



Decision of the European Ombudsman closing her inquiry into complaint 1321/2011/(PMC)(EIS)LP against the European Banking Authority

Decision

Case 1321/2011/LP - **Opened on** 19/07/2011 - **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 is an Italian consumers association (*Consumatori Associati*) whose President submitted an application to the abovementioned call for interest.

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, [2] 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 [3] . 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 18 March 2011 and 11 April 2011, the complainant wrote to the EBA to complain about the selection process and the fact that no representative from 'old Europe'(that is from Member States other than those that joined the EU in or after 2004) had been selected as consumer representatives.

8. In its reply of 26 April 2011, the EBA pointed out that it had published on its website information on all successful candidates. It also clarified that no more than one position had been given to applicants representing the same institution, and stressed that the selection process was the result of a "dynamic" interaction of many criteria.

9. On the same day, the complainant wrote back to the EBA expressing its dissatisfaction with the above reply. On 17 June 2011, the complainant lodged the present complaint. The subject matter of the inquiry

10. The Ombudsman decided to open an inquiry into the following allegations and claims:

Allegations:

1. EBA failed to ensure adequate transparency in its selection of members to the stakeholder categories laid down in Regulation (EU) No 1093/2010.

2. EBA wrongly considered that credit rating agencies and auditing companies fall within the stakeholder category of "users of financial services".

3. EBA failed to respond adequately to the complainant's challenge to the decisions made by



its Board of Supervisors concerning the selection of members of the BSG.

Claims:

1. EBA should clarify the basis for its selection of members of the BSG by providing the complainant with all the information it requested in this regard.
2. EBA should annul its selection of representatives of credit rating agencies and auditing companies as members of the BSG.
3. EBA should annul its selection of a person from a think-tank as a consumer representative and should appoint the President of the complainant as a consumer representative on the BSG.

The inquiry

11. On 19 July 2011, the Ombudsman opened an inquiry into the above-mentioned allegations and claims, inviting the EBA to clarify in particular (i) the term "users of financial services, and (ii) the reasons why the think-tank "*Re-define*" was appointed to the "consumers" category.
12. On 28 October 2011, the EBA sent its opinion, which however did not fully address all the allegations and claims. Upon further invitation by the Ombudsman, on 22 December 2011, the EBA submitted a supplementary opinion. The complainant submitted its observations on 10 February 2012.
13. After having examined the EBA's initial and supplementary 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 EBA failed to ensure adequate transparency in the selection of the members of its BSG

Arguments presented to the Ombudsman

14. The **complainant** alleged that EBA failed to ensure the necessary transparency when selecting the members of the BSG.

In its opinion, the **EBA** argued that, in line with the Regulation, it tried to achieve *an appropriate geographical and gender balance* " and a "*representation of stakeholders across the Union*". Thus, pursuant to Article 37(2) of the Regulation, it primarily focused on the qualities



of the candidates, ensuring a balanced representation of expertise and experience from different categories of stakeholders. The EBA added that it had described in detail the operational rules of selection process and the criteria it applied in a letter it had addressed to *EuroInvestors* on 26 April 2011, a copy of which the complainant had attached to its complaint.

15. In its supplementary opinion, the EBA provided more detailed information about how the selection process had been carried out. In that regard, it explained that after a preliminary evaluation of all the applications received, the latter were grouped by category of stakeholders, and presented to the Management Board meeting in February 2011 for further discussion. In its submissions to the Ombudsman, the EBA also provided detailed information about the "generic" and "category-specific" criteria used for the assessment of the applications received, as well as a number of tables showing (i) the distribution of eligible applicants within the various categories, (ii) their gender and nationality and (iii) the entities they represented. The EBA also added that an initial plan to offer the status of an "observer" to selected consumer organisations that were not appointed to the BSG did not finally come to fruition as it failed to muster the agreement of the majority of the members of the BSG required by the Rules of procedure of the latter.

16. In its observations the complainant noted that the fact that the BSG had excluded "observers" from its activities was further evidence that the selection process was carried out in a way to avoid transparency.

