Decision of the European Ombudsman closing his inquiry into complaint 277/2012/RA against the European Commission

Decision
Case 277/2012/RA - **Opened on** 29/02/2012 - **Decision on** 02/07/2013 - **Institutions concerned** European Commission (Critical remark) | European Commission (No further inquiries justified) |

The complainant, an NGO known as Friends of the Earth Europe, alleged that the Commission had not properly handled its complaints about the accuracy of declarations made by two multinationals in the Commission's Register of Interest Representatives. The NGO also alleged that the Commission had not properly handled its request for public access to documents.

Subsequent to the NGO's lodging of the complaint with the Ombudsman, the Commission and the European Parliament implemented an agreement on the establishment of a joint Transparency Register. Whilst this fact obviously had a bearing on any suggestions the Ombudsman might make as regards the future, it did not affect the Ombudsman’s inquiry into possible maladministration by the Commission. That inquiry was, therefore, directed only towards the Commission.

The Commission insisted that it had handled the NGO's complaints correctly and that it had given the fullest possible access to the documents in question.

The Ombudsman criticised the Commission’s failure to explain adequately to the NGO why it had rejected its complaints about the accuracy of the declarations made in its Transparency Register. He also criticised its failure to apply Regulation 1049/2001 on public access to documents correctly, in that it redacted information from the requested documents on the grounds that it was "irrelevant".

As regards the future, the Ombudsman noted that the Commission and Parliament are currently reviewing the Joint Transparency Register. He made a further remark containing three suggestions. First, the review should fully take into account the OECD Principles for Transparency and Integrity in Lobbying. Second, it could examine whether guidelines on methodology could be provided to ensure not only greater accuracy, but also an achievable degree of comparability of the declarations on the Register. Third, the Ombudsman emphasised, following the OECD principles, that complaints make a valuable contribution to effective implementation of the Register and should be welcomed as an opportunity to enhance

the accuracy of the information it contains. Such complaints should be thoroughly investigated and the responses to them should deal in sufficient detail with arguments made by the complainants. The Ombudsman invited the Commission to ensure that its follow-up to this further remark takes into account the views of the European Parliament.

Finally, the Ombudsman also made a second further remark, according to which the Commission could systematically inform interest representatives, in advance of meetings with Commission staff members, that the Commission intends to release the names of interest representatives, if so requested in the context of applications for access to documents under Regulation 1049/2001.

The background to the complaint

1. The complaint, submitted by an NGO, Friends of the Earth Europe, concerns the accuracy of declarations made in the European Commission's Register of Interest Representatives and the Commission's handling of a request for public access to documents in relation thereto.

2. Subsequent to the NGO's lodging of the complaint with the Ombudsman, the Commission and the European Parliament implemented an agreement on the establishment of a joint Transparency Register [1] . Whilst this fact obviously has a bearing on any suggestions the Ombudsman might make as regards the future, it does not affect the Ombudsman’s inquiry into possible maladministration by the Commission. That inquiry has therefore, been directed only towards the Commission.

3. The complaint to the Ombudsman related to two complaints submitted by the NGO to the Commission about the inclusion of two multi-nationals (hereinafter 'Company X' and 'Company Y') in the Transparency Register. The complainant took the view that the Commission had failed to ensure that Company X and Company Y complied with the Commission's Code of conduct for interest representatives, and more specifically point 4 thereof, according to which registrants have to ensure that, to the best of their knowledge, information which they provide is unbiased, complete, up-to-date, and not misleading. The complainant alleged that the two companies, in their declarations to the Commission, seriously underestimated their spending on lobbying the EU institutions. In support of its view, the complainant compared the amounts declared by these two companies with (i) the amounts declared by the same two companies in the United States and (ii) the amounts declared by similar companies. The complainant also made reference to the two companies’ revenue or presence in Brussels. The complainant also argued that the companies failed to address adequately the issue of the costs they incurred relating to membership of influential professional associations and think tanks, as well as costs related to the organisation of joint events.

4. On 4 February 2011, the Commission replied to the issues raised by the complainant. It stated that, having heard representatives of the companies, it concluded that the companies had not infringed the Code of conduct. In particular, the Commission considered that the

comparisons made by the complainant and references to the companies' revenue or presence in Brussels did not establish that the information provided in the Register was false. Company X and Company Y had, it said, provided the Commission with the methodology they used to calculate the estimated costs related to activities falling within the scope of the Register. This methodology was, it argued, clear and in conformity with all guidance material. The Commission concluded by saying that it had already identified the need for more specific guidelines to make clear which activities fall within the scope of the Register and how to deal with different activities, including the membership of professional associations. The joint Transparency Register, which was at the time under preparation by the Commission and Parliament, would be updated accordingly, it said.

5. On 21 February 2011, the complainant wrote to the Commission arguing that it failed to justify its conclusions relating to the disclosure of membership fees of professional associations and think tanks, as well as the amounts of money devoted to co-organising events with high profile media. The complainant contested the Commission's view that the methodology was clear. In doing so, it cited the European Ombudsman's preliminary assessment in case 3072/2009/MHZ [2] .

6. The complainant also requested the Commission to explain the companies' lobbying budgets and the supporting documents submitted by these companies relating to their registration.

