

## Decision of the European Ombudsman closing her inquiry into complaint 1875/2011/(EIS)LP against the European Banking Authority

Decision

**Case** 1875/2011/LP - **Opened on** 14/10/2011 - **Decision on** 19/12/2013 - **Institution concerned** European Banking Authority ( Critical remark ) |

### The background to the complaint

1. The present case concerns the decision made in 2011 by the European Banking Authority (EBA) regarding the composition of its 30-member Banking Stakeholders Group (BSG). That decision was made pursuant to Regulation (EU) No 1093/2010 (the "Regulation") of the European Parliament and of the Council of 24 November 2010, establishing a European Supervisory Authority (EBA) [1] . On 23 October 2013, having carried out a new selection process (launched in May 2013), the EBA announced that the BSG would begin its second term of work with a revised composition. The inquiry into the present complaint included constructive discussions between EBA staff and the Ombudsman's services. Arising from these discussions, it was anticipated by the Ombudsman that the EBA would carry out the new selection process appropriately and in accordance with the Ombudsman's analysis of the original process. However, the present decision does not evaluate the second selection process or its outcome.

2. The complainant, EuroFinuse (formerly EuroInvestors), is a European Federation of Financial Services Users, comprising savers, investors, shareholders, life insurance policy holders, borrowers and other stakeholders who are independent from the financial industry. [2]

3. Recital 48 of the Regulation is worded as follows:

*" The Authority should consult interested parties on regulatory or implementing technical standards, guidelines and recommendations and provide them with a reasonable opportunity to comment on proposed measures. Before adopting draft regulatory or implementing technical standards, guidelines and recommendations, the Authority should carry out an impact study. For reasons of efficiency, a Banking Stakeholder Group should be used for that purpose, and should represent, in balanced proportions, Union credit and investment institutions, representing the diverse models and sizes of financial institutions and businesses, including, as appropriate, institutional investors and other financial institutions which themselves use*



*financial services; small and medium-sized enterprises (SMEs); trade unions; academics; consumers; and other retail users of banking services. The Banking Stakeholder Group should work as an interface with other user groups in the financial services area established by the Commission or by Union legislation ".*

4. Article 37 (2) of the Regulation provides as follows:

*" The Banking Stakeholder Group shall be composed of 30 members, representing in balanced proportions credit and investment institutions operating in the Union, their employees' representatives as well as consumers, users of banking services and representatives of SMEs. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent financial institutions, three of whom shall represent cooperative and savings banks ".*

5. Article 37 (3) of the Regulation is worded as follows:

*" The members of the Banking Stakeholder Group shall be appointed by the Board of Supervisors, following proposals from the relevant stakeholders. In making its decision, the Board of Supervisors shall, to the extent possible, ensure an appropriate geographical and gender balance and representation of stakeholders across the Union ".*

6. A call for expression of interest regarding the setting up of the EBA's BSG was published on 26 November 2010, [3] with a deadline for submitting applications of 26 December 2010. On 18 March 2011, the EBA issued a press release on its decision on the composition of its BSG [4] . The press release contained information on the names of the newly appointed members of the BSG, the institutions each one of them was representing, their nationality, and the subcategory to which they had been selected.

7. On 4 April 2011, the complainant addressed a letter to the EBA expressing its disappointment about the composition of the BSG and the fact that savers, investors' associations, and financial services users' associations were not represented. The complainant asked the EBA to take "immediate action" in order to ensure a balanced representation of all banking users in line with the Regulation.

8. By a letter of 26 April 2011, the EBA replied to the complainant. It explained that the number and quality of applications were among the criteria considered for the appointments made for the different categories, and emphasised that every effort had been made to ensure the necessary diversity not only among the foreseen categories, but also within them, which explained why no more than one position was given to applicants representing the interests of the same institution or federation. According to the EBA, in the case of users of banking services, preference was given to applications coming from entities with a European or international presence.

9. On 14 September 2011, not being satisfied with the above reply, the complainant lodged the present complaint.



## **The subject matter of the inquiry**

**10.** The complainant submitted the following allegations and the following claims, which were included in the Ombudsman's inquiry:

### **Allegations:**

1. The EBA failed to ensure a (i) geographical and (ii) gender balance within and between the stakeholder categories laid down in Regulation (EU) No 1093/2010.
2. The EBA failed to ensure an adequate balance between the representation of users and providers when selecting the members of the BSG, thereby violating Regulation (EU) No 1093/2010.
3. The EBA adopted an incorrect definition of the different stakeholder categories provided for in Regulation (EU) No 1093/2010.

