



Afgørelse i sag 1474/2018/TE om påståede mangler og partiskhed under Europa-Kommissionens udarbejdelse af dens politik og lovgivningsforslag vedrørende reduktion af engangsplastprodukter

Afgørelse

Sag 1474/2018/TE - Indledt den 01/10/2018 - Afgørelse af 22/03/2019 - Den vedrørte institution Europa-Kommissionen (Ingen fejl eller forsømmelser fundet) |

I maj 2018 vedtog Europa-Kommissionen sit lovgivningsforslag om et engangsplastdirektiv. Forslaget fastlægger regler for hele EU, som fokuserer på de ti hyppigst fundne engangsplastprodukter på Europas strande og have. De foreslåede regler omfatter et forbud mod visse engangsplastprodukter, herunder produkter anvendt til føde- og drikkevarer.

Klagen omhandlede en potentiel interessekonflikt ved Kommissionens udarbejdelse af dennes politik og lovgivningsforslag om reduktion af engangsplastprodukter. Klageren påstod også, at Kommissionen ikke har opfyldt sine egne retningslinjer for bedre regulering.

Ombudsmanden var klar over, at klageren, en forening af repræsentanter for producenter af føde- og drikkevareemballage, primært var utilfreds med indholdet i Kommissionens lovgivningsforslag. Selvom Ombudsmandens undersøgelser nogle gange afslører problemer med lovgivningen, har hun intet mandat til at indlede undersøgelser af berettigelsen af EU-lovgivning eller af lovgivningsforslag fremført af Kommissionen for EU-lovgiveren. Ombudsmandens undersøgelse i den pågældende sag fokuserede derfor på Kommissionens administrative aktiviteter under udarbejdelse af lovgivningsforslaget.

Ombudsmanden undersøgte i denne sammenhæng Kommissionens udbudsprocedure for forberedelsen af den undersøgelse, som ligger til grund for EU's plaststrategi, og lovgivningsforslaget om et engangsplastdirektiv. Hun undersøgte også nøje, om Kommissionen overholdte sine egne retningslinjer for bedre regulering i forbindelse med den offentlige høring og konsekvensvurderingen, som blev gennemført i denne sammenhæng.

Ombudsmandens undersøgelse opdagede ikke nogen tilfælde af fejl eller forsømmelser. Hun afsluttede derfor sagen.

Background to the complaint

1. The complaint, submitted by the European association representing manufacturers of food and beverage service packaging 'Pack2Go Europe', concerns the way in which the Commission prepared its policy and legislative proposal on reducing single-use plastic



products, such as plastic cutlery, plates and straws.

2. In January 2018, the Commission adopted *The European Strategy for Plastics in a Circular Economy* [1] (hereafter the 'EU Plastics Strategy'), in which it committed to tackling damaging plastic litter through legislative action. In line with this commitment, the Commission worked on a legislative proposal aimed at reducing marine litter from single-use plastic products (hereafter the 'Single Use Plastics Directive'). In preparing this legislative proposal, the Commission carried out a public consultation [2] and an impact assessment [3].

3. On 16 May 2018, the complainant wrote to the Commission, expressing its concerns about the way in which the Commission had prepared the EU Plastics Strategy and was at the time preparing its proposal for a Single Use Plastics Directive. The complainant was particularly concerned about the Commission's reliance on an allegedly biased external consultant and its compliance with the 'Better Regulation Guidelines' - a set of rules and principles the Commission has established for itself when preparing new initiatives and proposals.

4. On 28 May 2018, the Commission adopted its legislative proposal for a Single Use Plastics Directive [4]. The proposal sets out EU-wide rules targeting the ten single-use plastic products most often found on Europe's beaches and seas. The proposed rules include a ban on certain single-use plastic products, including food and beverage service products.

5. On 26 July 2018, the Commission replied to the complainant that it had selected the external consultant based on objective criteria in accordance with the Commission's rules on tendering. It also confirmed that the Commission had prepared the legislative proposal in line with the Better Regulation Guidelines.

