



Republika e Kosovës • Republika Kosovo • Republic of Kosovo
Institucioni i Avokatit të Popullit • Institucija Ombudsmana • Ombudsperson Institution

Ex-officio

No. 450/2018

**REPORT WITH RECOMMENDATIONS
OF THE OMBUDSPERSON INSTITUTION**

*Related to unequal treatment of retirees by Commercial Banks in Kosovo in provision of
banking loan services*

Addressed to:

Mr. Fehmi Mehmeti, Governor of the Central Bank of the Republic of Kosovo

Members of Legal Committee, Kosovo Banking Association (KBA)

Prishtina, April 16, 2019

I. PURPOSE OF THE REPORT

The purpose of this Report is to draw attention of the Central Bank of Kosovo (hereinafter: CBK) regarding unequal treatment of retirees/ pensioners as clients, by Commercial Banks in Kosovo, in provision of banking loan services.

II. LEGAL BASES AND POWERS OF THE OMBUDSPERSON

1. The Constitution of Republic of Kosovo, in Article 135, paragraph 3, reads: *“The Ombudsperson is eligible to make recommendations and propose actions when violations of human rights and freedoms by the public administration and other state authorities are observed.”*
2. Based on the Law No. 05/L-019 on Ombudsperson, the Ombudsperson among others has the following responsibilities and powers:
 - *„...to investigate, either to respond to complaint filed or on its own initiative (ex officio), if from findings, testimonies and evidence presented by submission or by knowledge gained in any other way, there is a base resulting that the authorities have violated human rights and freedoms stipulated by the Constitution, laws and other acts, as well as international instruments on human rights.“* (Article 16, paragraph 4);
 - *„Publishes reports and makes recommendations on policies and practices on combating discrimination and promoting equality. (Article 16, paragraph 15);*
 - *„to draw attention to cases when the institutions violate human rights and to make recommendation to stop such cases and when necessary to express his/her opinion on attitudes and reactions of the relevant institutions relating to such cases; (Article 18, paragraph 1, point 2);*
 - *„ to make recommendations to the Government, the Assembly and other competent institutions of the Republic of Kosovo on matters relating to promotion and protection of human rights and freedoms, equality and non-discrimination;”* (Article 18, paragraph 1, point 5);
 - *„to publish notifications, opinions, recommendations, proposals and his/her own reports;*
(Article 18, paragraph 1, point 5);

- “ can advise and recommend to the institutions of the Republic of Kosovo for their programs and policies to ensure the protection and advancement of human rights and freedoms in the Republic of Kosovo.” (Article 18, paragraph 3);

3. Based on the Law No. 05/L-021 on Protection from Discrimination, apart other responsibilities:

- “The Ombudsperson shall handle cases related to discrimination under the relevant Law on Ombudsperson. (Article 9, paragraph 1);
- “...the Ombudsperson shall have an authority to investigate or act on any claim filed or with self-initiative (*ex-officio*) when there is reason to suspect that there has been discrimination by public entities. (Article 9, paragraph 2, point 3);

III. Actual state

Facts, proves and information on Ombudsperson’s disposal can be presented as follows:

1. The Ombudsperson, within the scope of his responsibilities and powers and in order to accomplish his mission and mandate in accordance with Article 16. paragraph 4 of the Law on Ombudsperson has initiated *ex officio* investigation no. 450/2018, as per provision of commercial loan services by banks in Kosovo to interested citizens who are beneficiaries of pensions aged over 65.
2. Based on the information that the Ombudsperson received from citizens of Kosovo, who are beneficiaries of old age pensions, Kosovo Republic Commercial Banks deny to them the right to obtain banking loan services, with the reasoning that retirees are pension beneficiaries and therefore loans cannot be approved to them.
3. In order to define relevant legal facts and circumstances related to this issue, representatives of the Ombudsperson held several direct meetings with authorized persons in Affiliates of several Banks¹ in Kosovo, which provide loan services to private persons. They discussed with them about the current situation of retirees over the age of 65, as persons interested in banking loan services and they were asked to provide explanations regarding their stand, in the meaning of provisions of the Law

¹ ISH BANK - The Turkish Bank, branch in Prishtinë (22-08-2018), is a specialized business bank that is focused on providing services for Corporate. It is business-oriented and is specialized in corporate services. Loans to private individuals are not refused, they do not have limitations regarding the age, but interest rates are so high that the Bank does not have any request for granting loans to private individuals; NLB Bank (13 September 2018); Raiffeisen Bank, September 21, 2018; BKT (03/11/2019). Telephone contact.

on Protection from Discrimination, which among others determines age and social status as the basis legally protected from discrimination.

4. From explanations of representatives of Banks visited, it can be concluded that none of the visited banks do not approve loans for retirees over 65, but loans to persons over 65 are approved solely in case they have registered businesses with which the Bank can secure the loan granted. It is emphasized that the Bank is guided by the interest of capital and banking operations, in relation to which they have the right to decide freely on election of their clients. It is also pointed out that the Bank's legal right and obligation is to identify, evaluate and assess risks and decide on which conditions it will approve loans and enter into contractual relationships.
5. In the course of investigations conducted related to the given case, the Ombudsperson, through his representative, through an e-mail requested information and explanation from the Central Bank of Kosovo ² as well as by Kosovo Banking Association ³ concerning the legal bases, which has been applied by Commercial Banks in Kosovo for waiving of the right to gain loan from the bank to retirees over 65 years of age, taking into account specific legal provisions of the Law on Protection from Discrimination.
6. The Central Bank's response⁴ was as follows: "Banks provide loans based on own credit policy which is approved by Board of Directors of Commercial Banks. Among crucial elements taken in consideration are also monthly incomes of the potential client", and for further information Kosovo Banking Association to be contacted.
7. Kosovo Banking Association⁵ responded on Ombudsperson's request, stating that: „Kosovo Banking Association is an organization with voluntary membership of banking institutions and as such does not affect their crediting policies. Banking institutions, through their legal and risk departments, compile the credit policies and procedures according to their business strategy and in compliance with applicable laws and regulations, always closely supervised by the CBK. ”

² Email of Ombudsperson's representative addressed to the CBK, on 22.02.2019.