### **Claims:**

1. The EBA should reconsider the composition of the BSG as soon as possible, and in any event, without waiting for the reappointment of the BSG, which will take place in 2013.
2. The EBA should publish the CVs of the selected members as well as the selection criteria on its website.

## **The inquiry**

**11.** On 14 October 2011, the Ombudsman invited the EBA to submit an opinion on the above allegations and claims.

**12.** On 31 January 2012, the EBA submitted its opinion to the Ombudsman, which was forwarded to the complainant for its observations. On 27 February 2012, the complainant submitted its observations.

**13.** After having examined the EBA's opinion and the complainant's observations, the Ombudsman concluded that it was necessary to proceed to an inspection of the EBA's file concerning this case. The inspection took place on 19 March 2013. The inspection report was sent to the complainant on 30 May 2013, for its eventual observations. The complainant did not submit any observations within the deadline fixed.



## The Ombudsman's analysis and conclusions

### A. Allegation that the EBA failed to ensure a geographical and gender balance within and between the stakeholder categories laid down in Regulation (EU) No 1093/2010

#### Arguments presented to the Ombudsman

14. The **complainant** contests the way the EBA complied with the requirements of Article 37(3) of the Regulation. In particular, it criticised the fact that: (i) nine out of the ten representatives of the banking industry came from leading multinational banks from "old" Member States (i.e., EU Member States before the 2004 enlargement), whereas only one of them came from the "new" Member States (i.e., the Member States that joined the EU in or after 2004); (ii) the EBA selected no representatives from the "old" Member States in the consumer category of the BSG, (iii) no fewer than eight members of the BSG came from the United Kingdom, which was thus overrepresented in the BSG; and (iv) the EBA selected only 10 women among the thirty members of the BSG.

15. In its opinion, the **EBA** argued that the Regulation foresees " *an appropriate geographical balance* " and " *representation of stakeholders across the Union* " . Thus, there is only an overall general geographical balance requirement and no specific requirement to ensure a geographical balance within the different categories of stakeholders. According to the EBA, as required by Article 37(2) of the Regulation, it had primarily focused on the qualities of the candidates, ensuring a balanced representation of expertise and experience from different categories of stakeholders.

16. As regards the composition of the "industry" category, the EBA explained that most of the applications for that category came from "old" Member States. That fact and its decision to appoint representatives from cross-border banking groups with significant presence around Europe led, in turn, to the appointment of consumer representatives mainly from the "new" Member States.

17. EBA explained that the list of the approved stakeholders per category was as follows:

#### Category

#### Number

Industry

10

Employees' representatives/trade unions

4



1

Consumers

5

Users of banking services

5

SME's

3

Top-ranking academics

6

**Total**

**30**

**18.** As regards the alleged high number of representatives of British nationality, the EBA pointed out that, contrary to the complainant's submissions, there were 5, not 8 representatives coming from the UK representing the interests of (i) financial institutions, (ii) SMEs, (iii) consumers, (iv) users of banking services, and (v) top-ranking academics. It reiterated that the personal competences of the candidates and the number of applications received from each country were important factors taken into consideration. Since most applications received were from Germany, France, and the UK, the EBA's Management Board decided to cap the number of appointed members per country. In some cases, however, the desire to ensure an appropriate representation for a given category of stakeholders meant that the nationality requirement would come second in consideration. Thus, the target number for the members representing SMEs was set at three which was the same number of applications received. As a result, the decision to appoint three representatives of SMEs prevailed over the nationality requirement, given that one of the three applicants was British.

**19.** Finally, as regards the gender selection, the EBA pointed out that female candidates represented 21% of all applications received. Despite this low percentage, the EBA set the target number of female stakeholders at 10, that is 33% of all applications received.

**20.** In its observations, the **complainant** insisted that the EBA had failed to set up a BSG that was fairly balanced.



## The Ombudsman's assessment

21. This is the first time a BSG has been appointed by the EBA pursuant to the Regulation. In that regard, the Ombudsman deems it useful to make two preliminary remarks. First, it is not the Ombudsman's task to substitute her choice of members of the BSG for that made by the EBA. In examining whether there was maladministration, the Ombudsman checks whether, in carrying out the selection process, the EBA acted lawfully and in accordance with the principles of good administration. Second, the Ombudsman is conscious of the difficulties inherent in combining geographical, gender and interest representation criteria with the need to ensure that the members chosen are competent, particularly in view of the fact that, as stated above, the EBA had no previous experience of carrying out this task. Finally, the Ombudsman takes the view that it was reasonable of the EBA to have confined its selection of BSG members to candidates from among those who had expressed an interest in appointment following a call for expression of interest directed at potential stakeholders. This approach complied with Article 37 (3) of the Regulation and the requirement laid down therein, according to which "*members of the Banking Stakeholder Group shall be appointed by the Board of Supervisors, following proposals from the relevant stakeholders*" (see above, paragraph 5).