7. The complainant also made a request for public access to documents, namely, for: " *all the documents related to the exchanges between the European Commission and [the concerned companies] regarding the calculation of [their] lobby registration, including all correspondences held by the Secretariat General with [the companies'] representatives, agendas and minutes of every meeting held between the two parties, and in respect to the calculation of [the companies'] lobby registration and that support the argument that the registration of [the companies] is correct* ". This request was registered on 13 May 2011 as an initial application for access to documents under Regulation (EC) No 1049/2001 on public access to documents [3] .

8. By e-mail of 6 June 2011, the Commission extended the deadline for replying to this request by 15 working days until 29 June. It explained that it needed additional time to consult the companies in question.

9. The Commission replied to the initial request for public access to documents on 7 July 2011. In its reply, it identified six documents:

(1) the Minutes of the informational meeting with Company Y on 28 October 2010;

(2) an internal note containing an analysis of the complaint made by the complainant with regard to Company Y;

(3) the e-mail from Company Y of 5 November 2011;

(4) the Minutes of the informational meeting with Company X on 21 October 2010;

(5) an internal note containing an analysis of the complaint made by the complainant with regard to Company X; and

(6) the e-mail from Company X of 25 October 2011.

10. The Commission granted partial access, but only to what it referred to as the "relevant" parts of these documents. It redacted from the "relevant" parts information concerning the amounts spent on lobbying by the two companies, as well as information on the beneficiaries of payments by the two companies. The Commission referred to the exceptions laid down in the first and third indents of Article 4(2) of Regulation 1049/2001, namely, the exception on the protection of commercial interests and the exception on the protection of the purpose of inspections, investigations and audits. Putting this information in the public domain would be prejudicial to the commercial interests of Company X and Company Y, it said. It would, in particular, put them in a more disadvantageous position than the other organisations registered in the Register, as it would disclose information which organisations are not obliged to disclose through registration. The Commission mentioned that it had balanced the public interest in disclosure against the protected interests and concluded that the possible added value of disclosing the information did not outweigh the protected interests. It also redacted personal data (the names of staff).

11. On 27 July 2011, the complainant filed a confirmatory application for access to the documents in question. It stated that the Commission's argument that the disclosure of specific information relating to the companies' lobbying activities would disadvantage them is equivalent to stating that the whole registration effort disadvantages registrants. If the percentages relating to the lobbying costs cannot be disclosed, the Register is not transparent, the complainant said. Furthermore, it argued that transparency is an issue of overriding public interest, as EU citizens have the right to know who is trying to influence their decision-makers.

12. Moreover, argued the complainant, failure by the Commission to disclose the entirety of the documents raises serious doubts about the Commission's investigation. The Commission's definition of lobbying includes not only direct lobbying meetings and efforts, but also indirect lobbying costs relating to the preparation of these meetings, events, and materials. The latter are not accounted for in the current calculations of lobbying costs for Company X and Company Y, it said, yet the Commission deemed their argumentation valid and their figures correct. In addition, the Commission seemed to rely completely on the companies' interpretations of lobbying activities, even when they did not match its own definition of lobbying. The complainant also contested the Commission's conclusion with regard to the way in which the companies dealt with membership of associations. Neither Company X nor Company Y mentions any agreement with the related industry associations and think tanks whereby they decide who should disclose which costs.

13. By letter of 22 August 2011, the complainant was informed that, due to the need for internal consultations, and given that the Commission's services operate with reduced staff during the summer holidays, the Commission was unable to provide a reply to its request for public access

on time and that, therefore, the deadline for replying to its request was extended by 15 working days, under Article 8(2) of Regulation 1049/2001. By letter of 12 September 2011, the complainant was further informed that the Commission was still not in a position to provide it with a final reply as the internal consultations were still ongoing.

14. The Commission responded to the confirmatory application on 24 October 2011, granting more extensive partial access to the "relevant" parts of the documents concerned. In particular, the Commission granted access to information concerning the two companies' memberships of certain trade associations and think tanks. However, the Commission refused to disclose budget figures and personal data of the employees of the two companies.

15. With regard to the latter, the Commission invoked Article 4(1)(b) of Regulation 1049/2001 which provides for the protection of the privacy and integrity of the individual. The Commission explained that the names and other data, such as e-mail addresses and telephone numbers of the companies' employees and of Commission officials, are personal data. It referred to the judgment of the Court of Justice in *Bavarian Lager* [4] to justify its refusal to disclose them.

16. The Commission also invoked the first indent of Article 4(2) of Regulation 1049/2001, according to which the institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests. It explained that Company X and Company Y were consulted at the initial stage of the reply on the disclosure of the information they had submitted. Both companies opposed the disclosure of certain elements, notably, financial information, including consultancy fees. Concerning figures relating to budget and personnel, Company X underlined that it did not disclose the amount spent on its activities for competitive and privacy reasons. This amount, which includes payment of rent and salaries, contains sensitive information of a confidential commercial nature, it said.

17. The Commission thus argued that disclosure would undermine the companies' commercial interests. Disclosing the exact amount of money spent on activities, as well as the number of staff, including the breakdown into different functions, would reveal commercially relevant information. The same holds true for membership in industry associations and fees paid to associations, as well as to consultancies. Disclosure would disadvantage the companies compared to their competitors, thus undermining their commercial interests.