³ Email of the Ombudsperson's representative addressed to the Kosovo Banking Association, on 27.03.2019.

⁴ Email, Response of Central Bank of Kosovo of the date 26.2.2019

⁵ Email, Response of Kosovo Banking Association of 06.03.2019.

8. The Ombudsperson, also with the intention of investigating the above stated issue, reviewed web pages of several Banks ⁶ concerning granting of loan services for the interested citizens.
9. Based on reviewed Banks' webpages regarding provision of loans for Kosovo citizens, the Ombudsperson notes that Banks have established and provide several types of loans for citizens.⁷ They provide loans for special category of citizens as well as for special purposes. Each Bank defines conditions in which the loans are approved. This refers mainly to amounts, repayment periods, amount and type of interest rate, guarantees, types of insurance, complementing costs and minimum conditions for loan approving. Among other things, Banks for granting loans to citizens, for any type of loan, one of the conditions that that must be fulfilled is an Employment Contract as well as the amount of regular monthly incomes.
10. Having in regard the obligation of possessing an Employment Contract, the Ombudsperson ascertains the fact that pursuant with provisions of the Law on Labour⁸, solely those from 18 up to 65 years old are included directly in obtaining loans. Only BKT⁹, as client acceptable category, as one of conditions for obtaining loans, explicitly determines the age limit from 21 to 65.

IV. RELEVANT LEGAL INSTRUMENTS IN REPUBLIC OF KOSOVO

The Constitution of Republic of Kosovo (henceforth the Constitution)

Article 21 [General Principles]

- 1. Human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order of the Republic of Kosovo.*
- 2. The Republic of Kosovo protects and guarantees human rights and fundamental freedoms as provided by this Constitution.*
- 3. Everyone must respect the human rights and fundamental freedoms of others.. [...]*

Article 24 [Equality before the Law]

⁶ Banka Kombëtare e Kosovës -BKT, <http://bkt-ks.com>; NLB, <http://www.nlb-kos.com>; Raiffeisen Bank, <http://www.raiffeisen-kosovo.com>; ProCredit Bank, <http://www.procreditbank-kos.com>; TEB, <http://www.teb-kos.com>; BPB, <https://www.bpbbank.com/>; Ekonomik Bank, <http://www.bekonomike.com> 04.03.2019.

⁷ See Banks' webpages listed under the footnote 6, Customer Loans, Cash Cover Loans, Express Loans, Students' Loans, Green Loans, Auto Loans, etc.

⁸ See the Law No. 03/L-212 on Labour, Article 7, paragraph 1 and Article 67, paragraph 1, point 4.

1. *All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination.*

2. *No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status [...]*

Article 53 [Interpretation of Human Rights Provisions]

11. *Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.*

12. **European Convention on Human Rights and Fundamental Freedoms** (4 November 1950) (henceforth "Convention") is a legal document which applies directly in compliance with the Constitution of Republic of Kosovo (Article 22) and prevails, in case of conflict, towards legal and provisions as well as other acts of public institutions:

Article 14 of the Convention

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, [...]

Article 1 Protocol 12 of the Convention stipulates:

General Prohibition of discrimination

1. *Any right determined by Law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

2. *No one shall be discriminated by a public authority by any of reasons foreseen in paragraph 1.*

16. Law No. 05/L-021 on Protection from Discrimination Article 1.

1. *The purpose of this law is to establish a general framework for prevention and combating discrimination based on nationality, or in relation to any community, social origin, race, ethnicity, colour, birth, origin, sex, gender, gender identity, sexual orientation, language, citizenship, religion and religious belief, political affiliation, political or other opinion, **social***

⁹ Data are available on Banka Kombëtare Tregtare webpage, <http://bkt-ks.com/kredite-konsumatore.aspx>, on

or personal status, age, family or marital status, pregnancy, maternity, wealth, health status, disability, genetic inheritance or any other grounds, in order to implement the principle of equal treatment.

Article 2.

1. *This law applies to all acts or omissions, of all state and local institutions, natural and legal persons, public and private sector, who violate, violated or may violate the rights of any person or natural and legal entities in all areas of life, especially related to: [...]*
 - a. *access to and supply of goods and services which are available to the public; [...]*

Article 3.

1. *The principle of equal treatment shall mean that there shall be no discrimination, direct or indirect in the sense of any of the grounds set out in Article 1 of this Law.*
2. *Discrimination is any distinction, exclusion, restriction or preference on any ground specified in Article 1 of this law, which has the purpose or impact of depreciation or violation of the recognition, enjoyment or exercise of human rights and fundamental freedoms guaranteed by the Constitution and other applicable legislations of the Republic of Kosovo.*

Article 4.

1. *Types of unequal treatment are as follows:*

*1.1. **Direct discrimination** - shall be taken to have occurred where one person is treated less favorably than another is, has been or would be treated in a comparable situation based on one or more grounds such as those stated in Article 1 of the Law; [...]*

Article 8.

All institutions should act in accordance with the principles of this Law during the exercise of their duties and drafting of policies and legislation.

Article 20. *[...] paragraph 2. Burden of proof shall be upon the respondent, who should prove that there has been no breach of the principle of equal treatment.*

V. LEGAL ANALYSES

17. By taking into account the issue of review or unequal treatment of retirees as clients by Commercial Banks in Kosovo in offering loan services, the Ombudsperson will

4.03.2019.

only analyze this issue from the human rights and freedoms aspect as well as legislation for protection against discrimination.

