

Decision of the European Ombudsman closing her inquiry into complaint 1682/2010/(ANA)BEH against the European Commission

Decision

Case 1682/2010/BEH - **Opened on** 20/10/2010 - **Decision on** 19/12/2013 - **Institution concerned** European Commission (Friendly solution) |

The background to the complaint

1. The complainant is a civil society organisation which, according to its website, is a coalition of almost 200 public interest groups, trade unions, academics and public affairs firms concerned with the increasing influence exerted by corporate lobbyists on the political agenda in Europe and its impact on policy making in the EU.
2. On 8 August 2008, an organisation forming part of the coalition making up the complainant sent open letters to the President and Vice-President of the European Commission, in which it drew the Commission's attention to certain issues relating to expert groups. In so doing, it referred to the Commission's Principles and Guidelines on the Collection and Use of Expertise [1] as well as to the Minimum Standards for Consultation [2]. In essence, the complainant underlined that, in the interest of transparency, it is important for the public to know who is consulted and why and requested the publication of the membership lists of expert groups advising the Commission. It moreover argued that specific interest groups have privileged access to the Commission and that, contrary to the above Commission Communications, business interests form an absolute majority over all other non-governmental actors consulted. The complainant called on the Commission to establish consistent membership-selection criteria and to include in these " *a clear definition of what an equal, proportional and participative representation of all relevant and affected groups in society means.* "
3. By letter dated 19 September 2008, the Commission's Secretary-General replied on behalf of the Commission and stated that transparency has been put at the forefront of the Commission's strategic agenda through the European Transparency Initiative. The latest development in the area was the creation of an online register on interest representation and a register of expert groups (including, since 2006, publication of the names of the members of expert groups). In addition, the Commission adopted Horizontal Rules on Expert Groups (SEC(2005)1004) to be followed by all its services when creating an expert group, appointing its



experts or organising its meetings. The Commission's Secretary-General explained that the role of expert groups is to provide high-level technical expertise to the Commission's services and not interest representation. The basis for the selection of experts therefore is their specialist knowledge, although they may also represent specific interests. Given that half of the expert groups are composed of experts from national administrations, the remaining ones have mixed compositions to include academics or scientists in a personal capacity, public officials, NGOs and the business sector. According to the Commission, the overall composition of expert groups is balanced: NGOs and trade unions, and the business sector, are represented in 25% of expert groups, academic and scientists in 30% and public practitioners in 70% of the expert groups.

4. As regards the specific groups mentioned in the complainant's letters, the Commission's Secretary General provided an annex entitled "*Technical information concerning certain groups under the remit of DG [3] Enterprise and Industry, DG Environment, DG Research, DG Transport and Energy, and DG Health and Consumers* ." In relation to the composition of those expert groups, the Commission invited the complainant to take into account the following factors: (i) composition depends on the particular objective/mandate of a group, (ii) expert groups do not take decisions, (iii) several groups could be consulted for any single proposal, and (iv) expert groups are but one mode of collecting experience or seeking views from different stakeholders, given that the Commission is using complementary or alternative means of gathering expertise and/or interest representation, such as studies, European agencies, Green papers, hearings, etc.

5. Regarding the publication of the names of expert group members, the Commission reiterated its commitment to do so, but explained that this is only foreseeable for individuals participating in a personal capacity. When an organisation is represented by individuals on a rotating basis, it is the name of the organisation which would be published. The Commission reassured the complainant that the process of publishing the names of individuals would be completed by the end of 2008. The Commission also explained that it was conducting an evaluation of the Horizontal Rules on Expert Groups to assess if further improvements could be made.

6. In an open letter dated 16 December 2008, the complainant welcomed the progress made in disclosing membership in expert groups and acknowledged the Commission's aim to publish all names before January 2009. It pointed out, however, that basic information was still missing for two thirds of the groups. The complainant requested the Commission to clarify the following points raised in its letter: First, the complainant argued that membership of an expert group should be conditional on the disclosure of the expert's name and, in the interest of transparency, confidentiality should only apply exceptionally. Second, the complainant requested confirmation that the Minimum Standards for Consultation Communication as well as the Guidelines on the Collection and Use of Expertise apply to expert groups. Third, the complainant requested the Commission's opinion on whether certain groups comply with the above Communications [4] . Fourth, the complainant expressed concern over the Commission's statement that "*the quality of expertise prevails over interest representation* " and that "*the level and quality of the individual experts presented in each meeting is often more important than the number of experts representing different interests.* " According to the complainant, this explained why the composition of expert groups is insufficiently diverse to ensure that "*differences in scientific*



approach " are represented. "[D] *ifferent types of expertise and different institutional affiliations* ", such as universities and public interest organisations, were missing, while only companies with a direct financial interest in certain EU policies are invited to provide relevant expertise to the Commission. Fifth, the complainant expressed concern over the Commission's statement that the number of organisations within an expert group does not affect the balance of interests and explained that the number of times a specific view is represented may influence decision-making within a group. Finally, the complainant expressed disagreement with the proposition that the Horizontal Rules on Expert Groups ensure transparency. It was therefore delighted to hear that these rules are subject to evaluation. Moreover, the complainant expressed the belief that the Commission should introduce an open, transparent and inclusive process for selecting the expert group members.

7. On 9 March 2009, the Commission informed the complainant that, although it had not formally received its letter of 16 December 2008, this letter was annexed to Parliamentary Question E-7074/08. The Commission considered that the President of the Commission's reply to that question, dated 6 March 2009, addressed most issues raised in this letter. The Commission also informed the complainant that the public Register of expert groups was completed in January 2009.

8. The Commission's reply to Parliamentary Question E-7074/08 is as follows. As regards the disclosure of experts' names, the Commission essentially stated that members who oppose publication must provide valid grounds and, in case they fail to do so, such individuals can no longer be members of expert groups. As regards the applicability of the Minimum Standards for Consultation Communication, the Commission confirmed that they apply to expert groups involved in the different stages of the policy-making cycle but that they are not relevant when expert groups address purely technical issues. As regards compliance of the six expert groups mentioned by the complainant in its letter of 16 December 2008 with the relevant Communications, the Commission stated that this was the case for five of them, while one group had not met since 2004. The Commission rejected the contention that there is a trade-off between quality of expertise and diversity of viewpoints. The Commission defended its previous statement that "*the number of organisations is not considered as a benchmark for the balance of interests*". Finally, the Commission stated that it did not consider it necessary to draw up general selection criteria. The selection of experts, where the Commission seeks to obtain the best available expertise and to ensure a balanced representation of interests at stake, may depend on a number of factors, such as the field concerned and the mandate of the group. When experts need to be appointed on these groups, the selection criteria are set out by the Commission in the call for applications.

9. By letter dated 31 July 2009, the complainant wrote to the Commission complaining about the fact "*that the Commission does not provide adequate transparency on the composition of expert groups and has not taken sufficient action to remedy the unbalanced composition of certain expert groups.*" Specifically, the complainant disputed as follows the Commission's position stated in the earlier correspondence and the Commission's reply to Parliamentary Question E-7074/08: (i) Disclosure of membership of expert groups is not complete; (ii) the Minimum Standards for Consultation Communication applies to expert groups dealing with



technical issues; (iii) certain industry-dominated expert groups do not comply with the relevant Communications; (iv) it is necessary to adopt new selection criteria for expert groups; (v) the grounds on which expert group members are excluded from disclosure should be published; and (vi) corporate representatives and lobbyists cannot participate in 'a personal capacity'. The complainant asked the Commission to take action in line with its above views.

10. By letter dated 23 October 2009, the Commission replied to the complainant, thanked it for meeting with the Commission on 22 September 2009 for an informal discussion and addressed the points raised by the complainant in its letter in the order they were made.

(i) As regards disclosure of membership in the Register of expert groups, the Commission defended its statement that full disclosure is currently provided. Specifically, the Commission explained that 103 groups were identified in the complainant's letter. In fact, 44 of those are exclusively composed of national authorities and the experts participating in expert group meetings are not appointed in a nominative way. In these cases, the indication of the national authority suffices. As regards 38 other groups, the Commission thanked the complainant for drawing its attention to factual errors on the Register which had since been corrected. It attributed the errors to the huge amount of information and the limited resources available and undertook to improve the information on expert groups. In 20 cases, the Commission considered that the complainant's allegations were not justified, either because the list is actually provided or "*because the information contained in the Register does not allow to state that members represent Industry, thus there are no names of Industry members to be indicated.*" As regards the remaining group, the Commission admitted that a list was not provided for it. Information concerning this group had been removed from the Register, "*as it appeared to be not a real expert group but rather a series of one-off meetings.*"

(ii) As regards the applicability of the Minimum Standards for Consultation Communication, the Commission stated that it only applies when the Commission wishes to trigger input from interested parties for the shaping of policy prior to a decision by the Commission and when consulting on major policy initiatives. The Communication could apply to "expert groups dealing with issues which are not part of the policy-making cycle, provided they are tailored to the tasks to be carried out."

(iii) As regards the composition of expert groups, the Commission stated that "*[t]he membership of expert groups is determined, first of all, by the mandate/tasks of the group and the specific expertise required. When it is the Commission which appoints experts in their personal capacity the selection is done, notably, through call[s] for applications. Sometimes, the composition of expert groups is fixed by the legislator. Furthermore, expert groups are but one mode of collecting expertise of seeking the views from stakeholders. Indeed, the work of expert groups is often complemented by other instruments and processes, such as studies, public consultations, European agencies, Green papers and hearings. Therefore, the degree of overall participation and involvement of stakeholders on a given matter should be assessed in light of all initiatives taken by the Commission, and not by simply looking at the composition of individual expert groups.*"



(iv) As regards the development of general criteria for selecting members of expert groups, the Commission underlined that *"the selection of experts depends on a number of different factors, such as the field concerned, the mandate of the group, the specific expertise required, as well as possible selection procedures which may be fixed by the legislator when establishing expert groups. When it is the Commission which appoints experts in their personal capacity, we always seek to organise the selection process in such a way that guarantees a high level of expertise, and where possible geographical and gender balance, while avoiding any conflict of interests. As already pointed out, the selection is done, inter alia, through calls for applications."* The Commission stated that it is committed to enhancing transparency and will consider further steps in the direction of improving the applicable selection procedures when it updates the framework on expert groups.

(v) As regards the publication in the Register of the number of experts for each group and the reasons why certain names are not provided, the Commission explained that derogation from publication may only be granted if disclosure of the expert's name could endanger his security or integrity or unduly prejudice his privacy. Should the specific reason for anonymity be published in the Register, the person concerned would run the risk of being identified, which would be likely to infringe the expert's privacy and personal data.

(vi) As regards the issue of industry representatives participating in a personal capacity, the Commission highlighted the importance of the specific expertise required by an expert group which may justify the participation of a member from the industry. When such experts are appointed in a personal capacity, *"they are bound to sign a written declaration to act in the public interest, together with a declaration as to whether there is any interest which would prejudice their independence. If the experts refuse to sign these declarations they are excluded from expert groups."* The Commission then analysed the role of expert groups as fora for discussion and brainstorming, whose main function is to provide the Commission with high level expertise. It added, however, that it remains fully independent when proposing a new policy or measure. As regards the publication of all public interest and conflict of interest declarations, the Commission explained that this would not be useful as in many cases the relevant documents are merely signed standard declarations. If a member of the public is interested in the specific content of these declarations, he or she may make an access to documents request under Regulation 1049/2001.

11. In an annex to its letter, the Commission provided detailed information regarding the individual expert groups mentioned in the complainant's letter. These concern six groups managed by DG Enterprise, two groups managed by DG Research, two groups managed by DG Internal Market, one group managed by DG Environment, one group managed by DG Information Society and one managed by DG Transport and Energy.

12. In November 2009, the complainant published a report entitled *"A Captive Commission: the role of financial industry in shaping EU regulation"*. In summary, the report criticises the composition of the expert groups advising the Commission in the field of financial regulation. In the complainant's view, the allegedly one-sided input the Commission received from expert groups dominated by the financial industry "directly contributed to the current financial



instability."