22. With the first allegation, the complainant criticised that the EBA (i) chose to appoint 9 out of the 10 members of the "industry" category from "old" Member States, (ii) appointed all members of the "consumer" category from "new" Member States only, (iii) appointed no fewer than eight members of the BSG from the United Kingdom, and (iv) selected only 10 women among the thirty members of the BSG.

23. In that regard, the Ombudsman notes that the exact same above-mentioned arguments have recently been addressed and examined in detail in her recent decision closing her inquiry into complaint 1966/2011/(EIS)LP against the EBA (hereafter, the "UNI Decision") [5] .

24. In the UNI Decision, having first noted that the purpose of the requirement of appropriate geographical balance would be frustrated unless it also applied, to the extent possible, within each of the various categories of members making up the BSG ("industry participants", "employees/trade union representatives", "consumers", "users", "SMEs" and "top-ranking academics"), the Ombudsman reached the following conclusions.

25. First, as regards the composition of the "industry" category, the Ombudsman found that, in the absence of any convincing explanation, by deciding to appoint 9 out of the 10 members of the "industry" category by selecting representatives from "old" Member States, the EBA did not comply with the requirement to ensure, "to the extent possible", "an appropriate geographical balance and representation of stakeholders across the Union". Thus, it committed an instance of maladministration (see paragraphs 26-29 of the UNI Decision). For these reasons, the Ombudsman will formulate below the same critical remark as in the UNI Decision.

26. Second, as regards the composition of the "consumers" category, the Ombudsman also found that the EBA failed to comply with the requirement to ensure, "to the extent possible", "an appropriate geographical balance and representation of stakeholders across the Union". In



doing so, the EBA committed an instance of maladministration (see paragraphs 30-32 of the UNI Decision). The Ombudsman will thus formulate below the same critical remark as in the UNI Decision.

**27.** Third, as regards the number of representatives of British nationality, the Ombudsman did not find any maladministration. However, and for the reasons set out in paragraph 33 of the UNI Decision, the Ombudsman will make in the present case the same further remark as in the UNI Decision.

**28.** Finally, as regards the complainant's argument that only 10 out of the 30 appointed representatives were women, the Ombudsman did not consider that the EBA committed an instance of maladministration (see paragraph 34 of the UNI Decision). However, for the reasons set out in that Decision, the Ombudsman will make the same further remark as in the UNI Decision.

## **B. Allegation that the EBA failed to ensure an adequate balance between the representation of users and providers when selecting the members of the BSG, thereby violating Regulation (EU) No 1093/2010**

### **Arguments presented to the Ombudsman**

**29.** The **complainant** alleged that the EBA failed to ensure an adequate balance between the stakeholder categories provided for in the Regulation. In this context, the complainant put forward the following two main arguments: First, 10 out of the total number of 30 members of the BSG were senior-level professionals employed and paid directly by the banking industry. Second, one of the three selected representatives of SMEs came from one of the largest European federations ("BUSINESSEUROPE") which, in addition to SMEs, also represented the interests of all the large banking federations. Therefore, this representative could also be considered as an "industry" representative.

**30.** With regard to the first argument raised by the complainant, the **EBA** explained that by selecting 10 out of the 30 members of the BSG among senior-level professionals employed and paid directly by the banking industry, it fully complied with the Regulation, which precisely foresees that 10 of the BSG members should represent financial institutions. Regarding the representation of SMEs, the EBA explained that it had received only four applications, one of which was considered "not appropriate". Having set the target number for the SME's representatives in the BSG at three, it selected all three applications, and recalled that one of the selected members came from a European federation, which used to be a member of the Committee of European Banking Supervisors (CEBS) consultative panel.

### **The Ombudsman's assessment**



**31.** The Ombudsman notes that the exact same above-mentioned arguments have already been examined in detail in her recent UNI Decision.

**32.** In particular, in the UNI Decision, the Ombudsman found that selecting 10 out of the total number of 30 members of the BSG among professionals employed and paid by the banking industry, the EBA, contrary to what the complainant has also argued in the present case, did not depart from the requirements of Article 37(2) of the Regulation, the latter setting the number of industry representatives precisely at ten members (see paragraphs 39-39 of the UNI Decision). Thus, in this respect, the EBA did not commit any instance of maladministration.