18. The Ombudsperson points out that the legislation for protection against discrimination plainly defines the equality principle without any direct or indirect discrimination whatsoever, determining that all are equal and enjoy equal status and equal judicial protection, regardless of their personal features and everybody is obliged to respect the equality principle, actually prohibition of discrimination.
19. The Ombudsperson confirms that, according to European Court on Human Rights, "*[the right] . . . not to be discriminated . . . is violated when States treat in an unequal manner [...] without providing any reasonable and objective justification*". In order for a justification to be "*objective and reasonable*" two steps need to be undertaken: Firstly, there must be a "*legitimate purpose*" for the abovementioned inequality and, secondly, a "*reasonable relationship of proportionality between means applied and the purpose aimed to be achieved*" must exist.
20. The Constitution explicitly states that it is mandatory for all authorities to respect the rights and freedoms of others; this principle is imperative and must be respected by everyone, including financial institutions.
21. As a result what has been stated above, acts of all Banks must be in compliance with the Constitution as well as the positive legal regulations, whether those in the field of banking, or with other regulations of the Republic of Kosovo, including also regulations that prohibit discrimination.
22. There are 11 Commercial Banks in Kosovo that owns the license for operation and which offer a standard package of banking services including loans, guarantees, current accounts, savings accounts, time deposits, national and international transfers and valuables safety deposit box services. These Banks operate in accordance with the terms and conditions defined with the Law no. 04/1-093 on Banks, micro financial institutions and non-banking financial institutions and Central Bank of Kosovo sublegal acts.
23. Based on abovementioned disclosed current state, in providing banking loan services to Kosovo citizens, the Ombudsperson, notes that Banks have arranged and provide a variety of loans for citizens' needs, amongst which are loans to special category of citizens, as well as for special purposes, but there are no loans designed for retirees, while from present loans, under current banks' conditions, none of type of loan is

provided to pensioners over the age of 65 due to their age, while this right in a comparable situation is not contested for other categories under the age of 65, or to those over the age of 65 running different registered businesses as well as to those employed.

24. In the present example, it is obvious that client's age determines fulfillment of terms for obtaining the loan, so a considerable number of pension beneficiaries cannot use this service due to the fact that they get their pensions and are over the age of 65 and do not have a registered business. Therefore, they are deprived from the opportunity of Bank's assessing their loan ability, based on comparable and objective criteria and approve their request for loan, in case they have loan ability.
25. By applying this in practice, Banks directly discriminate citizens based on direct criteria –age, as a personal feature, since due to deprivation of the right to use banking loan service; in a comparable situation, place a group of citizens in a less favorable position than other persons who do not have that personal feature.
26. In another situation, in Banks' practice, the right on using banking loan services is not provided to interested pensioners who are over the age of 65, but this right is provided to those of the same age group but who possess a private business. The Ombudsperson draws attention that by applying such practice, Banks directly discriminate citizens, hence, without objective and reasonable justifications, they treat differently clients of the same age group, based on their social status from which depends directly fulfillment of terms for getting the respective loan.
27. The Ombudsperson reiterates that the Law on Protection against Discrimination explicitly prohibits the status of age as well as social status as basis for any difference or unequal treatment and cannot accept existence of any objective and reasonable criteria for setting criteria of age and social status, based on which Banks make differences between clients – potential users of loan service.

VI. THE OMBUDSPERSON'S OPINION

28. Related to this issue, the Ombudsperson admits:

- that a loan is a banking service with legal-binding character in the field of a loan contract, which means that contracting a loan legal transaction presumes freedom, within the limits of mandatory rules, public order and good business practices, and that these transactions are carried out with free mutual willingness;

- that Bank mainly operates with assets of others and in essence it accomplishes the function of intermediating between surplus and deficit financial transactions and that the nature of their operations is of high-risk,
 - that credit transaction, according to its own legal and financial elements, contains basic risks of banking business, that the Bank is obligated, under special basic rules, to conduct evaluation of the credit financing risk which means an appropriate evaluation of credit financing risk at the time of approval of a specific service. The evaluation must be based on quantitative and qualitative criterion which takes into account even the specifics of a selected debtor and the money invested, in the sense of protection the quality of loan and decrease credit risk.
29. But, the Ombudsperson points out that this does not entrust Banks with the power that through their acts exclude, actually unable access on banking services to groups of citizens based on several personal characteristics, in this case, age and social status. Each banking service ought to be accessible for all citizens under equal conditions, while on certain cases, Banks have the authority to assess whether a specific client fulfills the criteria for obtaining specific banking service. Only such access and such manner of treatment ensure that all clients under same conditions can use banking services.
30. Client's age has no impact on this assessment, because it is not "financially measurable ", and it also cannot depend on client's age whether he/she will pay the loan efficiently and timely. The fact that a person is older than 65, does not, under any circumstances whatsoever, mean that he is financially incapable to return the loan efficiently and on time, nor that his financial capabilities are lower than financial capabilities of any person under the age of 65, bearing in mind that the regular monthly income which people receive are different and do not depend on age. At the same time, it should be taken in account that years of life are only one from conditions for realization of the right to a specific types of pensions and that the elderly people are entitled to equal access to all public services.
31. The Ombudsperson further states that the pensions are firm, regular and secure monthly incomes, behind which stands the state and are provided until the end of their lives. While, employed persons do not have this guarantee. Therefore, even though due to lower incomes in comparison with those who are actively employed, the

pensioners pose a greater risk for the Banks, however, there are no acceptable obstacles for Banks, that on the basis of their pension amount and other incomes, under any individual requirement, evaluate their credit score. Furthermore, during loan granting, Banks do have their rights to use insurance instruments for their interests such as life insurance, co-payment, etc.

32. As a consequence, the Ombudsperson emphasizes that Bank assessment, review and processing of a loan requirements as well as ruling for loan requirement must be based exclusively on quantitative and qualitative criteria that take into account all specifics of a selected client individually, without making any general exclusion given some personal characteristics.
33. Besides, the Ombudsperson does not exclude the fact that a Bank can specify specific conditions for specific groups of clients, through which it will approve the required loans and credits, but in that case, the conditions must be objective, comparable, and equal for all and not be related to clients' personal specifics, respectively, the legislation should be guarded against discrimination which has imperative character and is mandatory for all.
34. The Ombudsperson considers that Banks should actively advance their loan/credit policy in order to meet challenges, in the meaning to comply with newly created situations in the society, which is of great importance for the population in aspect of respecting human rights standards without discrimination on bases which are legally protected.
35. Nowadays, pensioners live in difficult conditions, pensions are low and additional income is more than a need. In present economic situation of our country, pensions often are the only financial sources of these families. For this reason, as this special category is becoming important category of our society it is obvious that there is a need of setting special loan policies for this category of people, as is the case in neighboring counties.

