

Decision of the European Ombudsman closing her inquiries into complaints 1874/2011/(EIS)LP and 1877/2011/(EIS) LP against the European Insurance and Occupational Pensions Authority

Decision

Case 1874/2011/LP - Opened on 27/10/2011 - Decision on 26/02/2014 - Institution concerned European Insurance and Occupational Pensions Authority (Critical remark) |

The background to the complaint

1. The present inquiries concern the decision made in 2011 by the European Insurance and Occupational Pensions Authority ('EIOPA') regarding the composition of the Insurance and Reinsurance Stakeholder Group ('IRSC') and the Occupational Pensions Stakeholder Group ('OPSG'). That decision was made pursuant to Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010, establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC [1] (the 'Regulation'). On 4 October 2013, and after having carried out a new selection process (launched in May 2013), the EIOPA announced that the two Stakeholder Groups would begin their second term of work with a revised composition. The inquiry into the present complaint included constructive discussions between EIOPA staff and the Ombudsman's services. Arising from these discussions, it was anticipated by the Ombudsman that the EIOPA 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 in case 1874/2011/(EIS)LP, 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] The complainant in case 1877/2011/(EIS)LP, BEUC (Bureau européen des Unions de Consommateurs), is a European consumer organisation, representing independent national consumer organizations from more than thirty European countries. Its main task is to represent its members and to defend the interests of European consumers.

3. Recital 47 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, an Insurance and Reinsurance Stakeholder Group and an Occupational Pensions Stakeholder Group should be used for that purpose and should represent, in balanced proportions and respectively, the relevant financial institutions operating in the Union, representing the diverse business models and sizes of financial institutions and businesses; small and medium-sized enterprises (SMEs); trade unions; academics; consumers; other retail users of those financial institutions; and representatives of relevant professional associations. Those stakeholder groups 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 Insurance and Reinsurance Stakeholder Group [IRSG] shall be composed of 30 members, representing in balanced proportions insurance and reinsurance undertakings and insurance intermediaries operating in the Union, and their employees' representatives, as well as consumers, users of insurance and reinsurance services, representatives of SMEs and representatives of relevant professional associations. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent insurance undertakings, reinsurance undertakings or insurance intermediaries, three of whom shall represent cooperative and mutual insurers or reinsurers ".

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

" The Occupational Pensions Stakeholder Group [OPSG] shall be composed of 30 members, representing in balanced proportions institutions for occupational retirement provision operating in the Union, representatives of employees, representatives of beneficiaries, representatives of SMEs and representatives of relevant professional associations. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent institutions for occupational retirement provision ".

6. Article 37(4) of the Regulation is worded as follows:

" The members of the Stakeholder Groups shall be appointed by the Board of Supervisors of the EIOPA 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 ".

7. A call for expression of interest regarding the setting up of the OPSG and IRSG was published on EIOPA's website on 26 November 2010, with a deadline for submitting applications of 31 December 2010. On 8 March 2011, the EIOPA issued a press release on the composition of its two stakeholder groups. [3] The press release contained information on the names of the newly appointed members of the two stakeholder groups, the institutions each one



of them was representing, their nationality, and the category to which they had been selected.

8. On 16 March 2011, the complainant in case 1874/2011/(EIS)LP addressed a letter to the Chairman of the EIOPA expressing its disappointment regarding the composition of the two stakeholder groups. The complainant submitted that the composition of those two groups did not respect the provisions of the Regulation and asked the EIOPA to take "immediate action" in order to ensure a balanced representation of all users in line with the Regulation. On 21 April 2011, the complainant in case 1877/2011/(EIS)LP also addressed a letter to the Chairman of the EIOPA raising similar concerns, and also asking the EIOPA to reconsider the composition of both stakeholder groups.

9. On 14 September 2011, the complainants lodged the present complaints.

The subject matter of the inquiry

10. The complainants submitted almost identical allegations and claims, the only difference being that, whereas the complainant in case 1874/2011/(EIS)LP complained about the composition of both the IRSG and the OPSG, the complainant in case 1877/2011/(EIS)LP complained about the composition of the IRSG only. For reasons of administrative efficiency, the Ombudsman thus decided to examine both complaints together and to include the following allegations and claims in a single inquiry.

Allegations:

1. The EIOPA failed to ensure (i) geographical balance and (ii) gender balance within and among the stakeholder categories of the IRSG and the OPSG as required by Article 37(4) of Regulation (EU) No 1094/2010.
2. The EIOPA failed to ensure an adequate balance between the representatives of the industry, on the one hand, and those of users and consumers, on the other hand, when selecting members of the IRSG and the OPSG.
3. The EIOPA adopted an incorrect definition of the different stakeholder categories provided for in Regulation (EU) No 1094/2010.

Claims:

1. The EIOPA should reconsider the composition of the IRSG and of the OPSG as soon as possible, and in any event, without waiting for the renewal of its membership, which will take place in 2013.
2. The EIOPA should publish the CVs of the selected members as well as the selection criteria



its website.

