

Decision of the European Ombudsman closing his inquiry into complaint 1967/2011/(EIS)LP against the European Securities and Markets Authority

Decision

Case 1967/2011/LP - **Opened on** 31/10/2011 - **Decision on** 19/12/2013 - **Institution concerned** European Securities and Markets Authority (Critical remark) |

The background to the complaint

1. The present case concerns the decision made in 2011 by the European Securities and Markets Authority (ESMA) regarding the composition of its 30-member Securities and Markets Stakeholders Group ("SMSG"). The decision was made pursuant to Regulation (EC) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [1] (the "Regulation"). On 12 December 2013, having carried out a new selection process (launched in mid-2013), the ESMA announced that the SMSG would begin its second term of work on 1 January 2014 with a revised composition [2] . The inquiry into the present complaint, which concerns the composition of the original SMSG, included constructive discussions between ESMA staff and the Ombudsman's services. On the basis of these discussions, the Ombudsman expected that the ESMA would, when carrying out the new selection process, take due account of the views concerning the original process that had been expressed by her services. However, the present decision does not evaluate the second selection process or its outcome.

2. The complainant, UNI Europa, is a European trade union federation for services and communication. According to information available on its website, it represents 7 million workers in 330 European trade unions [3] .

3. According to Recital 48 of the Regulation:

"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 Securities and Markets Stakeholder Group should be used for that



purpose, and should represent, in balanced proportions, financial market participants, small and medium-sized enterprises (SMEs), academics and consumers and other retail users of financial services. The Securities and Markets 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 that

" The Securities and Markets Stakeholder Group shall be composed of 30 members, representing in balanced proportions financial market participants operating in the Union, their employees' representatives as well as consumers, users of financial services and representatives of SMEs. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent financial market participants ".

5. According to Article 37(3) of the Regulation:

" The members of the Securities and Markets 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 ESMA'S SMSG was published on 26 November 2010, [4] with a deadline for submitting applications of 23 December 2010. On 12 April 2011, the ESMA issued a press release on its decision on the composition of its SMSG [5] . The press release contained information on the names of the newly appointed members of the SMSG, the institutions each one of them was representing, their nationality, and the subcategory to which they had been selected.

7. On 27 May 2011, the complainant addressed a letter to the ESMA, expressing its disappointment about the overall composition of the SMSG. In this letter, the complainant raised a number of issues that will be dealt with below. Among other things, the complainant regretted that only one employee representative had been appointed, and that this representative was moreover representing the interests of investors, not of employees.

8. By a letter of 10 June 2011, the ESMA replied to the complainant. It explained that it had received 242 applications and that it had done its best to ensure a rigorous and fair process and to comply with the requirements of the Regulation. It also stated that one of the three further applications to which the complainant had referred in this context was considered ineligible as it was submitted after the closing deadline for applications. The second one was from a staff member of the European Central Bank, which was thus seen as reflecting the views of an EU institution, whereas the third one was from a candidate with experience gained mainly in the life assurance sector rather than in the area of securities markets.

9. On 27 July 2011, the complainant replied to the ESMA, contesting the fact that one of the said three candidates had failed to respect the deadline for submitting applications and that the



remaining two lack the required qualifications.

10. By letter of 7 September 2011, the ESMA informed the complainant that although it did not intend to reconsider the setting up of the SMSG, it would reflect how best to accommodate in the future input from a wider range of stakeholders.

11. On 29 September 2011, not being satisfied with the above reply, the complainant lodged the present complaint.

The subject matter of the inquiry

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

Allegations:

(1) The ESMA failed to ensure (i) geographical and (ii) gender balance within and among the stakeholder categories of the SMSG, as required by Article 37(3) of Regulation (EU) No 1095/2010.

(2) The ESMA failed to ensure an adequate balance between the stakeholder categories provided for in Regulation (EU) No 1095/2010.

(3) The ESMA adopted an incorrect definition of the different stakeholder categories provided for in Regulation (EU) No 1095/2010.