13. In a letter of 18 February 2010 addressed to the Commissioner in charge of Internal Market and Services, the complainant identified eight groups whose membership favoured the financial business sector referred to in the November 2009 study and added a recently created group . The complainant reiterated its view that these groups did not respect the Guidelines for the Collection and Use of Expertise and the Minimum Standards for Consultation Communication and requested a meeting to discuss the concrete steps which the Commission intends to take so as to guarantee a balanced representation.

14. On 28 July 2010, the complainant lodged the present complaint with the Ombudsman.

The subject matter of the inquiry

15. In its complaint, the complainant submitted the following allegations and claims:

Allegations

(1) The Commission failed to provide a complete Register of expert groups.

In support of this allegation, the complainant argues that the membership of a number of expert groups remains unclear. Moreover, there are expert groups that are not included in the Register at all.

(2) The Commission failed to guarantee adequate transparency in the operation of the expert groups.

In support of this allegation, the complainant argues that (i) the Commission does not provide the public with the information needed to assess the overall participation and involvement of stakeholders on a given matter; (ii) the Commission does not publish a comprehensive overview of the meetings and does not have a webpage compiling all the consultation and expertise-seeking activities for the different policy and legislative initiatives and (iii) for the vast majority of expert groups, agendas and minutes are not available on line via links from the expert groups Register to the respective DG's web pages.

(3) The Commission failed uniformly to adopt best practices concerning industry representatives who are appointed to expert groups in a personal capacity.

In support of this allegation, the complainant argues that (i) the Commission does not adequately take into account the potential conflict of interest of industry representatives acting in a personal capacity; (ii) that a (potential) conflict of interest cannot be offset by a declaration of commitment to the public interest.



(4) The Commission failed to provide convincing reasons for not developing general criteria for the selection of members of expert groups.

In support of this allegation, the complainant argues that the current selection process is incompatible with the Guidelines for the Collection and Use of Expertise and with the Minimum Standards for Consultation Communication.

(5) The Commission failed to ensure a balanced composition of the expert groups.

In support of this allegation, the complainant argues that, in the majority of the expert groups identified by the complainant, representatives from industry form the majority while all other stakeholders, such as consumer groups, academics and the civil society, are underrepresented.

Claims

(1) The Commission should complete its Register of expert groups by ensuring that it includes all experts and all expert groups.

(2) The Commission should ensure appropriate transparency in the work of expert groups by publicising meetings held, and providing links to agendas and minutes and other relevant information, such as public interest and conflict of interest declarations.

(3) The Commission should apply in all other DGs the principle contained in DG SANCO's Guidelines on Conflict of Interest consistently that someone who is known to work for an organisation with a vested interest in a particular policy issue should not be appointed to give advice to the Commission.

(4) The Commission should develop and publicise general criteria for the selection of members of the expert groups.

(5) The Commission should address the issue of unbalanced composition of expert groups.

The inquiry

16. The complaint was forwarded to the President of the Commission for an opinion. The Commission's opinion dated 22 February 2011 was forwarded to the complainant with an invitation to make observations. The complainant submitted observations on 31 May 2011.

17. On 27 June 2013, the Ombudsman made a friendly solution proposal to the Commission to which the latter replied on 30 October 2013. The Commission's reply was forwarded to the complainant with an invitation to submit observations. By way of observations, the complainant, on 6 November 2013, submitted a November 2013 report entitled "*A Year of Broken Promises – Big business still put in charge of EU Expert Groups, despite commitment to reform*" of which the



complainant is a co-author.

The Ombudsman's analysis and conclusions

Preliminary remarks

18. The Ombudsman's present inquiry concerns certain aspects of the composition, operation and transparency of Commission expert groups. Rule 2 of the Horizontal Rules for Commission Expert Groups [5] provides the following definition of a Commission expert group:

" (1) 'Commission expert group' (hereinafter referred to as "expert group") means a consultative entity set up by the Commission or its services for the purpose of providing them with advice and expertise as set out in Rule 3, which comprises at least six members and is foreseen to meet more than once.

(2) 'Formal expert group' means an expert group set up by a Commission Decision.

(3) 'Informal expert group' means an expert group set up by a Commission service with the agreement of the Secretariat General. "

In addition, Rule 2(4) of the Horizontal Rules for Commission Expert Groups provides for the following definition of other similar entities:

" (4) 'Other similar entity' means a consultative entity which was not set up by the Commission or its services, the role of which is the same as, or similar to, that set out in Rule 3 and for which the Commission services ensure administrative and financial management. "

Rule 3 of the Horizontal Rules for Commission Expert Groups specifies the role of expert groups in the following terms:

" The role of expert groups shall be to provide advice and expertise to the Commission and its services in relation to:

(1) the preparation of legislative proposals and policy initiatives in the framework of the Commission's right of initiative;

(2) the preparation of delegated acts;

(3) the implementation of existing Union legislation, programmes and policies as well as coordination and cooperation with Member States and stakeholders in that regard. "

For the purposes of the present inquiry, the Ombudsman considers the reference to "expert groups" in the allegations and claims submitted by the complainant to cover formal and informal



Commission expert groups, as well as other similar entities.

19. In its observations on the Commission's opinion, the complainant took the view that there were currently more than 100 unbalanced expert groups which resulted in EU policies serving narrow interest instead of the common interest of EU citizens. According to the complainant, this was for instance highlighted by insufficient regulation of financial markets and watered down environmental policies putting at risk the livelihoods of citizens in the EU and in third countries.

20. In order to avoid misunderstandings, the Ombudsman recalls that the present inquiry is about certain aspects concerning the composition, operation and transparency of Commission expert groups. By contrast, the inquiry does not concern the contents of Commission policies which have previously been considered by expert groups or of the advice provided to the Commission by expert groups. The Ombudsman is therefore not required to consider in her assessment the outcome of the work of expert groups.

21. In its opinion, the Commission pointed out that both the Principles and Guidelines on the Collection and Use of Expertise, as well as the Minimum Standards for Consultation Communication refer first and foremost to the policy-making cycle. However, in line with its previous correspondence with the complainant, the Commission confirmed that those Communications can apply as well to expert groups dealing with issues which are not part of the policy-making cycle, "*provided they are tailored to the tasks to be carried out*". The Ombudsman considers the latter proviso to be singularly unclear and to seemingly leave unfettered discretion to the Commission as to the applicability of the Communications in certain areas. While it did not specifically raise this issue in its allegations, the complainant made repeated reference to them. Given that the issue of the applicability of the said Communications is intrinsically linked to the allegations and claims to be examined in the present case, the Ombudsman took up this aspect in her friendly solution proposal (see paragraph 144 below).

Legal Framework

22. As regards the rules and principles concerning the Ombudsman's assessment of the present complaint, reference is made to the following provisions.

23. Article 9 of the Treaty on European Union (TEU) reads as follows:

" In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. ..."

24. 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. ..."

25. Article 6(2) of the European Code of Good Administrative Behaviour [6] provides that "[w]hen taking decisions, the official shall respect the fair balance between the interests of private persons and the general public interest. "

26. Article 9 of the European Code of Good Administrative Behaviour provides that "[w]hen taking decisions, the official shall take into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration. "

27. The 2005 Commission Communication on " *Framework for Commission Expert Groups: Horizontal Rules and Public Register* " [7] (henceforth referred to as the '2005 Framework') provides for "[M]inimum horizontal rules " governing, among other things, the composition and appointment of members of expert groups as well as their operation. It also foresees the launch of a public Register of expert groups.

28. The 2010 Commission Communication on " *Framework for Commission Expert Groups: Horizontal Rules and Public Register* " [8] (henceforth referred to as the '2010 Framework'), accompanied by a Commission staff working document [9] , aims at simplifying and clarifying the provisions introduced by the 2005 Framework and provides for " *Horizontal Rules for Commission Expert Groups* ". The accompanying Commission staff working document contains:

- an outline of the main features of the Register of Commission expert groups and other similar entities (Annex I);
- a standard Commission decision setting up an expert group (Annex II);
- a standard call for applications regarding the selection of experts appointed in a personal capacity (Annex III); and
- standard rules of procedure of an expert group (Annex IV).

29. The 2002 Commission Communication " *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission* " [10] (the 'Minimum Standards for Consultation Communication') sets out a number of general principles that should govern the Commission's relations with interested parties and provides for a set of minimum standards for the Commission's consultation process.

30. The 2002 Commission Communication " *On the Collection and Use of Expertise by the Commission: Principles and Guidelines* " [11] (the 'Guidelines for the Collection and Use of Expertise') seeks to identify and promote good practices regarding the collection and use of



expertise at all stages of Commission policy-making.

31. The European Transparency Initiative [12] features the launch of databases providing information about consultative bodies and expert groups advising the Commission and aims at a wide consultation of stakeholders and in-depth impact assessments prior to legislative proposals.

32. The White Paper on European Governance [13] sets as a priority (a) the establishment and publication of minimum standards for consultation on EU policy; (b) the creation of partnership arrangements going beyond minimum standards in selected areas and (c) committing the Commission to additional consultation in return for more guarantees of the openness and representativity of the organisations consulted.

A. Allegation of incomplete Register and related claim

Arguments presented to the Ombudsman

33. The complainant alleged that the Commission failed to provide a complete Register of expert groups. In support of this allegation, the complainant argued that the membership of a number of expert groups remains unclear. Moreover, there are expert groups that are not included in the Register at all. The complainant claimed that the Commission should complete its Register of expert groups by ensuring that it includes all experts and all expert groups.

34. In its opinion, the Commission referred to the great efforts it had made in order to ensure transparency in relation to expert groups. Following the adoption of its 2005 Framework, an online public Register of expert groups was launched in October 2005. While the Register was regularly updated, it had not always been possible to avoid factual errors or delays in updating it.

35. The Commission stated that the 2010 Framework provided the basis for the launch of a new and more accurate version of the Register in December 2010. Since 2007, the Commission had gradually published the names of expert group members. While the 2005 Framework only provided for publication in relation to formal expert groups, the Commission had gone beyond this commitment by also making available relevant information in relation to informal groups. The Commission went on to state that the "*disclosure of membership of expert groups in the Register was completed in January 2009. Thus, in principle, the names of all members of expert groups are available.*" In view of these circumstances, the Commission considered that the Register is complete and stated that it was fully committed to ensuring that all expert groups and all group members are disclosed and that relevant information is regularly updated. The Commission also stated that the new version of the Register had enhanced transparency and pointed out that "*the transition from the old to the new version of the Register is still ongoing, thus some of the data still need to be validated; transition should be completed over the next few months*".



36. The Commission added that, as explained in its previous correspondence with the complainant, the type of information published in the Register depended on the membership of the group. Thus, it published individual names "*when members are appointed in a nominative way*". However, if members are organisations or Member States, it is the names of organisations or the Member States concerned that are to be published, given that those, and not the individuals representing them, were to be considered members of the group. Nevertheless, the Commission stated that it sometimes goes beyond this arrangement and publishes also individual names of representatives. The Commission further pointed out that, in the case of Member States, it often publishes the names of the Member State authorities concerned. The Commission also referred to an annex providing specific information on a number of expert groups managed by its following Directorates-General: DG Enterprise, DG Agriculture, DG Internal Market and Services, DG Research, DG Information Society, DG Health and Consumers, DG Mobility and Transport, DG Taxation and Customs Union, DG Environment, DG Energy, DG Regional Policy, DG Eurostat, and DG Economic and Financial Affairs.

37. In its observations, the complainant submitted that the Commission made contradictory statements as regards the completeness of the Register. While the Commission stated that it considered the Register to be complete, it pointed out, at the same time, that the transition from the old to the new Register was ongoing and still required validation of relevant data in order to be complete. In the given context, the complainant drew attention to a message appearing when accessing the Register which reads as follows: "*The register is being reconstructed and does not include all Commission expert groups and others similar entities for the time being.*" Against this background, the complainant submitted that the Commission should not consider its Register to be complete. The complainant also referred to statements made at a meeting with the Commission's Secretariat-General, at which, according to the complainant, it was stated that the Register would never be 100% complete, given in particular the fluctuations experienced in the creation and closing-down of groups. However, the complainant insisted that applicable rules demanded full transparency. A Register that would not be 100% complete or fully reliable would therefore constitute an instance of maladministration.