The inquiry

11. On 27 October 2011, the Ombudsman invited the EIOPA to submit an opinion on the above allegations and claims.

12. On 31 January 2012, the EIOPA submitted its opinion, which was forwarded to the complainants for observations. On 29 and 30 March 2012, EuroFinuse and BEUC, respectively, submitted their observations.

13. After having examined the EIOPA's opinion and the complainants' observations, the Ombudsman concluded that it was necessary to proceed to an inspection of the EIOPA's file concerning this case. The inspection took place on 18 April 2013. The inspection report was sent to the complainants on 30 May 2013 for their eventual observations. The complainants did not submit any observations.

The Ombudsman's analysis and conclusions

A. Allegation that the EIOPA failed to ensure (i) geographical balance and (ii) gender balance within and among the stakeholder categories of the IRSG and the OPSG as required by Article 37(4) of the Regulation

Arguments presented to the Ombudsman

14. The **complainants** contest the way the EIOPA handled the requirements of Article 37(4) of the Regulation. In particular, they criticised the fact that (i) as regards the IRSG, there are no representatives of the insurance and reinsurance sector from the "new" Member States (i.e., the Member States that joined the EU in or after 2004), whereas as regards the OPSG, only one out of the ten members of the industry came from a "new" Member State, (ii) as regards the IRSG, eight out of the thirty members came from Germany, whereas as regards the OPSG, five out of the thirty members came from the United Kingdom, with these two countries being thus overrepresented in the respective two stakeholders groups, and (iii) the EIOPA selected only 8 women among the thirty members of both of the IRSG and the OPSG.

15. In its opinion, the **EIOPA** argued that in order to comply with the requirement of " *an appropriate geographical balance* " and " *representation of stakeholders across the Union* " it decided that members should be drawn from as many differing cultural heritages as possible, thus ensuring a wide representation of regulatory approaches and market structures. It also stressed that the selection process was based primarily on the professional expertise and



experience of the candidates.

(i) As regards the geographical balance

16. The EIOPA explained that as regards the IRSG, only 12 out of 100 eligible candidates were from "new" Member States (12%) and that only 3 of them applied for the "industry" category. However, none of them was selected due to either insufficient experience, exclusively national professional focus and/or limited English language skills. There were however three candidates from "new Member States" who were appointed to the IRSG, two to the "consumers" category and one to the "academics" category, thus representing 10% of the IRSG. As regards the OPSG, from an eligible pool of 91 candidates, only 11 were from "new" Member States, four of whom applied for the "industry" category. On the basis of their qualifications, the EIOPA selected only one highly experienced candidate. It rejected a second applicant for that category since he came from the same organisation as the first chosen member. Overall, the EIOPA appointed four candidates from new Member States to the OPSG, one to the "industry" category, two to the "consumers" and one to the "academics" category. Thus, although candidates from "new" Member States represented only 12.1% of all eligible candidates, they made up 13.3% of the members of the OPSG.

(ii) As regards the number of German and British candidates

17. According to the EIOPA, as regards the IRSG, applications from German nationals represented 20.8% of all eligible applications. The EIOPA stressed that all chosen German applicants were not only considered best in their respective category (on the basis of their professional and/or academic experience), but also provided a specific expertise that was valuable to the IRSG. With regard to the OPSG, the EIOPA pointed out that the applications from the UK represented 14.3% of all eligible applications, and that it decided to appoint 5 UK candidates (16.7%), not only because of their experience and expertise, but also because of the importance of the UK pension schemes market.

(iii) As regards gender balance

18. The EIOPA pointed out that there were 9, not 8 women appointed to the IRSG. It considers that with 30% of the IRSG members being female compared to a share of only 20% eligible female applications, and with 26.7% of the OPSG members being female compared to a share of only 14.3% eligible female applicants, it fully complied with the requirement of the Regulation to ensure, to the extent possible, a gender balance.

The Ombudsman's assessment

19. This is the first time a stakeholder group has been appointed by the EIOPA 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 IRSG and OPSG for that made by the EIOPA. In examining whether there was maladministration, the Ombudsman checks whether, in carrying out the selection process, the EIOPA 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 EIOPA had no previous experience of carrying out this task. Finally, the Ombudsman takes the view that it was reasonable of the EIOPA to have confined its selection of the members of the two groups 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(4) of the Regulation and the requirement laid down therein, according to which, "*members of the Stakeholder Groups shall be appointed by the Board of Supervisors, following proposals from the relevant stakeholders*".

20. Next, the Ombudsman notes that she has already examined in detail very similar selection processes carried out by (i) the European Banking Authority (decision closing her inquiry into complaint 1966/2011/(EIS)LP - the 'UNI Decision'), and (ii) the European Securities and Markets Authority (decision closing her inquiry into complaint 1967/2011/(EIS)LP - the "UNI II Decision"), in which very similar arguments were also raised. [4] Given that the selection processes to which the UNI and UNI II Decisions relate were based on two Regulations [5] whose relevant provisions are almost identical with those of the Regulation at issue in the present case, the Ombudsman will, where appropriate, refer to her findings and conclusions made in these two Decisions.