18. With regard to the question of possible overriding public interest, the Commission argued that it considers that the aim of ensuring transparency concerning the activities of representing interests to EU institutions is best pursued by respecting the companies' request for non-disclosure of their commercially sensitive information. It explained that companies are only obliged to provide publicly the information set out in the rules of the Register and can expect the Commission to respect confidentiality concerning all other data exchanged. In the present case, following the two complaints, the Commission carried out an investigation and concluded that there was no breach of the rules. The complainant's request for public access aims at publication of additional information provided by the companies in the course of this investigation which is not part of the information that has to be provided by virtue of the rules of the Register. Such disclosure, following an unfounded complaint, and in the face of the express

opposition of the companies, would unduly put these companies in a disadvantageous position which, the Commission says, clearly contradicts the rules of the Register. By doing so, the Commission would not promote further voluntary registration but would discourage organisations from registering, thereby compromising the interest of transparency rather than pursuing it. As a result, the Commission saw no public interest that would outweigh the interests of Company X and Company Y in the protection of their commercial interests and the interest of the protection of the purpose of the Commission's investigations [5] .

19. The complainant then turned to the European Ombudsman.

The subject matter of the inquiry

20. The complainant alleges that the Commission erred:

(1) by failing to give adequate reasons for rejecting its view that the lobbying budgets submitted by two companies in relation to the Commission's Transparency Register were underestimated;

(2) by rejecting its request for full public access to documents related to the entries made by the two companies in the Commission's Transparency Register;

(3) by failing to respect the time limits laid down in Regulation 1049/2001 on public access to documents.

21. The complainant claims that the Commission should:

(1) properly handle complaints concerning interest representation;

(2) give access to the requested documents in their entirety.

22. With regard to the first allegation, the Ombudsman's letter opening the inquiry informed the Commission that he accepts, in principle, its explanation to the complainant that comparisons are not, on their own, sufficient to imply that the companies underestimated their lobbying budgets. However, he asked it to comment on the following issue. The Ombudsman considers that it is appropriate that the Commission seeks to ensure that there is no double counting of lobbying budgets. As such, it is appropriate that money used to finance professional associations be declared by either the companies financing the professional associations, or by the professional associations. However, the choice as regards which entity should declare the amounts should not be arbitrary. In principle, in line with the purpose of the Register, the choice as regards which entity should declare the amounts should be based on a specific analysis of the activities of the professional associations, so as to reflect those activities as accurately as possible, thus enhancing their overall transparency. If money is provided to a professional association by a company in order to represent the individual interests of the company, in principle, that money should be declared by the company, and not by the professional association or think tank.

23. With regard to the second allegation, the Commission was asked to comment on the following issue. In its replies to the initial and confirmatory applications, the Commission referred to the "relevant" parts of the documents and mentioned that certain parts of the documents are "out of scope". No mention is made of the exception(s) in Regulation 1049/2001 that apply to these parts of the documents. The Ombudsman understands that it is possible to consider an entire document to be outside the scope of a complainant's request and notes that there is an obligation on an applicant to make a sufficiently precise request in order to allow the institution to identify the documents. However, it is only possible to redact parts of a document if they fall under the exceptions contained in Article 4 of Regulation 1049/2001. The Commission's attention was drawn to case 1633/2008/DK [6] - notably, point 2.2 of the Commission's follow-up to the further remarks in that case - in which a similar issue was examined.

The inquiry

24. The complaint was submitted to the Ombudsman on 2 February 2012. On 29 February, the Ombudsman opened an inquiry and sent the complaint to the Commission with a request for an opinion. This correspondence also contained a request to inspect the relevant documents. That inspection took place on 22 March 2012. On 11 June 2012, the Commission sent its opinion, which was forwarded to the complainant with an invitation to submit observations. The complainant submitted observations on 16 July 2012.

The Ombudsman's analysis and conclusions

Preliminary remarks

25. As recognised by Article 11 of the Treaty on European Union, the participation of representative associations and civil society in EU decision-making improves the quality of democracy at EU level. The EU institutions should take measures to promote such participation.

26. These measures should encourage the highest standards of transparency and integrity in public participation. As recognised in the OECD Principles for Transparency and Integrity in Lobbying [7] , a sound framework for transparency in lobbying is crucial to safeguard the public interest, promote a level playing field, and avoid capture by vocal interest groups.

27. Section IV of the OECD Principles, entitled 'Mechanisms for effective implementation, compliance and review', highlights the importance of compliance, monitoring, and enforcement and is, in this regard, of particular relevance to the case at hand. Principle 9, in particular, provides that while clear and enforceable rules and guidelines are necessary, they are not sufficient. It is vital to raise awareness of rules and standards, enhance skills and understanding of how to apply them, and verify disclosures on lobbying and public complaints. This principle further provides that a coherent spectrum of strategies and mechanisms, including properly

resourced monitoring and enforcement, should be designed and applied to ensure compliance, and to deter and detect breaches. Finally, according to the OECD, all key actors – in particular public officials, representatives of the lobbying industry, civil society and independent 'watchdogs' – should be involved both in establishing rules and standards, and putting them into effect.

28. The Ombudsman welcomes the improvements already made by the Commission in this area. The very act of creating a Transparency Register, where interest representatives can identify themselves and provide information relating to the resources they employ when lobbying EU institutions, is an important advance in terms of improving the quality of democracy at EU level.

29. The Ombudsman also welcomes the Commission's statement that it is cognisant of the need for improvements in the context of the joint Transparency Register (see paragraph 4 above). Complaints from representative associations and other civil society organisations, such as the present complaint, play an important role, as the OECD Principles recognise, in helping to identify where such improvements can be made and to ensure effective implementation of rules and principles on the transparency of lobbying.

