



European Ombudsman

Directorate B
Complaints and Inquiries Unit 3

Ms Anni Mykkanen
European Association of Corporate Treasurers
3, Rue d'Edimbourg
Paris
F-75008

Anni.mykkanen@avisa.eu

Strasbourg, 10/09/2014

Complaint 545/2014/LP

Dear Ms. Mykkanen,

Please find enclosed the opinion that the European Ombudsman received from the ESMA concerning your above complaint.

If you wish to make any observations on the opinion, please send them to us before 15 October 2014.

Please note that, if we do not receive any observations from you, the Ombudsman may close the case with a decision, based on the information you have already provided and the ESMA's opinion.



Yours sincerely,

Lambros Papadias
Head of Complaints and Inquiries Unit 3

Enclosure:

- Copy of the opinion submitted by the ESMA



Médiateur européen

17 JUL. 2014

Date d'arrivée

**European Ombudsman
Emily O'Reilly
1 avenue du Président
Robert Schuman
CS 30403
F-67001 Strasbourg Cedex**

Ref: Complaint 0545/2014/(EIS)LP

Dear Ms. O'Reilly,

Thank you for your letter dated 5 May 2014 regarding the complaint 0545/2014/(EIS)LP lodged by the European Association of Corporate Treasurers, concerning the selection of the members of the Securities and Markets Stakeholder Group (SMSG). In your communication you requested ESMA's observations with respect to the complaint, which we hereby would like to provide you with.

General comments

Overall, ESMA acknowledges that persons representing a wide range of professions may have a legitimate interest in the activities of ESMA, given the very broad mandate given to ESMA in the Regulation setting up ESMA and the highly diverse range of players active in the European securities markets. As such, corporate treasurers, issuers and other non-financial end users could be considered to be among ESMA's stakeholders.

We would like to highlight that the selection process of the Stakeholder Group of ESMA, which led to the approval of the first stakeholder group in 2011, was carried out in good faith and to the best of its abilities. However, following the launch of the ESMA Stakeholder Group (and those of EBA and EIOPA) a number of complaints were directed against the respective compositions of those groups. In preparation of the decisions on those complaints, a meeting between the staff of the European Ombudsman's office and ESMA's staff was organized on 16 April 2013.



On 12 June 2013, ESMA launched a call for expression of interest¹ thereby starting the renewal of its Stakeholder Group. The Call for expression of interest was accompanied by the Selection Procedure and an application form.² The deadline for application was 10 August 2013, 23:59 CET. The composition of the new SMSG was announced on 12 December 2013³. Brief biographies of the SMSG members have been published on the SMSG section of ESMA's web-site.

I would like to emphasize that throughout the selection process of the Group, ESMA endeavored to take into account the preliminary views expressed by the European Ombudsman's office, as the revised Selection Procedure for the SMSG selection shows.⁴ ESMA was also able to take into account the views expressed in the decision against EBA of 7 November 2013 (case 1966-2011-(EIS) LP following a complaint by UNI Europa.

Against this background ESMA would like to address the statements made by the EACT as follows.

ESMA's Procedure

The documents published for the selection procedure gave guidance on how to apply and on which stakeholders were invited to apply based on the requirements of Article 37 of Regulation No 1095/2010 of the European Parliament and of the Council (the ESMA Regulation). All applicants were invited to select one category only, in line with their main area of expertise.

The selection procedure published on 12 June 2013 for the launch of the application to ESMA's Securities and Markets Stakeholder Group, included the following statements:

"The Authority will therefore be seeking to include stakeholders representing retail users of financial information, consumers and their representatives financial services' intermediaries; market infrastructure providers; issuers; institutional investors; representatives of shareholders; financial services employees and their representatives; individuals representing the interests of small and medium-sized enterprises (SMEs); and top-ranking academics." (paragraph 5)

¹ http://www.esma.europa.eu/system/files/2013-esma-702_rev1-esma_smsg_call_for_expression_of_interest.pdf

² <http://www.esma.europa.eu/content/Application-Form-ESMA-Securities-and-Markets-Stakeholder-Group-2013>

³ http://www.esma.europa.eu/system/files/2013-1909_esma_appoints_new_securities_markets_stakeholders_group_members.pdf

⁴ http://www.esma.europa.eu/system/files/2013-esma-703-esma_smsg_renewal_process.pdf



ESMA described the following categories as outlined by the ESMA Regulation (in paragraph 6);

- Users of financial services – includes individuals and/or individuals or associations delivering services and advice to retail users or businesses.
- Representatives of consumers – includes representatives of consumer organisations or any natural person acting in a consumer capacity with proven record in protection of consumers' interests.
- Financial market participants – this group includes:
 - Financial services' intermediaries
 - Market Infrastructure providers such as: i) Regulated Markets ii) MTFs iii) CCPs, iv) CSDs and v) Trade Repositories
 - Issuers (potentially some of which may alternatively represent SME's)
 - Institutional Investors such as i) Insurance Companies, ii) Pension Funds, iii) Asset and Fund Management Firms
 - Representatives of shareholders
 - Auditors
 - Accountants
 - Credit Rating Agencies.
- Representatives of financial market participants' employees i.e. i) employees' representatives from a firm/company or ii) trade unions.
- Representatives of small and medium-sized enterprises (SMEs) – this group includes individuals employed by a SME relevant to the securities and financial markets field, or representatives of their organisations.
- Independent Top-ranking academics
 - Individuals falling into this category are assessed based on their academic qualifications. They should preferably hold a Ph.D. in finance, economics, law or other field relevant to financial services, or equivalent qualifications and a solid academic experience in a university or institute of higher education (e.g. professor-ship), have a strong publication record in the field of finance, economics, law and participation in international conferences and workshops. They must be independent from interests of credit and investment institutions or similar.