(i) As regards the geographical balance

21. The Ombudsman has already stressed in the UNI Decision that, given the existence of an internal market for financial services, of which the insurance and occupational pensions markets are, according to the Regulation, two important segments, it is essential that any consultative stakeholder group set up to reflect the interests 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. Having first noted that the purpose of the requirement of appropriate geographical balance laid down in the applicable Regulation would be frustrated unless it also applied, to the extent possible, within each of the various categories of members making up the stakeholder group concerned, the Ombudsman reached the following conclusions.

22. First, as regards the composition of the "industry" category, the Ombudsman found in the UNI 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 Ombudsman finds that the EIOPA did not submit any convincing explanation either as to why all members of the "industry" category of the IRSG, and 9 out of ten of the "industry" category of the OPSG came from "old" Member States.

23. More particularly, with regard to the composition of the IRSG, the EIOPA argued that eligible applications from "new" Member States represented only 12% of all applications, and that none of the three applicants who applied for the "industry" category had either the required experience, sufficient English language skills and/or a European "professional focus". The Ombudsman recognises that the low number of applications from candidates from "new" Member States rendered the EIOPA's task of ensuring an appropriate geographical balance more difficult. However, apart of the requirement of sufficient professional experience, there is nothing in the Regulation that could be relied upon to justify the EIOPA's decision to reject candidates on grounds such as "limited English language skills" and/or "exclusive national professional focus". In particular, as regards the allegedly limited English language skills of the candidates in question, the Ombudsman considers that the EIOPA could have come up with alternative solutions (such as allowing those applicants to use another language that could also be understood by the remaining members of that category or providing translation services or even simultaneous interpretation during meetings) rather than ending up with a situation whereby none of the 10 members of the "industry" category was from a "new" Member States. As regards the allegedly overly national professional focus of the candidates concerned, one would expect applicants to have a very good and solid knowledge of issues concerning, first and foremost, their own industry market, rather than that of the whole of the Union. In fact, the very purpose of setting up such Stakeholder Groups is to allow representatives from the various Member States to share the knowledge and experience of their own national industry with the remaining members of the Stakeholder Group, and thus contribute to promoting a stable and single Union market for financial services as laid down in the Regulation.

24. Thus, the Ombudsman finds that in the present case, as far as the composition of the IRSG is concerned, the EIOPA committed an instance of maladministration (see by analogy paragraphs 26-29 of the UNI Decision). For these reasons, the Ombudsman will formulate below the same critical remark as in the UNI Decision.

25. As regards the composition of the OPSG, the EIOPA argued that having received only four applications from candidates from the "new" Member States for the "industry" category, it selected one only highly experienced candidate and had to reject a second applicant on the ground that he represented the same organisation as the candidate selected. The Ombudsman acknowledges that, in this case, faced with such a limited number of applications, the EIOPA may have had no other choice but to appoint the only applicant who had the required qualifications. She also finds the position of the EIOPA not to appoint a second candidate from the "new" Member States on the grounds that he represented the same organisation as the first appointee to be reasonable. Thus, no maladministration can be found in that regard. That being said, the Ombudsman believes that it is in the interest of the EIOPA that it takes any measure deemed appropriate, whether in terms of raising awareness among industry representatives from "new" Member States or by reinforcing further its ties with the corresponding regulatory bodies of those Member States, in order to ensure that a larger number of applications for the



industry category is received in the future, at least as far as the OPSG is concerned. The Ombudsman will thus make below a corresponding further remark.

(ii) As regards the number of German and British candidates

26. As regards the number of representatives of German (IRSG) and British (OPSG) nationality, the EIOPA underlined that the main criterion used was "professional experience", and that the relevant appointments reflected the fact that most of the applications for the IRSG and OPSG came respectively from Germany and the United Kingdom. As mentioned above, the Ombudsman recognises that the selection process is influenced by the quality and, to some extent, also by the number of applications received from candidates from a given Member State. Although it is *prima facie* rather difficult to understand why out of the 30 members that were to be selected among candidates coming from the then 27 Member States, 8 members in the case of the IRSG and 5 members in the case of the OPSG were chosen from one single Member State (Germany and the UK, respectively), the Ombudsman notes that the complainants have not criticised the explanations given by the EIOPA as to the reasons that led it to make the appointments in question. Moreover, the Ombudsman takes note of the fact that 3 among the 8 German nationals appointed to the IRSG and 2 among the 5 British nationals appointed to the OPSG were women, a consideration that should also be seen as part of EIOPA's overall efforts to ensure, to the extent possible, an appropriate gender balance. In these circumstances, the Ombudsman does not find any maladministration in relation to this aspect of the present case. That being said, the Ombudsman considers it useful to remind the EIOPA that it would be advisable to act in the future in such a way as to avoid the risk that one or more Member States may appear to be overrepresented. The Ombudsman will make a further remark in this respect below.