VII. CONCLUSION OF THE OMBUDSPERSON

36. Having in regard what has been stated above, the Ombudsperson ascertains that Banks in Republic of Kosovo with their practice, by depriving retirees over 65 years of age from the right to gain banking loan service, based on their personal

characteristics –age as well as their social status, exercise double violation and breach provisions of the Law on Protection against Discrimination.

37. Based on these findings and in accordance with the Article 135, paragraph 3 of the Constitution of the Republic of Kosovo and Article 16, paragraph 4 of the Law No. 05/L-19 on the Ombudsperson,

THE OMBUDSPERSON recommends:

- To undertake appropriate actions related to approving reforms on crediting policies in Kosovo Banks, with the aim of preventing discrimination against elder citizens, respectively retired persons using banking services as follows:

That the Central Bank of Kosovo to recommend to all Commercial Banks in the Republic of Kosovo:

- *To review and harmonize general terms and conditions of the business with positive-legal regulations in the field of legislation against discrimination, due to which the elder citizens cannot use some banking services.*
- *To be cautious in the future, that through applied practices, policies, and decisions refrain from doing unjustifiable differences, inactions or unequal treatment (exclusions, limitations or preference giving) in relation to individuals or group of persons, based on any personal feature.*

In compliance with Article 132, paragraph 3, of the Constitution of Republic of Kosovo (“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”) and Article 28 of the Law No.05/L-019 on Ombudsperson, (“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions ... must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”), You are kindly asked to inform us on steps to be undertaken regarding this issue.

Warmly submitted,

Hilmi Jashari
Ombudsperson



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Ex-officio

Br. 450/2018

**IZVEŠTAJ SA PREPORUKAMA
OMBUDSMANA REPUBLIKE KOSOVE**

u vezi sa nejednakim tretiranjem penzionera, od strane komercijalnih banaka na Kosovu, u pružanju bankarskih usluga kredita, kao i mera koje Centralna banka Kosova treba preduzeti u regulisanju ovog pitanja

upućen:

**G. Fehmi Mehmeti guverner Centralne banke Kosova
Članovima Zakonodavnog komiteta Udruženja banaka Kosova**

Priština, dana 16. april 2019. godine

I CILJ IZVEŠTAJA

Ovaj izveštaj ima dva glavna cilja:

- Da skrene pažnju Centralne banke Kosova (u daljem tekstu CBK) na nejednako tretiranje penzionera u pružanju bankarskih usluga kredita, od strane komercijalnih banaka na Kosovu.
- Da, posebno ukaže na potrebu da starije osobe uživaju svoja prava i slobode bez diskriminacije po bilo kojoj pravno zaštićenoj osnovi, kao i da se starijim osobama pruži mogućnost korišćenja svih javnih usluga raspoloživih resursa, koja im omogućavaju da imaju adekvatan životni standard i ravnopravno učestvuju u javnom, ekonomskom, društvenom i kulturnom životu

II PRAVNI OSNOV I NADLEŽNOSTI OMBUDSMANA

1. Ustav Republike Kosovo, u članu 135 stav 3, navodi: “ *Ombudsman ima pravo da vrši preporuke i predlaže mere, onda kada primeti kršenje prava i sloboda ljudi od strane organa javne administracije i ostalih državnih organa* ”.
2. Na osnovu Zakona o Ombudsmanu br. 05/L-019, Ombudsman, između ostalog, ima sledeće nadležnosti i odgovornosti:
 - „*da obavi istragu bilo da bi odgovorio na podnetu žalbu ili samoinicijativno (ex officio), ako iz nalaza, dokaza i podnetih činjenica u podnesku ili iz stečenih saznanja na drugi način, ima osnova da proizilazi da su od strane vlasti kršena ljudska prava i slobode, utvrđene Ustavom, zakonima i drugim aktima, kao i međunarodnim instrumentima o ljudskim pravima.*“ (član 16, stav4);
 - „*da objavljuje izveštaje i daje preporuke o politikama i praksama za borbu protiv diskriminacije, i za promovisanje jednakosti.* (član 16, stav15);
 - „*da skrene pažnju na slučajeve kada institucije krše ljudska prava i da podnese preporuke da se prekine sa takvim slučajevima, a kada je to neophodno da izrazi svoje mišljenje o stavovima i reagovanju odgovarajućih autoriteta u vezi takvih slučajeva.*“ (član 18, stav 1 tačka 2);
 - „*da preporučuje Vladu, Skupštinu i druge nadležne institucije Republike Kosovo o pitanjima koje se odnose na unapređivanje i zaštitu ljudskih prava i sloboda, ravnopravnosti i nediskriminacije.*” (član 18, stav 1, tačka 5);
 - „*da objavi obaveštenja, mišljenja, preporuke, predloge i svoje izveštaje.*” (član 18, stav 1, tačka 6);
 - “*može dati svoj savet i preporuke autoritetima Republike Kosovo o programima i njihovim politikama radi obezbeđivanja zaštite i unapređivanja ljudskih prava i sloboda u Republici Kosovo.*” (član 18, stav 3).

3. Na osnovu Zakona o zaštiti od diskriminacije, br. 05/L-021, pored ostalih nadležnosti:

- “*Ombudsman se bavi pitanjima koja se odnose na diskriminaciju prema odgovarajućem Zakonu o ombudsmanu.*“ (član 9, stav 1)
- „*Ombudsman je ovlašćen da istražuje ili deluje povodom bilo koje žalbe ili samoinicijativno (ex-officio)) kada postoji osnova za sumnju da postoji diskriminacija od strane subjekata javnog sektora.*“ (član 9 stav 2, tačka 3).

III ČINJENIČNO STANJE

Činjenice, dokazi i informacije kojima raspolaže Ombudsman mogu se predstaviti na sledeći način:

4. Ombudsman je u okviru svojih odgovornosti i nadležnosti, a u cilju ispunjenja svoje misije i mandata, shodno članu 16. stav 4, Zakonu o Ombudsmanu, Ombudsman pokrenuo ex-officio istragu br, 450/2018, u vezi sa pružanjem kreditnih usluga

komercijalnih banaka na Kosovu za zainteresovane građane koji su korisnici penzija u dobi preko 65 godina.