**33.** As far as the representation of SMEs is concerned, and the fact that, as the complainant has also argued in the present case, one of the representatives chosen for that category worked for a large organisation that represented not only the interests of SMEs, but also those of the banking federations, the Ombudsman, for the same reasons as those set out in paragraphs 43-44 of the UNI Decision, finds no maladministration in this regard, either.

## C. Allegation that the EBA adopted an incorrect definition of the different stakeholder categories provided for in Regulation (EU) No 1093/2010

### Arguments presented to the Ombudsman

**34.** The **complainant** alleged that the EBA adopted an incorrect definition of the different stakeholder categories provided for in the Regulation. In that respect, the complainant raised two main arguments. First, as regards the "consumers" category, it argued that one of the selected members was actually an academic, while another one worked for a think-tank ('Re-Define'). Thus, none of these two representatives could be said to represent the interests of the consumers.

**35.** Second, with regard to the category of "users", the five representatives selected for that category were actually "providers", not "users" of banking services, representing influential organisations (i.e., major credit-rating agencies and auditing companies) that supplied services to the banking sector. The broad way in which the EBA interpreted the term "users" made it thus possible to appoint more members to the BSG that were part of the industry, while no representatives of savers and investors' associations were selected. The complainant also noted the absence of any representative of companies which are customers of banks, such as major retailers or their associations.

**36.** In its reply, the **EBA** argued that applicants were free to indicate in their application their interest for more than one of the six categories of stakeholders, and it was for the EBA to decide, on a case-by-case basis, into which category each application should be mapped. With regard to the representative of consumers who is an academic, the EBA explained that he was





also a member of the Financial Services User Group (FSUG) [6] that also worked on issues related to consumer protection and price transparency. According to the EBA, the person in question had important experience in representation, drafting opinions and recommendations on initiatives affecting "users" of financial services and had also in the past been a member of the Forum of User Experts in the area of Financial Services ("FIN-USE"), identifying key issues that affected users of financial services. He was also appointed in the past to represent the interests of the financial users in the previous "CEBS Consultative Panel" [7] . Given his valuable contribution in the previous work carried out by CEBS, he was positively considered by the EBA, and was thus appointed as a member of the "consumers" category.

**37.** As regards the member who represented the think-tank "Re-define", the EBA explained that "Re-define" is an independent and non-profit international organization, which had recently signed a four-year framework agreement with the European Parliament to advise the ECON Committee on matters pertaining to financial services regulation and economic policy, and that the said representative had extensively published articles and proposals on consumer-related issues.

**38.** As regards the definition of the notion of "users", the EBA submitted that since no definition of "users" was provided for by the Regulation, it decided to adopt a broad interpretation of this term in order to have a coherent and balanced overall representation in the BSG. Thus, the term "users" was interpreted as including all possible entities, other than industry representatives, that enable final users to take their decision on financial/banking services. It further explained that only fifteen applications falling within this category were received, and that only seven among them clearly indicated the representation of the interest of users of banking services.

## **The Ombudsman's assessment**

**39 .** The Ombudsman notes that the complainant's argument that two of the representatives appointed by the EBA to the "consumers" category appeared to lack the necessary expertise or connection with the consumer movement has already been examined in the UNI Decision. Therefore, for the same reasons as those set out in the UNI Decision (see paragraphs 51-52), the Ombudsman considers that no instance of maladministration occurred in that respect. The Ombudsman will however formulate in this regard the same further remark as the one made in the UNI Decision (see paragraph 52 of that Decision).

**40.** Likewise, in the UNI Decision, the Ombudsman examined in detail the same arguments as those raised in the present case by the complainant concerning the way the EBA defined the term "users of banking services". In the UNI Decision, the Ombudsman concluded that by failing to exclude from the "users" category applications from entities which are clearly providers of remunerated services to the financial sector, not users of the latter's services, the EBA committed an instance of maladministration (see paragraphs 53-54 of the UNI Decision). The Ombudsman will thus formulate in the present case the same critical remark as in the UNI Decision.



## D. The complainant's claims

### The complainant's claims

**41.** The **complainant** claimed that (i) the EBA should reconsider the composition of the BSG as soon as possible, and in any event, without waiting for the renewal of its membership due in 2013. It also claimed that (ii) the EBA should publish on its website the CVs of the selected members as well as detailed information on the selection criteria and the selection process by which each candidate was selected.

**42.** In its opinion, the **EBA** noted that the selection process was conducted in good faith and to the best of its abilities. Any likely reconsideration of the composition of the BSG would be a very time-consuming exercise and affect the expected stakeholders' contribution to the EBA's planned objectives for 2012. However, the EBA would be more than willing to accommodate the Ombudsman's suggestions and recommendations with regard to the next reappointment of the BSG members in 2013.