(4) The ESMA wrongly established an alternate members' list, which is not provided for in Regulation (EU) No 1095/2010

(5) The ESMA committed administrative errors when it evaluated applications from candidates put forward by the complainant

Claims:

(1) The ESMA should reconsider the composition of the SMSG as soon as possible, and in any event, without waiting for the renewal of its membership, which will take place in 2013.

(2) The ESMA should publish the CVs of the selected members as well as detailed information on the selection criteria and the selection process on its website.

The inquiry



13. On 31 October 2011, the Ombudsman invited the ESMA to submit an opinion on the above allegations and claims.

14. On 30 January 2012, the ESMA submitted its opinion to the Ombudsman. This opinion was forwarded to the complainant for its observations. On 1 March 2012, the complainant submitted its observations.

15. After having examined the ESMA's opinion and the complainant's observations, the Ombudsman concluded that it was necessary to proceed to an inspection of the ESMA's file concerning this case. The inspection took place on 16 April 2013. The inspection report was sent to the complainant on 26 August 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 ESMA failed to ensure geographical and gender balance within and among the stakeholder categories of the SMSG as required by Article 37(3) of Regulation (EU) No 1095/2010

Arguments presented to the Ombudsman

16. The **complainant** contested the way in which the ESMA 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 "industry" category ("financial market participants"), and all of the members of the "users" category came from leading financial institutions from "old" Member States (i.e., EU Member States before the 2004 enlargement), whereas only five out of the thirty came from "new" Member States (i.e., the Member States that joined the EU in or after 2004); and that (ii) only 11 of the 30 members were women.

17. In its opinion, the **ESMA** argued that the Regulation requires "*to the extent possible, [to] ensure an appropriate geographical and gender balance and representation of stakeholders across the Union*". It argued that it had primarily focused on the qualities of the candidates, ensuring a balanced representation of expertise and experience from different categories of stakeholders. It added that although, when looking at the weighting given to each country under the qualifying majority voting rules applicable in the Council, new Member States may indeed appear to be under-represented, applicants from those Member States represented only 7.1% of all applicants, but 16.7% of the members of the SMSG. As regards the fact that all members of the users category were from "old" Member States, the ESMA pointed out that it had received 132 applications for that category of which only 8 were from "new" Member States. Two of those applications were from Bulgaria and Poland, two countries already well represented in the



SMSG. Finally, as regards the gender issue, the ESMA pointed out that although female candidates represented only 19% of all applications received, it appointed 11 female stakeholders, that is 37% of the members of the SMSG.

The Ombudsman's assessment

18. This is the first time an SMSG has been appointed by the ESMA 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 for that made by the ESMA as regards the composition of the SMSG. In examining whether there was maladministration, the Ombudsman checks whether, in carrying out the selection process, the ESMA 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 ESMA had no previous experience of carrying out this task. Finally, the Ombudsman takes the view that it was reasonable for the ESMA to have confined its selection of SMSG members to candidates who had expressed an interest in appointment following a call for expression of interest. This approach complied with Article 37(3) of the Regulation and the requirement laid down therein, according to which "*members of the Securities and Markets Stakeholder Group shall be appointed by the Board of Supervisors, following proposals from the relevant stakeholders*" (see above, paragraph 5).

19. Next, the Ombudsman notes that she has already examined in detail a very similar selection process carried out by the European Banking Authority in a decision closing her inquiry into complaint 1966/2011/(EIS)LP (the 'UNI Decision') in which very similar arguments were raised. [6] Given that the selection process to which the UNI Decision relates was based on an almost identical Regulation [7], where appropriate, the Ombudsman will refer below to her findings and conclusions made in the UNI Decision.

20. In particular, in the UNI Decision, having first noted that the purpose of the requirement of appropriate geographical balance laid down in the Regulation would be frustrated unless it also applied, to the extent possible, within each of the various categories of members making up the SMSG, the Ombudsman reached the following conclusions.

