

Decision of the European Ombudsman closing his inquiry into complaint 1151/2008/(DK)ANA against the European Commission

Decision

Case 1151/2008/(DK)ANA - Opened on 26/06/2008 - Recommendation on 08/10/2012 - Decision on 09/07/2013

The European Biofuels Technology Platform ('the Platform') is a body which is independent of the Commission but has close links with it. The Platform has direct input into the Commission's biofuel research policy and indirect input into the Commission's overall energy policy.

An NGO that was concerned that the Commission did not sufficiently take into account issues of public interest in the field of biofuels complained to the European Ombudsman.

The main allegation which the Ombudsman took up for inquiry was that the Commission failed adequately to address the complainant's concerns regarding the balanced representation of stakeholders in the composition of the Platform.

In his preliminary assessment, the Ombudsman found that, although the Commission provided clarifications about the functioning of the Platform within the context of biofuels research policy and, more generally, the Commission's overall policy, it did not adequately address all the complainant's concerns. The Ombudsman proposed, as a friendly solution, that the Commission could consider specifying whether there are mechanisms to ensure (i) the objectivity of the Platform's recommendations, (ii) attention to issues of public interest, and (iii) to what extent external input is taken into account by the Commission.

In analysing the Commission's reply to his proposal, the Ombudsman acknowledged the initiatives taken by the Commission both in relation to the objectivity of the Platform's recommendations and the equality of opportunity to stakeholders. Nevertheless, the Ombudsman identified certain shortcomings and he, therefore, made draft recommendations that the Commission should consider taking (i) the necessary initiatives to enhance the objectivity of the Platform's recommendations in the field of biofuel research policy and (ii) further measures to ensure that it receives a pluralistic and objective input concerning policy initiatives in the field of renewable energy.

In spite of its objections to the Ombudsman's findings of maladministration, the Commission outlined the initiatives taken to implement the Ombudsman's draft recommendations.



The Ombudsman found that, even though these initiatives lacked detail, they constituted steps in the right direction. The Ombudsman trusted that the Commission's undertakings would translate into concrete actions and practices in the implementation of the new Horizon 2020 Programme.

In light of these considerations, the Ombudsman found that no further inquiries were justified into the complaint.

The background to the complaint

1. The complaint concerns the European Commission's policy-making in the field of biofuels. It was submitted by a Brussels-based civil society organisation [1] which argues that the Commission failed to ensure that the public interest is sufficiently taken into account in its policy in the field of biofuels.

2. In the last decade, the promotion of biofuels has been integrated into the European Union's policy on renewable energy [2]. The EU has also included biofuels as an energy research theme under the Seventh Framework Programme for Research and Technological Development ('FP7') [3]. In 2005, the "*Biofuels Research Advisory Council*" ('BIOFRAC'), a group of industry and research experts, drew up a report called "*A vision for biofuels up to 2030 and beyond*" [4] ('the Vision Report 2030'). In that report, BIOFRAC examined the use of biofuels and made proposals for a research agenda. One proposal was to create a "*European Biofuels Technology Platform*" [5] (the 'Platform') to implement the research agenda.

3. By way of background, the term European Technology Platform ('ETP'), first coined in 2002, refers to structures that bring together actors in order to promote certain areas of research [6]. Such platforms, including the Platform here concerned, are not part of the institutional structure of the Commission but the Commission may fund and guide them, and use their output for its policy-making. The main objective of ETPs is to increase the competitiveness of industry in the EU.

4. The Platform's primary objective is to implement the main proposals outlined in the Vision Report 2030. The Platform's composition is complex, involving a number of working groups for different fields of research [7]. It is assisted by a Secretariat and is partly financed by FP7.

5. The complainant contacted the Commission in order to obtain additional information about the Platform. To this end, in its e-mail of 20 April 2007, it requested information about the background of those who applied to join the Platform's Steering Committee. In its reply of 25 April 2007, the Commission stated that, while it was willing to provide the information requested, it was unable to do so at that stage and asked the complainant to be patient. In its follow-up e-mail of 2 May 2007, the Commission informed the complainant that, once completed, the requested information would be published on the Platform's website. In the following months,



the complainant sent four reminders without receiving a reply.

6. In parallel, by letter dated 1 June 2007 and addressed to Mr Potočník, who at the time was the Commissioner responsible for science and research, the complainant outlined its concern about the Platform's influence on the Commission's biofuels policy. This concern stems from the complainant's view that, in its work, the Platform does not take sufficient account of public interests other than competitiveness. The complainant pointed out that "[a] *part from producing the report 'Biofuels in the European Union. A Vision for 2030 and beyond', BIOFRAC was also invited to prepare the ground for the Strategic Research Agenda and to provide considerable input to the Seventh Framework Programme (FP7)*". The complainant considered that the Commission should not have allowed BIOFRAC and the Platform to be entirely dominated by commercial interests, such as those of the automotive and oil industries, while "*not a single public interest civil society organisation*" was represented. In its view, this was at odds with "*democracy and fairness in public policy making*" and resulted in "*one-sided advice emerging*" from these bodies.

7. In his reply of 27 June 2007, the Commissioner acknowledged the complainant's concerns about the role of the industry in the EU biofuels policy and the possible implications this may have for sustainable development. At the same time, however, the Commissioner stated that "[t] *he active involvement of industry in European research policies and implementing European research programmes is the logical consequence [of] the objectives for research and technological development at Community level [as] set out by the Treaty: the Community shall have the objective of strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level*". The Commissioner then explained the role of ETPs in achieving the goals of the Lisbon Strategy by better incorporating the industry's needs into EU research priorities and by bringing together stakeholders to define a Strategic Research Agenda ('SRA') and to suggest possible directions for its implementation. Because of this, there is "*deliberate industrial focus of technology platforms*", reflected in BIOFRAC and in the composition of the Platform. The Commissioner noted that the Platform's composition can evolve in order to adapt to changing needs; that the Platform is an open and transparent forum; and that all interested stakeholders can contribute to its discussions and deliverables, mainly through the website and the annual General Assembly. Further, the Commissioner pointed out that the Platform was developing the SRA that was meant to go through a public consultation before being presented at the first General Assembly and encouraged the complainant "*to contribute to this public consultation and to consider applying for membership of the stakeholder group*".

8. The Commissioner also outlined the Commission's decision-making process in the field of biofuels. He informed the complainant that the Platform is an important initiative in this context but "*not the only source of stakeholder input into [the Commission's] decision-making process*" and noted the examples of "*input ... received through public consultations, for example on the Biomass Action Plan, on the review of the Biofuels Directive, on Biofuel issues in the new legislation on the promotion of renewable energy, and on the European Strategic Energy Technology Plan*". In the design and implementation of the EU's research and technological development Framework Programmes, the Commission makes use of a variety of sources, of



which the Platform is just one. After consulting different advisory groups, the Commission submits a Framework Programme proposal to the Council and the European Parliament.

9. Next, the Commissioner stated that the development of biofuels must proceed in a context of sustainability. Aware of the need to promote the most efficient and environmentally-friendly biofuels, the Commission gives priority to research into second generation biofuels and to the development, in a broader context, of sustainability criteria on a global scale. The Commissioner referred to the partnership between the EU and Brazil in this regard.

10. The Commissioner concluded his letter by outlining one of the main objectives of the EU's policy in research as follows: "[t]o remain competitive, European industry needs to increase the high-technology content of its activity, and transform this technology into highly competitive marketable products and services in an environmentally sustainable way".

11. The complainant considered that the Commissioner's reply failed adequately to address the concerns that it had raised. On 21 April 2008, it submitted a complaint to the European Ombudsman.

The subject matter of the inquiry

12. The Ombudsman opened an inquiry into the following allegations concerning maladministration by the Commission:

Allegations:

(1) The Commission failed adequately to address the complainant's concerns regarding the balanced representation of stakeholders in the composition of the Platform.

(2) The Commission failed to reply to the complainant's request to be informed about the breakdown by background of those who applied to join the Steering Committee of the Platform and its working groups.

The inquiry

13. On 26 June 2008, the Ombudsman asked the Commission to submit an opinion on the above two allegations. The Commission sent its opinion on 30 October 2008. The Commission's opinion was forwarded to the complainant with an invitation to submit observations. The complainant sent its observations on 27 March 2009.

14. On 8 November 2010, the Ombudsman made a proposal for a friendly solution. On 4 March 2011, the Commission sent its reply which was forwarded to the complainant. The complainant sent its observations on the Commission's reply on 29 April 2011.



15. On 8 October 2012, the Ombudsman addressed draft recommendations to the Commission. On 4 March 2013, the Commission sent its detailed opinion on the Ombudsman's draft recommendations which was forwarded to the complainant for observations. The complainant did not submit any observations on the Commission's detailed opinion.