**43.** The EBA also confirmed that it has already published the CVs of the selected members of the BSG, and that they are available online on its website. With regard to the selection criteria, both the generic and the category-specific ones, the EBA stated that it relied on the requirements laid down in Article 37 of the Regulation and its corresponding recitals. It also clarified that general and category-specific criteria were adopted at the February 2011 EBA Management Board meeting and subsequently used for the establishment of a proposed list of stakeholders that was submitted to the March 2011 meeting of EBA's Board of Supervisors.

### The Ombudsman's assessment

**44.** The Ombudsman examined the exact same claims in the UNI Decision. Thus, in paragraph 58 of that Decision, she already explained the reasons why the first claim cannot succeed. As regards the complainant's second claim, the Ombudsman noted in the UNI Decision that all the CVs of the members of the BSG had by now been published on the EBA's website. In the UNI Decision, the Ombudsman also explained why she was not convinced that the EBA should be obliged to publish detailed information on the selection criteria used and the process by which each candidate was selected (see paragraph 59 of the UNI Decision). However, as also stated in the UNI Decision (see paragraph 59), it would further improve the overall transparency of the selection process if the EBA were to publish, once the members of the BSG have been appointed, meaningful information that could show how, in the light of the various applications received, the EBA complied with the requirement to ensure a balanced representation of all the various categories of stakeholders concerned, and how, in doing so, it also ensured "*to the extent possible (...) an appropriate geographical and gender balance and representation of stakeholders across the Union*". The Ombudsman will thus make a further remark below.



## E. Conclusions

**45.** On the basis of his inquiry into this complaint, the Ombudsman closes the case with the following critical remarks:

**1.** By applying the requirement laid down in Article 37(3) of the Regulation to ensure to the extent possible " *an appropriate geographical and gender balance and representation of stakeholders across the Union* " only as regards the composition of the BSG as a whole, and not also within each category of membership, the EBA committed an instance of maladministration.

**2.** By including in the "users" category applications from representatives of entities which are clearly not retail users of the services provided by the financial/banking sector, but rather providers of remunerated services to the latter, the EBA committed another instance of maladministration.

No maladministration has been found as regards the other aspects of the complainant's allegations and claims.

## Further remarks

**1.** In future selections of members of the BSG, it would be advisable for the EBA to avoid the risk that one or more Member States may appear to be over-represented.

**2.** The EBA could publish future calls for expression of interest in becoming a member of the BSG, not only on its own website, but also in the specialised financial press, and use, in general, any other communication channel that could increase the awareness and interest of women candidates.

**3.** It would facilitate and further improve the selection process if the EBA were to require future applicants to indicate only one of the six categories for which they would like to be considered.

**4.** It would further improve the overall transparency of the selection process if the EBA were to publish, once the members of the BSG have been appointed, meaningful information that could show how, in the light of the various applications received, the EBA complied with the requirement to ensure a balanced representation of all the various categories of stakeholders concerned, and how, in doing so, it also ensured " *to the extent possible (...) an appropriate geographical and gender balance and representation of stakeholders across the Union* ".

During the inquiry, and especially on the occasion of the inspection of documents, there were



informal and constructive discussions between the EBA and the Ombudsman's services. During these discussions, the EBA expressed its willingness to revise its approach for the second selection round. As already noted, the EBA announced the new composition of the BSG on 23 October 2013. Although the present decision only concerns the first selection process that took place in March 2011, the Ombudsman invites the EBA, in its follow-up to the critical and further remarks above to explain how it revised its approach during the second selection process to take account of any lessons learned during the Ombudsman's inquiry.

Emily O'Reilly

Done in Strasbourg on 19 December 2013

[1] OJ 2010 L 331, p. 12.

[2] <http://www.eurofinuse.org/index.php?id=72> [Link]

[3]

<http://www.eba.europa.eu/cebs/media/Publications/Other%20Publications/Others/2010/BSG%20call%20for%20exp>  
[Link]

[4] <http://www.eba.europa.eu/-/the-eba-establishes-its-banking-stakeholder-group> [Link]

[5] Decision of 7 November 2013,  
<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/52432/html.bookmark> [Link]

[6] The European Commission set up in 2010 a Financial Services User Group (FSUG). The group took over the tasks of two earlier groups, the Forum of User Experts in the area of Financial Services (FIN-USE) and Financial Services Consumer Group (FSCG).

[7] Committee of European Banking Supervisors (CEBS). On 1 January 2011, the EBA was established, taking over CEBS' ongoing tasks and responsibilities.