21. First, as regards the composition of the "industry" category, the Ombudsman found in that Decision 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". In the present case, the ESMA also did not submit any convincing explanation as to why it chose to appoint 9 out of the 10 members of the "industry" category, and all 5 members of the "users" category, from representatives from "old" Member States.

22. The ESMA's argument that applicants from "new" Member States represented only 7.1% of



all applicants, but 16.7% of the SMSG is not convincing. Although the Ombudsman recognises that the low number of applications from candidates from "new" Member States rendered ESMA's task of ensuring an appropriate geographical balance more difficult, the fact remains that the ESMA received in total at least 17 applications from "new" Member States, and thus could have striven to ensure that more than 5 members from those Member States were appointed to the SMSG. In particular, the ESMA could have tried to ensure that, at least, the category of "users" is not composed exclusively of representatives of "old" Member States. In that regard, the Ombudsman has already stressed in the UNI Decision that, given the existence of an internal market for financial services, of which the securities market is, according to the Regulation, an important segment, it is essential that any consultative stakeholders' group set up to reflect the interest of various segments of the financial services sector should be, to the extent possible, a true representation of the actual geographical spread of the industry, covering, in principle, as many EU countries as possible. Next, the ESMA's argument that among the 8 applications it had received from "new" Member States for the "users" category, there were two from applicants from , Poland and Bulgaria, Member States that were already represented in the other categories, cannot be accepted as a valid reason why no single representative from "new" Member States was appointed to the "users" category. In fact, the ESMA could still have appointed other applicants from "new" Member States to the "users" group and thus complied with the objective to ensure an appropriate geographical balance. The ESMA did not explain why it was not possible to proceed to an overall selection of candidates from "new" Member States which would have ensured that, at the end, no category was composed exclusively by applicants from "old" Member States. Thus, the Ombudsman finds that in the present case the ESMA committed an instance of maladministration (see by analogy paragraphs 26-29 of the UNI Decision). For these reasons, the Ombudsman will also formulate below the same critical remark as in the UNI Decision.

23. Finally, as regards the complainant's argument that only 11 out of the 30 appointed applicants were women, for the same reasons as those set out the UNI Decision, the Ombudsman does not consider that the ESMA committed an instance of maladministration (see paragraph 34 of the UNI Decision). In fact, and as in the UNI Decision, the Ombudsman takes note of the ESMA's explanation that applications by women represented only 19% of all applications received. In trying to comply with the requirement of ensuring to the extent possible an appropriate gender balance, the ESMA decided finally to appoint 11 women, that is, 37% of the total number of the members of the SMSG. Thus, as in the UNI Decision, the Ombudsman acknowledges the efforts made by the ESMA to counteract the very low proportion of applications from women by appointing a larger proportion of female members. In these circumstances, she does not find maladministration in relation to this aspect. However, for the reasons set out in the UNI Decision, the Ombudsman will make a further remark (see paragraph 34 of the UNI Decision).

B. Allegation that the ESMA failed to ensure an adequate balance between the stakeholder categories provided for in Regulation (EU) No 1095/2010



Arguments presented to the Ombudsman

24. The complainant argued that the ESMA failed to ensure an adequate balance between the stakeholder categories provided for in the Regulation. By allocating seven places to users' representatives and five places to consumer representatives whereas only two were assigned to employees' representatives and only one to SMEs' representatives, the ESMA not only failed to respect the numerical equality among those categories but also caused the latter two categories to be clearly under-represented.

25. Moreover, the complainant argued that the group of "users" was de facto an extension of the "industry" category, leading to an over-representation of that category to the detriment of the "demand side".

26. According to the **ESMA**, the definitions of and references to "financial market participants" ("industry") and "users of financial services" ("users") provided for by the Regulation were broad and overlapping. It explained that it divided the applicants into twelve main categories in order to better distinguish between different types of interests that should be represented in the SMSG. The ESMA further submitted that the need to ensure that the different types of "users" were adequately represented, including institutional investors who might also be considered part of the industry, meant that 7 places had to be allocated to that category. As a result, the remaining 8 places were shared by the representatives of employees, retail investors and SMEs. According to the ESMA, its priority was not to ensure a numerical equality among all categories, but the representation of all different views.