(iii) As regards gender balance

27. Finally, as regards the complainants' arguments that only 9 out of the 30 applicants appointed to the IRSG, and 8 out of the 30 applicants appointed to the OPSG were women, the Ombudsman does not consider, for the same reasons as those set out in the UNI and UNI II Decisions, that the EIOPA committed an instance of maladministration (see for instance, paragraph 34 of the UNI Decision). In fact, as in the UNI and UNI II Decisions, the Ombudsman takes note of the EIOPA's explanation that applications by women for the IRSG represented only 20% of all eligible applications received, whereas applications by women for the OPSG represented an even lower percentage, that is 14.3% of all eligible applications received. In trying to comply with the requirement of ensuring, to the extent possible, an appropriate gender balance, the EIOPA decided finally to appoint 9 women to the IRSG, that is 30% of the total number of the members of the IRSG, and 8 women to the OPSG, that is 26.7% of the total number of the members of the OPSG. Thus, as in the UNI and UNI II Decisions, the Ombudsman acknowledges the efforts made by the EIOPA 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 any maladministration in relation to this aspect.



However, and for the reasons set out in the UNI and UNI II Decisions (see paragraph 34 of the UNI Decision), the Ombudsman will make below a further remark.

B. Allegation that the EIOPA failed to ensure an adequate balance between the representation of the industry, on the one hand, and those of users and consumers, on the other hand

Arguments presented to the Ombudsman

28. The complainants argued that the EIOPA failed to ensure an adequate balance between the stakeholder categories provided for in the Regulation. More particularly, they argue that: (i) as regards the IRSG, only four of the five selected members are actual representatives of consumers, and as regards the OPSG, only two of the three selected members are actual representatives of beneficiaries or consumers, the third being an academic, not a consumer representative; (ii) in both stakeholder groups, there are no representatives of SMEs; (iii) as to the IRSG, intermediaries, in particular brokers, are under-represented, whereas as to the OPSG, the EIOPA selected employers' representatives without this been foreseen by the Regulation; (iv) as regards the IRSG, one of the persons selected in the 'academics' category is a director in a national federation of insurance undertakings and cannot thus be considered as independent, whereas two other members work for organisations that are largely funded by the financial industry; and (v) as regards "retail users", and "representatives of relevant professional associations", no representatives of life insurance holder associations were appointed to the IRSG, and no representatives of "*pension participants*" associations to the OPSG.

29. The EIOPA argued that the selection of the members of the different categories was in line with the requirements of the Regulation.

(i) As regards consumers/beneficiaries

30. The EIOPA explained that the consumer representative appointed in both the IRSG and OPSG, holds an academic position at the Warsaw School of Economics, served for 6 years as the insurance ombudsman in Poland, and his latest research project focused on consumer credit and housing loans and the role of assets and their distribution in people's pensions, housing and financial savings. He was thus selected for the IRSG in his personal capacity as an ordinary consumer. The same applicant, being a member of a mandatory pension fund in Poland was also selected for the beneficiary/consumer category of the OPSG.

(ii) As regards SMEs

31. The EIOPA explained that as regards the IRSG, there were 4 applications for the SMEs



category. Two of them represented entities that were already appointed to the "industry" category, the third was a mutual insurance company that did not fall under the definition of an SME, and the fourth was a representative of the International Association of Legal Protection Insurance (RIAD). Thus, the SMEs were already represented by two entities appointed to the "industry" category. As regards the OPSG, there was no application for the SMEs category. The EIOPA selected however an applicant affiliated to an association known to promote the interests of SMEs ("BusinessEurope").

(iii) As regards the representation of intermediaries (IRSG) and the appointment of employers' representatives (OPSG)

32. The EIOPA explained that the "European Federation of Insurance Intermediaries (BIRAP) is represented in the IRSG through the Chairman of its Management Committee, thus ensuring a strong representation of "intermediaries", including brokers. Although it received three additional applications from (re)insurance intermediaries, two were from members of BIRAP, and a third from a candidate with a strong national focus. As regards the appointment of representatives of employers to the OPSG, the EIOPA argued that as far as the supervision of institutions for occupational retirement provision is concerned, it is important that both employers' and employees' representatives are appointed to the OPSG. In the EIOPA's view, the list of categories of Article 37(3) of the Regulation is not exhaustive.

(iv) As regards academics

33. The EIOPA pointed out that the academic appointed to the IRSG stepped down as of 1 January 2012, and that a new call for a candidate to replace him would be launched. As regards the two other academics whose independence was also called into question, the EIOPA acknowledged that indeed one of them holds an endowed professorship/chair at a German University. However, such sponsored chairs are regulated by a detailed Code of Conduct which ensures the required transparency, independence and freedom of research and teaching. There are more than 1000 such chairs at German universities. The chair in question is also funded by the German Insurance Association and the State of Hesse, each sponsor providing € 250 000 per year for a planned funding period of 10 years. The independence of research and teaching is ensured by the Principles of Best Practice in Research and Teaching of the University in question. The second academic is a Senior Research Fellow and Head of Research of the Financial Institutions, Prudential Policy and Tax Unit at the Centre for European Policy Studies (CEPS). CEPS's income derives from a large number of EU and Member States' contracts awarded on a competitive basis, as well as from studies and briefings prepared for the European Parliament, with 27% of its income deriving from (corporate) membership fees.