5. Na osnovu informacija koje je Ombudsman primio od građana Kosova, korisnika starosnih penzija, komercijalne banke u Republici Kosovo uskraćuju pravo osobama starijim od 65 godina, da koriste bankarske usluge podizanja kredita, uz obrazloženje da su korisnici penzija i da im se iz tog razloga ne može odobriti kredit.
6. U cilju utvrđivanja pravno relevantnih činjenica i okolnosti u vezi sa navedenim pitanjem, predstavnici Ombudsmana, su održali direktne sastanke sa ovlašćenim licima filijala nekoliko banaka¹⁰ na Kosovu, koje pružaju usluge kredita privatnim licima. Sa njima se razgovaralo o postojećoj situaciji u kojoj se nalaze penzioneri starosti preko 65 godina, kao lica zainteresovana za kreditne usluge banaka i zahtevana su izjašnjenja u vezi sa navedenim postupanjem u smislu odredaba Zakona za zaštitu od diskriminacije, koji, između ostalog, određuje starosnu dob i socijalno stanje, kao pravno zaštićene osnove od diskriminacije.
7. Iz izjašnjenja predstavnika posećenih banaka, može se zaključiti da nijedna od posećenih banaka ne odobrava kredite penzionerima preko 65.g starosti, ali odobravaju kredite licima preko 65 godina starosti koja imaju svoje biznise iz kojih se banka može obezbediti. Navedeno je da se Banke rukovode interesom kapitala i bankarskog poslovanja, u vezi sa kojim imaju pravo da slobodno odlučuju o izboru klijenata. Takođe pravo i zakonsku obaveza banke je da identifikuje, meri i procenjuje rizike i odluči pod kojim uslovima će odobravati kredite i sklapati ugovorne odnose.
8. Tokom istrage navedenog pitanja, Ombudsman je preko svojih predstavnika, putem elektronske pošte zahtevao i informacije i izjašnjenje od Centralne banke Kosova¹¹ kao i od Udruženja kosovskih banaka,¹² u vezi sa pravnim osnovom koji su komercijalne banke na Kosovu primenile za uskraćivanje prava na kredit, penzionerima preko 65 godina, imajući u vidu relevantne odredbe Zakon o zaštiti od diskriminacije.
9. Odgovor Centralne Banke Kosova¹³ upućuje da: „Banke daju kredite na osnovu kreditne politike koju su odobrili upravni odbori komercijalnih banaka. Među ključnim elementima koji se razmatraju su mesečni prihodi koje potencijalni kupci imaju.“ i da se za više informacija, kontaktira Udruženje kosovskih banaka.
10. Udruženje kosovskih banaka¹⁴ odgovorilo je na zahtev, „da su organizacija sa dobrovoljnim članstvom bankarskih institucija i da kao takva ne utiče na njihove kreditne politike. Bankarske institucije, preko svojih pravnih odeljenja, kao i odeljenja

¹⁰ IŠ BANKA- Turska banka, filijala u Prištini (22-08-2018), je banka specijalizovana za biznise koja je orjentisana za pružanje usluga korporacijama. Orjentisani su na klijentelu za biznise i specijalizovani su za usluge korporacija. Kredite za privatna lica ne odbijaju, nemaju ograničenja u vezi sa starosnom dobi klijenata, Njihove interesne kamate su visoke i nemaju zahteve za kreditima od privatnih lica; NLB Banka (13.09.2018); Raiffeisen Banka, 21.09.2018; BKT (11.03.2019).telefonski kontakt.

¹¹ E-pošta predstavnice Ombudsmana, upućen CBK dana 22.02.2019.g.

¹² E-pošta predstavnice Ombudsmana , upućen Udruženju banaka Kosova dana 27.03.2019.g

¹³ E-pošta, Odgovor Centralne Banke Kosova od 26.2.2019

¹⁴ E-pošta, Odgovor Udruženja kosovskih banaka od 6.3.2019.

za rizik razvijaju kreditne politike i procedure u skladu sa svojom poslovnom strategijom i u skladu sa važećim zakonima i propisima, uvek pod nadzorom CBK.“

11. Ombudsman je takođe, u cilju istrage navedenog pitanja izvršio uvid u zvanične web stranice pojedinih banaka¹⁵ u vezi sa pružanjem kreditnih usluga zainteresovanim građanima.
12. Na osnovu uvida, u ponude kredita za stanovništvo na Kosovu, Ombudsman primećuje da su banke kreirale i nude više vrsta kredita za građane.¹⁶ U ponudi su krediti za posebne kategorije građana kao i za posebne namene. Svaka od banaka, postavlja uslove pod kojima se krediti odobravaju. Ovde se pre svega misli na iznose, rokove otplate, visinu i tip kamatne stope, garancije, vrste obezbeđenja, prateće troškove i minimalne uslove za odobravanje kredita. Između ostalih, banke za podizanje kredita za građane, za bilo koju vrstu kredita, kao jedan od uslova postavljaju i ugovor o radu, kao i određeni iznos redovnih mesečnih primanja.
13. Imajući u vidu obaveznost ugovora o radu, Ombudsman konstatuje činjenicu da se, prema odredbama Zakon o radu,¹⁷ ovim uslovom, direktno obuhvataju lica starosne dobi od 18 do 65 godina. Jedino je BKT¹⁸, za prihvatljivu kategoriju klijenata, kao jedan od uslova za podizanje kredita, eksplicitno postavila starosnu granicu od 21 do 65 godina staosti.