6. Dissatisfied with the reply, the complainant turned to the Ombudsman on 21 August 2018. The inquiry

7. The Ombudsman opened an inquiry into the complaint. The complainant's position is that:

1) There was a **conflict of interest** in the way the Commission used an external consultant in the development of policy and legislation related to the EU Plastics Strategy; and

2) The Commission **disregarded its own Better Regulation Guidelines** by failing to conduct an appropriate and adequate impact assessment and public consultation.

8. In the course of the inquiry, the Ombudsman's inquiry team met with representatives of the Commission to clarify certain aspects of the complaint.

Preliminary remarks

9. The Ombudsman understands from the facts of the present complaint that the complainant is dissatisfied with the substance of the Commission's legislative proposal for a Single Use Plastics Directive. The Ombudsman notes that the Commission has presented the proposal to the EU legislature - to the European Parliament and to the Council of the EU - and that it is now subject to a political discussion and, ultimately, to a political decision. The Ombudsman also notes that, on 19 December 2018, Parliament and Council reached political agreement on the legislative proposal in trilogue negotiations.



10. The Ombudsman investigates potential instances of maladministration in the actions of the EU administration. While her inquiries will sometimes reveal issues with legislation, she has no mandate to inquire into the merits of EU legislation. The Ombudsman also takes the view that her inquiries should not examine the merits of legislative proposals presented by the Commission to the EU legislature. The Ombudsman's inquiry in the present case therefore focused on the administrative activity of the Commission in preparing the legislative proposal.

On the alleged conflict of interest

Arguments presented to the Ombudsman

11. The **complainant** claimed that there was a conflict of interest in the way the Commission used an external consulting firm to help prepare policy and legislation related to the EU Plastics Strategy. In support of its argument, the complainant pointed out that the consulting firm in question " *had publicly lobbied for a range of restrictive measures targeting our products* " and had published its " *own advocacy report* " proposing specific measures on single-use plastics items. The complainant suggested that the consulting firm either had done so in its own right " *or perhaps was paid to do so by an interested third party* ". In view of this, the consulting firm was entirely compromised before being engaged by the Commission.

12. The **Commission** rejected the complainant's allegation of a conflict of interest. It explained that it had chosen the external consultants to prepare the EU Plastics Strategy based on objective criteria, in accordance with the Commission's rules on tendering processes. The Commission added that it would always take full political responsibility for its final proposals.

13. In the meeting with the Ombudsman's inquiry team, the Commission representatives explained the tendering process for the study underlying the EU Plastics Strategy and the legislative proposal for a Single Use Plastics Directive. The Commission stated that it had a 'framework contract' [5] with several service providers resulting from a call for tenders, which was conducted in 2016. The service providers to the framework contract were invited to bid for the specific contract [6] to prepare the study underlying the EU Plastics Strategy. The terms of reference of the contract were extended to cover the impact assessment for the proposed Single Use Plastics Directive.

14. In response to further questions from the Ombudsman, the Commission explained that the consulting firm in question was not part of the above-mentioned framework contract and that the specific contract was awarded to another service provider. The consulting firm in question was involved in this contract as a member of the contractor's consortium.

The Ombudsman's assessment

15. The complainant and the Commission raised different though related arguments under



the heading of a “*conflict of interest*”. These arguments concern whether the Commission correctly followed its rules on tendering processes, whether the consultancy firm was in a conflict of interest situation and, finally, whether it is problematic, as a matter of principle, for external consultants to have reached conclusions based on their expertise in a particular area before being engaged by the Commission. The Ombudsman will assess these arguments in turn.

16. When awarding service contracts to external consultants, the Commission is bound by the provisions of the EU Financial Regulation [7] . More detailed rules are contained in the respective tender notices and service contracts, which set out the selection criteria relating to tenderers’ legal, regulatory, economic, financial, technical and professional capacity as well as provisions on conflict of interest.