The Ombudsman's assessment

17. 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 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 from among those who had expressed an interest in appointment following a call for expression of interest from 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).

18. Next, the Ombudsman notes that she has already examined in detail the selection process carried out by the EBA in the Decision closing her inquiry into complain 1966/2011/(EIS)LP (the 'UNI Decision'). [4] Thus, where appropriate, the Ombudsman will refer to her findings and conclusions made therein.



19. As regards the alleged absence of transparency of the selection process, the Ombudsman notes that the complainant did not submit any concrete arguments in support of its allegation, but merely limited itself to alleging an absence of transparency, in general. That being said, the Ombudsman notes that, within the context of the present inquiry, the EBA provided detailed information and further clarifications concerning the way the selection process was carried out. In fact, the main procedural steps of the selection process were also set out in detail in a letter submitted by the complainant itself (see paragraph 14 above), which was sent by the Chairman of the EBA to one of the unsuccessful applicants, an organisation to which the complainant also appears to be affiliated. In its observations, the complainant argued, however, that the fact that the BSG decided not to allow "observers" to take part in its meetings was further proof of the absence of transparency surrounding the composition of the BSG. In that respect, the Ombudsman notes that the issue of whether "observers" could attend the meetings of the BSG is unrelated to the selection process as such. Moreover, and as the EBA pointed out, the decision of the BSG not to allow "observers" to attend its meetings was, in any event, taken in compliance with its rules of procedure of the BSG.

20. Thus, the Ombudsman considers that the complainant's allegation of a lack of transparency as regards the selection process in question has not been established. Accordingly, no instance of maladministration can be found in this regard.

B. Allegation that EBA wrongly considered that credit rating agencies and auditing companies fall within the stakeholder category "users of financial services"

Arguments presented to the Ombudsman

21. The **complainant** alleged that the EBA adopted an incorrect definition of the category of "users" since the representatives selected for that category were actually "providers", not "users" of banking services. In fact, they were major credit rating agencies and auditing companies that supplied services to the banking sector.

22. The **EBA** argued that rating agencies are an important part of the risk assessment process and the calculation of capital requirements by institutions. It pointed out that, in the absence of any definition of the term "users" in the Regulation, it had adopted a broad interpretation of that term, including all possible parties, other than industry representatives, who enable final users to take their decisions on financial/banking services, such as credit rating agencies and auditing companies.

The Ombudsman's assessment



23. The Ombudsman has examined in detail the exact same above mentioned arguments in the UNI Decision (see paragraphs 53-54). In that 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. The Ombudsman will thus formulate in the present case the same critical remark as in the UNI Decision.

C. Allegation that EBA failed adequately to respond to the complainant's challenge to the decisions made by its Board of Supervisors concerning the selection of members of the BSG

Arguments presented to the Ombudsman

24. The complainant alleged that it has significant experience on consumer protection issues, whereas the selected stakeholder from the think-tank "*Re-define*" is not related to any consumer organisation. It also argued that the requirement of geographical balance laid down in the Regulation was not met since only applicants from the "new Member States" (those that joined the Union in or after the 2004) were selected for the consumer category.

25. The EBA replied that it had tried to ensure that the overall composition of the BSG would reflect a "geographical and gender balance and representation of stakeholders across the Union". It also stated that it enjoys a wide margin of discretion regarding the selection of its BSG's members. The EBA defended its selection of a consumer representative from "*Re-define*" in that the latter is a non-profit entity which has signed a framework agreement with the European Parliament on matters pertaining to financial services regulation and economic policy and cooperates with a wide group of various stakeholders. According to the EBA, "*Re-define*" has a proven track record on consumer-related issues while its representative has significant experience, expertise and involvement in consumer protection issues, which was also the reason why he was subsequently elected as President of the BSG.

26. As regards the criterion of "geographical balance", the EBA explained that it chose all 5 members of the consumer category among applicants from "new Member States" as a means to counterbalance the disproportionate representation of "old" Member States in the industry category (credit and investment stakeholder).

