the basis of the exception invoked and, consequently, to assess the legality of a decision refusing access, even partial, to that document. In the present case, it is however clear that the contested decision was vitiated at least to some extent by errors of law and assessment requiring that decision to be remitted to the EIOPA in any event, without any examination of the documents requested being necessary.

159 In summary, as regards documents 1-6, there may well be good reasons to refuse access on the basis of, in particular, Article 4(3) of Regulation No 1049/2001. However, as indicated above, it is for EIOPA to examine to what extent partial access should have been granted in the light of the above considerations. On the other hand, as regards documents 7 and 8, it appears that at least partial access should have been provided; once again, it is for EIOPA to examine to what extent. Whether document 9 must be withheld in order to protect the NBS's position in the pending court proceedings will need to be verified further, in the context of which, EIOPA will need to consult the NBS (paragraph 157 above).

160 Article 60(5) of the EIOPA Regulation provides that the Board of Appeal may (either) confirm the decision taken by the competent body of EIOPA or remit the case to that competent body. Article 60(5) does not entitle the Board to direct EIOPA to publish a redacted version of the requested documents.

161 In the light of the entirety of these considerations, the case should be remitted to EIOPA for the adoption of an amended decision, in accordance with Article 60(5) of the EIOPA Regulation.

VII – Costs

162 Both parties have asked the Board of Appeal to award costs against the respective other party.

163 Pursuant to Article 25 of the Board of Appeal's Rules of Procedure, and by application of the principle that the unsuccessful party is to be ordered to pay the costs if they have been applied for by the successful party,[89] EIOPA must be ordered to pay the costs, in accordance with the form of order sought by NOVIS.

[88] Judgment of 24 April 2024, *Naass and Sea-Watch v Frontex*, T-205/22, EU:T:2024:266, para 95, citing judgment of 28 November 2013, *Jurašinović v Council*, C-576/12 P, EU:C:2013:777, para 27 with further citations of case-law.
[89] See, e.g., Article 134(1) of the Rules of Procedure of the General Court.

VIII – Decision

164 On those grounds, the Board of Appeal hereby unanimously:

1) remits the case to EIOPA for the adoption of an amended decision;

2) orders EIOPA to pay the reasonable costs of NOVIS and to bear its own costs.

The original of this Decision is signed by the Members of the Board of Appeal in electronic format and countersigned by hand by the Secretariat.

Michele Siri (President, Co-Rapporteur)
(SIGNED)

Margarida Lima Rego (Vice President)
(SIGNED)

Gerben Everts
(SIGNED)

Christos Gortsos
(SIGNED)

Geneviève Helleringer
(SIGNED)

Carsten Zatschler (Co-Rapporteur)
(SIGNED)

On behalf of the Board of Appeal Secretariat

Adrien Rorive
(SIGNED)

A signed copy of the decision is held by the Secretariat

Date of the decision: 30 July 2024.