17. The Ombudsman notes that subcontracting to third parties is possible under the Commission’s rules on tendering [8] . As such, she has not identified any issue as regards respect for the Commission’s rules on tendering processes. This extends to the allegation of conflicts of interest — the complainant has not substantiated in any way the assertion that the consulting firm “*perhaps was paid ... by an interested third party*”.

18. Finally, the complainant takes issue with the fact that the consultancy firm had reached conclusions based on its expertise on marine litter before working on the study underlying the EU Plastics Strategy and the proposal for a Single Use Plastics Directive. The question therefore arises whether it is problematic as such that the consulting firm had reached such prior conclusions and whether this should have prevented the Commission from relying on the firm’s expertise in this case.

19. The Ombudsman considers that it is inherent in being an expert in a certain area to draw conclusions based on that expertise. This should not be problematic as long as such conclusions are based on objective criteria. In the absence of any evidence to the contrary, the Ombudsman assumes that the consultancy firm came to its conclusions, which are laid down in the report mentioned by the complainant, based on objective criteria stemming from its expertise on marine litter.

20. The Commission itself notes that it must take full political responsibility for its final proposals. As such, it was for the Commission to ensure that it was aware of the position expressed publicly by the consultancy firm so that it could take that information into account in reviewing the consultancy’s work in this case. There is nothing to suggest that the Commission was not aware of the consultancy’s report proposing specific measures on single-use plastics items, given that the report was published.

21. The Ombudsman’s inquiry into this aspect of the complainant has thus not brought to light any instance of maladministration.

On the compliance with the Better Regulation Guidelines

Arguments presented to the Ombudsman



22. The **complainant** argued that the Commission disregarded the Better Regulation Guidelines by failing to conduct an appropriate and adequate public consultation and impact assessment.

23. As regards the public consultation , the complainant claimed that the response time was too short and that the questionnaire consisted of closed questions that excluded alternative answers.

24. As regards the impact assessment , the complainant put forward several alleged shortcomings concerning its substance, for instance, that it would fail to consider the impacts and risks for food hygiene, public health and consumer health. The complainant further criticised that the Commission had not involved the European Food Safety Authority (EFSA) and that it had failed to complete the so-called 'Life Cycle Analysis' [9] before finalising the impact assessment. The complainant was also concerned about the sequence of drafting the impact assessment and the legislative proposal, which happened in parallel but should have been, in the complainant's view, consecutive.

25. The **Commission** considered that it had complied with its Better Regulation Guidelines when carrying out both the public consultation and the impact assessment.

26. As regards the public consultation , the Commission noted that the eight-week public consultation period had already been announced in the inception impact assessment, which had been approved by the Secretariat-General of the Commission. Furthermore, the Commission argued that it is in line with the Better Regulation Guidelines to ask a number of closed questions, provided that scope for open questions is ensured.

27. As regards the impact assessment , the Commission explained that there is no obligation to consult EFSA in the preparation of legislative proposals. The Commission further noted that the Life Cycle Analysis was, in this particular case, part of the impact assessment and reviewed by the Regulatory Scrutiny Board, in line with the Better Regulation Guidelines. Finally, the Commission considered that there is no prescribed sequence for conducting the impact assessment and drafting the legislative proposal laid down in the Guidelines.

The Ombudsman's assessment

28. The Commission has committed itself to a set of rules and principles to ensure a transparent, evidence-based and inclusive policy and law-making process. These rules and principles are laid down in the 'Better Regulation Guidelines' [10] and the associated 'Better Regulation Toolbox' [11] .

29. The Ombudsman understands that the Better Regulation Guidelines are a commitment of the Commission; they are not legally binding. Having said that, the Ombudsman has consistently taken the view that EU institutions and bodies should apply the rules they have established for themselves. This ensures consistency, transparency and avoids any sense of arbitrariness in the way the EU administration works.