The Ombudsman's assessment

27. The Ombudsman recalls that according to Article 37(2) of the Regulation, the SMSG "*shall be composed of 30 members, representing in balanced proportions financial market participants operating in the Union, their employees' representatives as well as consumers, users of financial services and representatives of SMEs. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent financial market participants*". It follows that 10 out of the 30 seats of the Group are expressly allocated to "industry" participants and that at least 5 seats should be reserved for top-ranking academics. That means that, in principle, the remaining 15 seats should be allocated in "*balanced proportions*" to the remaining four categories of stakeholders, thus potentially allowing for a minimum of three seats for each of the categories of "users", "consumers", "employees representatives" and "SMEs". In carrying out the selection process, the ESMA must also comply with Article 37(3) of the Regulation, which requires that the composition of the SMSG, apart of ensuring a geographical and gender balance, should, to the extent possible, also reflect an appropriate "*representation of stakeholders across the Union*".

28. It follows from the above that by appointing to the SMSG 10 "industry" representatives and 5 top-ranking academics, the ESMA did not depart from the requirements of Article 37(2) of the



Regulation. Nor does the Ombudsman consider that by deciding to appoint only two rather than three employees' representatives the ESMA acted outside the margin of the discretion it enjoys in this field. However, as the Ombudsman has found in the UNI Decision, where a similar allegation was also examined (see paragraphs 38-41 of the UNI Decision), the same cannot be said with regard to the decision of the ESMA to appoint only one representative of SMEs when, as stated above, there was scope to appoint, in principle, at least three representatives for this category. Even though the Regulation does not fix the number of members to be appointed to this category and the ESMA, therefore, has discretion as to how many members should be foreseen for each category, the decision to limit this number to just one in the present case, as far as the SMEs category was concerned, raises serious questions. In effect, even though the Regulation does not provide specific numbers for these categories, the fact that they are mentioned without any distinction would suggest that the legislator considered it appropriate that these categories should, in principle, comprise similar numbers of members. Moreover, there is nothing in the relevant provisions of the Regulation to imply that, apart of the 10 industry representatives and the 5 top-ranking academics, a clear-cut preference should be given to any of the four remaining categories of stakeholders, as ESMA chose to do in the present case.

29. Accordingly, the Ombudsman finds that the ESMA's decision to appoint only one representative of SMEs to the SMSG failed to do justice to the requirement of Article 37(2) of the Regulation to ensure, to the extent possible, a balanced representation of stakeholders across the Union, and thus gave rise to an instance of maladministration. The Ombudsman will thus formulate below a critical remark.

30. Finally, as regards the argument of the complainant that, as the result of the allocation of places within the SMSG, the demand side was under-represented while the industry side was over-represented, the Ombudsman would agree with ESMA that given the very broad definition of "financial market participants" in Article 4(1) of the Regulation, it cannot be excluded that demand side "users", such as institutional investors (i.e., insurance, pension funds, asset management firms), might also be seen as being, partly, industry participants. That being said, since the definitions of the "financial market participants" and "users" categories, as far as the securities market segment is concerned, do indeed appear to overlap, it is all the more important for the ESMA to ensure that, to the extent possible, the "users" category is not given an undue numerical preference to the detriment of the remaining four categories. The Ombudsman will thus make a further remark in that regard below.

C Allegation that the ESMA adopted an incorrect definition of the different stakeholder categories provided for in Regulation (EU) No 1095/2010

Arguments presented to the Ombudsman

31. The **complainant** argued that neither of the two employees' representatives selected could be considered to be employees' representatives. One of them ([the Vice Chair of the national



Association of Investor Relations Directors] [8]), represented the interests of investors, while the other ([the Head of the Consumer Policy Department in a national Chamber of Labour]) represented the interests of consumers. In addition, the sole representative of SMEs appeared to be working for a [national] Stock Exchange and to be a former director of the largest manufacturer of [...].