IV RELEVANTNI ZAKONSKI INSTRUMENTI U REPUBLICI KOSOVO

14. Ustav Republike Kosovo (u nastavku Ustav)

Član 21 [Opšta Načela]

1. *Ljudska prava i osnovne slobode su neodvojiva, neotuđiva i neosporiva i čine osnov pravnog reda Republike Kosovo.*
2. *Republika Kosovo štiti i garantuje ljudska prava i osnovne slobode, predviđene ovim Ustavom.*
3. *Svi su dužni da poštuju prava i osnovne slobode ostalih. [...]*

Član 24 [Jednakost pred Zakonom]

1. *Pred zakonom su svi jednaki. Svako ima pravo na jednaku zakonsku zaštitu, bez diskriminacije.*
2. *Niko se ne sme diskriminisati na osnovu rase, boje, pola, jezika, veroispovesti, političkog ili nekog drugog uverenja, nacionalnog ili društvenog porekla, veze sa nekom zajednicom, imovine, ekonomskog ili socijalnog stanja, seksualnog opredeljenja, rođenja, ograničene sposobnosti ili nekog drugog ličnog statusa. [...]*

¹⁵ Nacionalna trgovinska banka -BKT, <http://bkt-ks.com>; NLB, <http://www.nlb-kos.com>; Raiffeisen banka, <http://www.raiffeisen-kosovo.com>; ProCredit banka, <http://www.procreditbank-kos.com>; TEB, <http://www.teb-kos.com>; BPB, <https://www.bpbbank.com/Ekonomiska> banka, <http://www.bekonomike.com>, dana 04.03.2019.

¹⁶ Videti na web stranicama banaka navedenim u footnote 6, Potrošački krediti, krediti sa novčanim pokrićem, ekspres krediti, studentski krediti, zeleni krediti, auto krediti i dr.

¹⁷ Videti, Zakon o radu, br. 03/L-212, član7, stav 1 i član 67, stav 1, tačka.

¹⁸ Podatak dostupan na web strani Nacionalne trgovinske banke, <http://bkt-ks.com/kredite-konsumatore.aspx>, dana 04.03.2019.

Član 53 [Tumačenje Odredbi Ljudskih Prava]

Osnovna prava i slobode zagarantovana ovim Ustavom se tumače u saglasnosti sa sudskom odlukom Evropskog suda za ljudska prava.

15. **Evropska Konvencija o zaštiti ljudskih prava i osnovnih sloboda**, (4.novembar 1950), (u daljem tekstu "Konvencija") je pravni dokument koji se direktno primenjuje u skladu sa Ustavom Republike Kosovo (čl.22), i ima premoć u slučaju sukoba, nad odredbama zakona i drugim aktima javnih institucija,shodno tome,

Član 14.Konvencije

Uživanje prava i sloboda predviđenih u ovoj Konvenciji obezbeđuje se bez diskriminacije po bilo kom osnovu, [...]

Član 1 Protokola 12 uz Konvenciju ističe:

Opšta zabrana diskriminacije

1. *Svako pravo koje zakon predviđa ostvarivaće se bez diskriminacije po bilo kom osnovu kao npr. polu, rasi, boji kože, jeziku, veroispovesti, političkom i drugom uverenju, nacionalnom ili društvenom poreklu, povezanosti s nacionalnom manjinom, imovini, rođenju ili drugom statusu.*

2. *Javne vlasti neće ni prema kome vršiti diskriminaciju po osnovima kao što su oni pomenuti u stavu 1*

16. Zakon br. 05/L-021 o zaštiti od diskriminacije

Član 1.

1. *Cilj ovog zakona je uspostavljanje jednog opšteg okvira za sprečavanje i borbu protiv diskriminacije po osnovu nacionalnosti ili veze sa nekom zajednicom društvenog ili nacionalnog porekla, rase, etničke pripadnosti, boje kože, rođenja, porekla, pola, rodne pripadnosti, rodnog identiteta, seksualnog opredeljenja, jezika, državljanstva, religije i verskih ubeđenja, političke pripadnosti, političkog ili drugog mišljenja, **socijalnog ili ličnog stanja, starosnog doba, porodičnog ili bračnog statusa, trudnoće, porodiljstva, imovinskog stanja, zdravstvenog stanja, ograničene sposobnosti, genetskog nasledstva ili na drugoj osnovi, u cilju sprovođenja principa jednakog tretmana.***

Član 2.

1. *Ovaj zakon se sprovodi za sve aktivnosti ili neaktivnosti, svih lokalnih i državnih institucija, fizičkih i pravnih lica, javnog i privatnog sektora, koji su kršili, krše ili mogu kršiti prava bilo kog lica ili fizičkih ili pravnih lica, u svim oblastima života, a posebno kada se bave: [...]*

1.10. *pristupom i snabdevanjem materijalnim dobrima i uslugama koje su dostupne javnosti; [...]*

Član 3.

1. *Princip jednakog tretmana znači da neće biti nikakve neposredne ili posredne diskriminacije, u pogledu bilo kojeg navedenog osnova koji je određen u članu jedan (1) ovog zakona.*

2. *Diskriminacija znači svako razlikovanje, isključivanje, ograničavanje ili davanje prednosti, na bilo kom osnovu navedenom u članu jedan (1) ovog zakona, koji ima za cilj ili efekat da obezvređi ili ugrozi priznavanje, uživanje ili obavljanje, osnovnih ljudskih prava i sloboda koja su priznata Ustavom Republike Kosova i važećim zakonodavstvom u Republici Kosovu.*

Član 4.

1. Vrste nejednakog tretmana su sledeće:

1.1. Neposredna diskriminacija - kada se neko lice tretira na manje povoljan način, nego što se tretira ili je bilo tretirano ili će biti tretirano neko drugo lice u uporedivoj situaciji po jednom ili više osnova propisanih u članu (1) ovog zakona ; [...]

Član 8.

Sve institucije treba da deluju u skladu sa principima ovog zakona tokom obavljanja svojih obaveza i tokom izrade politika i zakonodavstva.