The Ombudsman's assessment

27. With its third allegation, the complainant has called into question, first, the way the EBA complied with the requirement of ensuring an appropriate geographical balance when appointing the members of the "consumers" category, and second, the fact the think tank "*Re-define*" had no apparent involvement or experience in consumer protection issues.



28. The Ombudsman has examined the exact same above-mentioned two arguments in the UNI Decision. In particular, in that Decision, the Ombudsman rejected as unfounded the argument, also raised in the present case by the EBA, according to which, provided there is an overall balance, the EBA is free to ignore the geographical balance in the composition of the various categories making up the BSG. As the Ombudsman stated in the UNI Decision (see paragraph 25 thereof), 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 the financial services sector making up the BSG ("industry participants", "employees/trade union representatives", "consumers", "users", "SMEs" and "top-ranking academics"). Based on that premise, the Ombudsman found that the decision of the EBA to choose all 5 members of the "consumers" category among applicants from "new" Member States as a means to counterbalance its decision to appoint 9 out of the 10 members of the "industry" category from applicants coming from "old" Member States to be flawed, and to have given rise to an instance of maladministration (see paragraphs 32-34 of the UNI Decision). For these reasons, the Ombudsman will thus formulate below the same critical remark as the one made in the UNI Decision.

29. As regards the fact that one of the selected members in the "consumers" category worked for a think-tank ("*Re-define*"), as the Ombudsman noted in the UNI Decision, working for a think-tank does not, in itself, imply that someone is not able to represent consumers or stand for their rights, and what needs to be examined in each case is if a selected member is indeed able to act as an objective and dedicated consumer representative. The Ombudsman also noted in the UNI Decision that, in principle, there should be a strong presumption that candidates representing consumer organisations and/or clear consumer interests are more suitable for being appointed to the "consumer" category than those whose main expertise and/or professional experience concerns other fields (see paragraph 51 of the UNI Decision). However, in the UNI Decision, the Ombudsman found that, as regards the present case, the EBA convincingly explained the reasons why it considered that the representative of the relevant think-tank, given his professional experience in this field, was deemed to have the required ability and experience to represent the interests of consumers. As in the case that gave rise to the UNI Decision, the complainant in the present case did not submit any concrete arguments to suggest that the representative in question could not represent the interests of consumers of financial services or that he was or could be influenced by other conflicting interests. Thus, as in the UNI Decision, the Ombudsman finds no maladministration in this regard in the present case. That being said, and with a view to improving further the selection process the Ombudsman will make below the same further remark as in the UNI Decision.

D. The complainant's claims

The complainant's claims

30. The **complainant** claimed that (i) the EBA should provide it with all the information



requested with regard to the selection process, (ii) that the selection of representatives from "Re-define" and from credit rating agencies should be annulled, and that (iii) its President should be appointed as a consumer representative.

31. In its opinion, the **EBA** addressed the first two claims in the context of its replies to the first and third allegation, respectively. As regards the third claim, the EBA stated that although a proposal to allow consumer organisations that have not been appointed to the BSG, such as the complainant, to participate in the work of the BSG as "observers" failed to muster the required majority of the members of the BSG, the EBA envisages taking further steps in the future to ensure a regular dialogue with consumers and their organisations.

The Ombudsman's assessment

32. As regards the first claim, the Ombudsman notes that in addressing the first allegation, the EBA provided all the relevant information and answers with regard to the way the selection process was carried out. Thus, this claim cannot succeed. That being said, 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.

32. As regards the other two related claims, to the extent that both are premised on the assumption that the selection process could be annulled and carried out again, the Ombudsman already explained in the UNI Decision why such an approach is no longer feasible (see paragraph 58 of the UNI Decision). Thus, these two claims cannot succeed either.

E. Conclusions

33. On the basis of his inquiry into this complaint, the Ombudsman closes the case with the following conclusions:

1. 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 an instance of maladministration

2. 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 another instance of maladministration.

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

Further remarks

1. 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.

2. 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'Reily

Done in Strasbourg on 19 December 2013

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

[2]

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

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

[4] Decision of 7 November 2013,

<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/52432/html.bookmark>