30. The Ombudsman notes that the Joint Transparency Register is currently under review by the Commission and Parliament. He trusts that the review will fully take into account the OECD Principles mentioned above. The Ombudsman will address a further remark to the Commission in this regard. Given that only the Commission had the opportunity to participate in the present inquiry, the Ombudsman invites the Commission to ensure that its follow-up to the further remark takes into account the views of the European Parliament. The Ombudsman will send the present decision to the European Parliament, for information.

31. Finally, it should be underlined that, as pointed out by the Ombudsman in case 3072/2009/MHZ, it is for the Commission and not the Ombudsman to judge whether the method of calculation used by a lobbying group wishing to register its related budget is appropriate [8] . The Ombudsman's inquiry as far as the complainant's first allegation is concerned therefore concerns only the Commission's investigation of the complainant's complaints and the reasons the Commission gave the complainant for rejecting its complaints.

A. Allegation of failure to give adequate reasons for rejecting the complainant's Transparency Register complaints and the related claim

Arguments presented to the Ombudsman

32. In support of its allegation, the complainant argues that the FAQs [9] of the (former) Commission Register state that the activities falling in the scope of the Register include: contacting members or officials of the EU institutions; preparing, circulating and communicating

letters, information material or argumentation and position papers; and organising events, meetings or promotional activities in support of an objective of interest representation. The information disclosed by the Commission reveals, however, that Company Y estimated a percentage for the time and costs related only to direct lobbying of the EU institutions, which the complainant understands to include meeting with EU officials. If correct, this would contradict the Commission's own guidelines that lobbying activities should also include the preparation of lobby meetings and letters. In addition, the complainant states that Company Y excluded payments to third parties, such as trade associations, think tanks or consultancies, which, in Company Y's understanding, will be accounted for by the organisations concerned. However, the entries of these third parties in the Register do not seem to account for such payments, said the complainant.

33. In the case of Company X, the complainant states that Company X deducted from its total EU Liaison office budget the fees paid to industry associations and think tanks, and consultancy fees paid to consultancies for policy monitoring services. The Commission FAQs provide, however, that in order to avoid double-counting, those registering are encouraged to agree with their partners and clients who reports what. Such an agreement does not seem to be provided for either in Company X's registration, or in the registration of any of the partners that the company works with on lobbying activities.

34. The complainant finds it puzzling that the Commission does not make more efforts to verify the reliability of the information in the Register. Ultimately, it says, if the Register fails to provide credible information and figures, it is the Commission's very credibility that risks being damaged. The Commission should be responsible for the quality of the information that is published in its own Register. At the moment, outside complaints are the main way of checking the quality and reliability of the data. The Commission's approach to complaints, however, raises serious concerns.

35. In its opinion, the Commission insisted that it carefully examined the complainant's complaints and acted in accordance with its Code of good administrative behaviour. It investigated the facts with the companies concerned, and provided the complainant with detailed reasoning as to why it considered the complaints unfounded.

36. In its observations on the Commission's opinion, the complainant mentioned that the entry of Company X was recently updated in the (new) Register, with the result that its declared annual lobbying budget has increased tenfold. According to the complainant, such a significant increase raises new questions in relation to how its initial complaints were investigated by the Commission, and the adequacy of the reasons given by the Commission for rejecting the complaints. Between the time of its complaint concerning Company X and Company X’s most recent update, it seems that neither the influence of Company X in Brussels, nor the number of its staff involved in EU lobbying have increased commensurately. According to the complainant, the updated figures clearly illustrate that having a rational method for the calculation of a lobbying budget does not necessarily imply that the declared figures are correct.

37. The complainant goes on to say that, if the Commission considers the lobbying budget

declared by an organisation to be correct, it is surprising that it does not question the overnight tenfold increase of this figure— even in the context of the new Commission-Parliament Transparency Register with stricter guidelines for calculation. In the complainant's view, the Commission either failed to investigate the complainant's complaint properly, and/or it fails to monitor the credibility of the figures declared in the Register — *de facto* putting the credibility of the Commission in its mission to promote openness at risk.

The Ombudsman's assessment

38. The Ombudsman first regrets that, in its opinion on this complaint, the Commission takes issue with the complainant's challenging the Commission's general policy, specifically, with the complainant's arguments relating to the method of taking account of membership fees. The Commission insists that the complainant's argument may not be addressed as part of the present inquiry.The Ombudsman presumes that this statement extends to his question to the Commission concerning this issue, as outlined in paragraph 22 above. The Ombudsman recalls that complaints are a valuable resource to help improve the system that the Commission has put in place. By clarifying the question of membership fees, improvements could clearly be achieved. The Ombudsman regrets that the Commission does not appear to share his view on this point.

39. The Ombudsman will now examine how the Commission investigated the complaints in question. He notes that the Commission met with the companies concerned, obtained additional clarifications from them via e-mail, and examined all the information provided. The Commission came to the conclusion that the companies had not infringed the Code of conduct for interest representatives and informed the complainant of its conclusion. In light of the voluntary nature of the Register, and in the absence of any formal powers of investigation (for example, the Commission has no power to carry out an audit of a company's accounts to verify the declaration made), or of any sanctions which can be imposed on companies, the Ombudsman agrees that the Commission did all in its power to investigate the complainants' complaints. Moreover, the Ombudsman's services examined the relevant files in this case in the context of an inspection. The Ombudsman can confirm that, in light of the files inspected, the Commission's conclusions appear reasonable. Its internal analysis of the complainant's complaints convincingly addresses each of the points raised by the complainant, specifically concerning comparisons made by the complainant, memberships of and payments to third-party organisations, and activities such as sponsoring and co-organising of events [10] .