34. In its observations, the complainant in case 1877/2011/(EIS)LP pointed out that the institute responsible for the sponsored chair mentions on its website that it would do its best to meet the expectations of the German Insurance Association and the State of Hesse. The complainant in case 1874/2011/(EIS) LP observed that what matters is not the University's claim of



"independence of research and teaching", but the fact that the relevant chair is financed to the extent of 50% by the German Insurance Association. As regards CEPS, the complainant in case 1877/2011/(EIS)LP pointed out that its list of "corporate members" was not public.

(v) As regards retail users ("life insurance policy holders" and "pension participants' associations")

35. According to the EIOPA, the representatives of the (i) Danish Consumer Council, (ii) the FSA's Consumer Panel from the UK, (iii) the German Association of Consumer Organisations and (iv) the appointed Polish "consumer" are all considered to take care of issues relevant for life, non-life and health insurance policy holders. It added that it received only one application specifically mentioning "life insurance policy holders" and "pension participants' associations". The EIOPA stated that although the representative of the complainant in case 1874/2011/(EIS)LP possessed the required experience in the securities market (being an asset and investment manager), he did not have a sufficiently broad experience to cover a large variety of the life, health and non-life insurance issues dealt with by the IRSG. Nor was the said applicant's experience related to occupational pensions (OPSG) sufficiently substantiated compared to other applicants.

36. In its observations, the complainant in case 1874/2011/(EIS)LP noted that the applicant in question, a representative of its organisation, has a decade-long experience in occupational pensions and was also identified by the Commission, as early as 2007, as a life insurance and pensions expert in its "Forum of User Experts in the Area of Financial Services" (FIN-USE).

The Ombudsman's assessment

37. The Ombudsman recalls that according to Article 37(2) of the Regulation, the "Insurance and Reinsurance Stakeholder Group shall be composed of 30 members, representing in balanced proportions insurance and reinsurance undertakings and insurance intermediaries operating in the Union, and their employees' representatives, as well as consumers, users of insurance and reinsurance services, representatives of SMEs and representatives of relevant professional associations. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent insurance undertakings, reinsurance undertakings or insurance intermediaries, three of whom shall represent cooperative and mutual insurers or reinsurers". Likewise, according to Article 37(3), the "Occupational Pensions Stakeholder Group shall be composed of 30 members, representing in balanced proportions institutions for occupational retirement provision operating in the Union, representatives of employees, representatives of beneficiaries, representatives of SMEs and representatives of relevant professional associations. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent institutions for occupational retirement provision".

38. It follows that 10 out of the 30 seats of the IRSG and the OPSG 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 in both stakeholder groups 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 these categories. In carrying out the selection process, the EIOPA must also comply with Article 37(4) of the Regulation, which requires that the composition of the stakeholder groups, apart from ensuring a geographical and gender balance, should, to the extent possible, also reflect an appropriate "representation of stakeholders across the Union". It is in the light of these considerations that the Ombudsman will examine below the complainants' arguments.

(i) As regards consumers/beneficiaries

39. As regards the appointment to the IRSG and the OPSG of a consumer representative who was also an academic, the Ombudsman notes that she has already examined a very similar allegation in the UNI Decision. In that Decision, the Ombudsman stressed that the mere fact that one of the selected members in the "consumers" category was actually an academic did not necessarily imply that that member did not have any expertise or connection with the consumer movement. Being an academic does not, in itself, imply that someone is not able to represent consumers or stand for their rights. However, the Ombudsman stressed in the UNI decision that the mere fact that a chosen member is also, like any other member of the stakeholder group, a consumer of financial services, cannot serve as an adequate and valid justification for appointing that member in the "consumers" category. Otherwise, the appointing authority could misuse the selection process by appointing to the "consumers" category representatives of the industry (or of any of the other 5 categories), on the sole ground that, in their own capacity, the latter are also consumers of financial services. Therefore, the Ombudsman considered in the UNI decision that 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.

40. In that regard, the Ombudsman 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. In the present case, the EIOPA convincingly explained the reasons why it considered that the member in question (an academic), given his professional experience in this field, was deemed to have the required ability and experience to represent the interests of consumers. The complainants did not submit any concrete arguments to suggest that the member in question could not represent the interests of consumers of financial services or that he could be influenced by other conflicting interests. Thus, as in the UNI Decision, 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 EIOPA were to require, in the future, that applicants for the IRSG and the OPSG 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 EIOPA 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.