30. At the same time, the Better Regulation Guidelines and its associated Toolbox should always be applied with a view to achieving their stated purpose, namely to ensure a transparent, evidence-based and inclusive policy and law-making process. Otherwise, these rules risk turning into a mere tick-box exercise. This is reflected in the Better Regulation Guidelines themselves, which clarify that the rules “ *should be applied in a proportionate manner using common sense. The aim is not to respect procedural requirements per se but to ensure that the Commission is equipped with relevant and timely information on which to base its decisions*”. Flexibility in the application of the Guidelines may be required and the Guidelines allow for exceptions to the rules if “ *validated and justified externally*”.

Public consultation

i. Length of consultation period

31. The public consultation on “ *Reducing marine litter: action on single use plastics and fishing gear* ” [12] was open for contributions during an eight-week period from 15 December 2017 to 12 February 2018.

32. According to the Better Regulation Toolbox, “ *[t]he **minimum period** for replies to public consultations is **12 weeks*** ” [13] (emphasis added). “ *There will, however, be occasions when certain procedural steps or processes cannot be done or need to be shortened or simplified for good reasons (e.g. political urgency, the need to respect confidentiality and security concerns etc.). Such exceptions from the requirements of the Guidelines and Toolbox are possible but prior approval is necessary* ” [14] .

33. The Ombudsman understands that such prior approval can be obtained either when a major initiative is first presented for political validation or afterwards. In the latter case, the Directorate-General of the Commission in charge of the initiative must seek the approval of the Secretariat-General. The Better Regulation Toolbox further specifies that all approved exceptions must be documented in Annex I of the relevant impact assessment report as well as in the explanatory memorandum accompanying a Commission proposal [15] .

34. In this particular case, the eight-week public consultation period had been announced in the inception impact assessment, which had been approved by the Commission’s Secretariat-General. Given the upcoming European Parliament elections, and the need to ensure the implementation of the Juncker Commission’s Circular Economy Action Plan [16] , it was reasonable for the Commission to shorten the consultation period. This was validated, via the approval of the inception impact assessment, by the Commission’s Secretariat-General.

35. The Ombudsman notes, however, that the Commission did not justify the exception externally - neither in Annex I of the impact assessment nor in the explanatory memorandum to the proposal [17] . The Commission should always strive to follow the rules it has established for itself, in line with the principles outlined in paragraphs 28 and 29 above.



36. Given the fact that this omission constitutes a minor issue in the overall context of the preparation of the legislative proposal, the Ombudsman finds it sufficient to draw the Commission's attention to this shortcoming by way of this decision.

ii. Questionnaire

37. The Ombudsman notes that multiple-choice or 'closed' questions are amongst the options that the Better Regulation Guidelines suggest as possible question types. The Better Regulation Toolbox specifies, however, that public consultations should offer participants the opportunity to raise additional issues, for example "*through open questions in a questionnaire or the possibility to upload further material*" [18].

38. The Ombudsman confirmed that, in the public consultation at issue, there were several possibilities for participants to answer questions by ticking the box "*other*" and then filling in a text box. It was furthermore possible to upload files in order to "*provide useful data sources or indicators regarding the economic, social and environmental impacts of single use plastics, or the costs and impacts of production*" [19].

39. The Ombudsman considers that these options offered participants, such as the complainant, a reasonable opportunity to express their individual concerns.

Impact assessment

40. The complainant put forward several alleged shortcomings as regards the substance of the Commission's impact assessment. The Ombudsman is not in a position to second-guess the Commission's substantive assessment and can carry out only a limited review in this regard. She therefore focussed her inquiry on the procedural issues raised by the complainant concerning the involvement of EFSA in the impact assessment, the delayed completion of the Life Cycle Analysis and the sequencing of drafting the impact assessment and the legislative proposal.