40. The Ombudsman recalls, however, that the complainant's allegation in this case pertains to the reasons provided *to it* by the Commission for rejecting its complaints. In this regard, the Ombudsman cannot agree with the Commission's statement, according to which it provided the complainant with *"detailed reasoning as to why it considered the complaints unfounded"* . In its response to the complainant's complaints, the Commission limited itself to stating that:

(i) the comparisons made by the complainant do not establish that the information provided by the companies in the Register is false;

(ii) the companies in question have provided the Commission with their methodology of calculating their estimated costs which are directly related to activities falling within the scope of the Register — this methodology is clear and in conformity with all guidance material offered by the Commission; and

(iii) the Commission has already identified the need for improvements regarding more specific guidelines in order to specify which activities fall within the scope of the Register, how to treat different forms of activities including the treatment of memberships and payments to other organisations — the Joint Register will include such new elements.

41. The Ombudsman notes that the response provided by the Commission to the complainant was in general terms and failed to address the specific arguments made by the complainant. Since the Commission did address these specific arguments in its own internal assessment of the complaints, the Ombudsman fails to understand why the Commission did not share these reasons with the complainant [11] . The Ombudsman notes that, as a result of the scant reasoning provided by the Commission in its response to the complainant, the latter felt compelled to make a request for public access to documents in order to verify, for itself, that the reasons put forward by the companies in question stood up to scrutiny. Had the Commission itself provided more detailed reasons to the complainant, the latter would not have needed to make this request for public access, with the resource implications that such a request entails.

42. In light of this analysis, the Ombudsman makes the finding that the Commission erred by failing to give adequate reasons for rejecting the complainant's view that the lobbying budgets submitted by two companies in relation to the Commission's Transparency Register were underestimated. This constitutes an instance of maladministration.

43. In light of this finding, the Ombudsman has considered the possibility of proposing a friendly solution in this case [12] . Since the Ombudsman is, however, able to assure the complainant that the Commission did in fact have good reasons for rejecting the complaints, the Ombudsman considers that no useful purpose would be served by proposing a friendly solution. The Ombudsman will therefore make a corresponding critical remark.

44. The Ombudsman suggests that the current review of the Joint Transparency Register could seek to enhance the Register’s contribution to the transparency of lobbying by examining whether, in the light of experience, including the Ombudsman’s findings in the present case, guidelines on methodology could be provided to ensure not only greater accuracy, but also an achievable degree of comparability of the declarations on the Register.

45. The Ombudsman emphasises, following the OECD principles, that complaints make a valuable contribution to effective implementation of the Register and should be welcomed as an opportunity to enhance the accuracy of the information it contains. Such complaints should be thoroughly investigated and the responses to them should deal in sufficient detail with cogent and relevant arguments made by the complainants.

46. The Ombudsman's further remark to the Commission mentioned in paragraph 30 above will also cover these points.

B. Allegation of failure to provide full public access to documents and the related claim

Arguments presented to the Ombudsman

47. With regard to the second allegation, it is necessary to look at two separate aspects: first, the Commission's statements to the effect that certain parts of the documents in question were out of scope, and second, the question of whether the exceptions invoked by the Commission under Regulation 1049/2001 were validly invoked.

48. Regarding the parts of the documents that the Commission considered fell outside the scope of the complainant's application, the Commission quotes its follow-up to a further remark from the Ombudsman in his decision in case 1633/2008/DK [13] . It explains that it receives frequent requests for access to undefined documents, often formulated as 'all documents' or 'any documents' related to a given topic. In such cases, the Commission's services search for relevant documents in archives or databases. The documents may deal with a number of different subjects, which are not related to the area of interest mentioned by the applicant. Given the very wide definition of 'document' in Regulation 1049/2001, many of these documents are of an informal nature. The Commission's practice is to extract relevant parts of the documents and to consider those parts for disclosure. The Commission takes the view that this method is favourable to the applicant, since it enables its services to retrieve the information sought by the applicant without obliging him or her to identify specific documents. The Commission considers that its practice of selecting relevant parts of documents in reply to requests for access to 'any documents' concerning a given topic is a satisfactory way of dealing with this type of request.

49. The Commission takes the view that it has applied these rules in the case at hand. It recalls the application, as formulated by the complainant: " all the documents *related to the exchanges between the European Commission and [the concerned companies]* regarding the calculation *of [their] lobby registration, including all correspondences held by the Secretariat General with [the companies'] representatives, agendas and minutes of every meeting held between the two parties, and in respect to the calculation of [the companies'] lobby registration and that support the argument that the registration of [the companies] is correct* " (emphasis added by the Commission). In order to reply to this request, the Commission examined all documents in its possession concerning the complainant's complaints regarding the Register entries of the two companies and took into consideration those parts of the documents which concerned " *exchanges between the European Commission and [the concerned companies] regarding the calculation* ", including " *correspondences, agendas and minutes of every meeting* ". The remaining parts of the documents were blanked out and marked as "out of scope".

50. As far as the second issue outlined above is concerned, namely the application of the exceptions laid down in Article 4 of Regulation 1049/2001, the complainant argues that key information, particularly regarding the percentages and figures relating to lobbying activities, were kept secret. This made it very difficult, if not impossible, to verify and understand the Commission's reasoning when dealing with its complaints and appeal.