(ii) As regards SME's

41. As regards the SMEs category of the IRSG, the Ombudsman takes note of the EIOPA's explanation that the only two eligible applications for this category were from representatives of SMEs that had already been appointed to the "industry" category and could thus also represent the interests of the SMEs. As regards the OPSG, the Ombudsman also notes that, as the EIOPA explained, despite the fact that no application for that category was submitted, it did appoint an applicant affiliated with an association ("BusinessEurope") known to represent the interests of SMEs. The complainants did not submit any observations in that regard calling into question or suggesting that the person that was chosen could not represent the interests of SMEs. It is useful to point out that in the UNI Decision, where a similar argument was also raised, the Ombudsman rejected an allegation that the association in question ("BusinessEurope") did not represent the interests of the SMEs. Thus, the Ombudsman finds no maladministration in this regard.

(iii) As regards the representation of intermediaries (IRSG) and the appointment of employers' representatives (OPSG)

42. As regards the alleged under-representation of insurance intermediaries in the IRSG, the Ombudsman notes that Article 37(2) of the Regulation provides that "[t]en of its members shall represent insurance undertakings, reinsurance undertakings or insurance intermediaries, three of whom shall represent cooperative and mutual insurers or reinsurers". Thus, as regards the remaining 7 members of the industry category, the Regulation does not fix the number of the various types of undertakings to be appointed to that category, and therefore the EIOPA has discretion as to how to balance the business models. In that respect, the EIOPA explained convincingly why, having received four applications from insurance intermediaries, it decided to appoint the Chairman of the European Federation of Insurance Intermediaries as the sole representative of insurance intermediaries. The complainants have not called into question the EIOPA's above explanations. Thus, the Ombudsman finds no maladministration in this respect.

43. As regards the appointment of employers' representatives to the OPSG, the EIOPA justified its decision on the grounds that the list of categories mentioned in Article 37(3) of the Regulation is not exhaustive, and that it is important that both employees' and employers are represented in the OPSG. The Ombudsman finds no support in the wording of Article 37(3) for EIOPA's view that the list of categories of Article 37(3) is indicative. Had the EU legislator wished that employers' representatives should also be appointed to the OPSG, it would have made this explicit. In fact, employers appear to be already represented in the OPSG through the 10 members of the "industry" category. Thus, the Ombudsman considers that by appointing to the OPSG representatives of employers, the EIOPA committed an instance of maladministration. The Ombudsman will thus formulate below a critical remark.



(iv) As regards academics

44. Following the EIOPA's announcement that the one of the three academics who allegedly lacked the requisite independence, stepped down and would be replaced by a new candidate, there is no need any longer for the Ombudsman to look into this aspect of the case. As regards the other two academics, the Ombudsman considers that the fact that one of them holds an endowed chair in a German University, does not, as such, imply that he lacks the requisite independence to carry out his function as an academic. As the EIOPA explained, such chairs, although often sponsored by the industry or other similar interests, including, in this case, the German Insurance Association, are regulated by a detailed Code of conduct that ensures transparency, independence and freedom of research. In fact, the website of the University in question clearly acknowledges that its chair (the International Centre for Insurance Regulation) is "*generously sponsored by the German Insurance Association (GDV) and the State of Hesse. We will continue to do our best to meet their expectations by delivering internationally visible research output, by establishing an independent international platform for an exchange of ideas and finally by offering high-level training programs for regulatory authorities and insurers*" [6]. The complainants did not submit any specific arguments to suggest that the holder of the sponsored chair in question, despite the above-mentioned clear commitment to establish an "*independent international platform for an exchange of ideas*" in order to offer "*high-level training programs for regulatory authorities and insurers*", lacked the requisite academic independence or could be influenced by other conflicting interests. As regards the remaining academic, associated with CEPS, the EIOPA explained convincingly why it considered that the activities of CEPS did not call into question the independence of the selected member. In that regard, the Ombudsman notes that CEPS' goals are described as aiming to "*achieve high standards of academic excellence and maintain unqualified independence*", and to have a "*complete independence to set its own research priorities and freedom from any outside influence*" [7]. On its website, CEPS states that its membership is indeed composed of 120 "Corporate Members" and 130 "Institutional Members", which provide expertise and practical experience and act as a "sounding board for CEPS policy proposals". Contrary to what the complainants stated, the CEPS corporate membership list is published on its website [8]. The complainants have not submitted any concrete arguments to call into question the independence of the academic in question. Thus, the Ombudsman finds no maladministration in this case.

(v) As regards retail users ("life insurance policy holders" and "pension participants' associations")

45. The Ombudsman notes that the complainants' allegation that there were no retail users' representatives appointed in either of the two Stakeholders Groups, (i.e., no representatives of life insurance policy holders in the IRSG, and no pension participants' representative in the OPSG) is intrinsically linked with their third allegation, according to which the EIOPA adopted an incorrect definition of the notion of "retail users". Therefore, the Ombudsman will examine these arguments together with the third allegation.