The Ombudsman's analysis and conclusions

A. Allegation that the Commission failed adequately to address the complainant's concerns regarding the balanced representation of stakeholders in the composition of the Platform

Arguments presented to the Ombudsman

16. The complainant alleged that the Commission did not adequately address the concerns expressed to it regarding the balanced representation of stakeholders in the Platform's composition. It argued that when the Commission initiated BIOFRAC in 2005, and, in 2006, created the Platform as its direct follow-up, it allowed both to be almost entirely controlled by corporations with an interest in the expansion of biofuels. In his reply, Commissioner Potočník did not deny that BIOFRAC and the Platform were industry-dominated and influential. The complainant argued that the Platform was dominated by representatives of companies and lobby groups representing narrow commercial interests, namely, the automotive industry, a forestry company, an energy company, a representative of farmers, and eight members from research centres or universities which are closely linked to the oil and biotech industry, but there was not a single representative from public interest groups. In its view, the Platform's unbalanced membership resulted in recommendations which ignored the negative social and environmental impact of certain policy options, such as the accelerated use of 'agrofuels' [8] in the transport sector.

17. The complainant further pointed out that the Platform's Steering Committee members were selected by the Chair and Vice-chairs of BIOFRAC, in consultation with the Commission. This way of proceeding resulted in the Platform's Steering Committee being dominated by industry, while there was not a single representative of citizens' organisations. The Platform's five working groups were also heavily dominated by industry, and the lack of balanced representation seemed to be a deliberate choice. The Platform's newsletter even stated that "*an adequate balance of industry vs. research/public centres was established in order to preserve the Platform as an industry-led group.*"

18. In view of the above, the complainant took the view that the Commission failed to ensure a balanced composition of these influential bodies and allowed them to be driven by narrow commercial interests. This policy resulted in flawed recommendations which ignored matters of



public interest, such as environmental sustainability, and the human rights of local communities in agrofuel-producing countries. The complainant went on to argue that, even if the Commission's Communication on General principles and minimum standards for consultation of interested parties by the Commission [9] (the 'Commission's Communication on Consultations') was not applicable in this case, the Commission should fulfil minimum standards regarding whom it invites to participate in ETPs.

19. In its opinion, the Commission first summarised the background to the case. It explained that the Lisbon Strategy emphasised the importance for EU research policy to maximise the impact of new knowledge on the economy. This objective was taken up by the debate preceding the preparation of FP7. One clear objective was to increase investment in research, particularly by the private sector. Efforts were made to engage in improved dialogue with industry regarding research priorities. The Commission wanted industrial researchers to share their views with public researchers and consumers in order to ensure that research strategies were not defined without knowing what was happening on the market, thereby missing opportunities to contribute to EU competitiveness. In this context, the Commission encouraged the creation and development of ETPs.

20. The Commission then outlined the main features of ETPs, their establishment and operation. As a first step, the Commission develops a concept and encourages industrial sectors and other stakeholders to come together in order to define a shared vision for research in their field, and to work on the development of an SRA. In general, the Commission provides guidance and participates as an observer in meetings and events. However, the Commission is not bound by ETPs' recommendations. Nor is it in any way obliged to take up their suggestions in its Research Work Programmes. In fact, ETPs are independent stakeholder networks, very often with no legal identity. They meet several times a year in open stakeholder events. They have no contractual relationship with the Commission, which does not own, control or manage them. The Commission does not determine the membership of ETPs, but it does encourage them to keep their events open to relevant stakeholders.

21. The Commission explained that ETPs are consulted without, however, excluding any other stakeholders from the relevant consultations. In fact, any organisation or individual citizen is free to submit suggestions and views to the Commission. ETPs are autonomous as regards membership, management and decision-making procedures. Consequently, the Commission cannot be held responsible for their composition. Therefore, the complainant's argument about "*the Commission's deliberate choice*" lacks grounds. Specifically, the Platform in question welcomes all organisations which apply to participate as stakeholders and organises periodic conferences which are open to any interested party.

22. As regards the complainant's first allegation, the Commission pointed out that the Platform's SRA was merely a vision document prepared by an autonomous network which represents the European biofuel community. However, the Commission is free to decide whether to accept the SRA's conclusions, and to consider other inputs and suggestions. The Communication on Consultations sets out a number of principles which concern the Commission's legislative process. These principles apply to the Commission's consultation and dialogue processes with



interested parties, including ETPs, but they do not govern the way in which independent networks, such as the Platform, carry out their own consultation procedures. Nevertheless, the Commission has always encouraged ETPs to seek wide participation.

23. Finally, the Commission emphasised that the Platform does not, as the complainant repeatedly suggested, engage in dialogue or debate energy policy in general, in order, for example, to define the EU's targets for biofuels. The purpose of the Platform is rather to reach agreement on research priorities which arise from such debates, and which remain a highly technical input. The Commission stated that there were no grounds for the complainant's subjective view that the Platform exerts "*enormous influence*" on the Commission's energy policy.

24. In its observations, the complainant maintained that, according to the Commission, the purpose of ETPs was to have industrial researchers "*sharing views with public researchers and consumers*". However, in the case of the Platform, the interests of consumers had clearly been forgotten and were not represented. As regards the Commission's statement that ETPs are independent stakeholder networks, often with no legal identity, and which meet several times a year, the complainant observed that this description leaves out the most significant characteristic of the Platform. In fact, the latter might meet in stakeholder meetings, but its work, similar to the SRA, is drafted in *non-open* working groups that are disproportionately dominated by business representatives. Although the draft was open for comments before final approval, the "*essentials were not open for change*", and the final draft "*did not include the fundamental objections raised by many submissions*".

25. The complainant also observed that the fact that "*any organisation or individual citizens are free to submit suggestions and views to the Commission*" is in no way comparable to the role played by ETPs, which are influential in determining the research agenda of the European Union and the allocation of EU funds. The complainant also argued that the Commission's statement that it cannot be held responsible for the composition or membership of ETPs ignores the fact that the Platform's Steering Committee members were selected by the Commission-appointed BIOFRAC Chair and Vice-Chairs, in consultation with the Commission. Furthermore, the members of the five working groups were "*handpicked*" by the same Steering Committee from the available candidates.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

26. In his preliminary assessment, the Ombudsman first recalled that, since the entry into force of the Treaty of Lisbon, Article 1 of the Treaty on European Union ('TEU') provides that "[t] *his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen*". This provision is consonant with the Commission's established practice of consulting interested parties when formulating its policies. In 2002, this practice was partly codified in the Commission's Communication on Consultations. The Communication confirmed the plurality of



input into the Commission's policy-making, and gave rise to high expectations regarding future developments in that direction. In this regard, following amendment by the Treaty of Lisbon, Article 11 TEU reads as follows:

"1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent."

27. As regards the specific area here concerned, the Ombudsman noted that recital 25 of Directive 2003/30/EC of the European Parliament and of the Council on the promotion of the use of biofuels or other renewable fuels for transport (hereafter, the 'Biofuels Directive') [10] , states that "[a]n increase in the use of biofuels should be accompanied by a detailed analysis of the environmental, economic and social impact in order to decide whether it is advisable to increase the proportion of biofuels in relation to conventional fuels. " Likewise, recital 9 of the FP7 Decision [11] states that " ... the dialogue between science and society in Europe should be intensified in order to develop a science and research agenda that meets citizens' concerns, including by fostering critical reflection, and is aimed at reinforcing public confidence in science. " In this context, the Ombudsman also noted that biofuel support policies are controversial [12] .

28. Before assessing the arguments presented to him, the Ombudsman considered it appropriate to clarify certain notions or distinctions, expressly or implicitly alluded to in the exchange of correspondence between the complainant and the Commission and in their respective submissions.

29. Starting from the terms " *representation* ", " *consultation* ", " *advice/advisory bodies* ", the Ombudsman noted that, in its letter to the Commission, the complainant referred to " *consultation* ", " *advice* " and " *advisory bodies* ". In its response, the Commission referred to " *public consultation* " in various fields, and to " *different advisory bodies* ", to show that input for its policy-making on biofuels comes from multiple sources. In its opinion, the Commission gave a detailed account of how all kinds of actors may express their views about the issues being discussed by the Platform. At one point, it stated that, basically, any EU citizen can express his or her views within the framework of the Platform. The Ombudsman noted that it appears from the foregoing that both parties in this case have used terms that may, depending on the policy field in question, refer to very different procedures, and different levels of impact and interaction with the Commission.