32. According to the **ESMA** , the two employees' representatives were employees or working for employees' interests. In particular, the member of the [national] Association of Investor Relations Directors, is an employee of a listed company and could thus add a different perspective on employee issues. The other appointed candidate works for the [national] Chamber of Labour which acts as a think-tank for employee interests as well as consumer interests. As regards the representative of SMEs, the ESMA argued that all applicants for that category could be considered to represent the interests either of the "industry" or of the "users". In the absence of a "pure" representative of SMEs, the applicant chosen was the most appropriate one.

The Ombudsman's assessment

33. The Ombudsman considers that the fact that one of the two employee representatives was actually a member of [a national] Chamber of Labour, which also acts a think-tank for the interests of employees, was more than adequate for the ESMA to consider that member as being, in principle, well placed to represent the interests of employees. The fact that the other selected member was working for [a national] Association of Investor Relations Directors does not necessarily imply, as the complainant appears to suggest, that he had no expertise or connection with representing the interests of employees. However, the mere fact that a chosen member is formally an employee of a given entity cannot serve as an adequate and valid justification for appointing that member in the "employee" category. Therefore, the Ombudsman considers that what needs to be examined in each case is if a selected member is indeed able to act as an objective and dedicated employee representative.

34. In that regard, the Ombudsman considers that, in principle, there should be a strong presumption that candidates representing the interests of employees are more suitable for being appointed to the "employees" category than those who appear to represent, essentially, the interests of investor relations managers. In the present case, the ESMA failed convincingly to explain the reasons why, in this case, it was not possible to appoint another member who would have been more suitable for representing the interests of employees, instead of those of investor relations managers. The Ombudsman notes that, with regard to the selection of the representative for SMEs (see paragraph 35, below), the ESMA argued that it did not receive any application from more suitable candidates. No such argument was put forward by the ESMA as regards the selection of members representing the "employees" category. In these circumstances, the Ombudsman finds that the ESMA has failed properly to explain its choice in this regard. This constitutes an instance of maladministration. The Ombudsman will thus make a critical remark below.



35. As regards the member appointed as an SMEs' representative, the Ombudsman takes note of the ESMA's explanation that, in the present case, there was no application by any other candidate that could be said to represent the interests of SMEs only, all applicants appearing to also represent the interests either of the "industry" or the "users" category. The Ombudsman also notes that the complainant did not submit any concrete arguments or observations to call this explanation into question or to suggest that the person that was chosen could not represent the interests of SMEs. Thus, the Ombudsman finds no maladministration in this regard. That being said, the Ombudsman believes that it would facilitate and further improve the whole selection process if the ESMA were to require in the future that applicants for the SMSG indicate preferably only one of the six categories for which they would like to be considered. That way, applications could better suit the category targeted, thus reducing further the likely scope of challenges the ESMA could face by appointing candidates whose main qualifications may not be those of the category concerned. The Ombudsman will make a further remark in that regard below.

C. Allegation that the ESMA incorrectly included in its Decision an alternate members' list

36. The **complainant** alleged that the ESMA was wrong to establish an alternate members' list. First, no such list was foreseen in the Regulation, and second, no precise rules existed as to the status of such members and the circumstances under which they could replace permanent members of the SMSG.

37. In its reply, the **ESMA** argued that the Regulation did not prevent the establishment of an alternate members' list and that the list was supposed to allow for a quick and efficient replacement of vacancies. The ESMA pointed out that the list did not provide a replacement for every potential SMSG member, and where necessary, it would issue a new open call for suitable candidates.