38. The complainant also stated that an annex to the Commission's opinion listed certain expert groups (e.g., CARS 21 and CESAME2) which, alongside a number of other groups, could not be found in the Register. Moreover, it was not clear from the Register whether certain groups, such as, for instance, the Competitiveness in Biotechnology Advisory Group, had been dissolved or were just inactive.

39. Moreover, the membership of the expert group entitled "Propriété industrielle" was not disclosed at all. Also, the information provided in the Register on the number of members of expert groups managed by DG Agriculture did not correspond to the allocation of seats foreseen by Decision 2004/391/EC.

40. The complainant also took the view that the information contained in the Register on the nature of entities from which expert group members come was misleading. For instance, the



complainant stated that lobby groups were at times labelled as NGOs or international organisations, whereas a University was considered to fall within the category of "corporate". According to the complainant, these inconsistencies would make it impossible for the public to assess and scrutinise the composition of expert groups. The complainant thus submitted that the Commission should introduce a common approach to categorising interest groups.

41. The complainant recalled that the Commission's Secretariat-General has to approve the creation of expert groups. It submitted that such approval should only be considered valid and members should be authorised to meet if all relevant information on the group has been uploaded on the Register within one month of the group's creation. According to the complainant, it was clearly unacceptable that an expert group such as CARS21 had not yet been included in the Register in spite of the fact that it had been created six months ago. The complainant also submitted that the Commission should clearly announce the moment when the transition of the data is complete and "[t] *here would be no excuse after that point for not including all expert groups* " in the Register. The complainant also considered that the Register's search engines do not work properly and suggested that all the information available be put into one database instead of in a huge number of different databases.

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

Preliminary remark

42. In its observations on the Commission's opinion, the complainant took the view that the Commission's statements according to which the Register is complete are incorrect and should be considered to amount to an instance of maladministration. The Ombudsman recalled that the allegation here under review concerns the question whether the Register is complete but not whether or not statements made by the Commission in this regard are correct. The Ombudsman therefore needed to analyse whether the complainant's allegation that the Commission failed to provide a complete Register is founded. In so doing, she had to consider the statements made by the Commission in the course of the inquiry and, at least implicitly, take a view on them. Beyond that, however, the Ombudsman considered that it would not serve a useful purpose to include in the present inquiry the issue as to whether the Commission made correct statements in this regard.

43. The complainant also argued that the composition of many groups is unclear, given that the affiliations of members who are serving in a personal capacity are not disclosed. This is the case, for instance, with the "Insolvency Law Group of Experts" and the "European Corporate Governance Forum". Given that the complainant submitted a separate allegation concerning the appointment of experts in a personal capacity, the Ombudsman considered this issue in the context of the examination of that allegation.

The Ombudsman's preliminary assessment



44. Article 1(2) TEU, foresees that decisions should be taken as openly as possible and as closely as possible to the citizen. With the entry into force of the Treaty of Lisbon, the principle of transparency received further momentum and, by virtue of Article 11 TEU, which, among other things, requires the EU institutions to maintain an open, transparent and regular dialogue with representative associations and civil society, it has received additional recognition as an essential ingredient of the democratic principles governing the activities of the Union. Moreover, Article 15(1) of the Treaty on the Functioning of the EU (TFEU) now explicitly links what has grown into a general principle of Union law to the work of the Union's institutions, bodies, offices and agencies. In addition, it associates transparency with the twin goal of promoting good governance and ensuring the participation of civil society.

45. In the Minimum Standards for Consultation Communication adopted in 2002, the Commission already recognised that *"... for the consultation process to be meaningful and credible it is essential to spell out who participated in these processes."* It follows from that Communication that the consultation process should therefore make clear who is being consulted and which interests the parties consulted represent, so as to allow, among other things, the interested public to assess its inclusiveness. Through the 2005 Framework, the transparency obligations incumbent on the Commission were further stepped up by establishing the Register and requiring *"maximum transparency"* with regard to formal Commission expert groups. The Commission staff working document [14] accompanying the 2010 Framework mandates the Commission's Secretariat-General to continue managing the Register on the basis of data encoded by the Commission's services and in close collaboration with them. That document furthermore provides as follows: *"In order to ensure transparency, it is vital that information made available in the register is fully reliable. All services should regularly update data."*

46. It followed from this brief review of the Commission's Communications against the background of the principle of transparency that the Commission has entered into a clear and unambiguous commitment to provide a Register which is both complete and reliable. As a result, citizens may legitimately expect that the information made available in the Register is reliable and that any changes occurring in the course of the existence and operation of an expert group will be recorded on the Register in a timely manner.

47. While the complainant considered that the Register contains lacunae as regards certain groups but also as regards the membership of groups already listed, the Commission, in its opinion, took the view that the Register is complete, but also maintained that the transition was still ongoing. The Ombudsman considered the Commission's remarks on the state of the Register at the time of submission of its opinion not to be easily reconcilable with each other. In fact, the declared need for transition involving the entry of further data into the Register would appear to rule out the conclusion that the Register is complete. In any event, when read together, it emerged from the Commission's statements that, at the time of the submission of its opinion, further work was still needed in order to complete the Register.

48. It followed that the complainant's view that the Register was not complete was borne out by the Commission's own statements. In the given context, the Ombudsman also drew attention to



the fact that, as recently as early 2012, the search form for the Register included the following disclaimer: " *The register is being reconstructed and does not include all Commission expert groups and other similar entities for the time being.* " There could thus be no doubt that, at least as late as early 2012, the Commission itself considered that the Register did not list all Commission expert groups and other similar entities. The Ombudsman furthermore noted that, in its observations, the complainant pointed to concrete examples suggesting that, contrary to the commitments entered into by the Commission, the information provided in the Register was not complete.

49. The Ombudsman considered it noteworthy that (i), at the time of making the friendly solution proposal, the aforesaid disclaimer no longer appeared on the search form of the Register. The Ombudsman furthermore noted that (ii) certain improvements as regards the degree of information provided in the Register had been made in the meanwhile. Thus, for instance, the complainant pointed out that it was not clear whether the "Legal Certainty group" was still active, given that it did not figure in the Register. However, at the time of the Ombudsman making a friendly solution proposal to the Commission, the Register recorded the "Legal Certainty group" as a closed expert group and, in line with the level of detail provided in relation to other groups, described its membership. Similarly, the complainant pointed to the absence of the "CARS 21" groups in the Register. However, at the time of making the friendly solution proposal, the "CARS 21 High Level Group" was listed as an expert group on hold. In the given context, the Ombudsman noted with satisfaction that the search form allows not only to search for active groups, but also for those which are "closed" or "on hold". The Ombudsman moreover considered reasonable the Commission's decision to publish, as regards the membership of groups, individual names only where members are appointed in a nominative way but not in case of organisations or Member States holding membership.

50. However, there were still instances of groups which do not yet figure in the Register. By way of example, the "Advisory Group on the Energy 2050 Roadmap", to which the complainant made reference and which appeared to have completed its mission [15] , was not listed in the Register. The same appeared to be true of the "Competitiveness in Biotechnology Advisory Group" which was absent from the Register.

51. The Ombudsman noted that, especially in its observations, the complainant referred to many other groups, which, according to it, were not listed on the Register. She considered that it would be difficult for the Ombudsman to undertake the time-consuming and laborious task of performing a comprehensive and systematic check of the Register so as to assess its completeness. In any event, however, performing such a check would not be useful in the present case where the examples reviewed above (i) reveal, apart from progress made in certain areas, clear shortcomings as regards the completeness of the Register and (ii) suggest that the Register is also incomplete as regards other groups. The absence of a complete Register, in spite of the Commission's commitments in this regard, suggested an instance of maladministration. The Ombudsman therefore took up this aspect in the friendly solution proposal below.

52. The Ombudsman furthermore took note of the complainant's view that the Commission's



categorisation of certain of the entities from which expert group members come is misleading. At the same time, she realised that it can be a complex task for the Commission to categorise a particular organisation. For instance, it would not appear unthinkable that an NGO is in fact set up by an industry with a view to promoting a particular interest. This could obviously raise issues of proper categorisation. Similarly, there could be doubts about the appropriate categorisation of research centres run and funded by industry. These complexities notwithstanding, the Ombudsman thought it useful for the Commission to consider defining criteria for different categories of entities so as to ensure the correctness and appropriateness of relevant information on the Register. Considering that a complete and reliable Register needs to build on a proper categorisation of the entities with which members of expert groups are affiliated, the Ombudsman also took up this aspect in the friendly solution proposal.

53. In its observations, the complainant also took the view that the Register's search engines do not work properly and suggested that all the information available be put into one database instead of a huge number of different databases. While it appeared that the complainant had not yet raised this aspect with the Commission, the Ombudsman invited the Commission to take it into account when considering the friendly solution proposal.

54. The Ombudsman finally understood that, according to the complainant, expert groups should be authorised to meet only if and once all relevant information has been uploaded in the Register within one month of a given group's creation. The Ombudsman fully shared the complainant's underlying assumption that the completeness of the Register also requires that updates regarding new groups or groups already in operation are made in a timely manner. At the same time, she had doubts whether the measure proposed by the complainant would adequately address the problem. In particular, it would not contribute to the timeliness of updates in relation to existing groups. Other than that, however, the Ombudsman noted that Rule 4(4) of the Horizontal Rules for Commission Expert Groups which are annexed to the 2010 Framework provides as follows: "*A Commission service wishing to set up an informal expert group shall submit a request to the Secretariat General via the Register. If all relevant information is provided, the Secretariat General shall give formal authorisation for setting up the expert group ...*" It therefore appeared that, in cases to which Rule 4(4) of the Horizontal Rules for Commission Expert Groups applies, the Secretariat General has all the information needed to be put on the Register before formal approval for setting up the expert group is given.

B. Allegation of lack of adequate transparency and related claim

Arguments presented to the Ombudsman

55. The complainant alleged that the Commission failed to guarantee adequate transparency in the operation of the expert groups. In support of this allegation, the complainant argued that (i) the Commission does not provide the public with the information needed to assess the overall participation and involvement of stakeholders in a given matter; (ii) the Commission does not



publish a comprehensive overview of the meetings and does not have a webpage compiling all the consultation and expertise-seeking activities for the different policy and legislative initiatives and (iii), for the vast majority of expert groups, agendas and minutes are not available on line via links connecting the expert groups Register with the respective DG's web pages. The complainant claimed that the Commission should ensure appropriate transparency in the work of expert groups by publicising meetings held and providing links to agendas and minutes, as well as other relevant information, such as public interest and conflict of interest declarations.

56. In its opinion, the Commission stated that "*in many cases, competent Commission departments have provided on the Internet, via dedicated webpages, relevant information on expert groups' activities, including agendas, minutes and discussion documents*" as well as on other initiatives complementing the work of expert groups. In an annex to its opinion, the Commission provided further information on its activities designed to ensure the transparency of expert groups' activities.

57. The Commission moreover submitted that the 2010 Framework intends to enhance transparency by foreseeing, in particular, that its services shall ensure that information concerning the activities carried out by these groups is made public directly in the Register or through a link in the Register to a dedicated website. The Commission emphasised its commitment to ensure correct fulfilment of this requirement by all services concerned.

58. The Commission took the view that publishing in the Register (a) the written declarations committing the experts who sign them to act in the public interest, as well as (b) declarations as to any prejudice to their independence would not add valuable information, given that experts usually sign standard declarations. Bearing, moreover, in mind the high number of experts concerned and the limited resources available, publication of that information would seem unnecessary and disproportionate. The Commission added that the 2010 Framework does not require experts to sign the aforesaid declarations any more. Instead, Rule 9(1) of the 2010 Framework provides that the relevant Commission's services shall inform experts appointed in their personal capacity that, by accepting to be members of the group, they commit themselves to act independently and in the public interest. The Commission's services shall also inform those experts that they may be excluded from the group or a specific meeting thereof, should a conflict of interest arise. The Commission underscored its commitment to ensure that these requirements are respected by all services concerned.