30. The Ombudsman then moved on to define the terms " *representativity* " and " *objectivity* ". He pointed out, in this regard, that, in its letter to the Commission dated 1 June 2007, the complainant expressed two concerns: first, that the Platform was not representative of " *democracy and fairness* ", and second, that the Platform's output [13] was not objective. This



was of particular concern to the complainant since the Commission uses the Platform's output for guidance, and it considers its recommendations. The Ombudsman noted that it is important to distinguish clearly between the two issues. For the Platform to be *representative* of democratic and/or fair values it must, for instance, take into account different views in a context which, at the least, will ensure that there is equality of participation from a procedural point of view. For output to be representative, it needs to be formed from views of very different kinds, some of which may not be of a purely technical nature. *Objectivity*, however, raises more concrete issues regarding the technical content and quality of the output, and the basis on which it is formulated. It raises specific questions as to whether the output is, or can reasonably be expected to be, factually well-founded and in line with informed and expert opinion.

31. As regards the terms "*binding*" and "*non-binding*", the Ombudsman noted that the Commission pointed out that the guidance emanating from the Platform is non-binding, and that it may decide not to follow such advice. Whilst true, this comment does not address the complainant's concerns. In the Ombudsman's understanding, the complainant's point was not that the Platform purports somehow to take over the Commission's decision-making, which obviously remains formally independent and autonomous, but that its guidance **influenced** that decision-making.

32. The Ombudsman then underlined that the present case concerns issues which are cross-sectoral, that is, they do not relate exclusively to the field of administrative action of one specific Directorate-General. He noted that the complainant and the Commission are naturally fully aware of this. In its letter to Commissioner Potočník dated 1 June 2007, the complainant noted that "[w]e will send a copy [of] this letter to Commission President Barroso and Commission Vice-President Kallas as the privileged access and influence granted to BIOFRAC and the [Platform] underlines a wider challenge for the Commission in addressing the frequently unbalanced representation of interests in advisory groups assisting its preparing of policy proposals." [14] This cross-sectoral aspect was fully taken into account in the assessment of the present case and the corresponding proposal for a friendly solution.

33. A careful reading of Commissioner Potočník's letter dated 27 June 2007 to the complainant showed that it contains certain positive and helpful information. The Commissioner's letter was well-structured and provided useful background information. It put the matter in its relevant context, and explained succinctly the Platform's strong focus on the industry and the corresponding composition of its membership. In addition, the Commissioner addressed the complainant's more general concerns by giving assurances that the Commission bases its policies on the input it receives through various public consultations. In particular, the Commissioner's letter stated that the Commission's policies on research are based on input from advisory bodies. However, it provided no further details on this aspect of the complainant's concerns.

34. After examining the legislation governing the FP7, the Ombudsman found it reasonable for the Commission to take the view that the Platform should be industry-focussed. Although the Commission should take into account the views of environmentalists, human rights activists and consumer representatives, as well as those of industrialists and other business-interested



persons, neither Article 11 of the Treaty on European Union ('TEU') nor the Commission's Communication on Consultations requires that every ETP should have a balanced representation of different interests. An overall balance could also be found by listening to a variety of sources of advice, each representing a different interest. The Commission must necessarily have wide discretion in deciding how to achieve the necessary overall balance.

35. Against this background, the Commissioner's reply to the complainant's letter contained a satisfactory explanation regarding the Platform's focus on industry. However, it would have been reasonable and appropriate for the Commission to provide a more detailed reply to the other concerns expressed in the complainant's letter.

36. In particular, neither the Commissioner's letter nor, subsequently, the Commission's opinion explained whether any mechanisms exist to ensure the factual objectivity of the Platform's input, namely, the objectivity of its advice/recommendations. This was an issue about which the complainant voiced particular concerns. Similarly, although the Commission briefly mentioned "*public consultation*" in various contexts, and "*different advisory groups*", it did not explain whether the input sources ensure that attention is paid to matters of public interest, as referred to by both the complainant and the Biofuels Directive quoted above ("*environmental, economic and social impact*").

37. Finally, the Commission did not provide the complainant with information which would enable it to obtain even a basic idea of how much weight the Commission attaches to the input from these multiple sources. The Ombudsman concluded that it is probably difficult to calculate precisely the impact that each source may have in each individual case. However, in the Ombudsman's view, the Commission's allusion to the sheer quantity of procedures, and the mass of input it receives through public consultation and from advisory bodies, could not reasonably be considered to constitute a sufficient response to the concerns raised by the complainant in the present case [15] .

38. In light of the above, the Ombudsman found that the Commission's reply did not adequately address all the complainant's concerns and that this could amount to an instance of maladministration. He therefore made a corresponding friendly solution proposal to the Commission.

39. At this point, the Ombudsman found it relevant to note briefly the following points. First, the complainant initially addressed Directorate-General ('DG') Research. The Ombudsman thus understood that the latter may initially have thought it best to provide a succinct reply, containing brief points on the relevant context. However, given that the complainant is a civil society organisation advocating good governance, it would have been reasonable and appropriate for DG Research to involve the Commission's specialised services on good governance and communication with civil society and/or the Secretariat General, in order to provide the complainant with a more satisfactory and informative reply. Second, in light of the ever greater focus on inclusive EU policy-making, notably reinforced through Article 11 of the TEU, the Commission itself would benefit if it were to establish a sound practice of providing clearly structured information and replies whenever questioned about its sources of external



input, and how they influence its policy-making process. Adopting the Ombudsman's friendly solution proposal would be a step in that direction.

40. In view of the above considerations, the Ombudsman made the following friendly solution proposal to the Commission:

" Taking into account the Ombudsman's findings, the Commission could consider supplementing its reply to the complainant by providing information on:

1) whether there are any mechanisms to ensure the factual objectivity of the European Biofuels Technology Platform's advice and/or recommendations to the Commission concerning its policy-making;

2) whether the mechanisms of public consultation and different advisory groups to which the Commission's original reply refers are intended to, and actually do ensure that sufficient attention is given to the issues of public interest raised by the complainant. Furthermore, the Commission could provide information on advisory bodies, their membership, and any mechanisms introduced to ensure the objectivity of their input into the Commission's policy-making on biofuels;

3) the extent to which the separate input from various external sources is taken into account in the Commission's policy-making on biofuels."

The arguments presented to the Ombudsman after his friendly solution proposal

The Commission's reply

1) Availability of mechanisms to ensure the factual objectivity of the Platform's advice and/or recommendations

41. Concerning point 1) of the Ombudsman's proposal, the Commission clarified, as a preliminary point, that the Platform "*may be involved in providing recommendations to the overall energy policy objectives, e.g. on the setting of renewable energy targets, only through public consultations which are open to all stakeholders and also the general public*".

42. The Platform's direct input to the Commission's policy-making is on the Commission's biofuel research policy and is thus essentially of a technical nature. In its SRA, the Platform identified the technical bottlenecks hindering the development of innovative biofuel technologies and proposed research actions which contribute to overcoming them.

43. The objectivity of the Platform's recommendations should therefore be judged in terms of



absence of a technological bias resulting from, for example, vested interests of its members, and hence of the provision of a fair assessment of all relevant technological options. In the Commission's view, the input provided by the Platform can indeed be characterised by its openness to a wide spectrum of technological options. This technological neutrality results, first, from the Platform's own decision-making process, which ensures that the input provided reflects the views of the sector as a whole rather than the views of particular actors. The drafting of the Platform's recommendations involves a process of internal discussion and consensus before these are submitted to the Commission or to other bodies. In the case of the last SRA, a public consultation which significantly influenced the final document issued was also organised.

44. The Commission further noted that it assesses the objectivity of the advice and recommendations received from the Platform, notably by (a) systematically attending the Platform's Steering Committee meetings and observing the decision-making process; (b) providing guidelines/good practices; (c) examining the documents produced by the Platform and using them as a basis for discussion when setting up EU-relevant actions and initiatives such as the Strategic Energy Technology Plan (SET-Plan); and (d) discussing with the Platform's management matters concerning its membership or the organisation of its outreach activities, when such action is considered appropriate by either side. By way of example, following such interaction, the Platform decided to include in its Steering Committee an NGO, the Bellona Foundation, a Norwegian environmental organisation with a focus on technology. Another example is the opening of the Platform's annual stakeholders meeting to other sectors with a potential interest in the area. On the basis of the above, the Commission considered that the Platform is characterised by the openness and inclusiveness of its proceedings and of its main deliverables.

2) Mechanisms to ensure attention to public interest issues and the objectivity of input and 3) the extent to which external input is taken into account in the Commission's policy-making on biofuels

45. In its reply, the Commission examined the next two points of the Ombudsman's proposal for a friendly solution together and did so at essentially three levels concerning its main policy initiatives on biofuels: (a) the overall energy policy level, (b) the research and technology policy level, and (c) the research and development implementation level. With regard to each of these levels, the Commission provided detailed examples of how issues of public interest related to biofuels have been addressed and integrated, which external sources have been involved, and how their input was taken into account.