The Ombudsman's assessment

38. The Ombudsman notes that the Regulation does not provide for the establishment of an alternate members list. Although she recognises that in some cases it may be useful for an administrative body, such as the ESMA, to have in place a list with potential alternate candidates that could be used in order to quickly replace members where this becomes necessary, the fact however remains that the existence of such a list is likely to cause further confusion as to how any such replacement is supposed to take place, and under which conditions a new call for expression of interest may instead be required. In fact, in the absence of a clear basis in the Regulation, an alternate members' list, such as the one maintained by the ESMA, may have adverse effects on administrative transparency and legal certainty, potentially increasing the risk of further complaints by third parties against the ESMA. Thus, it would be better for the ESMA to avoid in the future establishing and maintaining such a list. Given that, following the recent renewal of the SMSG, the list in question is no longer valid, there are



however no grounds for further inquiries into this matter. The Ombudsman will however make a further remark in that regard.

D. Allegation that the ESMA did not evaluate correctly the candidates put forward by the complainant

The complainant's case

39. The **complainant** argued that the ESMA was wrong to declare inadmissible an application by one of its members on the grounds that his application was submitted after the set deadline of 23 December 2010. In fact, the candidate in question had submitted his application by e-mail on 22 December 2010. On 23 December 2010, he sent an optional motivation letter to be added to his earlier application. Furthermore, the ESMA wrongly rejected another application from a staff member of the European Central Bank who was an expert in the field of securities and also an employee representative.

40. The **ESMA** replied that it was not clear to which inadmissible application the complainant was referring, given that the application referred to by the ESMA was received on 24 December 2010, that is one day after the deadline had expired. It further explained that, as already stated in a letter sent to the complainant on 10 June 2011, staff members of the ECB were not ideal candidates for the SMSG given the ECB's position as a Union body rather than as a financial market participant. Moreover, the role of the SMSG was not to reflect the views of the employees of the European Union bodies.

41. In its observations, the **complainant** reiterated that its candidate had sent on time his application (on 22 December 2010) and annexed copies of the relevant correspondence by the person concerned.

The Ombudsman's assessment

42. The Ombudsman notes that, in their correspondence prior to the submission of the current complaint, neither the complainant nor the ESMA provide any specific elements that would allow to identify the application for which there was a dispute as to its admissibility. It was only at the stage of its observations that the complainant submitted copies of an e-mail sent by the applicant concerned to the ESMA on 22 December 2010, containing his initial application, followed by another e-mail, sent the day after, in which the said candidate also attached an optional motivation letter.

43. The Ombudsman finds that, contrary to the complainant's allegation, the above-mentioned application was not rejected by the ESMA as inadmissible. In fact, in the documents inspected by the Ombudsman, the name of the above candidate was included in a list compiled by ESMA of all admissible applications which were subsequently assessed by its Supervisory Board.



Although the ESMA did refer to a late application submitted by one of the candidates, it is clear that the application referred to by the complainant was duly taken into account by the ESMA.

44. Next, the Ombudsman considers that the decision by ESMA to reject an application made by a candidate who was a member of the staff of the ECB, on the ground that the said candidate represented a Union body, and not a financial market participant or its employees, was reasonable. Thus, no maladministration has been committed in this regard.

E. The complainant's claims

The complainant's claims

45. The **complainant** claimed that (i) the ESMA should reconsider the composition of the SMSG 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 ESMA 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.

46. In its opinion, the **ESMA** noted that the selection process had been conducted in good faith and to the best of its abilities.

47. The ESMA also stated that it would publish summaries of the CVs of all members of the SMSG containing their relevant professional background. Moreover, when the next reappointment of the SMSG members takes place in late 2013, the ESMA would try further to improve and make more transparent the whole selection process based on the experience already gained.

The Ombudsman's assessment

58. Given that, on 12 December 2013, the ESMA announced the composition of a new SMSG (effective as of 1 January 2014), the Ombudsman takes the view that it is no longer possible to reconsider the composition of the stakeholder group that was set up in early 2011. Thus, the complainant's first claim cannot succeed.