59. In its observations, the complainant took note of the Commission's position as regards the transparency of expert group activities in accordance with the 2010 Framework. At the same time, the complainant maintained that a random check in the Register confirmed that, in most cases, the hyperlinks contained therein provided general information on the respective policy only, but not the minutes or agendas of expert groups' meetings. The complainant also voiced concern that, according to the 2010 Framework, these documents would be provided when "*it is possible*", which left the Commission with an unfettered discretion not to publish them. In the complainant's view, this moreover went against the Guidelines for the Collection and Use of Expertise which stipulate that "*the main documents associated with the use of expertise on a policy issue, and in particular on the advice itself, should be made available to the public*". The



complainant also referred to the White Paper on European Governance according to which "[d]emocracy depends on people being able to take part in public debate. To do this, they must have access to reliable information on European issues and be able to scrutinise the policy process in its various stages".

60. In addition, the complainant asserted that the Register does not contain links in relation to certain groups, such as the "Expert Group on Market Infrastructure". According to the complainant, the Commission moreover did not explain how it ensures transparency as regards the different types of consultations it conducts on a given matter.

61. In conclusion, the complainant considered that the Commission does not provide access to the minutes and agendas for the vast majority of expert groups which, according to the complainant, constitutes an instance of maladministration. As for its claim, the complainant submitted that agendas, minutes and contributions of members of expert groups should be provided through the links to the websites of the relevant DGs in the Register, "except under special circumstances, as provided for in legislation (security, etc.)". The Commission should also provide information on all the consultation methods it uses in a particular area.

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

62. The Ombudsman recalled at the outset that the present inquiry concerns the composition and operation of Commission expert groups. In its allegation here under review, the complainant alleged a lack of transparency concerning the operation of Commission expert groups. At the same time, however, the complainant, in certain of its supporting arguments, appeared to go beyond the issue of transparency in the operation of these groups. Thus, the complainant argued, for instance, that there is a lack of transparency as regards the overall participation and involvement of stakeholders on given policy matters. The complainant also referred to what it considered to be an absence of a comprehensive overview of consultation and expertise-seeking activities. Bearing in mind the focus of the inquiry and considering the sheer breadth of certain of the complainant's supporting arguments which go beyond what is already a broad and complex issue in its own right, namely, transparency in the operation of Commission expert groups, in the following, the Ombudsman took into account only those supporting arguments, which match the complainant's allegation of a lack of transparency in the operation of Commission expert groups.

63. As a consequence, the Ombudsman needed to examine whether the Commission has made available, in particular through the Register, sufficient information on (i) the participation and involvement of stakeholders in expert groups; and (ii) meetings held by expert groups, including agendas and minutes.

64. The Ombudsman noted that the Commission's White Paper on European Governance lists among the actions to be taken by the Commission the publication of "... guidelines on collection and use of expert advice in the Commission to provide for the accountability, plurality and



integrity of the expertise use. This should include the publication of the advice given. " [16]

65. In implementing this commitment, the 2002 Guidelines for the Collection and Use of Expertise define certain core principles and guidelines which apply " *whenever Commission departments collect and use advice of experts coming from outside the responsible department* ". According to guideline 13 of that Communication, "[t] *he main documents associated with the use of expertise on a policy issue, and in particular the advice itself, should be made available to the public as quickly as possible, providing no exception to the right of access applies.* "

66. The Ombudsman furthermore recalled that the Horizontal Rules for Commission Expert Groups annexed to the 2010 Framework provide for detailed rules on transparency of expert groups. According to Rule 17(1), all Commission expert groups and other similar entities " *shall be published in the Register* ". Although Rule 17(2) only contains an obligation for the Commission's services to provide " *information required in the Register* " without defining this information, the information to be published is not limited to the composition of an expert group. This becomes apparent when Rule 17 of the Horizontal Rules for Commission Expert Groups is read in conjunction with Rule 18 of those Rules, which make specific provision for the publication of names of expert group members. The same conclusion emerged from the above-quoted guideline 13 of the Guidelines for the Collection and Use of Expertise, which extends publication requirements to the main documents and to the advice itself. The Ombudsman thus understood the reference to " *information required in the Register* " broadly, as encompassing information on the composition of expert groups, as well as on their proceedings, including the outcome of their deliberations. This understanding was corroborated by the Commission's own practice exemplified by the Register which, in relation to each of the groups listed, provides for different tabs bearing the following titles: "Details", "Additional Information", "Subgroups", "Statistics", and "Members".

67. In conclusion, and especially bearing in mind Article 15(1) TFEU, the Ombudsman considered that the Commission has committed itself to providing detailed information on both the (i) composition and (ii) operation of expert groups. As regards the latter type of information, the Commission's commitment is subject to the absence of an " *exception to the right of access* ". The Ombudsman understood this to mean that the Commission should publish relevant information, unless there are duly substantiated reasons for secrecy. It appeared useful to add that exceptions to the general commitment to transparency should be construed narrowly.

68. In applying the above principles to the information provided by the Commission, the Ombudsman noted that, in its observations, the complainant referred, among other things, to the "Expert Group on Market Infrastructure" in order to support its view that the level of information provided by the Commission is insufficient. In the following, the Ombudsman took this group as an example and assessed the information provided in relation to it before arriving at more general conclusions.

69. The Register lists the "Expert Group on Market Infrastructure" under the category of closed expert groups. On the tab entitled "Details", the Commission, apart from a general description of membership, provides basic information on that group's mission, task, and the starting date of



its activities. Under the tab "Additional Information", information about the selection of members and the group's internal rules of procedure can be retrieved. As for the meetings held by that group, there is a hyperlink to the website of DG Internal Market which provides further hyperlinks to agendas, participants' lists and 'summary reports' in relation to the meetings held by the group. The tab on "Subgroups" records that there are no subgroups assigned to the group and the tab on "Statistics" gives general statistical information, such as on the gender balance of the members of the group. Lastly, the tab entitled "Members" lists all members appointed in a personal capacity by indicating their names and affiliations, as well as the organisations enjoying observer status.

70. The above description showed that the level of information published on the Register as regards the "Expert Group on Market Infrastructure" appeared by and large to be satisfactory and in line with the commitments entered into by the Commission. However, there were two aspects in need of further comment.

71. First, as regards minutes of the meetings of that group, the "summary reports" published on the website of DG Internal Market appeared to provide only a very rough outline of the proceedings of this group, which does not allow the user to acquaint himself with the actual work of that group to a sufficient degree. By contrast, the documentation of the proceedings of other groups, such as CESAME 2 (Clearing and Settlement Advisory and Monitoring Expert Group) or FISCO (Fiscal Compliance Group) appeared to be much more detailed and allows citizens to familiarise themselves in depth with different views and positions exchanged in the course of a given meeting. The Ombudsman considered that she does not need to perform a comprehensive and systematic analysis of the information provided in the Register in relation to each expert group listed, in order to reach the conclusion that the example of the "Expert Group on Market Infrastructure" suggested, more generally, that, contrary to the commitments reviewed above, the Commission did not make available on the Register a sufficient level of detail as regards minutes and/or reports of meetings. This could amount to an instance of maladministration. The Ombudsman therefore took up this aspect in the friendly solution proposal below.

72. Second, no public interest and conflict of interest declarations by the members of the group are accessible through the Register. In this regard, the Ombudsman took note of the Commission's positions that the 2010 Framework does not require experts to sign such declarations any more and that publication of standard declarations would be unnecessary and disproportionate. While the absence of a requirement to sign declarations under the 2010 Framework would not prevent the Commission from publishing declarations submitted to it in line with the previous rules or from highlighting the fact that a particular member has submitted a standard declaration, the Ombudsman considered that such publication practice could give rise to misunderstandings about the requirements in terms of submitting declarations pursuant to the current rules. She therefore considered the Commission's position to be reasonable.

C. Allegation of failure to adopt best practices and related claim



Arguments presented to the Ombudsman

73. The complainant alleged that the Commission failed uniformly to adopt best practices concerning industry representatives who are appointed to expert groups in a personal capacity. In support of this allegation, the complainant argued that (i) the Commission does not adequately take into account the potential conflict of interest of industry representatives acting in a personal capacity; and (ii) a (potential) conflict of interest cannot be offset by a declaration of commitment to the public interest. The complainant claimed that the Commission should consistently apply in all other DGs the principle contained in DG SANCO's Guidelines on Conflict of Interest, namely, that someone who is known to work for an organisation with a vested interest in a particular policy issue should not be appointed to an expert group giving advice to the Commission.

74. In its opinion, the Commission stated that members of expert groups "*are selected primarily on the basis of the skills and expertise needed to fulfil in the most effective and efficient way the mandate of the specific group. In that respect, the participation of members coming from the industry can be sought in relation to the task that the group has to accomplish. Possible conflicts of interests are tackled either in the selection phase through an in-depth analysis of the past professional experience of candidates, including ethical conduct, and/or at the appointment through the mandatory disclosure of any interest that might prejudice the expert's independence and the formal commitment to act in the public interest.*" The Commission moreover submitted that it pays attention to any possible conflict of interest that might arise in the course of a group's operation that "*could contaminate*" its objectives and jeopardise its effectiveness and efficiency.

75. The Commission reiterated that the 2010 Framework provides for clearer and stronger horizontal rules, applicable to all expert groups, on how to manage conflicts of interest. The Commission went on to state that DG SANCO had developed a reflection paper on how to implement the above policy in the specific area falling within its remit. However, contrary to what had been suggested by the complainant, the relevant document from DG SANCO did not lay down any guidelines of that DG on conflicts of interest but instead was a discussion document drawn up by the "Stakeholder Dialogue Group" in April 2008. The relevant document did not imply any particular follow-up and was not a formal statement of DG SANCO's policy on conflicts of interest.

76. In its observations, commenting on the appointment of experts in a personal capacity, the complainant recalled that, according to the 2010 Framework, the selection of experts shall be carried out in such a way as to avoid any conflicts of interest. The 2010 Framework moreover stipulates that, by accepting to serve as members of the group, experts who are appointed in their personal capacity commit themselves to act independently and in the public interest. They may be excluded from the group or a specific meeting thereof, should a conflict of interest arise. Against this background, the complainant considered the 2010 Framework to contradict statements made in the Commission's opinion as well as in previous contacts with the



complainant.

77. More specifically, the complainant stated that Commission staff members had, in meetings with the complainant, made the point that excluding persons working for industry from appointment in a personal capacity would make it difficult to find experts with the necessary technical expertise. At the same time, Commission staff members had also acknowledged that employees of companies were bound to support the interests of their company and that it was not logical to assume that staff members of companies would put their companies' interests aside when participating in an expert group. The complainant found confirmation for the latter point in a scientific study. According to the complainant, it was perfectly legitimate and logical for the Commission to rely on the technical expertise of persons employed by industry. However, the Commission should recognise that, contrary to what the 2010 Framework assumes, it is entirely impossible that these persons act "*independently and in the public interest*". As a consequence, the Commission should never appoint industry experts in a personal capacity but instead as experts and stakeholders, bearing in mind the need to keep a balance between different types of interest. There was therefore a contradiction between the avoidance of conflicts of interest, as required by the 2010 Framework, and the Commission's practice of appointing industry representatives as independent members.

78. Referring to the OECD's definition of a conflict of interest, the complainant stated that corporate representatives appointed in a personal capacity faced a conflict of interest, given that they could exploit their membership for the benefit of their industry.

79. The complainant noted that, in its contacts before submitting the present complaint, the Commission had stated that experts appointed in a personal capacity had to sign written declarations that (a) they would act in the public interest, (b) that no interest they hold would prejudice their independence and (c) that violation of these terms might lead to their exclusion from the group. However, this approach had never been implemented. The complainant explained that, following a request for access to documents, it had obtained access to relevant declarations of the members of eight expert groups managed by DG MARKT. Although relevant declarations of many experts were missing, the latter were not excluded from the group.

80. The complainant moreover pointed out that, according to the Commission, the 2010 Framework does not require members of expert groups to sign relevant declarations any more. Instead, the Commission stated that possible conflicts of interest are tackled in the selection phase and at the time of the appointment of experts through a mandatory disclosure of any prejudicial interest. In relation to these aspects, the complainant pointed out that (i) the 2010 Framework makes no mention of a "mandatory disclosure of any interest". At any rate, the rules should foresee such mandatory disclosure for all professional and pro bono activities which should be publicly accessible. The complainant moreover pointed to (ii) the participation of a particular NGO in two expert groups. The selection process in relation to that NGO involved an in-depth analysis of the past professional experience of the individual candidate over a series of interviews. It was unclear, however, whether the selection procedure was equally rigorous for all applicants. According to the complainant, the Commission had not provided any indication of any serious process for assessing potential conflicts of interest of experts appointed in a



personal capacity before deciding on the composition of an expert group. The Commission should lastly have (iii) excluded from expert groups those experts who did not sign relevant declarations.