46. As regards point (a), the Commission referred to the energy and climate change package (hereafter, the 'Energy Package'), which groups the main EU policy instruments in this area and noted that public consultations have been extensively used to ensure that the instruments properly reflect public concerns and sensitivities. In the example of the Renewable Energy Directive ('RED') [16], binding targets for the use of energy from renewable sources were set, including a specific binding target (expected to be largely met by biofuels) of 10% for the use of renewable energy in transport by 2020. The Commission organised five public consultations



which contributed to its RED proposal. These consultations attracted replies from a wide range of stakeholders, including citizens and NGOs. In particular, the second consultation specifically addressed sustainability criteria for biofuels. The Commission argued that, while there was general support from most respondents for the criteria proposed, many stakeholders suggested further reinforcement of the sustainability scheme, for instance, regarding the suggested minimum percentage of biofuel greenhouse gas savings, which was generally considered insufficient. This percentage was subsequently increased from 10% in the original Commission proposal put forward for consultation to 35% in the Commission's RED proposal.

47. As regards point (b), the Commission put forward the example of the SET-Plan, that is, the "*technological arm*" of the Energy Package, whose principal aim was to align the EU's research policy with other relevant policies and initiatives. The SET-Plan involved hearings and workshops with established advisory and stakeholder groups, as well as a public consultation. The SET-Plan adopted a wide approach towards low-carbon technologies and introduced a number of measures to boost their deployment in the EU. The implementation of the SET-Plan consists of a set of Industrial Initiatives, one of which is the European Industrial Bioenergy Initiative ('EIBI'). The EIBI aims to make advanced bioenergy technologies commercially available on a large scale by 2020, and to strengthen EU technology leadership for renewable transport fuels. As indicated in the SET-Plan, it focuses on "*next generation*" biofuels. Like all SET-Plan Industrial Initiatives, it is industry-led. The main lines of the EIBI have been proposed by the Platform, and have been used as a basis for discussion with a number of stakeholders (industry associations and technology platforms, Commission DGs with an interest in the initiative, the European Energy Research Alliance ('EERA'), EU Member States and FP7 Associated Countries). The EIBI has been presented to a wider audience (including the general public, NGOs and academia) on several occasions. It is implemented by an 'EIBI Team' which is composed of representatives of industry, Member States and FP7 Associated Countries which have declared their particular interest in the initiative, as well as the Commission and the EERA.

48. As regards point (c), the Commission explained that the SET-Plan activities influence the definition of the annual Work Programme ('WP') which concerns the allocation of funds through the FP7. As regards biofuels, the content of the WP is defined through a specific procedure as follows. First, the Commission services dealing with energy research produce a Strategy Paper drawing inspiration from several sources. These include the SET-Plan, the Advisory Group on Energy Guidelines ('AGE'), exchanges and interaction with the biofuel community, within the Platform and outside, and the results from previous projects. Second, the Cabinets of the Commissioners in charge of Research and Innovation and of Energy discuss and agree upon this Strategy Paper, before sending it to the Energy Programme Committee for possible suggestions. Following inter-service consultation, the WP is approved and published.

49. The Commission contended that there are numerous examples of cases in which issues of public interest are incorporated into the WP in the field of biofuels. For instance, taking into consideration the need to avoid possible adverse effects of biofuel production on the food and feed market, and of the need to increase the potential of biofuels to reduce greenhouse gas emissions from transport, the Commission has, since the beginning of FP7, exclusively supported biofuel research in "*advanced*" biofuels. Furthermore, in the call on biorefineries



under the WP, research consortia were required to undertake a full sustainability assessment based on Life Cycle Analysis (LCA) methodology.

50. In conclusion, the Commission argued that, by providing the requested information, it has given the appropriate follow-up to the Ombudsman's proposal for a friendly solution.

The complainant's observations

1) Availability of mechanisms to ensure the factual objectivity of the Platform's advice and/or recommendations

51. In its observations, the complainant argued that the Commission's response did not address point 1) of the Ombudsman's proposal properly. First, it commented on the Commission's argument that the Platform is only involved in providing recommendations to the overall energy policy objectives through public consultations open to all stakeholders and to the general public. The complainant stressed that the fact that it is possible for several stakeholders to give an opinion on a particular issue does not imply that it will be taken into account in the Commission's policy-making. The role given to the Platform to influence policy through the design of the Strategic Research Agenda ('SRA'), and the weight of its input in the allocation of funds under the FP7 "*cannot be compared to the more symbolic role given to other stakeholders who are just allowed to submit their opinion*". The opportunity open to stakeholders to submit an opinion "*cannot be used to justify the privileged access and/or disproportionate role given to one category, for instance commercial interests*". Moreover, the fact that other stakeholders can give an opinion does not ensure the objectivity of the Platform's advice and/or recommendations.

52. Second, the complainant disagreed with the Commission's argument that the Platform's input is essentially of a technical nature and that the objectivity of its advice should be judged in light of the absence of any technological bias. In the complainant's view, the Platform's input goes far beyond technical options for agrofuels. For instance, BIOFRAC's recommendation for a target of 25% use of agrofuels in the Vision Report 2030 can hardly be considered to be of a technical nature. Setting a target for agrofuels "*within the renewable energy targets was a major policy issue with far-reaching implications*". The complainant attributed the very high rate of agrofuel use in the EU to the fact that the Platform is so heavily industry-dominated. This results in advice that "*is biased towards the commercial interests of their members*". According to the complainant, it was impossible, within the industry-dominated composition of the Platform, to question the use of agrofuels. Moreover, the complainant drew attention to the Commission's own acknowledgement of the role of ETPs in decisions concerning the FP7, and to the statement that "*they are proving to be powerful actors in the development of European research policy, in particular in orientating the Seventh Research Framework Programme to better meet the needs of industry* [17]". The complainant considered that the allocation of funds, decisions on research policy and renewable energy targets are all issues of major importance.



53. Third, the complainant commented on the Commission's reference to the Platform's decision-making in the case of the SRA, in which a public consultation was organised. The complainant argued that the Commission's claim that this consultation had a significant influence on the final document plainly ignored the fact that the main point made by many civil society groups that commented on the SRA draft was not at all considered. Although many groups rejected the 25% target for the use of agrofuels in the EU, which was put forward as the main goal of the SRA, that was not even noted in the text. The complainant argued that, by contrast, the Commission and the Platform use the consultation to "coat" the SRA in a layer of legitimacy.

54. Fourth, the complainant disagreed with the Commission's explanations about how it assesses the objectivity of the Platform's advice and with its conclusion that the SRA and the EIBI set an example of openness and inclusiveness of the proceedings and of its main deliverables. It argued that the Platform might be open to different sectors of the industry related to agrofuels, but other than this, it is not inclusive. According to the complainant, the Platform's deliverables reflect only business interests and do not represent the views and concerns of sectors such as consumers or communities affected by the growth of agrofuels. The fact that the SRA and the EIBI were subject to consultations does not mean that the resulting advice is objective. The Platform's internal proceedings still reflect the fact that it is a body absolutely dominated by business interests. The essential goal, the push for agrofuels, is not open to discussion.

55. Furthermore, the complainant disputed the Commission's argument that it ensured the Platform's objectivity by attending the Steering Committee meetings and discussions about its membership. The Steering Committee is still overwhelmingly corporate-dominated, and, in the complainant's view, the Commission is partly responsible for this. The Steering Committee was elected by the Commission-appointed BIOFRAC chair and the two vice-chairs in consultation with the Commission. The 125 members of the 5 Working Groups were handpicked by the Steering Committee from among over 300 candidates. Only two NGO representatives were finally selected.

56. The complainant then downplayed the importance of the participation of an NGO, Bellona, in the Steering Committee. It argued that the inclusion of an NGO in the Steering Committee does not change the reality that this remains a body dominated by the industry. In addition, Bellona had been criticised for its role in the Zero Emissions Platform ('ZEP'), a Technology Platform in the field of Carbon Capture and Storage ('CCS'). According to the complainant, "[h]eavily funded by industry, Bellona has been actively promoting the controversial CCS technology". Through participation in ZEP's Steering Committee, it helped "legitimise the biased influence of that body".

2) Mechanisms to ensure attention to public interest issues and the objectivity of input and 3) the extent to which external input is taken into account in the Commission's policy-making on biofuels



57. As regards the Commission's reply to points 2) and 3) of the Ombudsman's proposal for a friendly solution, the complainant argued that it is debatable whether the Commission spearheaded the integration of issues of public interest into its energy and climate change policy initiatives.