Član 20. *[...] paragraf 2. Teret dokazivanja pada na tuženu stranu, koja treba da dokaže da nije postojalo kršenje načela jednakog postupanja.*

V ANALIZA ČINJENIČNOG STANJA

17. Imajući u vidu pitanje razmatranja, odnosno nejednako tretiranje penzionera kao klijenata, od strane komercijalnih banaka na Kosovu, u pružanju bankarskih usluga kredita, Ombudsman će sa aspekta poštovanja ljudskih prava i sloboda kao i antidiskriminacijskog zakonodavstva, analizirati samo ovo pitanje.
18. Ombudsman podvlači da antidiskriminacijsko zakonodavstvo, propisuje načelo jednakosti bez ikakve posredne ili neposredne diskriminacije, tako što je regulisano da su svi jednaki i uživaju jednak položaj i jednaku pravnu zaštitu, bez obzira na lična svojstva, te da je svako dužan da poštuje načelo jednakosti, odnosno zabranu diskriminacije.
19. Ombudsman navodi da prema odlukama Evropskog suda za ljudska prava, „pravo da ne budu diskriminirani se krši kada države tretiraju ljude nejednako [...] bez pružanja objektivnog i razumnog opravdanja. Da bi takvo opravdanje bilo “objektivno i razumno“ mora da prođe dva koraka: Prvo, mora postojati „legitimni cilj“ za nejednakost u pitanju i, drugo, treba da postoji i „razuman odnos proporcionalnosti između upotrebljenih sredstava i cilja kome se teži“.
20. Ustav, izričito određuje da je obaveza svih organa da poštuju prava i slobode drugih, ovo načelo je imperativno i mora se poštovati od svih, uključujući i finansijske institucije.
21. Sledom navedenog, svi akti banaka moraju da budu usklađeni sa Ustavom i pozitivno-pravnim propisima, kako onima iz oblasti poslovanja banaka, tako i sa drugim propisima Republike Kosovo, uključujući i propise koji zabranjuju diskriminaciju.
22. Na Kosovu licencu za rad ima 11 komercijalnih banaka, koje pružaju standardni paket bankarskih usluga, uključujući zajmove, garancije, tekuće račune, štedne račune, oročene depozite, domaće i strane transfere, kao i usluge za očuvanje stvari od

vrednosti. Ove banke svoju delatnost obavljaju u skladu sa uslovima propisanim Zakonom o bankama, mikrofinansijskim institucijama i nebankarskim finansijskim institucijama, br. 04/L-093 i podzakonskim aktima Centralne banke Kosova.

23. Na osnovu napred iznetog činjeničnog stanja, u pružanju bankarskih usluga kredita građanima Kosova, Ombudsman u jednoj situaciji, primećuje da su banke kreirale i nude više vrsta kredita za potrebe građana, među kojima su krediti za posebne kategorije građana kao i za posebne namene, međutim u ponudi banaka nema posebno kreiranih kredita za penzionere, kao važnog dela stanovništva, a od postojećih kredita, pod postojećim uslovima banaka, ni jedan od kredita koji se nude građanima, nije dostupan za penzionere preko 65 godina starosti, zbog njihove starosne dobi, dok se to pravo u uporedivoj situaciji ne osporava ostalim kategorijama penzionera ispod 65 godina, kao ni zaposlenim licima.
24. U konkretnom slučaju, očigledno je da od starosnog doba klijenta, zavisi ispunjenost uslova za dobijanje kredita, tako da određeni broj korisnika penzija ne može da koristi ovu uslugu samo zbog svog ličnog svojstva – starosnog doba. Time se oni lišavaju mogućnosti da banka proceni njihovu kreditnu sposobnost, na osnovu uporedivih i objektivnih kriterijuma i da im odobri traženi kredit, ukoliko su kreditno sposobni.
25. Primenom ovakve prakse, banke neposredno diskriminišu građane na osnovu direktnog kriterijuma - starosne dobi kao ličnog svojstva, jer zbog uskraćivanja prava da koriste bankarsku uslugu kredita, u uporedivoj situaciji stavlja jednu grupu građana, u nepovoljniji položaj u odnosu na druga lica koja nemaju to lično svojstvo.
26. U drugoj situaciji, u praksi banaka, pravo na korišćenje usluga kredita nemaju zainteresovani korisnici penzija preko 65 godina starosti, ali se licima iste starosne dobi, koja imaju privatni biznis, ne uskraćuje ovo pravo.
27. Takođe, i primenom ovakve prakse, banke neposredno diskriminišu građane, tako što bez objektivnog i razumnog opravdanja, različito tretiraju klijente iste starosne dobi, na osnovu njihovog socijalnog stanja, od kojeg direktno zavisi ispunjenost uslova za dobijanje odgovarajućeg kredita.
28. Ombudsman napominje da Zakon za zaštitu od diskriminacije izričito zabranjuje i starosnu dob, i socijalno stanje, kao osnov za bilo kakvo pravljenje razlike ili nejednako postupanje, i ne može se prihvatiti da postoji bilo kakvo objektivno i razumno opravdanje za uvođenje kriterijuma godina starosti ili socijalnog stanja, na osnovu koga banke prave razliku među klijentima – potencijalnim korisnicima usluge kredita.

VI MIŠLJENJE OMBUDSMANA

29. U vezi sa pitanjem Ombudsman ne poriče:

- da je kredit bankarska usluga obligaciono-pravnog karaktera iz oblasti ugovora o kreditu, što znači da ugovaranje kreditnog pravnog posla pretpostavlja slobodu, u granicama prinudnih propisa, javnog poretka i dobrih poslovnih običaja i da se ovi poslovi obavljaju po slobodnoj obostranoj volji;