81. The complainant also stated that it was quite normal that experts did not want to sign "*an irrational and false statement that they are independent when it is so clear that they are not*". According to the complainant, this was one more argument for the Commission to stop appointing experts affiliated with the industry in a personal capacity. In the given context, the complainant pointed out that the Commission's Secretariat-General had shown some openness as regards the complainant's position that "*corporate members of expert groups should either be registered on behalf of the company they work for or should represent a certain sector*". According to the complainant, a staff member of the Commission's Secretariat-General had stated that the Commission would not approve groups where the background of members is not clearly mentioned. However, for existing groups the situation was more complex and would take some time to be changed. The complainant pointed out that it would not accept a "gradual change" on this matter, given that the Commission's current practice had no basis in the applicable rules and was misleading for the public. The complainant also drew attention to the fact that the Commission's practice had come under criticism by certain Members of the European Parliament (MEPs) during a plenary debate held in February 2011. Moreover, in a recent letter addressed to two Commissioners, a group of MEPs had asked the Commission to develop procedures in order not to allow persons with vested interests to participate in expert groups in a personal capacity.

82. The complainant finally provided a list of 19 expert groups in the case of which "*the current rules on conflicts of interest are clearly violated with industry representatives being appointed 'in a personal capacity'*". The complainant added that this was probably also the case for many more expert groups.

83. Commenting on the Commission's statements concerning the document originating from DG SANCO, the complainant accepted the Commission's explanations that that document was a discussion document only. At the same time, the complainant considered that the principles contained in that document "*go in the right direction*", pointing out that this view had also been endorsed by the aforesaid MEPs. Thus, individuals "*working for corporations and lobby groups*" should never be appointed in a personal capacity but only as stakeholders. The complainant opined that the provisions contained in the 2010 Framework regarding conflicts of interest should be clarified and strengthened. Instead of referring to the need to avoid conflicts of interest in the selection of experts, they should state that "*during the selection of experts risks for potential conflicts of interests should be carefully assessed, and experts with high risks should be excluded*". Moreover, instead of providing for the *possibility* of excluding experts appointed in a personal capacity in case a conflict of interest arises, the rules should provide that experts "*will be excluded from the groups if they have a conflict of interest*". Lastly, declarations of professional activities of experts acting in a personal capacity should be accessible through the Register and the relevant rules should foresee this.



The Ombudsman's assessment

84. The Ombudsman noted that the complainant's allegation concerns the appointment to expert groups in a personal capacity of representatives affiliated to an industry. Bearing in mind that the complainant's claim relating to that allegation refers to persons affiliated with organisations with a vested interest, the Ombudsman, in the assessment to follow, proceeded on the basis of the latter concept, it being understood that an organisation holding a vested interest in a given policy is not necessarily a company or a business corporation.

85. Article 4(2) of the Model Commission Decision annexed to the Commission Staff Working Document [17] (henceforth referred to as the 'Model Decision') explicitly provides for a distinction between members of experts groups appointed in a personal capacity and members appointed to represent an interest. As regards the former category of members, Article 4(7) of the Model Decision provides that they shall act independently and in the public interest. Moreover, Article 4(8) of the Model Decision requires for their names to be published in the Register.

86. The Guidelines for the Collection and Use of Expertise contain the following statement: "*It is a truism that no one is entirely 'independent' ... Nevertheless, as far as possible, experts should be expected to act in an independent manner. Experts can, of course, still bring to the table knowledge they hold by virtue of their affiliation, or nationality: indeed, experts may sometimes be selected for this very reason. Nevertheless, the aim is to minimise the risk of vested interests distorting the advice proffered by establishing practices that promote integrity, by making dependencies explicit, and by recognising that some dependencies - varying from issue to issue - could impinge on the policy process more than others.*" [18] According to guideline 12, experts should declare immediately any direct or indirect interest in the issue at stake, as well as any relevant changes after the work commences.

87. Rule 9 of the Horizontal Rules for Commission Expert Groups annexed to the 2010 Framework contains detailed rules on the selection and appointment of members of expert groups to be appointed in their personal capacity. It is worthwhile quoting them in full:

" Selection process and appointment of members

When expert group's members are appointed by the Commission or its services, the following provisions shall apply:

(1) Where individual experts are appointed in their personal capacity, they shall be chosen according to a selection process that guarantees a high level of expertise and, as far as possible, geographical and gender balance, taking into account the specific tasks of the expert group and the type of expertise required. In addition, the selection of experts shall be carried out in such a way as to avoid any conflict of interests.

Without prejudice to specific selection procedures provided for by Commission decisions establishing expert groups, public calls for applications shall be used as far as reasonably



practicable. For that purpose, Commission services shall make use of the standard template for a call for applications for the selection of experts appointed in a personal capacity established by the Secretariat General. Services may depart from the template or supplement it, where this is justified by specific requirements.

Where a call for applications is not reasonably practicable (for example where very specific expertise is required), the choice of experts shall be made on the basis of objectively verifiable criteria.

The Commission services concerned shall inform experts who are appointed in their personal capacity that, by accepting to be members of the group, they commit themselves to act independently and in the public interest. Commission services shall also inform those experts that they may be excluded from the group or a specific meeting thereof, should a conflict of interest arise. "

88. The Model "Call for applications for the selection of experts appointed in a personal capacity" annexed to the Commission Staff Working Document [19] contains the following provisions: " *Members shall give the Commission an independent opinion free from outside influence ...*" The Model Call for applications also contains the following stipulation: " *They shall commit to act independently and in the public interest. "*

89. Moreover, Article 11(1) of the Model Rules of Procedure annexed to the same Commission Staff Working Document stipulates that, should a conflict of interest in relation to an expert arise, the Commission services may exclude this expert from the group or a particular meeting thereof. In the alternative, they may decide that the expert in question shall abstain from discussing the items on the agenda concerned and from any vote on these items.

90. It was against the background of these rules that the Ombudsman had to assess the complainant's allegation here under review.

91. As a starting point, she observed that appointment in a personal capacity to an expert group is distinct from appointment to represent an interest. Furthermore, appointment of experts in a personal capacity is not limited to persons coming from industry but instead open to any person fulfilling, among other things, the requirements of Rule 9(1) of the Horizontal Rules for Commission Expert Groups. It followed that the applicable rules apparently rest on the assumption that objective advice serving the public interest can in principle be obtained from experts regardless of their affiliation with organisations holding a vested interest, provided that certain safeguards are complied with.

92. In its opinion, the Commission referred to the skill and experience brought to the group by members appointed in a personal capacity. The Ombudsman considered the Commission's statements in this regard to be plausible. The complainant did not challenge the usefulness of the experience and expertise brought to groups by members appointed in a personal capacity. The complainant argued, however, that the Commission should never appoint industry experts in a personal capacity but instead as experts and stakeholders. The Ombudsman considered



that endorsing the complainant's position that a member appointed in his or her personal capacity would by definition represent the interests of the association he or she is affiliated with would in effect rule out appointment of any expert in a personal capacity, it being understood that there is no agreed definition or threshold as to what an organisation acting exclusively in the public interest would constitute. Nevertheless, the Ombudsman welcomed future reflection on this issue and understood the document originating from DG SANCO to constitute an important contribution in this regard.

93. This being said, the Ombudsman considered it obvious that the appointment of a person affiliated with an organisation holding a vested interest could give rise to conflicts of interest. It was therefore equally clear that particular caution is advised, (i) in particular when deciding on the appointment of members in a personal capacity, so as to minimise the risk of conflicts of interest. Moreover, (ii) during the term of membership of members appointed in a personal capacity, the risk of conflicts of interest must also be managed by appropriate means.

94. As regards the first aspect, the Ombudsman considered it essential that public calls for applications are used to the greatest extent possible and that, in cases where public calls would not serve a useful purpose, the selection is based on objective criteria. The Ombudsman noted with satisfaction that Rule 9 of the Horizontal Rules for Commission Expert Groups makes explicit provision to this effect. Rule 9(1) equally provides for conflicts of interest to be avoided in the selection of experts and thus allows addressing the issue of conflicts of interest at the crucial stage of selecting members appointed in a personal capacity. The Commission's submission that potential conflicts of interest are assessed in the selection phase and/or at the time of appointment was thus borne out by the above-mentioned rules.

95. As regards the second aspect, the above-quoted rules foresee that members appointed in a personal capacity have to commit themselves to act independently and in the public interest. The Ombudsman shared the complainant's doubts as to the effectiveness of a formal declaration to ensure independence and a commitment to act in the public interest. At the same time, she recalled that Rule 9(1) of the Horizontal Rules for Commission Expert Groups allows for the exclusion of a member from the group or from a specific meeting thereof and therefore provides for specific sanctions in case a conflict of interest arises. While the complainant appeared to argue that a conflict of interest should result in the automatic exclusion of the group member affected, the Ombudsman considered that the complainant did not demonstrate why such a rule allowing for no margin to take into account the specifics of a given conflict of interest would be necessary.

96. There could be no doubt that the sanctions foreseen can only be effective if a conflict of interest is detected in the first place. The effectiveness of these sanctions therefore hinges on (i) the readiness of the member concerned to declare any such conflict and/or on (ii) possibilities to detect any such conflict through other means. The Ombudsman took the view that, even in the absence of a member declaring a conflict of interest, the existence of actual or potential conflicts can be ascertained if information on the (i) members of expert groups, including on the affiliation of members appointed in a personal capacity and (ii) the deliberations of the expert groups, including meeting agendas, minutes of meetings and reports stemming from the groups'



activities, is available on the Commission's Register.

97. Given that the Ombudsman made a friendly solution proposal in relation to the Commission's Register below, there was no need for further action on the Ombudsman's part concerning the complainant's third allegation and claim.

D. Allegation of failure to provide convincing reasons for not developing uniform selection criteria and related claim

Arguments presented to the Ombudsman

98. The complainant alleged that the Commission failed to provide convincing reasons for not developing general criteria for the selection of members of expert groups. In support of this allegation, the complainant argued that the current selection process is incompatible with the Guidelines for the Collection and Use of Expertise and the Minimum Standards for Consultation Communication. The complainant claimed that the Commission should develop and publicise general criteria for the selection of members of the expert groups.

99. In its opinion, the Commission explained that it sets up expert groups when it needs to gather external expertise in order to perform its tasks. As a consequence, *" the selection of experts is done on a case by case basis in light of their specialist knowledge in a given field and taking into account the type of work to be carried out, which can vary to a great extent "*. The Commission underscored the technicality of the issues dealt with by certain groups and the difference in their scope. It offered as illustrative examples issues linked to the implementation of existing legislation or the preparation of new policy initiatives. As regards the appointment of experts in a personal capacity, the Commission pointed out that the selection was based on an expert's competences relating to the policy concerned, as determined, among other things, in the course of calls for applications. Concerning the membership of public authorities and/or organisations, the Commission stated that it was normally up to them to identify their representatives and ensure a high level of expertise.

100. Contrary to what the complainant alleged, the Commission considered its aforesaid practice to be *" perfectly in line with the Communications on the collection and use of expertise and on minimum standards for consultation "*. According to the former Communication, *" arrangements for collecting and using expertise should be designed in proportion to the task in hand, taking account of the sector concerned, the issue in question and the stage in the policy cycle "*. Moreover, according to the Minimum Standards for Consultation Communication, the *" principle of proportionality ... must govern the Commission's administrative practice "*, and *" the Commission has to assess its consultation needs on a case-by-case basis in line with its right of initiative. "* The Commission also referred to the Communication on Smart Regulation [20] , according to which the Commission's *" engagement with civil society must be seen against the background of the full range of opportunities that citizens and other stakeholders have to contribute to the policy making process "*. In the given context, the Commission submitted that it



had developed a " *regular dialogue with stakeholders in different formats , expert groups being just one of them* ". According to the Commission, these formats take into account its long-standing policy of openness and inclusiveness and reflect wide differences in the policy fields, as well as the diversity of stakeholders.