51. With regard to the Commission's reference to the protection of commercial interests, the complainant argues that transparency concerning the calculation of a lobbying budget is not in contradiction with commercial confidentiality. The complainant did not request information about individual fees or contracts to be released, it said.

52. In any case, the Commission's argument concerning commercial confidentiality of the information is contradictory, says the complainant. On the one hand, the Commission states that the purpose of the Register is to increase transparency about lobbying activities in the EU. On the other hand, the Commission seems reluctant to upset corporate groups, whenever concerns are raised about the credibility of the budgets they disclose for lobbying.

The Ombudsman's assessment

53. The Ombudsman will deal, first, with the question of the scope of the complainant's request.

54. The Ombudsman recalls that, in its replies to the initial and confirmatory applications, the Commission refers to the "relevant" parts of the documents and mentions that certain parts of the documents are "out of scope". No mention is made of the exception(s) in Regulation 1049/2001 that apply to these parts of the documents. In its opinion, the Commission explained that it receives frequent requests for access to undefined documents, often formulated as 'all documents' or 'any documents' related to a given topic. In such cases, the Commission's services search for relevant documents in archives or databases. The Commission, furthermore, extracts relevant parts of the documents and considers those parts for disclosure.

55. The Ombudsman notes that the Commission may be right in considering that, when it receives requests for access to undefined documents, its approach to look for the *"relevant information"* contained in parts of various documents is favourable to transparency. However, the concept of *"relevant parts of a document"* is not to be found in Regulation 1049/2001, which clearly provides that access to a part of a document can only be refused if one or more of the exceptions, as set out in Article 4 of the Regulation, is applicable. Moreover, if a request for public access to documents is not sufficiently precise to enable the institution to identify which documents - *in their entirety* - are relevant to the request [14] , the institution should consult with the applicant on the matter [15] . Insofar, therefore, as the Commission's approach could be used selectively, in cases where it could assist applicants, the Ombudsman finds it acceptable. However, the Ombudsman cannot accept generally an approach that could be used abusively, to evade the Regulation's requirement of reasoning when a requested document is not disclosed in its entirety. If, when making a confirmatory application, an applicant insists on having a document in its entirety, he should be provided with it, unless an exception set out in

Article 4 applies.

56. In the case at hand, the Ombudsman notes that the Commission did contact the complainant to clarify its request. As a result of this clarification, the Commission identified six documents.The complainant's confirmatory application *could only be understood* to imply a request for *full access* to the six documents identified by the Commission. The Commission was, therefore, under an obligation either to grant public access to those documents, or to give valid and adequate grounds for refusing access. It should have dealt with the request as relating to the documents in their entirety, without pondering on whether certain information contained therein fell within the scope of the complainant's request. Accordingly, the fact that parts of a document may be considered *"irrelevant"* , in the eyes of the institution, does not constitute a valid reason for refusing access to these parts. The Ombudsman notes that the Commission has not argued that any exception to access would be applicable to the *"irrelevant"* parts of the documents at issue in this case. The Commission's refusal to provide access to *"irrelevant"* parts of the documents was therefore wrong.

57. The Ombudsman further notes that, for the most part, the sections of the documents which the Commission considered irrelevant contain: (i) a description of the complainant's complaints concerning the Transparency Register; (ii) the Commission's analysis of the complainant's complaints; (iii) quotations from the Commission's FAQs, a document which is available on the Commission website; (iv) general information provided by the companies in question to the Commission concerning the Transparency Register; (v) contact details for, *inter alia* , the complainant; and (vi) banal statements, for example, the companies in question thanking the Commission for the opportunity to provide more detailed information following the meeting. The Ombudsman sees no justification for the Commission to redact the information contained in these sections of the documents in question. The Ombudsman also draws the Commission's attention to the fact that the Commission redacted certain information from some documents, while not redacting identical information from others.

58. In light of the foregoing, the Ombudsman finds that the Commission's decision to redact certain parts of the documents at issue in this case because they fell outside the scope of the complainant's request amounted to an instance of maladministration.

59. The Ombudsman has considered the possibility of proposing a friendly solution to this aspect of the case [16] , notably in light of the complainant's claim, outlined in paragraph 21 above, that the Commission should give access to the requested documents in their entirety. It is, however, not clear if the complainant still wants access to *these parts* of the documents rather than the parts of the documents dealt with in paragraphs 60 to 66 below. In the event that it does, the complainant could make a new application to the Commission under Regulation 1049/2001, which the Ombudsman trusts the Commission will deal with rapidly and taking into account his analysis in the present decision.

60. With regard to the second leg of this allegation, namely the alleged erroneous application of the exceptions under Regulation 1049/2001, the Ombudsman notes that the right of public access to documents is not absolute. There are specific exceptions foreseen in the Regulation

that limit that right.

61. The examination required for the processing of a request for access to documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception is not in itself sufficient to justify the application of that exception [17] . In principle, the application of an exception can be justified only if the institution has previously determined that access to the document would specifically and actually undermine the protected interest. In addition, the risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical [18] . The examination carried out by an institution to determine that a protected interest would be undermined by public disclosure of a requested document must be apparent from the reasoning set out in the decision limiting public access [19] .

62. In the case at hand, the Commission explains that it cannot give access to the concrete data regarding the two companies (such as, the rent they paid for premises, the amount they paid out in terms of salaries, the fees they paid for services, the role of employees…) as these data are covered by the exceptions in Regulation 1049/2001 pertaining to the protection of personal data (Article 4(1)(b)) and the protection of commercial interests (Article 4(2), first indent).