41. As regards the **involvement of EFSA**, the Ombudsman notes that the Better Regulation Toolbox refers to EFSA as *one of* the information sources of evidence-based better regulation [20]. EFSA is also listed as *one of* the permanent bodies at EU level that may carry out risk assessments [21]. There is, however, no requirement that EFSA *must* be involved in the drafting of impact assessments relating to its areas of expertise.

42. As regards the **Life Cycle Analysis**, the Ombudsman understands that, according to the Better Regulation Guidelines, this is one of the methods and tools "*that can be used to carry out analyses*". It is not a mandatory part of an impact assessment. The Ombudsman also takes note of the Commission's explanation that, in this particular case, the Life Cycle Analysis was not conducted as a self-standing assessment, but constituted a partial analysis that was integrated into the impact assessment. This implies that the input coming from the Life Cycle Analysis was reviewed by the Regulatory Scrutiny Board [22].

43. As regards the **sequencing of drafting the impact assessment and the legislative proposal**, the Better Regulation Toolbox explains that, "*[g]iven the variety of Commission*



initiatives accompanied by an IA, there is no one-size-fits-all solution on how to consult, in what time sequence and at which stage of the IA process " [23] . There is thus no prescribed sequence in the Better Regulation Guidelines.

44. In view of the above, the Ombudsman's inquiry into this aspect of the complaint has not brought to light any instance of maladministration.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion :

There was no maladministration by the European Commission.

The complainant and the European Commission will be informed of this decision.

Emily O'Reilly

European Ombudsman

Strasbourg, 22/03/2019

[1] Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Strategy for Plastics in a Circular Economy* , COM/2018/028 final.

[2]

<https://ec.europa.eu/info/consultations/reducing-marine-litter-action-single-use-plastics-and-fishing-gear>

[3] Commission Staff Working Document, Impact Assessment, Reducing Marine Litter: action on single use plastics and fishing gear, SWD(2018) 254 final, 28 May 2018, available at: http://ec.europa.eu/environment/circular-economy/pdf/single-use_plastics_impact_assessment.pdf

[4] Proposal for a Directive of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment, COM(2018) 340 final.

[5] Framework Contract No. ENV.C.2/FRA/2016/0017. " *Framework contracts* " can be understood as 'long-term relationships' with one or more service providers, which lay down the essential terms governing a series of specific contracts to be awarded during a given period.

[6] Specific Contract No. 07.0201/2017/756813/SER/ENV.B.1.

[7] Current and past versions of the EU Financial Regulation are available here: https://ec.europa.eu/info/publications/financial-regulations_en



[8] European Commission, DG Environment, Draft Framework Contract for Services, Point II.10.1 on “subcontracting”, available here:

<https://etendering.ted.europa.eu/cft/cft-document.html?docId=15532>

[9] ‘Life Cycle Analysis’ is a means to assess the environmental impacts of a product, encompassing all the stages of its ‘life’ (including raw material extraction, materials processing, manufacture, distribution, use, repair and maintenance, and disposal or recycling).

[10] The Better Regulation Guidelines are available here:

<https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how>

[11] The Better Regulation Toolbox is available here:

https://ec.europa.eu/info/better-regulation-toolbox_en

[12] Information on the public consultation is available here:

<https://ec.europa.eu/info/consultations/reducing-marine-litter-action-single-use-plastics-and-fishing-gear>

[13] Tool #53.

[14] Tool #1.

[15] Tool #1.

[16] Communication from the Commission, *Closing the loop - An EU action plan for the circular economy*, COM(2015) 614 final, 2 December 2015, available here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0614>

[17] This point was also noted by Parliament’s research service when conducting the initial appraisal of the impact assessment : “ *the IA does not explain why it did not respect the minimum 12 week period for open public consultations required by BR Guidelines Tool #53* ”.

[18] Tool #53.

[19] Question 15.

[20] Tool #4.

[21] Tool #15.

[22] The Regulatory Scrutiny Board examines and issues opinions and recommendations on all the Commission's draft impact assessments and major evaluations and fitness checks of existing legislation.

[23] Tool #53.