101. In view of the aforesaid diversity of circumstances, the Commission stated that it was not convinced of the potential added value of more stringent rules on its interaction with civil society. Therefore it stated that it did not consider it appropriate to draw up general criteria for the selection of expert group members.

102. The Commission also stated that it is fully committed to ensuring implementation of the provisions contained in the 2010 Framework, notably that experts appointed in a personal capacity shall be chosen according to a selection process that guarantees a high level of expertise and avoids any conflicts of interest. The Commission also pointed out that, according to the 2010 Framework, public calls for applications shall be used as far as reasonably practicable and, where this is not the case, the choice of experts shall be made on the basis of objectively verifiable criteria. The Commission also expressed its commitment to further enhance the transparency of selection procedures by including information on the aforesaid selection procedures in the new version of the Register, as stated in the 2010 Framework.

103. In its observations and after noting the Commission's reference to the Guidelines for the Collection and Use of Expertise, the complainant took the view that, given that they are used as a means of interaction with the Commission and of collecting expertise, expert groups were to be considered bound by the Minimum Standards for Consultation Communication. According to the complainant, this had been accepted by the Commission. The complainant pointed out that the Minimum Standards for Consultation Communication requires the Commission to ensure that there is consistency and transparency in the way its departments operate their consultation processes. The complainant took the view that reading this principle together with the principles for a pluralist and diverse composition of expert groups designed to avoid the eventuality that particular groups benefit from a privileged access, as they emerge from the Commission's Communications, " *should lead the Commission to establish some common criteria in the composition of expert groups* ". According to the complainant, this would be the only certain way to implement the principle that the Commission services shall, as far as possible, ensure a balanced representation.

104. On the other hand, "[w]ithout common selection criteria, the Commission's codes of conduct ... and the new rules on expert groups are violated ". According to the complainant, the Commission's current interpretation of the applicable rules allows it to defend any composition however unbalanced it may be, by focusing on "efficiency". Given that the 2010 Framework only requires a balanced composition " *as far as possible* ", the Commission failed to explain why a balanced composition is not possible in some cases. According to the complainant, only the Commission could currently judge whether a sufficient balance between an equal representation of stakeholders and efficiency has been achieved. The complainant also expressed criticism of the Commission's understanding of "efficiency" which appeared to be interpreted " *in a short term and administrative way, while real efficiency is about producing policies and legislation* "



that benefit society at large. "

105. In the complainant's view, the general selection criteria *" should include safeguards against the domination of expert groups by special interests and corporate interests in particular "*. Moreover, the creation of expert groups should be publicly announced and there should be public calls for interested parties to apply *" when groups are to be composed by experts acting in a personal capacity and when experts are also interest representatives "*.

106. The complainant concluded by saying that *" some minimum balance in the interest groups consulted "* by the Commission would contribute to a more balanced decision-making process in line with Article 9 TEU. The complainant agreed that differentiated selection criteria on a case-by-case basis could be retained, but argued that that there should be *" some general rule providing safeguards against the domination of expert groups by specific interest "*. Unless experts are *" independent from any interest, they are also interest representatives however 'technical' their task may be "*. A balance should therefore always be kept and not only *" as far as possible "*.

The Ombudsman's assessment

107. The Ombudsman noted that the allegation here under review concerns the alleged lack of convincing reasons for not developing general criteria for the selection of expert group members. While the complainant in its submissions repeatedly referred to the issue of balanced representation in Commission expert groups, the Ombudsman recalled that the latter issue forms part of a separate allegation and would be analysed under that heading. The following assessment therefore touched upon the issue of representativeness only to the extent that it is directly linked to the alleged lack of best practices concerning general criteria for the appointment of experts.

108. Guideline 8 of the Guidelines for the Collection and Use of Expertise states that, when identifying and selecting experts, departments *" should cast their nets as widely as possible in seeking appropriate expertise. As far as possible, fresh ideas and insights should be sought by including individuals outside the department's habitual circle of contacts. Departments should also strive to ensure that groups are composed of at least 40% of each sex. "* Guideline 9 moreover requires for both mainstream and divergent views to be considered. An annex to the Guidelines details certain "practical questions" that may arise in their application as well as "practical tips" in reply to these questions. The heading of "Identifying and selecting experts" contains the following statements: *" Should open calls for candidates be published when seeking expertise for expert groups? Have any such calls been publicised as widely as possible, including electronic means? Open calls may be particularly appropriate when dealing with sensitive issues and when groups are liable to stand for a reasonable period of time. "* [21]

109. According to the Minimum Standards for Consultation Communication, *" consultation processes run by the Commission must be transparent, both to those who are directly involved and to the general public "*. According to that Communication, it must be clear, among other



things, " *who is being consulted and why* " [22] .

110. Point 3.2 of the 2005 Framework provides that "[m] *embers shall be selected in a transparent manner, on the basis of clearly defined objective criteria. Members appointed in a personal capacity shall be selected, as far as possible, through a call for applications.* "

111. Rule 9(1) of the 2010 Framework provides as follows:

" *Where individual experts are appointed in their personal capacity, they shall be chosen according to a selection process that guarantees a high level of expertise and, as far as possible, geographical and gender balance, taking into account the specific tasks of the expert group and the type of expertise required*

Without prejudice to specific selection procedures provided for by Commission decisions establishing expert groups, public calls for applications shall be used as far as reasonably practicable . For that purpose, Commission services shall make use of the standard template for a call for applications for the selection of experts appointed in a personal capacity established by the Secretariat General. Services may depart from the template or supplement it, where this is justified by specific requirements.

Where a call for applications is not reasonably practicable (for example where very specific expertise is required), the choice of experts shall be made on the basis of objectively verifiable criteria. " [23]

112. According to point 8 of the Commission Staff Working Document [24] , for the sake of transparency, relevant information on the selection process used will be made available on the Register. The Model "Call for applications for the selection of experts appointed in a personal capacity" annexed to the Commission Staff Working Document lists the criteria to be taken into account when assessing applications. These include proven competence and experience in relevant areas; the need to strike a balance within the group in terms of representativeness of applicants; as well as gender and geographical origin.

113. The Ombudsman noted that, in its opinion, the Commission referred to a case-by-case analysis it needs to perform when deciding on the expertise required to be provided by members of expert groups. Bearing in mind that expert groups are active in all areas of EU policy and that the range of expertise sought is therefore wide and requires for the Commission, which is on the receiving end, to have a sufficient degree of discretion, the Ombudsman considered the Commission's position to be reasonable. In particular, she was unable to share the complainant's view that the Commission's position is incompatible with the applicable rules reviewed above which, on the contrary, appeared to recognise the Commission's discretion, while at the same time setting certain limits to that discretion. Thus, for instance, Rule 9(1) of the 2010 Framework requires the Commission, as far as individual experts appointed in their personal capacity are concerned, to have recourse to a selection process guaranteeing a high level of expertise and, as far as possible, geographical and gender balance, taking into account the specific tasks of the expert group and the type of expertise required. At first sight, it would



appear difficult to define further general criteria applicable to all expert groups. On the other hand, to the extent that the complainant referred to a criterion of representation, this aspect would be examined under the heading of its fifth allegation.

114. In view of the above considerations, the Ombudsman considered that the Commission had put in place general criteria for the selection of members of expert groups. She moreover considered the Commission's position that it would not serve a useful purpose to adopt more stringent general rules to be convincing. At the same time, she noted and applauded the Commission's commitment to further enhance transparency of selection procedures by including relevant information in the Register. The Ombudsman therefore concluded that there are no grounds for further inquiries into the present allegation.

E. Allegation of failure to ensure a balanced composition and related claim

Arguments presented to the Ombudsman

115. The complainant alleged that the Commission failed to ensure a balanced composition of expert groups. In support of this allegation, the complainant argued that, in the majority of expert groups it identified, the industry representatives form the majority while all other stakeholders, such as consumer groups, academics and the civil society, are underrepresented. The complainant claimed that the Commission should address the issue of the unbalanced composition of expert groups.

116. In its opinion, the Commission pointed out that, contrary to what the complainant stated, it respects the letter and spirit of the Guidelines for the Collection and Use of Expertise, which identify excellence, the extent to which experts act in an independent manner, and pluralism as the determinants of the quality of advice. The Commission stated that, when selecting members of expert groups, it always strives to strike a balance between the above three criteria. The Commission also submitted that, as identified by the complainant in its previous correspondence with the Commission, it had repeatedly provided the complainant with "*relevant and detailed information on how this was effectively ensured for a number of expert groups*".

117. For detailed and updated information on the rationale of the composition of many expert groups, the Commission referred to an annex to its opinion. According to the Commission, the information provided showed that the complainant's allegation was "*largely groundless or inaccurate*". At the same time, the Commission pointed out that, for reasons of efficiency, it is not in a position to undertake the costly and lengthy work of providing detailed information on each of the 111 expert groups referred to in the complainant's complaint.

118. The Commission moreover stated that the 2010 Framework foresees that its relevant services "*shall aim at ensuring a balanced representation of relevant areas of expertise and*



areas of interest, while taking into account the work to be carried out and the specific expertise required". The Commission underlined that it was fully committed to implementing these provisions and also expressed its readiness *"to consider ways to enhance the balance in the composition of existing expert groups, if needed"*. Exemplifying its commitment, the Commission referred to the "Communication towards a single market act" which provides for increased consultation and dialogue with civil society. In particular, where feasible and appropriate, expert groups would be extended beyond business representatives to incorporate the views of consumers, NGOs, and trade unions, among others.

119. The Commission also recalled that, in a letter addressed to the complainant, Commissioner Barnier fully acknowledged that a fair balance of non-industry stakeholders' representation in consultation processes would still have to be achieved. The Commission pointed out that it was committed *"to seek an adequate presence of civil society representatives in its expert groups"* in the area of the internal market, both as regards existing and newly set up groups. The Commission underlined, however, that a certain degree of flexibility was needed, given the 'technical' nature of certain groups, for which it might not be optimal to have a majority of civil society representatives. By way of example, the Commission referred to expert groups in the areas of wholesale services and of payments.

120. The Commission furthermore stated that, also in the field of information society, efforts were made with a view to ensuring a more balanced representation of relevant stakeholders, as well as a geographical and gender balance in all groups. The selection of members of expert groups in that area would be done on the basis of public calls.

121. In its observations, the complainant took the view that the Commission did not argue that it seeks to ensure a balanced composition of expert groups but only that it strives to strike a balance between excellence, independence and pluralism. According to the complainant, it was unclear what the Commission meant by "excellence". The complainant also pointed out that a reference to "excellence" could in practice make any composition defensible. By contrast, the complainant stated that it itself had given a clear definition what it meant by "balance" and "pluralism", namely, that *"no more than half of the non-governmental actors should come from a single type of interest (in particular from big business)"*. The rationale behind this principle, which should apply to each and every expert group and is in line with Article 6 of the European Code of Good Administrative behaviour, is that there should be a balance between special economic interests and *"the public or general interest"*. In the complainant's view, *"experts from diverse backgrounds representing different aspects of the public interest (environmental, consumer, social etc.) as well as wide strands of the population (labour, SMEs, professionals) and independent academics should always collectively outnumber big business representatives"*. Otherwise, there would be discrimination in favour of business interests as a special category of interest.

122. In view of the above, striking a balance between "excellence" and "pluralism" could not justify that an expert group would be dominated by corporate interests. The fact that an expert working for the corporate sector might be qualified as excellent could not affect the conclusion that that expert's advice could not be decoupled from the economic interests of the sector



involved. Including experts from the corporate sector therefore necessitated counter-balancing their inclusion with experts linked to other types of interest. The fact that not all experts coming from the corporate sector would have the same interest did not safeguard that the public interest, which is not to be equalled to the sum of different commercial interests, would adequately be taken into account. In the complainant's view, having experts looking at a problem mainly from a commercial perspective could seriously distort the Commission's understanding of a particular issue.