63. In line with the settled case-law of the Union courts [20] , the Ombudsman agrees that it is reasonably foreseeable, and not purely hypothetical, that the disclosure to the public of specific information concerning a company's costs (such as the rental costs, the salaries paid and the fees paid) could undermine the interest set out in the first indent of Article 4(2) of Regulation 1049/2001.

64. With regard to the personal data exception, in the *Bavarian Lager* judgment, the Court of Justice found that where a request based on Regulation 1049/2001 seeks to obtain access to documents containing personal data, the provisions of the data protection regulation (Regulation 45/2001 [21]) become applicable in their entirety [22] . In that particular case, the Court found that the Commission was right to verify whether the persons mentioned in the document in question had given their consent to the disclosure of personal data concerning them. The Court further found that the Commission complied with Article 8(b) of Regulation 45/2001 [23] by requiring that, in respect of the five persons who had not given their express consent, the applicant establish the necessity for the personal data to be transferred.

65. The Ombudsman notes that, in its response to the complainant's confirmatory application in this case, the Commission limited itself to referring to the *Bavarian Lager* judgment in order to blank out the names and contact details of its own staff and the interest representatives referred to in the documents. Unlike the situation in that case, however, the Commission made no reference as to whether or not it had attempted to verify whether the data subjects (in this case, the persons mentioned in the documents concerned, including their e-mail addresses and telephone numbers) were prepared to give their consent to the disclosure of personal data concerning them. Further, it did not inform the complainant that it had the right to put forward reasons why it would be justified to transfer the data to it.

66. The Ombudsman is not convinced that the fundamental right to protection of personal data constitutes a systematic obstacle to public scrutiny of whether natural persons involved in lobbying activities may have conflicts of interest. He therefore notes that, as an issue of general policy, it would be in the interests of transparency, and in particular in the interests of promoting participatory democracy, for the Commission systematically to inform interest representatives, in advance of meetings with Commission staff members, and in the context of written communications between the Commission and interest representatives, that the Commission intends to release the names of interest representatives [24] , if so requested in the context of applications for access to documents under Regulation 1049/2001. Any interest representative would, in that context, have the possibility of exercising their right to object to the release of their personal data on compelling legitimate grounds relating to his or her particular situation [25] . The Ombudsman will make a further remark in this regard.

C. Allegation of failure to respect the time limits laid down in Regulation 1049/2001

Arguments presented to the Ombudsman

67. In its opinion, the Commission explained that the delay in providing the complainant with a reply to its initial application was due to the need to consult the companies concerned, a process which took more time than expected for such consultations. With regard to the confirmatory stage, the delay was in part due to the fact that the treatment of the request fell during the summer holiday period, which meant that internal consultations were difficult due to the absence of many Commission employees. The Commission recognised that both the initial and confirmatory replies to the complainant's application were not issued within the deadlines provided for under Regulation 1049/2001. The Commission acknowledges that this can be only partly explained by the need to consult the companies concerned and apologised for not having met these deadlines.

The Ombudsman's assessment

68. Regulation 1049/2001 requires that initial applications, as well as confirmatory applications, shall be handled "promptly". Regulation 1049/2001 also sets out time limits for the processing of applications for access to documents: the initial application and the confirmatory application must be processed within 15 working days; this time limit may, in exceptional circumstances, be extended by 15 working days for the initial application and for the confirmatory application [26] .

69. The Ombudsman notes that the complainant's initial application for access to documents was lodged on 12 May 2011. The Commission replied on 7 July, namely ten working days beyond the 15 plus 15 working day deadline, provided for in Regulation 1049/2001. According to the Commission, it consulted the companies in question, in line with Article 4(4) of the Regulation, at this stage. The Commission responded to the confirmatory application dated 27

July on 24 October, which was 33 working days beyond the 15 plus 15 working day deadline. In its response to the confirmatory application, the Commission referred to a letter dated 22 August in which it extended the time limit. It also referred to a further holding letter, in which it mentioned that internal consultations were still ongoing and apologised for any inconvenience caused. In its opinion, the Commission explained the delay and, again, apologised for not having met these deadlines.

70. The Ombudsman notes that the Commission should make every effort to respond to requests for access to documents in due time. Where it is aware that it will not meet the relevant deadlines, it should inform the applicant, in advance of the expiry of the deadline, and explain why it cannot meet the deadline. It should, moreover, apologise to the applicant for any inconvenience caused by a delay.

71. With regard to the complainant's initial application, the Commission explained that the process of consulting the companies in question took more time than expected for such consultations. The Ombudsman finds this to constitute a reasonable explanation for a delay of ten working days. With regard to the confirmatory application, the Ombudsman notes that the Commission informed the complainant of its inability to meet the deadline before that deadline expired. He further notes the explanations it provided for the delay, both in the course of dealing with the complainant's application and in the course of this inquiry. Finally, the Ombudsman notes that the Commission apologised to the complainant for the delay — it did so as part of one of its holding replies to the complainant, and as part of this inquiry. The Ombudsman therefore sees no useful purpose in pursuing this issue in the present case, and thus finds that no further inquiries are justified in respect of this aspect of the complaint.

D. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remarks and conclusion:

The Ombudsman is aware from his inspection of the file that the Commission had good reasons for rejecting the complainant's complaints. However, the Commission failed to provide these reasons to the complainant. This constitutes an instance of maladministration.