58. In the example of the Commission's RED proposal on the overall energy policy level under (a) above, the complainant noted that the Commission's initial proposal contained only three sustainability criteria. In the complainant's view, any reference to 'sustainability' without including social issues is unjustified, while the Commission's later reference to 'environmental sustainability' is misleading. This is because all environmental issues regarding soil, air and water were addressed by mere reporting requirements. In fact, the criterion of Indirect Land Use Change ('ILUC') was introduced into the RED at a later stage by the European Parliament. As regards the setting of mandatory targets, the complainant argued that the obligatory agrofuel target is a very costly measure to help combat climate change. Nevertheless, the Commission went ahead with mandatory targets and stated that "*the use of obligatory targets was widely supported*". This was despite the fact that all NGOs across the board voiced their opposition to the agrofuel mandatory target.

59. The complainant argued that, within the framework of the RED, it could not be argued that public consultations have 'ensured' a 'proper reflection' of 'public concerns and sensitivities'. The Commission never considered lowering the agrofuels target or dropping it altogether. As regards the proposed emission cuts, the biodiversity criterion, and the 'reporting requirements' on all other environmental (soil, air, water) and social issues, the Commission's proposal did not 'properly reflect' the 'public concerns and sensitivities'. The complainant considered that the Commission's argument that, after the second round of public consultations the emission cuts threshold was raised from 10% to 35%, proved that the proposal constituted bad policy-making because it advanced the use of agricultural land as a 'climate measure', while only demanding such a minor emissions cut. The complainant also suggested that "*[s]ome have argued that the Commission may have proposed such a low emission cut threshold in order to have a bargaining tool ... while getting away with other major flaws such as leaving out indirect land use change and social issues*". In any case, the complainant argued that the Commission could not claim to have adequately consulted the public.

60. Regarding the SET-Plan and initiatives like the EIBI on the research and technology level under (b) above, the complainant noted that the Commission acknowledged that these are industry-led. The Commission's reply that the SET-Plan Industrial Initiatives have been used 'as a basis for discussion' with other 'stakeholders', including ETPs, other Commission DGs, the EERA and EU Member States meant that the views of civil society and environmental organisations have not been taken into account. As the Commission put it, they "*have been presented to a wider audience on several occasions*". The complainant stressed that this showed that the Commission neither paid sufficient attention to issues of public interest nor observed the objectivity requirement for the input of advisory groups.

61. The complainant then submitted its observations concerning the influence of the SET-Plan activities on the extent of implementation of research and technology policy concerning the FP7



WP, examined under (c) above. In the complainant's view, the fact that the SET-Plan leads to the formulation of Calls for Proposals implies that the industry shapes the research agenda and that it influences the way the research budget is spent. The WP procedure, as described by the Commission in its reply, does not contain any element of civil society involvement or consultation. The complainant argued that the Commission's statement that the FP7 WP takes into consideration issues of public interest by focusing purely on 'advanced' biofuels ignores the fact that this research policy will only pay off in the future, while the mandatory targets called for in the SRA and set out in the RED are already applicable. In the meantime, the agrofuel targets could intensify climate change rather than help combat it.

62. The complainant summarised what it perceived to be the core problem in this area in the following manner: "*the Commission has set up a body that is dominated by business to give advice on the same issue in which they have a commercial stake and with a predetermined goal of boosting the use of agrofuels in the EU. This predefined goal and the unbalanced membership has resulted in recommendations that are blind to the negative social and environmental impacts of accelerating the use of agrofuels in the EU*".

63. The complainant concluded its observations by stating that the Commission did not address in a satisfactory manner (a) the questions which the Ombudsman asked in his friendly solution proposal and (b) the complainant's concerns.

The Ombudsman's assessment after his friendly solution proposal

64. The Ombudsman began his assessment by noting that, in its observations, the complainant contended that the Commission's reply was unsatisfactory. It therefore followed that the Ombudsman's quest for a friendly solution has not been entirely successful.

Preliminary remarks

65. Before proceeding with his assessment of the complaint following his proposal for a friendly solution, the Ombudsman considered it necessary to clarify the scope of his inquiry into the complainant's first allegation.

66. To this end, the Commission's reply to the Ombudsman's proposal was useful in that it elucidated the full extent of the Platform's dual role: first, the Platform makes recommendations to the Commission concerning biofuel research policy and, second, it may provide input into the Commission's policy-making as regards energy policy objectives through participation in public consultations. The Ombudsman understood this to mean that the Platform has (a) direct input into the Commission's policy-making in the narrow field of biofuel research policy, and (b) indirect input, through participation in public consultations into the broader field of energy policy. Because of this twofold role, the Platform's representativity (the "*balanced representation of stakeholders in the composition of the Platform*", to use the wording of the allegation) may not



be understood in the same way in the context of, for example, research priorities in research on biofuels under FP7 and the far broader issue of the EU mixture of sources of renewable energy. The assessment of the Platform's representativity, therefore, must be contextual.

67. In this regard, the complainant alleged (i) that the Platform's advice is not sufficiently objective and (ii) that the Commission fails to ensure that all views are properly heard in general. The Commission did understand the complainant's concerns in that sense and addressed the latter's arguments in support of the allegation accordingly. The Ombudsman understood this approach to mean that the Platform's representativity may be assessed properly only by examining the objectivity of the Platform's advice and the opportunities other stakeholders have to participate in the Commission's policy-making. This is in line with the Ombudsman's own understanding of the allegation and he therefore considered it appropriate to proceed on that basis.

68. In support of their different viewpoints, both the Commission and the complainant commented at length on the substantive influence of the Platform and other stakeholders on the Commission's policy-making in the field of biofuels. Notwithstanding the usefulness of these comments in contributing to the Ombudsman's understanding of the issues, it was pointed out that it is not necessary for the purposes of the assessment at hand to address the substantive issues raised. By contrast, it should be emphasised from the outset that the Ombudsman's analysis would focus on procedural aspects.

69. Before proceeding with his analysis, however, the Ombudsman considered it appropriate further to elaborate on the analytical framework in light of which the examination of the Commission's reply to his friendly solution proposal would take place. In this regard, it should be noted that, in his proposal for a friendly solution, the Ombudsman clarified key concepts, such as 'representativity' and 'objectivity', and defined the relevant terminology used in the Commission's policy-making in the field of biofuels (see paragraphs 28-31 above).

70. Moreover, the Ombudsman outlined the basic provisions on democratic principles following the entry into force of the Treaty of Lisbon, notably Articles 1 and 11 TEU (see paragraph 26 above). In a nutshell, Article 11 TEU establishes certain democratic rights and mandates the institutions to employ appropriate means in order to give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. It lays down the obligation to maintain an open, transparent and regular dialogue with representative associations and civil society, and establishes an obligation, incumbent specifically on the Commission, to carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. Thereby, the Treaty provides the contours of a deliberative space within which the EU institutions interact with citizens, representative associations and civil society.

71. Specifically, the first two paragraphs of Article 11 TEU seek to ensure that the Union's policies are shaped by means of a pluralistic input which includes the views of citizens, representative associations and civil society. Participation in the democratic life of the Union establishes a link between EU citizens and its institutions and, based on the principles of



equality and transparency, enhances citizens' trust in the EU and the EU administration. Participation, however, is not unlimited but must take place " *by appropriate means* ". In order to fulfil their duties, EU institutions must therefore determine " *the appropriate means* " by which citizens and representative associations are given the opportunity to make known and publicly exchange their views. The Ombudsman considered that the precise manner by which participatory democracy is made effective in any given circumstance will depend on the specific nature of the Union action in question and the established procedures in place. In this regard, the EU institutions necessarily have a margin of discretion, especially in areas which are technically complex. However, they should always ensure that they can justify objectively how they exercise that margin of discretion.

72. The third paragraph of Article 11 TEU is closely linked to the legislative process. This provision, according to which "[t] he *European Commission shall carry out broad consultations* " [18] should be construed widely to enable any " *parties concerned* " to take part in the Commission's consultations. This is in line with the Commission's position, stated in its Communication on Consultations, that " *it will maintain an inclusive approach in line with the principle of open governance: Every individual citizen, enterprise or association will continue to be able to provide the Commission with input* " [19] . As the Commission has already acknowledged, for participation to be properly inclusive, it is very important to ensure equal access to the consultation process. In this regard, the Commission underlined its intention to " *reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access* " [20] . This inclusive model of participation espoused by the Commission should not *a priori* exclude areas of policy-making with a specific focus or which presuppose a certain level of expertise.

73. Against this backdrop, the Ombudsman examined the complainant's allegation and, in doing so, he followed the order of analysis and the joint consideration of the second and third points which the Commission proposed and the complainant followed in its observations.