59. As regards the complainant's claim that the CVs of the SMSG members should be published on the website of the ESMA, the Ombudsman notes that this claim has already been satisfied by the ESMA, and that all the CVs of the members of the SMSG were in the meantime published on the ESMA's website. With regard to the further claim that the ESMA also publish detailed information on the selection criteria used and the process by which each candidate was selected, the Ombudsman notes that, on 12 April 2011, the ESMA issued a press release, providing information about the names of the newly appointed members of the SMSG, the institutions each one of them was representing, their nationality, and the category to which they



had been selected. Moreover, the ESMA has adopted specific rules on access to documents giving effect to Article 72 of the Regulation [9] , thus enabling third parties to obtain access to documents, including those pertaining to the selection process, that could be made publicly available. [10] It appears that the complainant has not made use of this possibility. In these circumstances, the Ombudsman is not convinced that the ESMA would be obliged to publish detailed information on the selection criteria used and the process by which each candidate was selected, as requested by the complainant. That being said, in the Ombudsman's view, it would further improve the overall transparency of the selection process and also strengthen the citizens' trust in the ESMA's overall compliance with Article 37 of the Regulation, if the ESMA were to publish, once the members of the SMSG have been appointed, meaningful information that could show how, in the light of the various applications received, the ESMA 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

60. Thus, on the basis of her 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 SMSG as a whole, and not also within each category of membership, the ESMA committed an instance of maladministration.

2. By appointing only one representative of SMEs to the SMSG the ESMA did not comply with the requirement of Article 37(2) of the Regulation to ensure, to the extent possible, a balanced representation of stakeholders across the Union, and thus committed an instance of maladministration.

3. By failing properly to explain its choice as regards the representative of employees, the ESMA did not comply with Article 37(2) of the Regulation, and thus committed an instance of maladministration.

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

The complainant and the ESMA will be informed of this decision.

Further remarks



- 1. The ESMA could publish future calls for expression of interest in becoming a member of the SMSG, 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.**
- 2. Given the potentially wide definition of the "users" category, as far as the securities market segment is concerned, it would be advisable if the ESMA could ensure, to the extent possible, that the "users" category is not given an undue numerical preference to the detriment of the seats to be allocated to the remaining 4 categories of the SMSG.**
- 3. It would facilitate and further improve the selection process if the ESMA were to require future applicants to indicate only one of the six categories for which they would like to be considered.**
- 4. In order to maintain the required level of transparency in the setting up and functioning of the SMSG, it would be advisable if the ESMA could in the future avoid compiling an Alternate Members List.**

During the inquiry, and especially on the occasion of the inspection of documents (see paragraph 15 above), there were informal and constructive discussions between the ESMA and the Ombudsman's services. During these discussions, the ESMA expressed its willingness to revise its approach for the second selection round. As already noted, the ESMA announced the new composition of the SMSG on 12 December 2013. Although the present decision only concerns the first selection process that took place in 2011, the Ombudsman invites the ESMA, in its follow-up to the critical and further remarks set out 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 L 2010 L 331, p 84

[2]

<http://www.esma.europa.eu/news/Press-release-ESMA-appoints-new-Securities-Markets-Stakeholders-Group-members>
[Link]

[3] http://www.uniglobalunion.org/Apps/uni.nsf/pages/about_euEn [Link]

[4] http://www.esma.europa.eu/system/files/10_1466.pdf [Link]

[5] http://www.esma.europa.eu/system/files/2011_BS_123.pdf [Link]



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

[7] Regulation (EU) No 1093/2010, of the European Parliament and of the Council of 24 November 2010, establishing a European Supervisory Authority (EBA), OJ 2010 L 331, p. 12.

[8] Text and references inserted in [...] have been redacted or anonymised.

[9] According to Article 72(2) of the Regulation, "[t]he Management Board shall, by 31 May 2011, adopt practical measures for applying Regulation (EC) No 1049/2001".

[10]
http://www.esma.europa.eu/system/files/2011_MB_69___Decision_on_access_to_documents_rules.pdf
[Link]