With regard to the complainant's second allegation, by redacting information from the requested documents on the basis of its view that such information was irrelevant, the Commission failed to apply Regulation 1049/2001 correctly. This constitutes an instance of maladministration.

With regard to the complainant's third allegation, the Ombudsman finds that no further inquiries are justified.

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

A copy of the decision will also be sent to the European Parliament, for information as regards the first of the further remarks made below.

Further remarks

1. The Ombudsman trusts that the current review of the joint Transparency Register will fully take into account the OECD Principles for Transparency and Integrity in Lobbying.

The review could seek to enhance the Register's contribution to the transparency of lobbying by examining whether, in the light of experience, including the Ombudsman's findings in the present case, guidelines on methodology could be provided to ensure not only greater accuracy, but also an achievable degree of comparability of the declarations on the Register.

The Ombudsman emphasises, following the OECD principles, that complaints make a valuable contribution to effective implementation of the Register and should be welcomed as an opportunity to enhance the accuracy of the information it contains. Such complaints should be thoroughly investigated and the responses to them should deal in sufficient detail with cogent and relevant arguments made by the complainants.

(Given that only the Commission had the opportunity to participate in the present inquiry, the Ombudsman invites the Commission to ensure that its follow-up to the above further remark takes into account the views of the European Parliament).

2. The Commission could systematically inform interest representatives, in advance of meetings with Commission staff members, and in the context of written communications between the Commission and interest representatives, that the Commission intends to release the names of interest representatives, if so requested in the context of applications for access to documents under Regulation 1049/2001.

Done in Strasbourg on 2 July 2013

[1] See the Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation; OJ 2011 L 191, p. 29. See http://europa.eu/transparency-register/index_en.htm

[2] This complaint, which was submitted by the same complainant (Friends of the Earth Europe), also concerned the Commission's handling of a complaint regarding the Transparency Register.

The statement to which the complainant appears to refer forms part of the Ombudsman's reasoning for his friendly solution proposal. It reads as follows: *"the use of an acceptable methodology does not necessarily ensure that the total lobbying budget declared is accurate"* . See paragraph 30 of the Ombudsman's decision at: http://www.ombudsman.europa.eu/cases/decision.faces/en/10251/html.bookmark [Link]The complainant informed the Ombudsman that, following the Ombudsman's decision in case 3072/2009/MHZ, the relevant entity increased its declared lobbying budget in the Register eightfold.

[3] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[4] C-28/08 P *Commission v Bavarian Lager* [2010]ECR I-6055.

[5] The Commission makes a passing reference to this exception (the third indent of Article 4(2) of Regulation 1049/2001 on the protection of inspections, investigations, and audits) in its replies to the complainant's initial and confirmatory applications. This appears to stem from a point made by Company X in reply to the Commission's consultation on the public access request, according to which full disclosure of the detailed information may undermine the position of, and deter cooperation in good faith by, organisations supporting the Register, as the latter does not require public disclosure of the detailed methodology and part of this information is commercially sensitive. As the Commission does not substantiate its reliance on this exception and does not refer to it in its opinion on this complaint, it will not be dealt with in the context of the current inquiry.

[6] Available at: http://www.ombudsman.europa.eu/cases/decision.faces/en/10577/html.bookmark [Link]

[7] The OECD Principles for Transparency and Integrity in Lobbying are available at: http://www.oecd.org/gov/ethics/Lobbying%20Brochure%202012.pdf [Link]The Ombudsman notes that the European Parliament and the Commission are aware of the OECD Principles and that Commission Vice President Maros Šefčovič addressed the OECD Forum on Transparency

and Integrity in Lobbying held in Paris on 27-28 June 2013. For further information, see: http://www.oecd.org/corruption/ethics/lobbying-forum.htm

[8] See the Ombudsman's decision in case 3072/2009/MHZ, at paragraph 30.

[9] http://ec.europa.eu/transparency/docs/reg/FAQ_en.pdf [Link]

[10] As far as the complainant's argument concerning the direct and indirect lobbying expenditure of Company Y is concerned, the complainant did not raise this in its complaint to the Commission but rather in its complaint to the Ombudsman. The Ombudsman notes, in this regard, that the Commission refers to *"costs directly related to representing interests to EU institutions"* .

[11] For instance, in its internal assessment, the Commission refers a number of times to its FAQs, a publicly available document, while leaving this information out of its response to the complainant.

[12] Article 3.5 of the Ombudsman's Statute states that, as far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complainant.

[13] See the question from the Ombudsman to the Commission in his letter opening this inquiry and referred to in paragraph 23 above.

[14] Article 6(1) of Regulation 1049/2001.

[15] Article 6(2) of Regulation 1049/2001.

[16] See footnote 12 above.

[17] Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 45.

[18] Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 56.

[19] Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 69; and Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* , [2006] ECR II-2023, paragraph 115.

[20] Joined Cases T-355/04 and T-446/04 *Co-Frutta* v *Commission* [2010] ECR II-1.

[21] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data; OJ 2001 L 8, p.1.

[22] C-28/08 P, *Commission v Bavarian Lager* , [2010] ECR I-6055, paragraph 63.

[23] Idem, paragraphs 75 and 77.

[24] For further information on such an approach, see the paper produced by the European Data Protection Supervisor entitled "Public access to documents containing personal data after the *Bavarian Lager* ruling" and, more specifically, Section III thereof, entitled "The proactive approach".

[25] Article 18 of Regulation 45/2001.

[26] Article 7(1) and 7(3), and Article 8(1) and 8(2) of Regulation 1049/2001.