1) Availability of mechanisms to ensure the factual objectivity of the Platform's advice and/or recommendations

74. As regards areas in which the Platform provides direct input into the Commission's decision-making, the Commission defended, in its opinion, the availability of mechanisms to ensure the objectivity of the Platform's recommendations in biofuels research policy. After pointing out that the Platform's main purpose is to propose research actions in order to develop innovative biofuel technologies, the Commission argued that the Platform does not show any technological bias but carries out a fair assessment of all relevant technological options. According to the Commission, the Platform's technological neutrality and openness results from its own decision-making process, which ensures that the input provided reflects the views of the sector as a whole rather than the views of particular actors. Further, the Commission ensures the objectivity of the Platform's recommendations by, among others, attending the Steering Committee meetings, discussing membership and outreach activities and providing guidelines/good practices. When the Platform carries out public consultations, the Commission



consistently encourages it to ensure wide participation in them. In any event, the Commission reserves the right to reject the Platform's recommendations.

75. In its observations, the complainant expressed the view that the allocation of funds, decisions on research policy and renewable energy targets are all issues of major importance. It expressed its disagreement with the manner in which the Commission manages these issues and targeted specifically the focus of FP7 which, in its view, is tailored " *to better meet the needs of industry* [21] ". Moreover, the complainant criticised the manner in which the Platform carried out a public consultation concerning the Strategic Research Agenda [22] .

76. The Ombudsman emphasised above (paragraph 67) that the allegation at issue may only be properly analysed by examining the objectivity of the Platform's advice and the opportunities other stakeholders have to participate in the Commission's policy-making. He then emphasised that, in areas in which the Platform provides direct input into the Commission's policy-making, ensuring the objectivity of that input is particularly important.

77. In this regard, the submissions made by the Commission and the complainant in the course of the inquiry raise three important issues as regards the Platform's direct input into the Commission's policy-making in biofuel research policy: (i) the objectivity of the Platform's recommendations viewed through the lens of absence of " *technological bias* "; (ii) the Commission's discretion to reject the Platform's recommendations; and (iii) the manner in which the Commission ensures that the Platform, taking into account its formal independence of the Commission, operates in line with the principles which the Ombudsman outlined above.

78. As regards point (i), the Ombudsman acknowledged that every choice in the field of research policy, however technical in nature or narrow in scope, cannot be dissociated from numerous other environmental, social and economic considerations. It followed that for the Platform's recommendations to meet the objectivity requirement in the areas of research and technological development policy, to which it has a direct input, the Platform must take into account all relevant considerations. If the Commission measures the objectivity of the Platform's recommendations in the field of biofuels research policy by the lack of technological bias, then it adopts too narrow a perspective. In addition, as the Commission itself acknowledged, the principal aim of the SET-Plan is to align EU Research policy with other relevant policies and initiatives. That aim will not be achieved if the impact of the Platform's recommendations on other relevant policies and initiatives is not considered.

79. Moving on to point (ii), the Commission's argument that it is not bound to follow the Platform's recommendations, including its SRA vision, is not convincing. While the Commission may decide not to follow the Platform's recommendations in biofuel research policy, it nevertheless takes them into account in its decisions setting research funding priorities in the field of energy. The Commission is thus not exonerated from the obligation to ensure the objectivity of the advice it receives in that regard.

80. As regards point (iii), the Commission acknowledged the obligation to ensure the objectivity of the Platform's recommendations and explained its initiatives in order to fulfil this obligation.



The complainant was not satisfied with these initiatives.

81. The Commission's first initiative was to encourage the Platform to carry out its own consultation procedures and ensure that these are as open and as inclusive as possible, whilst acknowledging that the Communication on Consultations does not apply. The Ombudsman considered that this is fully in line with the analytical framework summarised in paragraphs 69-72 above and is therefore laudable.

82. The second initiative concerned the opening up of the Platform's membership to include one NGO, the Bellona Foundation. On this issue, it appeared that the Commission and the complainant perceive Bellona's membership in the Platform in diametrically opposed ways. The Commission's viewpoint was that this demonstrates the Platform's openness to civil society, and the complainant's was that this is, at best, an exception to the rule that the Platform is dominated by industry. The Ombudsman was not convinced that the objectivity of the Platform's recommendations can be measured by means of a simple exercise in arithmetic, in which that objectivity is directly proportionate to the number of NGOs among the Platform's members. The Ombudsman instead considered that this should be a qualitative exercise that would seek to establish whether the Platform's present composition compromises the objectivity of its recommendations. On the basis of the information submitted to him, the Ombudsman was unable to establish that the present composition of the Platform per se, to include one NGO, compromises the objectivity of its recommendations. Therefore, the Ombudsman found no maladministration as regards the issue of the Platform's membership.

83. Finally, the Commission's third cluster of initiatives to ensure the objectivity of the Platform's output comprised 1) attendance at the Steering Committee meetings, 2) regular management meetings, and 3) advice on issues of good administration. The Ombudsman found that these initiatives would be convincing if they were accompanied by specific measures put in place to evince that the content of those meetings reflects the Commission's statement. As they stood, the Commission's measures conveyed the impression that the Platform is a privileged interlocutor influencing the Commission's policy on biofuels. In fact, the Commission's arguments may be interpreted to mean that the Commission does in fact manage the Platform and that the Platform's input reaches the Commission informally before it does so formally, thereby precluding any other stakeholder from participating in the process. This amounted to an instance of maladministration.

84. In light of the above considerations it followed that, having regard to the Union's democratic features which have been further enhanced since the entry into force of the Treaty of Lisbon, the Commission failed to take adequate measures to enhance the objectivity of the Platform's recommendations in the field of biofuel research policy and thus sufficiently to address the complainant's concerns and meet citizens' expectations. Mindful of the discretion the Commission enjoys in this area, the Ombudsman made a corresponding draft recommendation below.

85. The Ombudsman acknowledged that the formal independence of the Platform as an independent stakeholders' network and the fact that it does not fall within the Commission's



administrative structure might limit the scope of the Commission's prospective initiatives. This notwithstanding, the Commission has put forward a number of initiatives that it has taken so far which, while respecting the Platform's independence, exert significant influence on its operation. In the Ombudsman's view, if the Commission were to follow up and complement its earlier initiatives with more specific content and with safeguards in favour of the transparency of the Platform's procedures, it would not interfere with the Platform's independence.

2) Mechanisms to ensure attention to public interest issues and the objectivity of input and 3) the extent to which external input is taken into account in the Commission's policy-making on biofuels

86. The considerations concerning the Platform's attention to public interest issues and the availability of opportunities for input by other stakeholders and civil society take a more prominent position in the discussion concerning the Platform's indirect input in the field of energy policy *lato sensu*. It is in the context of policy-making in the field of energy and climate change that the complainant voiced its concerns about the Commission's attention to public interest issues and about whether the Commission takes into account other sources of input in its proposals or whether the Platform constitutes a privileged interlocutor.

87. In its reply to the Ombudsman's proposal for a friendly solution, the Commission added clarifications to the matter and acknowledged that the Platform contributed to the public consultations concerning the Renewable Energy Directive ('RED'), and to other initiatives, such as the European Industrial Bioenergy Initiative ('EIBI'). Nevertheless, the Commission rejected the complainant's argument that the Platform exerts " *enormous influence* " on the Commission's energy policy and mentioned specific examples of input from other sources.

88. In its observations, the complainant argued that, within the framework of public consultations concerning the RED, the Platform's suggestions were largely followed while contributions from civil society organisations were disregarded. In particular, in relation to questions such as the setting of targets for use of agrofuels, the definition of sustainability criteria for the development of biofuels and the use of the Indirect Land Use Change ('ILUC') criterion, recommendations from civil society organisations were ignored. The complainant essentially argued that the Commission did not pay sufficient attention to public interest issues and did not take into account input emanating from civil society organisations.

89. The Ombudsman emphasised that he is conscious of the difficulties which arise in attempting to measure the input resulting from a public consultation concerning any policy initiative. In this regard, the Ombudsman acknowledged that, in its reply to his proposal for a friendly solution, the Commission provided abundant information accompanied by examples to defend its position that, in all initiatives in the field of renewable energy with an emphasis on biofuels, it pays attention to public interest issues so as to ensure a pluralistic and objective input. The complainant responded by invoking several examples pointing in the opposite direction.



90. Although, inevitably, the Commission may use quantitative indicators to evaluate the outcome of a public consultation on any given policy initiative, these may not serve as a substitute for a qualitative analysis of the representativity and objectivity of input to EU policy-making. In this regard, the Ombudsman referred to the guidance he gave in his proposal for a friendly solution, to the effect that 'objectivity' should be understood to raise concrete issues regarding the technical content and quality of the output, and the basis on which that output is formulated. Obviously, the procedural guarantees the Commission provides to participants in public consultations are crucial. Increased participation and the availability of public consultations by themselves do not, however, guarantee a pluralistic input. In the Commission's own words, "*the challenge of ensuring an adequate and equitable treatment of participants in consultation processes should not be underestimated*" [23] .