C. Allegation that the EIOPA adopted an incorrect definition of the different stakeholder categories provided for in the Regulation

Arguments presented to the Ombudsman

46. According to the **complainants**, the EIOPA adopted an incorrect definition of the different stakeholder categories provided for in the Regulation. First, one of the selected members in the "consumer" category of the IRSG and the OPSG is actually an academic with no connection either with "beneficiaries" or "consumers". Second, in both Stakeholder Groups, the selected representatives of "users" are actually providers of insurance and pension services coming from influential organisations.

47. As regards the appointment of an academic to the consumer category, the **EIOPA**, in its opinion, referred to the explanations it had already provided in relation to the second allegation. As regards the process for selecting "users", the EIOPA explained that, in the absence of a definition of that concept in the Regulation, it chose to rely on the definition provided in the Commission's Decision setting up a Financial Services User Group (FSUG) [9]. Recital 10 of that Decision states that the "*group should be composed of financial services experts such as individuals appointed to represent the interests of consumers, retail investors or micro-enterprises, but also individual experts having particular expertise in users' needs and priorities in the field of financial services, for example lawyers representing consumers, employee or worker representatives or academics*". Considering the lack of congruence between the membership rules for the FUSG and the EIOPA's Stakeholder Groups, and in the interest of including all possible interested parties, the EIOPA decided to adopt a broad interpretation of the concept of "user" and thus include in that category legal experts, actuaries, accountants, auditors and credit rating and financial analysts, that is to say, professions with expert knowledge about its tasks and regulatory prerogatives. According to the EIOPA, when consulted on the matter, the Commission did not object to such an interpretation.

The Ombudsman's assessment

48. As regards the complainants' arguments regarding the appointment of an academic to the "consumers" category in both the IRSG and the OPSG, the Ombudsman has already examined them within the context of the second allegation (see above, paragraphs 39-40).

49. As regards the definition of the concept of "users", the Ombudsman notes that as far as the IRSG is concerned, among the 8 representatives of the "users of insurance and reinsurance services", 4 appear to be senior executives of large insurance or financial companies, two are representatives of two major accounting and auditing firms, one is a lawyer from an international law firm, and one is a mediator appointed by a national insurance federation. Likewise, the 5



"users of occupational pension services" of the OPSG include the Head of a national Actuaries Institute, an actuary, a lawyer from an international law firm, an executive from a professional body of financial analysts and an executive from one of the largest accounting and auditing firms. Even though Article 37 of the Regulation does not contain a definition of the term "users", Recital 47 of the Regulation indicates that the two Stakeholder Groups should be composed of representatives of "*financial institutions operating in the Union, representing the diverse business models and sizes of financial institutions and businesses; small and medium-sized enterprises (SMEs); trade unions; academics; consumers; other retail users of those financial institutions; and representatives of relevant professional associations.*" Financial institutions that use financial services are thus to be included in the 'industry' category. It is further clear that the 'users' to which the Regulation refers as a separate category have to be "retail" users of financial services. Since consumers who are "end" or "final" users of financial (insurance and reinsurance) services are mentioned by the Regulation as a separate category, it could be argued that the term "users" encompasses those retail users who are situated in between the providers of financial services and consumers. Thus, there was no reason for the EIOPA to interpret the term "users" by having recourse to the wording of a different Commission Decision that concerned a different stakeholder group (FSUG). In fact, Article 37(2) of the Regulation, contrary to the wording of Recital 10 of the FSUG Decision, makes no reference to "*individual experts having particular experience in users' needs and priorities in the field of financial services, such as lawyer*", but refers only to "representatives" of the various categories of stakeholders.

50. However, as the Ombudsman has already pointed out in the UNI Decision where similar arguments were also raised in relation to the "users" category of the Banking Stakeholder Group of the European Banking Authority, it is not necessary to examine what the precise definition of retail users of financial services should be for the purposes of applying the Regulation. In fact, in the light of Recital 47, the approach followed in the present case by the EIOPA, consisting in appointing to the "users" category representatives of entities which were clearly not retail users of the services in question, but rather providers of services to the industry (accounting and audit firms, law firms, actuaries, analysts), cannot, in any event, be considered to be in line with the Regulation. Nor is there anything in the wording of the Regulation that could lend support to the EIOPA's approach to include in this category entities that play an "instrumental" role in assisting the EIOPA to carry out its tasks. Although the term "users" could encompass entities which, because of their specialised knowledge and experience of the workings and mechanics of the financial sector, could make a positive contribution to the IRSG, it is not acceptable for profit-making suppliers of remunerated services to the financial sector to be included in that category. Such entities would be likely to be perceived as representing commercial interests rather than those of the wider category of (retail) "users". In the Ombudsman's view, if the Union legislator had indeed intended to include representatives of such professions in the two Stakeholder Groups, the Regulation would have used a term other than 'users' of financial services. Thus, 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 EIOPA committed an instance of maladministration. The Ombudsman will thus formulate below the same critical remark as in the UNI decision.