Meetings with the European Ombudsman

As mentioned above, ESMA had met with staff from the European Ombudsman's office on 16 April 2013 following the complaint that had been launched against ESMA in 2011, after the selection of the first Stakeholder group.

At that meeting the European Ombudsman's office shared its initial assessments of the claims which are in two respects of special relevance here. Firstly, all applicants should be encouraged to choose only one category of expertise that they would bring to the SMSG if selected. The reason for this would be to limit the discretion of ESMA to select persons by placing applicants in certain categories and thereby to ensure the autonomy and predictability of the process. Secondly the ombudsman's staff pointed out that the user category should be understood as retail users, i.e. users representing retail users or possibly retail businesses users, in other words representatives of smaller businesses. This information from the European Ombudsman's office influenced how ESMA came to define the user category in the 2013 application procedure.

The decision against EBA (case 1966-2011-(EIS) LP referred to above makes it clear that the user category in the European Ombudsman's view shall be understood to be retail users. The decision dealt with the definition of users in the banking sector, and the European Ombudsman clearly spelled out that users shall be understood as retail users, with reference to the wording of the recital of the EBA Regulation. The wording of the ESMA Regulation is identical in these respects mentioning "users" in the article 37 and "other retail users of financial instruments" in paragraph 48 of the preamble.

Given the clear view of the European Ombudsman expressed in that decision, as supported by the wording of the EBA and ESMA Regulations in paragraph 48 of the preamble, and confirming the initial view given by the staff of the European Ombudsman, ESMA came to the conclusion that the user category shall be limited to retail users, as also reflected in ESMA's application procedure.

In that decision the European Ombudsman also confirmed its view that the procedures would be improved if one category of stakeholder only were selected by each applicant.

ESMA's Assessment

ESMA did have two Corporate Treasurers included as alternates in the former Stakeholder Group as representatives of users. ESMA also endeavoured twice to get these Corporate Treasures to accept nominations to become full members of the Stakeholder Group, when an opening had occurred after one person



had left the group. However, the two alternates did not accept our invitation to become members of the SMSG. In addition, it should be mentioned that ESMA has included corporate treasurers in its consultative working group for the post-trading standing committee (dealing with matters related to EMIR). ESMA has thus in the past demonstrated that it was not biased against the profession of corporate treasurers, as the complainant has claimed.

Mr Raeburn applied for the Stakeholder Group in the user category. He is the Chair of the Association of Corporate Treasurers representing corporations, often major ones, being issuers in the financial markets.

Following the statements made by the European Ombudsman's staff in April 2013, reflected in the formulation of the user category, and in particular after the European Ombudsman's decision on 7 November 2013, it is in ESMA's view clear that ESMA would have made an error, in contradiction with the European Ombudsman's decision, had Mr Raeburn, or any other person representing corporate treasurers, been selected for the user category.

ESMA believes that any representative of corporate treasurers could have applied in the category of financial market participants. As stated above, it was made clear in the material published together with the call for expression of interest, that the category of financial market participants included issuers. Similarly, regarding the category of users of financial services, the wording of the call of expression of interest pointed clearly in the direction of "retail" users, meaning private individuals or small businesses.

It could perhaps be claimed that ESMA should either have, on its own initiative, redirected certain applications into a better suited category, or have asked the applicants to do so themselves. However, had ESMA done so, this could also have been perceived as improper interference in the process as asking an applicant to reconsider the category to which he or she applied would have created a clear risk for a bias in favour of such candidates at the detriment of other candidates, who had read carefully the application procedure and subsequently applied in the appropriate category, to which ESMA would "redirect" other candidates' applications. A similar risk of flawed application process would have arisen if candidates had been asked to fill out applications for several categories, leaving it to ESMA's discretion to select the best suited candidates for the appropriate category.

EACT has in his letter also remarked that it does not contest that Mr Raeburn was not personally selected, but rather the fact that non-financial companies are not present.

ESMA finds it difficult to respond to such a vague complaint as it is not clear who in particular should have been selected in the view of EACT. ESMA is bound by the requirement to select ten financial market participants and given the diversity of the professions represented among financial market participants many categories of stakeholders have legitimate interest in being represented.



Even if non-financial companies also have a legitimate interest in the work of ESMA there is however no explicit legal obligation to include such stakeholders. To be selected, interested parties do not only have to apply but they should also be considered better placed than other candidates. The ESMA Regulation states that there are ten places available for financial market participants. Given the wide variety of such market participants, including a number of professions which previously appeared in the user category, the competition for those places is intense. It can be noted that there were four non-financial issuers applying in this category comprising a total of 79 applicants. Furthermore ESMA has to take into account criteria regarding a suitable geographical representation and gender balance.

Taking all of the applicable rules into account, the diversity of financial market participants as well as the applications received in the different subcategories of financial market participants into account, ESMA's view is that the current group shows an appropriate and balanced composition.

The Complainant has furthermore claimed that one person in the user category should have been selected in the consumer category, without specifying clearly to which person these comments are addressed. It is therefore difficult to respond on this point of the complaint. One member in the user category is in his home country advising an organisation called "active consumers", and it might be this person EACT is referring to. ESMA holds that this person, even if he represents an organisation which has the word "consumers" in its title is a very good representative of retail users.

I thank you, Ms O'Reilly, for the opportunity to respond to the complaint and very much hope that the information provided to you above satisfactorily explains the choices made by ESMA in the selection of the Stakeholder Group. Nevertheless, I stand ready to provide further explanations, should that prove necessary.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'S/M' or similar initials.

Steven Maijoor
Chair
European Securities and Markets Authority