91. Bearing in mind that his inquiry took a procedural perspective (paragraph 68 above), the Ombudsman next examined the specific aspects of the present case, in particular, the issues arising within the context of the RED. In this regard, the Ombudsman noted that the Commission carried out five rounds of consultations, appeared to have received and assessed the input given and to have taken it into account in at least one case concerning the target for emissions cuts. While the complainant characterised the original proposal as bad policy-making, the Commission's final proposal could equally be characterised as responsive to the feedback from other sources following its public consultations. In these circumstances and following a careful examination of the complaint file, it was not established that the Commission failed to meet its obligations which the Ombudsman analysed in paragraphs 69-72 above.

92. By contrast, the Ombudsman found that when it comes to the manner in which the Commission has formulated its industrial initiatives, its approach was not exemplary. In the example of the EIBI, the Commission acknowledged that it is developed by the Platform in cooperation with numerous stakeholders among which the industry and other ETPs, the Commission's DGs and the Member States. The Commission then explained that the EIBI is subsequently presented to a "*wider audience*", including the general public, NGOs and academics. This would appear to mean that the EIBI is first agreed upon between the Platform and the above-mentioned stakeholders and then simply presented to third parties.

93. The Ombudsman considered that for citizens and representative associations to exercise the right of democratic participation in all areas of Union action, they must be given a genuine opportunity to express their views and enjoy the expectation that these views will be taken into account by the EU institutions. To achieve this, the Commission should ensure that there is equality of opportunity for all parties involved, including the general public, NGOs and academics. On this issue, it appeared that the Commission failed to ensure such equality of opportunity and thus to address adequately the concerns expressed to it. This constituted an instance of maladministration and the Ombudsman made a corresponding draft recommendation to the Commission.

94. To recapitulate, in light of his analysis above, the Ombudsman made the following draft recommendations to the Commission:



" 1) Having regard to the Union's democratic features which have been further enhanced since the entry into force of the Treaty of Lisbon, the Commission should consider taking, in line with the Ombudsman's findings, the necessary initiatives to enhance the objectivity of the European Biofuels Technology Platform's recommendations in the field of biofuel research policy.

2) In line with the Ombudsman's findings, the Commission should consider taking further measures to ensure that it receives a pluralistic and objective input concerning policy initiatives in the field of renewable energy, such as the European Industrial Bioenergy Initiative. "

The arguments presented to the Ombudsman after his draft recommendations

First draft recommendation

95. In its detailed opinion, the Commission summarised its reply to the Ombudsman's proposal for a friendly solution and the Ombudsman's findings in his assessment after the friendly solution proposal. It acknowledged that the Ombudsman classified the Commission's initiatives to enhance the objectivity of the Platform into three clusters and recognised that the Ombudsman's first draft recommendation only concerns the Commission's third cluster of initiatives which comprised 1) attendance at the Steering Committee meetings, 2) regular management meetings, and 3) advice on issues of good administration but which failed to convince the Ombudsman and, therefore, amounted to an instance of maladministration (paragraph 83 above).

96. In substance, the Commission firstly noted that ETPs, whose aim was to bring together *" technological knowhow, industry, regulators and financial institutions to develop a strategic agenda for leading technologies "* have been successful in developing joint visions, setting Strategic Research Agendas and contributing to the definition of research priorities, including those under the Research Framework programmes and demonstrated by assessments carried out in 2008, 2009 and 2010.

97. The Commission disagreed with the Ombudsman's statement *" that its interactions with technology platforms amount to an instance of maladministration and is concerned by the use of this term, which constitutes a serious accusation "*. The Commission attributed this finding to a misunderstanding which may have resulted from a lack of precision in the wording used in its reply to the Ombudsman's friendly solution proposal. In this regard, the Commission argued that it listed the initiatives aiming at assessing the objectivity of the Platform together with practical measures aiming at increasing its objectivity, and added that it considered that this way of proceeding constitutes the most practical and realistic manner of addressing the issue of objectivity. The Commission pointed out that it does not consider that attending the Platform's meetings, discussing its membership and outreach activities, and providing guidelines and recommendations for its management implies that it manages the Platform. In addition, the Commission stated that it does not share the Ombudsman's view that receiving informal input



from a Technology Platform (or any other external body) at any stage of a policy initiative precludes other stakeholders from participating in the process.

98. Nevertheless, the Commission added that it agrees with the Ombudsman's first draft recommendation that it should take initiatives to further enhance the objectivity of the Platform's recommendations. The Commission pointed out that it considered this to be equally relevant to any Technology Platform or similar body surrounding the implementation of the SET-Plan, and indeed the implementation of other Framework Programme activities where appropriate. In this respect, the Commission informed the Ombudsman that, in the transition from the FP7 to Horizon 2020 [24], it is considering a review of the different structures/bodies surrounding the implementation of the Framework Programme, including the ETPs. This review includes the elaboration of a set of common criteria for assessing and monitoring the ETPs' input and performance. The Commission stressed that these criteria include openness to the widest possible range of stakeholders, in order for ETPs to have the widest possible perspective on their respective research and innovation strategies.

99. In light of these arguments, the Commission expressed the belief that it responded adequately to the Ombudsman's first draft recommendation.

Second draft recommendation

100. In its detailed opinion, the Commission disagreed with the Ombudsman's finding that it has "*failed to ensure such equality of opportunity*" regarding the industrial initiatives, since their formulation is "*developed by the Platform in cooperation with numerous stakeholders, among which industry and other ETPs, the Commission's DGs and the Member States*", and only "*subsequently presented to a 'wider audience'*".

101. The Commission noted that it shares the Ombudsman's view that "*further measures could be taken to receive a more pluralistic input concerning policy initiatives in the field of renewable energy, and more particularly from the general public and NGOs. These should be given the opportunity to express their views at a sufficiently early stage to have a chance to influence the decision-making process*". The Commission moreover noted that this issue has relevance going beyond the EIBI.

102. However, taking account of all the measures it has already taken to involve stakeholders beyond the purely technical and industrial spheres, the Commission disagreed with the Ombudsman's statement that it failed to ensure equality of opportunities for all parties concerned and that this amounted to an instance of maladministration. The Commission reiterated its concern at the use of this term which constitutes a serious accusation.

103. That said, the Commission accepted the Ombudsman's draft recommendation and posited that it is considering, in the context of enhancing the functioning of the SET-Plan in Horizon 2020 and in addition to the envisaged public consultation on the main elements of the future SET-Plan, to establish a body whose aim would be to interact more effectively with the civil



society at large and to provide input to the industrial and other initiatives of the SET-Plan in a more timely, structured and effective way.

104. In light of these arguments, the Commission expressed the belief that it responded adequately to the Ombudsman's second draft recommendation.

The Ombudsman's assessment after his draft recommendations

Preliminary remark

105. In its detailed opinion on both draft recommendations, the Commission stated that (a) it is concerned by the Ombudsman's use of the term 'maladministration' which constitutes a serious accusation and that (b) it disagrees with the Ombudsman's findings of maladministration in the case here concerned.

106. As regards (a), the Ombudsman recalls that, in accordance with Article 228 TFEU, he is empowered to receive complaints concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies. According to the definition provided in his 1997 Annual report, "*maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it*". The Ombudsman has consistently taken the view that maladministration is a broad concept and that good administration requires, among other things, compliance with legal rules and with principles of good administration [25] .

107. A finding of maladministration, therefore, implies that the Ombudsman considers an institution's administrative practice not to be in line with legal rules and/or principles of good administration. However, it does not imply any sort of accusation against an institution, let alone a serious accusation. In the given context, it should be noted that, in his draft recommendations, the Ombudsman carefully circumscribed the instances of maladministration he had identified, gave reasons in support of his view and asked the Commission to submit a detailed opinion, thus allowing it to react to his findings. He therefore disagrees with the Commission's statement that the findings expressed in his draft recommendations amount to a serious accusation.

108. As regards (b), the Ombudsman notes that the Commission objected to his finding contained in his first draft recommendation (see paragraphs 83-85 above) and took the view that that finding might have been affected by a misunderstanding. The Commission argued, in essence, that it took the third cluster of initiatives in order to assess rather than increase the objectivity of the Platform's recommendations. However, this distinction is not relevant for the purpose of the present analysis, given that the assessment and the increase of the objectivity of the Platform's recommendations simply constitute successive steps in that same process. It follows that the Commission's view as to the existence of a misunderstanding fails to convince. Nor did the Ombudsman's analysis leading to the first draft recommendation entail a criticism that the Commission manages the Platform, as the Commission seems to suggest.



109. Similarly, in relation to the second draft recommendation, the Commission disagreed with the Ombudsman's statement that it failed to ensure equality of opportunities for all parties concerned and that this amounts to an instance of maladministration. On this issue, the Ombudsman explained in paragraphs 92-93 above that, insofar as industrial initiatives and, more specifically, the EIBI are concerned, the relevant work was developed in cooperation with the industry, the ETPs, other Commission DGs and Member States, while it was only presented to a wider audience, including NGOs and academics. The Ombudsman regrets that the Commission appears reluctant to accept his finding of maladministration in this regard, but also notes that, in its detailed opinion, the Commission referred to concrete initiatives aiming at greater openness and pluralism which will be assessed below.