123. Commenting on the information on the composition of different expert groups provided by the Commission, the complainant, apparently speaking of the past, considered the Commission's statement that it had provided it with relevant and detailed information as to how a balance is ensured to be groundless. It pointed out that the Commission had never previously tried to explain how such balance would be achieved. In its opinion, however " *we see - in some cases - its first efforts to do so, but these explanations are inadequate* ". On a general basis, the complainant stated that the information provided on the rationale of the composition of some groups was very general and abstract. Moreover, it highlighted that, in several cases, the Commission has taken " *problematic approaches* " showing a clear bias towards business interests.

124. The complainant went on to make detailed comments in relation to the specific expert groups to which the Commission referred in the annex to its opinion. The information on problems perceived by the complainant relevant to the assessment of the allegation and claim here under review can be summarised as follows:

-In connection with the group "CARS 21", the Commission argued that it was more balanced than before and that there was now a better balance between manufacturers and suppliers. The complainant thus considered the Commission's approach to be that there would be no problems as to the composition of that group as long as there is a balance between different industrial sectors. The complainant considered this approach to be flawed.

-As regards the "High Level Group on the Competitiveness of the Chemical Industry", the Commission stated that it had repeatedly encouraged NGOs to increase their participation, but had had limited success in doing so. The complainant considered that, in these circumstances, the Commission should have reduced the number of industry participants so as to bring about a balanced composition.

-In relation to the "Competitiveness in Biotechnology Advisory Group", the complainant pointed out that examining the competitiveness of biotechnology without taking into account ethical, societal and safety implications was highly risky.

-The complainant noted that the " *Strategic Advisory Board on Competitiveness and Innovation* " should on the one hand be composed of representatives of industry and business associations, while, on the other hand, the members shall be appointed in a personal capacity, and advise the Commission independently of any outside influence. According to the complainant, it was irrational to require members to represent business associations and, at the same time, to be



independent.

-As regards the (disbanded) " *High Level Group on Competitiveness, Energy and the Environment* ", the complainant took the view that the Commission did not even try to explain how the group could be considered "balanced". In any event, given that that group consisted of 13 members from the industry and only four " *non-governmental participants* ", it was impossible to argue that that group was balanced.

-Commenting on expert groups managed by DG AGRI (Agriculture), the complainant pointed out that Decision 2004/391 [25] requires the Commission to " *seek the views of socio-economic sectors and consumers* " on certain issues. However, no care was taken to ensure that the views of the different stakeholders were sought in a balanced way. In the given context, the complainant stated that Decision 2004/391 puts workers, consumer and environmentalists in a single category, while farmers and business are put in three categories. In effect, one specific organisation represented 48% of all the seats in advisory groups managed by DG AGRI.

-As regards expert groups managed by DG MARKT, the complainant considered it surprising that the Commission referred to an " *alleged over-representation of industry interest* " while, for instance, Commissioner Barnier had recognised a need to rebalance expert groups. Moreover, the Commission relied on the technical nature of the issues involved so as to account for the fact that non-industry stakeholders and consumers are less numerous in those expert groups. According to the complainant, this was a flawed approach which contradicted the Commission's recognition of a need for a rebalancing of expert groups. The complainant went on to comment in detail on the composition of a number of expert groups so as to demonstrate that they are unbalanced in favour of big business and stated that the Commission did not comment on the composition of two groups.

-In relation to expert groups dealing with financial regulation, the complainant concluded that they remained highly unbalanced, despite the Commission's recognition of the need for an adequate and balanced representation. The complainant pointed out that 11 out of 20 groups dealing with financial regulation have non-governmental members, seven of which are dominated by corporate representatives. The complainant acknowledged that the percentage of corporate advisors to DG MARKT in this area had decreased from 84% (in 2009) to 73%. However, change at this pace could not make any difference to one-sided policies. The complainant also observed that, according to officials of DG MARKT, their approach to rebalancing was to replace members who left a group with individuals from different interest categories which, however, admittedly led to too slow progress. The complainant emphasised the need for more rapid progress and asserted that a simple method to be considered by the Commission would be to dissolve corporate-dominated groups.

-The complainant submitted that as regards non-financial expert groups as well, many groups were problematic. It pointed out that membership of some of those groups was not disclosed.

-Moving on to expert groups managed by DG Research, the complainant observed that, according to the Commission, some of the groups the complainant considered to be dominated



by big business are monitoring ongoing projects covered by grant agreements which meant that their minutes and exact proceedings should not appear on a publicly accessible website. The complainant took the view that the Commission should still be able to provide more information without endangering ongoing projects. The complainant also submitted that monitoring should not be left to corporate experts as there was a risk of conflicts of interest.

-As regards the composition of the “Coal and Steel Technical Groups”, the complainant criticised the Commission's approach as flawed in failing to recognise that experts coming from the corporate sector are also interest representatives. These experts should thus be excluded from technical groups or, at least, only hold a minority of membership, leaving monitoring tasks to actors without a direct interest in research funding.

-The complainant also noted that the Commission disagreed with the figures the complainant mentioned in relation to the “FP7 Advisory Group on Transport”. While the complainant did not exclude that it made a mistake, the differences between it and the Commission demonstrated problems with the reliability of the Register. Corporate representatives should not be admitted as experts in a personal capacity.

-As regards three groups managed by DF INFSO and commented on by the Commission, the complainant challenged the Commission's assumption that individuals working for companies do not act as pure interest representatives in their capacity as group members. The complainant maintained that at the very least they also acted as interest representatives. The complainant added that the fact that the Commission qualified certain research laboratories as belonging to “academia” disregarded the fact that many laboratories are part of corporations or are themselves companies with vested interests.

-As regards the “Intelligent Manufacturing Systems Industrial Advisory Group”, the Commission explicitly stated that only business was represented in that group. According to the complainant, there are no other advisory structures giving other parties a say. As regards the “eSafety” group, the complainant highlighted that the Commission did not challenge the complainant's view that it was dominated by corporate industry but explained that that group's Steering Group decides on appointments. According to the complainant, the Commission should control the composition of groups and not delegate this power to third parties.

-As regards expert groups managed by DG SANCO, the complainant pointed out that, in the Commission's opinion, that DG stated that “ *when selecting members of ... groups the equilibrium between industry and civil society organisations is a central one* ”. According to the complainant, this principle should be followed by the Commission as a whole.

-Commenting on specific groups managed by DG SANCO, the complainant noted that, as regards the “Advisory Group on the Food Chain and Animal and Plant Health”, the Commission, in 2010, launched a public call “ *to fill the empty slots, especially to include unrepresented sectors* ”. While the process had not yet been completed at the start of 2011, the complainant emphasised that this was the right approach in addressing the unbalanced composition of a group. At the same time, the complainant criticised that the group at issue remained



unbalanced.

-According to the complainant, the “Animal health and animal welfare group” was no longer available in the Register, but there was an imbalance in view of the fact that “big companies within their sector collectively” dominate. As regards the “European Alcohol and Health Forum”, big business makes up the majority of its composition. Finally, the “Working Group on clinical investigation and evaluation” only includes governments and business groups, but should also include civil society organisations.

-As regards expert groups managed by DG MOVE, the complainant noted with satisfaction that the “ *corporate-dominated group* ” “Télépéages” had been dissolved. The “expert group on inland waterway transport” appeared to be balanced now. However, the “expert groups on intermodality and logistics” remained unbalanced, with business associations representing the majority of non-governmental actors.

-In relation to the groups managed by DG TAXUD (Taxation and Customs Union), the complainant considered the “Trade Contact Group” to be an example of a wrong approach, given that “ *any international association that requests to be a member and proves its involvement in customs related activities is accepted* ”. This essentially made it impossible for the Commission to avoid over-representation of industry representation. A sub-group of that group was not available on the Register.

-Concerning the “Excise Contact Group”, the complainant disagreed with the Commission's view that it would be difficult to see which stakeholders other than trade associations would be interested in participating in such group. In the given context, the complainant posited that that group should be of interest to consumers, given that the final price of products could be influenced by excise. The “expert group on Taxation and Savings” has only members from the financial industry, whereas consumer and other groups should also be represented. Finally, the “Joint Transfer Pricing Forum” was “ *another scandalous case of industry dominance on a sensitive issue* ”.

-The complainant again highlighted the imbalance characterising the composition of certain groups managed by DG ENV (Environment). In relation to the “information exchange forum on best available techniques under legislation on industrial emission” it took the view that the fact that the IPCC Directive [26] only refers to the involvement of industry is a typical example of a flawed approach.

-In relation to groups managed by DG ENER (Energy), the complainant countered the Commission's view that, according to Article 11 of the Statutes for the Euratom Supply Agency [27] , the members of the “Comité Consultatif de l'Agence d'Approvisionnement de l'Euratom” are chosen by the Member States from among public organisations, industrialists and users. The complainant pointed out that Article 11 does not foresee that additional members should come from industry. In any event, the corporate representatives are not listed as government representatives in the Register, something that the Commission should clarify. In the given context, the complainant also put forward that the recently created “energy Roadmap 2050 ad



hoc Advisory Group” is not included in the Register.

-As for DG ECFIN, the complainant pointed out that the corporate sector is over-represented in the “Euro Cash User Group”. This had not been contradicted by the Commission, which only insisted that that group is not involved in the preparation of legislation but in information and exchange of views. According to the complainant, the Commission should not discriminate against specific groups when providing information and/or exchanging views.

-Speaking of the “ *Information des partenaires sociaux sur les activités des Fonds structurels* ” group managed by DG REGIO, the complainant noted that the Commission referred to an apparent over-representation of industry which is due to the particularities of different employer organisations being less concentrated than employee organisations. According to the complainant, the solution to this issue was simple, i.e., the Commission should invite more union representatives to join.

-Finally, as regards DG ESTAT, the complainant pointed out the unbalanced composition of “FEBI-FEBS-BUSINESSEUROPE-EUROCHAMBRES-INS-EUROSTAT”. The Commission pointed out that this group is open to any federation which shows an interest in participating in its information meetings and has representatives from all sectors of economy. According to the complainant, this was clearly discriminatory, given that unions and consumers are also “ *actors in the economy* ” and should be invited.

125. The complainant submitted that the above cases “ *as well as numerous groups which the Commission has failed to respond on* ” show that the Commission failed effectively to ensure a balanced composition of many of its expert groups. The problems with the Commission's approach were also apparent from its Communication on Smart Regulation which rests on the idea that citizens and business are given equal relevance as interlocutors of the EU institutions. According to the complainant, the unbalanced composition of a large number of expert groups violates the Commission's Minimum Standards for Consultation Communication, the Guidelines for the Collection and Use of Expertise, the White Paper on European Governance, the European Code of Good Administrative Behaviour, and Article 9 TEU.

126. Specifically in relation to its claim, the complainant took the view that the practice of DG SANCO appeared to be best in arriving at a relatively low percentage of corporate-dominated expert groups. Accordingly, the complainant submitted that the principle formulated by DG SANCO according to which “ *when selecting the members of ... groups the equilibrium between industry and civil society organisations is a central one* ”, should be adopted by the Commission as a whole.

127. The complainant pointed out that the “Single Market Informal Dialogue Group” managed by DG MARKT is a good example of a balanced group. On the other hand, membership of groups in which more than half of the non-governmental members come from a single type of interest, and in particular from big business, should be reviewed so as to create a balance between special economic interests and the public interest. The Commission should dissolve expert groups dominated by vested interests, or alternatively increase the participation of civil



society or reduce corporate participation. The absence of a single interest holding an absolute majority in a given group should be an essential condition for DGs creating or maintaining expert groups.

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

Preliminary remarks

128. In its observations, the complainant noted that the Commission had only commented on the composition of certain of the expert groups mentioned in its complaint. Referring in particular to expert groups managed by DG ENTR, the complainant interpreted the fact that the Commission did not comment on all the groups as indicating an inability to justify their composition. The Ombudsman recalled that the Commission, in its opinion, stated that, for reasons of efficiency, it was not in a position to provide detailed information on each of the 111 expert groups referred to in the complainant's complaint. While there could be doubts about the Commission's position in terms of the administrative effort needed to provide relevant information, the Ombudsman considered that, in view of the Commission's explanations, the complainant's conclusion was not convincing.