- da banka posluje pretežno tuđim sredstvima i da u osnovi obavlja funkciju posrednika između finansijski suficitarnih i finansijski deficitarnih transakcija, kao i da je karakter njenog poslovanja rizičan,
 - da kreditni posao po svojim pravnim i finansijskim elementima sadrži osnovne rizike bankarskog poslovanja, da je banka dužna da na osnovu posebnih propisa vrši procenu kreditnog rizika, što podrazumeva i adekvatnu procenu kreditnog rizika prilikom odobravanja korišćenja određene usluge. Procena mora biti zasnovana na kvantitativnim i kvalitativnim kriterijumima koji uzimaju u obzir i karakteristike određenog dužnika i plasmana.
30. Međutim, Ombudsman napominje da to ne daje pravo bankama da svojim aktima isključuju, odnosno, onemogućavaju pristup bankarskim uslugama čitavim grupama građana na osnovu nekog ličnog svojstva, u ovom slučaju starosnog doba i socijalnog stanja. Svaka bankarska usluga mora da bude dostupna svim građanima pod jednakim uslovima, a u pojedinačnim slučajevima banke imaju ovlašćenje da procenjuju da li određeni klijent ispunjava uslove za korišćenje određene bankarske usluge. Samo takav pristup i način postupanja obezbeđuju da svi klijenti pod jednakim uslovima mogu da koriste bankarske usluge.
31. Starosno doba klijenta nema nikakav uticaj na ovu procenu, jer nije „finansijski merljivo”, niti od samog uzrasta klijenta može zavisiti da li će on efikasno i blagovremeno da otplaćuje kredit. To što neka osoba ima više od 65 godina ni na koji način ne implicira da ona nema finansijske mogućnosti da efikasno i blagovremeno isplaćuje kredit, niti da su njene finansijske mogućnosti manje od mogućnosti koje ima (punoletna) osoba mlađa od 65 godina, s obzirom da su redovni mesečni prihodi koje ljudi ostvaruju veoma različiti i ne zavise od godina starosti. Pri tome, treba imati u vidu da su godine života samo jedan od uslova za ostvarivanje prava na određene vrste penzija, i da starije osobe imaju pravo na jednak pristup u korišćenju svih javnih usluga.
32. Ombudsman takođe ističe da su penzije stabilni, redovni i sigurni mesečni prihodi, iza kojih stoji država, i koje korisnici primaju do kraja života. Dok zaposlena lica nemaju ovu vrstu sigurnosti. S toga, i ako zbog nižih primanja, u odnosu na primanja radno aktivnih-zaposlenih lica, penzioneri predstavljaju povećani rizik za banke, nema prihvatljivih prepreka za banke, da na osnovu iznosa njihovih penzija i drugih prihoda ukoliko ih imaju, po svakom pojedinačnom zahtevu, vrše procenu njihove kreditne sposobnosti. Takođe, prilikom izdavanja kredita banke imaju mogućnost korišćenja instrumenata obezbeđenja svojih interesa, kao što su polisa životnog osiguranja, sudužnik, idr.
33. Sledom navedenog Ombudsman napominje da procena banaka, u razmatranju i obradi kreditnih zahteva, kao i rešenje o zahtevu za kredit, mora biti zasnovano isključivo na kvantitativnim i kvalitativnim kriterijumima koji uzimaju u obzir sve karakteristike određenog klijenta u svakom pojedinačnom slučaju, bez ikakvog generalnog isključivanja na osnovu nekog ličnog svojstva.

34. Pored toga, Ombudsman ne poriče da banka ima pravo i da za određene grupe klijenata, propiše posebne uslove na osnovu kojih će odobravati tražene kredite, ali i u tom slučaju uslovi moraju biti objektivni, uporedivi i jednaki za sve i ne smeju se dovoditi u vezu sa ličnim svojstvima klijenata. odnosno, moraju se poštovati antidiskriminacioni propisi koji su imperativnog karaktera i koji su obavezujući za sve.
35. Ombudsman smatra da banke trebaju da konstantno unapređuju kreditnu politiku kako bi odgovorile na izazove u smislu prilagođavanja novonastalim situacijama u društvu, što je od velike važnosti za stanovništvo u smislu poštovanja standarda koji se odnose na ljudska prava bez diskriminacije po bilo kom pravno zaštićenom onovu.
36. U današnje vreme penzioneri teško žive, penzije su niske, a dodatni novac je preko potreban. U ekonomskoj situaciji u kojoj se trenutno naša zemlja nalazi, penzije su, vrlo često, jedini prihodi u porodici. Iz ovih razloga, ova posebna kategorija dobija na značaju. i evidentna je potreba za kreiranjem odgovarajućih kredita za ovu kategoriju stanovništva, kao što je to slučaj u zemljama okruženja.

VII ZAKLJUČAK OMBUDSMANA

37. Imajući u vidu sve navedeno, Ombudsman zaključuje da banke u Republici Kosovo svojim praksama da penzionerima preko 65 godina starosti uskraćuju pravo pružanja bankarskih usluga kredita, na osnovu njihovog ličnog svojstva – starosne dobi, kao i njihovog socijalnog stanja, vrše akt dvostruke diskriminacije, i krše odredbe antidiskriminacionog zakonodavstva.

Na osnovu ovih nalaza, a u skladu sa članom 135, stav 3 Ustava Republike Kosova i člana 16, stav 4 Zakona br. 05/L-019 o Ombudsmanu,

Ombudsman preporučuje:

Na osnovu napred iznetog mišljenja, Ombudsman smatra da je neophodno usvojiti reforme u kreditnim politikama banaka na Kosovu, u cilju sprečavanja diskriminacije starijih građana, odnosno penzionera u korišćenju bankarskih usluga, kao u nastavku:

Da Centralna banka Kosova preporučí svim komercijalnim bankama u Republici Kosovo:

- *Da preispitaju i usklade opšte uslove poslovanja, zbog kojih stariji građani ne mogu da koriste neke bankarske usluge, sa pozitivno-pravnim propisima iz oblasti antidiskriminacionog zakonodavstva.*

- *Da u buduće vode računa da se svojim praksama, politikama i odlukama suzdrže od neopravdanog pravljenja razlike ili nejednakog postupanja i propuštanja (isključivanja, ograničavanja ili davanje prvenstva), u odnosu na lica ili grupe lica, koje se zasniva na nekom ličnom svojstvu.*

U skladu sa članom 132, stav 3 Ustava Republike Kosovo („*Bilo koji drugi organ ili institucija, koja sprovodi legitimnu vlast u Republici Kosovo je dužna da odgovori na zahteve Ombudsmana i da mu/joj predstavi sva dokumenta i informacije koje su od njega zatražena u saglasnosti sa zakonom*“) i člana 28 Zakona br. 05/L-019 o Ombudsmanu („*Autoriteti, kojima je Ombudsman uputio preporuke, zahtev ili predlog za preduzimanje konkretnih mera, uključujući i disciplinske mere, treba da odgovore u roku od trideset (30) dana. Odgovor treba da sadrži razloge u pisanoj formi o preduzetim radnjama u vezi navedenog pitanja*“), molimo Vas da nas informišete o radnjama koje ćete preduzeti u vezi sa ovim pitanjem.

S poštovanjem,

Hilmi Jashari

Ombudsman