First draft recommendation

110. The Ombudsman notes that, in its detailed opinion, the Commission informed him that it was considering a review of the bodies involved in the implementation of the Framework Programme [26]. That review includes the ETPs for which common criteria are envisaged for assessing and monitoring their input and performance. Among these criteria, the Commission counted openness to the widest possible range of stakeholders, in order for ETPs to have the widest possible perspective on their respective research and innovation strategies.

111. Although these initiatives are of a general nature and, at this stage, lack detail, the Ombudsman wishes to point out that the elements outlined above constitute steps in the right direction that would contribute to a qualitative assessment (see paragraph 81 of the present decision) of the objectivity of the ETPs' recommendations, including those of the European Biofuels Technology Platform. Moreover, the Ombudsman applauds the fact that the Commission recognises openness to the widest possible range of stakeholders as a criterion for assessing and monitoring the performance of the ETPs. The Ombudsman trusts that that statement will be transformed into concrete actions and practices.

112. On a more general level, the Ombudsman notes that, both in its reply to the Ombudsman's friendly solution proposal and its detailed opinion, the Commission accepted that it has a duty to ensure the objectivity of the Platform's recommendations. Moreover, the Ombudsman deems it important to highlight the Commission's statement that it should enhance the objectivity not only of the Platform's recommendations, as per the Ombudsman's draft recommendation, but also of all ETPs. The Ombudsman applauds this undertaking by the Commission. Mindful of the fact that the issue concerns both the strengthening of the Union's democratic features and a policy field which is close to the Union citizens, the Ombudsman trusts that the Commission will assign to it the necessary importance in the implementation of Horizon 2020 programme.

113. Taking into account that the process of approving the legislative instruments of the Horizon 2020 programme is ongoing [27], the Ombudsman considers that no further inquiries are necessary into this aspect of the complaint.



Second draft recommendation

114. The Ombudsman notes that, notwithstanding its disagreement with his reasoning leading to the second draft recommendation, the Commission pointed out that it accepted this draft recommendation. Specifically, the Commission stated that, in order to implement it, it was considering, in the context of enhancing the functioning of the SET-Plan in Horizon 2020, to establish a body whose aim would be to interact more effectively with civil society. The Commission pointed out that the specific mission of such a body would be to provide input to the industrial and other initiatives of the SET-Plan in a more timely, structured and effective way.

115. The Ombudsman considers that, at first sight, it cannot be overlooked that the aim of this initiative, as presented by the Commission, is to ensure the effective interaction of civil society with other stakeholders within the context of the SET-Plan. In this regard, the initiative could ensure that the Commission receives pluralist and objective input in its industrial policy initiatives in the field of renewable energy. That said, the question remains as to whether this body is going to be structured and to operate in a manner that ensures that it obtains and processes the input from all interested parties in a satisfactory manner. The Ombudsman trusts that the Commission will bear this concern in mind when, in the course of implementation of Horizon 2020, it translates this initiative into concrete measures.

116. On a more general level, the Ombudsman notes the Commission's positive statement to the effect that pluralist and objective input should be ensured not only in relation to the EIBI but to all industrial initiatives. Given that this undertaking goes beyond the Ombudsman's second draft recommendation, the Ombudsman considers it essential to highlight it and to applaud it.

117. In view of the above, the Ombudsman considers that this aspect of the complaint does not warrant any further inquiries either.

118. Taking the above into account, the Ombudsman considers that no further inquiries are justified into the complainant's first allegation.

B. Allegation of failure to inform the complainant about the background of applicants wishing to join the Steering Committee

Arguments presented to the Ombudsman

119. In its complaint, the complainant pointed out that, in its e-mail of 20 April 2007, it requested information about the background of those who applied to join the Platform's Steering Committee. In its reply of 25 April 2007, the Commission stated that, while it was willing to provide this information, it was not possible for it to do so at that stage and asked the



complainant to be patient. In its follow-up e-mail of 2 May 2007, the Commission informed the complainant that, once completed, the requested information would be published on the Platform's website. In the following months, the complainant sent four reminders without receiving a reply.

120. In its opinion, the Commission argued that it did not commit itself to providing any information, but referred the complainant to the Platform's website. All the complainant's reminders were sent to the Platform's Secretariat and not to the Commission. The Commission, therefore, did not fail " *to answer the complainant's request and cannot be accused of maladministration* ".

121. In its observations, the complainant stated that there was a misunderstanding. It argued that it was well aware that the Platform's Secretariat was not a Commission service. Its grievance concerned the failure of the Platform's Secretariat to release information concerning the background of candidates of working groups even after four reminders. In its observations on the Commission's reply to the Ombudsman's friendly solution proposal, the complainant pointed out that, despite its promises, the Platform failed to release information about the background of applicants wishing to join the Steering Committee. The complainant also regretted the fact that the Commission " *has still not agreed or come forward with anything* ".

The Ombudsman's assessment

122. As regards the procedural issue of the Commission's alleged failure to reply to the complainant's four reminder letters, it has been elucidated through the present inquiry that the reminders were sent to the Platform's Secretariat and not the Commission. As regards the substance of the complainant's request for information concerning the background of applicants wishing to join the Platform's Steering Committee, which was made both to the Commission and the Platform, it should be noted that, while the Commission expressed its willingness to accede to the request, it explained that the information was not available and directed the complainant to the Platform's Secretariat and to its website. There is therefore no evidence of maladministration concerning the Commission's conduct in this regard.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusions:

No further inquiries into the complainant's first allegation are justified.

There is no maladministration in relation to the complainant's second allegation.

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



P. Nikiforos Diamandouros

Done in Strasbourg on 9 July 2013

[1] <http://www.corporateeurope.org> [Link]

[2] Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport, OJ 2003 L 123, p. 42.

[3] Decision 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013), OJ 2006 L 412, p. 1.

[4] Available at: http://ec.europa.eu/research/energy/pdf/biofuels_vision_2030_en.pdf [Link]

[5] <http://www.biofuelstp.eu/index.html> [Link]

[6] http://cordis.europa.eu/technology-platforms/home_en.html [Link]

[7] <http://www.biofuelstp.eu/wgmembers.html> [Link]

[8] The Ombudsman understands the term 'agrofuels' used by the complainant to refer to fuels derived from food and oil crops.

[9] Communication from the Commission towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final.

[10] Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport, OJ 2003 L 123, p. 42.

[11] Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013), OJ 2006 L 412, p. 1.

[12] See, the OECD report, *Biofuel Support Policies: An Economic Assessment*, OECD 2008 (available at: http://www.oecd.org/document/28/0,3343,fr_2649_33717_41013916_1_1_1_1,00.html [Link])

[13] The complaint referred to the " *one-sided advice* " emerging from the Platform, and even questioned whether the biofuels idea fulfilled its own (objective and technical) purpose, referring to " *mounting evidence that agrofuels aggravate, not mitigate, the threat of climate change* ".



[14] The Secretariat-General, for instance, is specifically concerned with interest representation, transparency, consultation, and related issues:

http://ec.europa.eu/dgs/secretariat_general/index_en.htm [Link]

[15] It is recalled that the specific initiative referred to by the complainant in this case involved the commissioning of a report, by the Commission, entitled "*A vision for biofuels up to 2030 and beyond*". It therefore does not appear unreasonable for the complainant to have concluded that the Commission was calling for advice and recommendations that would potentially influence its long-term policies.

[16] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Text with EEA relevance), OJ 2009 L 140, p. 16.

[17] <http://cordis.europa.eu/technology-platforms/> [Link]

[18] Emphasis added.

[19] See footnote 9.

[20] See, in this regard, the Commission's White Paper on European Governance, COM(2001)428.

[21] <http://cordis.europa.eu/technology-platforms/> [Link]

[22] http://www.biofuelstp.eu/srasdd/080111_sra_sdd_web_res.pdf [Link]

[23] See the Commission's Communication on Consultations (cited in footnote 9 above).

[24] Proposal for a Regulation of the European Parliament and of the Council establishing Horizon 2020 - The Framework Programme for Research and Innovation (2014-2020) COM(2011) 809 final.

[25] Decision of the European Ombudsman closing his inquiry into complaint 2660/2009/(BU)RT against the Council of the European Union, at paragraph 21.

[26] Proposal for a Regulation of the European Parliament and of the Council establishing Horizon 2020 - The Framework Programme for Research and Innovation (2014-2020) (COM(2011) 809 final.

[27] http://ec.europa.eu/research/horizon2020/index_en.cfm?pg=h2020-timeline [Link]