D. The complainant's claims

The complainant's claims

51. The **complainants** claimed that: the EIOPA should (i) reconsider the composition of the IRSG and OPSG as soon as possible, and, in any event, without waiting for the renewal of its membership due in 2013, and (ii) publish on its website the CVs of the selected members together with the selection criteria.

52. In its opinion, the **EIOPA** submitted that the selection process had been conducted in good faith and to the best of its abilities. The EIOPA subsequently also informed the Ombudsman of the fact that the CVs of the selected members of the two Stakeholder Groups had been made available on its website. It also stated that the selection criteria were published in the initial call for expression of interest for members of the two Stakeholder Groups and that they would be further revised within the context of the forthcoming renewal of the two groups' membership, based on the "lessons learnt" during two replacement procedures that were already carried out in 2012 and 2013.

The Ombudsman's assessment

53. Given that, on 4 October 2013, the EIOPA announced the composition of a new IRSG and OPSG (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 were set up in early 2011. Thus, the complainants' first claim cannot succeed.

54. As regards the complainants' claim that the CVs of the IRSG and OPSG members should be published on the website of the EIOPA, the Ombudsman notes that this claim has in the meantime been satisfied by the EIOPA. With regard to the further claim that the EIOPA also publish detailed information on the selection criteria used and the process by which each candidate was selected, the Ombudsman notes that, on 8 March 2011, the EIOPA issued a press release, providing information about the names of the newly appointed members of the IRSG and OPSG, the institutions each one of them was representing, their nationality, and the category to which they had been selected. Moreover, the EIOPA has adopted specific rules on access to documents giving effect to Article 72 of the Regulation [10], thus enabling third parties to obtain access to documents, including those pertaining to the selection process, that could be made publicly available. [11] It appears that the complainants have not made use of this possibility. In these circumstances, the Ombudsman is not convinced that the EIOPA 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 citizens' trust in the EIOPA's overall compliance with Article 37 of the Regulation, if it were to publish, once the members of the Stakeholder Groups have been



appointed, meaningful information that could show how, in the light of the various applications received, the EIOPA 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.

D. Conclusions

55. 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(4) 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 IRSG as a whole, and not also within each category of membership, the EIOPA committed an instance of maladministration.**
- 2. By appointing representatives of employers to the OPSG the EIOPA did not comply with the exhaustive list of categories provided for by Article 37(3) of the Regulation, and thus committed an instance of maladministration.**
- 3. By including in the "users" category of the Stakeholder Groups applications from representatives of entities which are clearly not retail users of the services provided by the financial sector, but rather providers of remunerated services to the latter, the EIOPA committed another instance of maladministration.**

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

The complainants and the EIOPA will be informed of this decision.

Further remarks

- 1. The EIOPA should take appropriate measures to increase the awareness of candidates from "new" Member States interested in applying for the "industry" category" of the OPSG.**
- 2. In future selections of members of the Stakeholder Groups it would be advisable for the EIOPA to avoid the risk that one or more Member States may appear to be over-represented.**
- 3. The EIOPA could publish future calls for expression of interest in becoming a member of the Stakeholder Groups, 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.

4. It would facilitate and further improve the selection process if the EIOPA were to require future applicants to indicate only one of the five categories for which they would like to be considered.

5. It would further improve the overall transparency of the selection process if the EIOPA were to publish, once the members of the Stakeholder Groups have been appointed, meaningful information that could show how, in the light of the various applications received, the EIOPA 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 (see paragraph 13 above), there were informal and constructive discussions between the EIOPA and the Ombudsman's services. During these discussions, the EIOPA expressed its willingness to revise its approach for the second selection round. As already noted, the EIOPA announced the new composition of the Stakeholder Groups on 4 October 2013. Although the present decision only concerns the first selection process that took place in 2011, the Ombudsman invites the EIOPA, 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 26 February 2014

[1] OJ 2010 L 331, p. 48.

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

[3] https://eiopa.europa.eu/fileadmin/tx_dam/files/pressreleases/Stakeholder-Groups.pdf [Link]

[4] Decision of 7 November 2013, <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/52432/html.bookmark> [Link] and Decision of 19 December 2013, - <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/52944/html.bookmark> [Link]

[5] 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, and 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), OJ L 2010 L 331, p 84.

[6] <http://www.icir.de/weblinks> [Link]

[7] <http://www.ceps.be/content/about-ceps> [Link]

[8] <http://www.ceps.eu/files/20131113CEPSCorpMemb.pdf> [Link]

[9] Recital 10 of Commission Decision of 20 July 2010 setting up a Financial Services User Group, OJ C 199, 21/07/2010 p.12.

[10] 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".

[11]

[https://eiopa.europa.eu/fileadmin/tx_dam/files/aboutceiops/Public-Access-\(EIOPA-MB-11-051\).pdf](https://eiopa.europa.eu/fileadmin/tx_dam/files/aboutceiops/Public-Access-(EIOPA-MB-11-051).pdf)
[Link]