129. In its observations, the complainant, when giving its views on the composition of expert groups, also reiterated certain of the issues covered by its other allegations. Thus, the complainant challenged the completeness and reliability of the Register in relation to certain expert groups and reiterated its view that experts affiliated with industry should not be appointed as members in their personal capacity. Given that these issues were addressed by the Ombudsman under the heading of the complainant's other allegations, there was no need to address them again when assessing the complainant's present allegation.

130. In its observations, the complainant also argued that the Commission should explain whether it has examined the risk of conflict of interest concerning the chair of the “energy Roadmap 2050 ad hoc Advisory Group”. Article 2(4) of the Statute of the European Ombudsman requires complaints to be preceded by appropriate administrative approaches to the institution concerned. It did not appear that the complainant has already approached the Commission in this regard and the Ombudsman was therefore not entitled to deal with this aspect. In any event, she noted that, given the focus of her present inquiry, it would not appear useful to include that issue in the inquiry. Still, she explained that the complainant remains free to submit a new complaint after having made appropriate administrative approaches to the Commission.

131. The complainant's complaint concerns a large number of expert groups, including certain groups whose composition is defined in Union legislation. The complainant, for instance, criticised that the IPCC Directive [28] only provides for the involvement of industry in expert groups in certain areas. The Ombudsman recalled that she is entrusted with inquiring into instances of maladministration in the activities of the Union institutions, bodies, offices and



agencies (Article 228 TFEU). However, she is not entitled to consider the merits of legislation adopted by the political institutions of the Union. The Ombudsman's assessment therefore could not include the composition of expert groups, as foreseen in Union legislation.

Assessment

132. As a starting point, the Ombudsman noted that, on the level of principle, the parties agree that the Commission is required to seek a balanced composition of expert groups. The Ombudsman furthermore reasoned that indeed, the idea that the institutions should receive pluralist input is firmly entrenched in the TEU as well as in the Commission's Communications containing rules on consultations with citizens and the White Paper on European Governance, which links the quality of EU policy to ensuring wide participation throughout the policy chain. What is in dispute between the parties is the extent and precise content of the Commission's duty.

133. The Ombudsman had already had the opportunity to state that improving the extent and intensity of EU citizens' participation in the work of the EU institutions, bodies, offices and agencies enhances the democratic nature of the EU. Participatory democracy, based on the principles of equality and transparency, improves citizens' trust in the EU and the EU administration. Increased trust in the EU and the EU administration is a key element in increasing the effectiveness of the EU and its administration [29] .

134. Article 11(1) TEU states that 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. The institutions are moreover under an obligation to maintain an open, transparent and regular dialogue with representative associations and civil society (Article 11(2) TEU). The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent (Article 11(3) TEU). Article 11(1) TEU therefore requires the institutions to determine by which appropriate means citizens and representative associations are to be given the opportunity to make known and publicly exchange their views. The same consideration had to be held to apply to Article 11(2) and (2) TEU.

135. The Ombudsman went on to argue that the precise manner, that is, the appropriate means, by which participatory democracy is made effective in any given circumstance will depend upon the specific nature of the Union action in question. It also involves determining when and how participation is appropriate in a particular process [30] . The EU institutions necessarily have a margin of discretion when deciding upon the precise manner in which participatory democracy is made effective. This is all the more so in areas which are technically complex. However, they should always ensure that they can justify objectively how they have exercised that margin of discretion [31] .

136. As regards specifically the collection of expertise which should be understood as one way of making effective the principle of participatory democracy enshrined in Article 11 TEU, the



Guidelines for the Collection and Use of Expertise state that the manner in which experts are involved " *should be determined by the urgency, complexity and sensitivity of the policy issue* " (guideline 3). By way of example, alongside expert groups, guideline 3 lists involving experts in-house as well as through consultancy and conferences. It should moreover be noted that, according to the 2010 Framework, the Commission may count on instruments and processes other than expert groups, such as studies, agencies, green papers and hearings, so as to ensure that it obtains the full range of views and expertise on a given matter.

137. It followed that, although undoubtedly of great importance, reliance on expert groups is but one facet of the dialogue between citizens and the EU institutions envisaged by Article 11 TEU. The Ombudsman therefore had no problem to accept that " *the degree of overall participation and representation of stakeholders should be assessed in light of all initiatives taken by the Commission.* " [32] As an upshot, the Ombudsman reasoned that assessing whether the dialogue foreseen by Article 11 TEU is balanced and sufficiently pluralistic cannot be likened to a simple exercise in arithmetic. Thus, the fact that an expert group in a given field does not contain representatives of a particular interest could be offset by involving these stakeholders through other means. Given that the choice of the expertise required as well as of the means to obtain it is covered by the Commission's discretion, it appeared to be in principle sufficient for the purposes of Article 11 TEU that citizens and representative associations holding the requisite expertise are given an opportunity to be consulted through means allowing them adequately to make their views known. In the given context, the Ombudsman noted that the Guidelines for the Collection and Use of Expertise single out plurality as one of the determinants of the quality of advice and recognise that a diversity of viewpoints " *may result from differences in scientific approach, different types of expertise, different institutional affiliations, or contrasting opinions over the fundamental assumptions underlying the issue.* " [33]

138. It is true that Rule 9(2) of the 2010 Framework stipulates additional specific requirements for groups in which individual experts are appointed to represent an interest or where organisations are appointed as members of groups. In these instances, the Commission shall, " *as far as possible* ", ensure a balanced representation of relevant stakeholders, " *taking into account the specific tasks of the expert group and the type of expertise required* ." Moreover, the Commission's Communication also states that, "[w]hen defining the composition of expert groups, the Commission and its departments shall aim at ensuring a balanced representation of relevant areas of expertise and areas of interest, as well as a balanced representation of gender and geographical origin, while taking into account the specific tasks of every particular expert group and the type of expertise required".

139. In the Ombudsman's view, it was noteworthy that the requirement of a " *balanced representation* " goes hand in hand with the additional provisos that the Commission is to take into account, other than considerations of gender and geographical origin, a group's specific tasks, the type of expertise required, as well as relevant areas of expertise and interest. Yet again, this strongly suggested that assessing whether a group benefits from a balanced representation is not simply an exercise in arithmetic, it being understood that expert groups are not entities deciding on a policy matter by casting a vote. Instead, in light of the different aspects which the Commission is to take into account when constituting an expert group, an assessment



whether the composition of a group translates into a balanced representation could only be performed on a case-by-case basis. Such analysis also needs to take into account actual differences in the way different interest groups are organised. In the given context, the Ombudsman noted the Commission's reference, in connection with the "*Informations des partenaires sociaux sur les activités des Fonds structurels*" group to different levels of concentration of employer's organisations and trade unions. The Commission's view that, as a consequence of this factual difference, the number of members coming from each side differs, did not appear to be unreasonable at first sight. For the same reasons, the complainant's view that what it referred to as representatives of the public interest should collectively always outnumber industry representatives was not convincing.

140. This being said, the Ombudsman had difficulties accepting the complainant's position that relying on a criterion of excellence would necessarily result in an over-representation of industry. First, this argument rests on the assumption that excellence could be only found in that sector to the exclusion of, for instance, academia which the Ombudsman found difficult to accept. Second, it disregards the fact that, according to the Guidelines for the Collection and Use of Expertise, excellence is but one criterion which needs to be balanced with plurality, without taking any automatic prevalence over the latter criterion. In any event, while the balancing exercise falls within the Commission's discretion, the Commission must be able objectively to justify its decisions on the appointment of experts (see paragraph 135 above).

141. In view of the above, the Ombudsman considered that, at first sight, the Commission has appropriate rules in place so as to ensure a balanced representation of different interests in its expert groups and welcomed its commitment to observing these rules.

142. At the same time, the Ombudsman realised that, as regards the actual implementation of these rules, the complainant referred to a number of examples of expert groups in which it appeared difficult to argue that their composition corresponds to any notion of a balanced representation. This, for instance, appeared to be the case of the "Euro Cash User Group", an active group operating on a permanent basis. According to the information provided in the Register, that group comprises 27 members, of which 24 members are listed under the category of "corporate". As for the "Intermodality and logistics" group, to take another example, there could at least be doubts as to its balanced composition, with apparently a large majority of members coming from the transport industry. On the other hand, there are groups which, in terms of their composition, appeared to be fully in line with the Commission's rules set out above. For instance, out of the 37 members of the "Cars 2020 expert group", 21 members are institutional members representing the Commission, the Committee of the Regions and the European Economic and Social Committee, as well as the Member States. As for the remaining 16 seats, there appeared to be an exact parity of (i) members representing industry (such as associations of automobile and motorcycle manufacturers) and (ii) members from trade unions, NGOs and consumer associations, with each of these two categories holding eight seats.

143. In its opinion, the Commission repeatedly referred to a need to further enhance balance in certain areas. It moreover stated that in additional areas efforts were already underway. In its observations, the complainant recognised that progress had been made in relation to certain



groups, while maintaining its allegation and referring to specific instances of unbalanced expert groups. The Ombudsman considered that the examples reviewed above are sufficient to suggest that there continued to be problems as regards the implementation of the Commission's rules on the composition of expert groups. While the Ombudsman understood that the Commission is aware of the problem of the composition of expert groups as well as of the need for further progress in relation to certain groups so as to ensure a more balanced composition, she nevertheless included this aspect in the friendly solution proposal below.

F. The proposal for a friendly solution

144. On the basis 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:

(1) Clarifying the scope of application of (i) the Communication "Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission" and (ii) the Communication "On the Collection and Use of Expertise by the Commission: Principles and Guidelines";

(2) Defining criteria for categorising different entities represented in groups (industry, academia etc.) so as to ensure the correctness and appropriateness of relevant information on the Register;

(3) Completing its Register of expert groups by ensuring that it includes all experts and all expert groups and provides for a sufficient level of detail as regards minutes and/or reports of meetings;

(4) Reviewing the user-friendliness and accessibility of information presented in the Register;

(5) Taking further measures towards ensuring, in line with the relevant Communications, a balanced representation of relevant areas of expertise and interest in expert groups. ”

G. As regards the first limb of the Ombudsman's proposal ('clarifying the scope of application')

The arguments presented to the Ombudsman after the friendly solution proposal

145. The Commission reiterated that, as emerges from their contents, both communications relate in the first place to the policy-making cycle. The Commission specified that the Guidelines on the Collection and Use of Expertise state that they “ *are relevant to the involvement of*



expertise at all stages in the policy-making cycle ". In the same vein, the Minimum Standards for Consultation Communication defines "consultations" as "*those processes through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission* ".

146. The Commission added that it may apply the principles and guidelines contained in both communications also in relation to expert groups dealing with issues which are not part of the policy-making cycle. When considering different consultation options in this regard, the Commission is guided by the principle of proportionality. This translates into assessing the Commission's consultation needs on a case-by-case basis and designing relevant arrangements in proportion to the task in hand, taking account of, for instance, the sector concerned and the issue in question. The Commission concluded by stating that the "*spirit of those provisions* " is also relevant for expert groups operating outside the policy-making cycle, notwithstanding the fact that the proportionality considerations set out therein formally apply only to the policy-making cycle.

147. In its observations on the Commission's reply to the friendly solution proposal, the complainant did not specifically comment on this issue.

The Ombudsman's assessment after the friendly solution proposal

148. The Ombudsman considers that the Commission has provided clarifications as regards the applicability of the aforesaid communications. Thus, it explained that (i) they are both geared to the policy-making cycle; (ii) their spirit may nevertheless apply to expert groups outside the policy-making cycle; and (iii) the extent of their application to groups outside the policy-making cycle is subject to the principle of proportionality. She therefore concludes that the Commission has accepted the first limb of the friendly solution proposal.

H. As regards the second limb of the Ombudsman's proposal ('Defining criteria for categorising different entities')

The arguments presented to the Ombudsman after the friendly solution proposal

149. The Commission submitted that its rules on expert groups establish four different types of group members: (i) individuals appointed in a personal capacity, (ii) individuals representing a common interest, (iii) organisations in the broad sense of the word and (iv) Member States' authorities. The Commission stated that, with a view to providing further clarifications to the general public on the differences between types of members, it modified the explanatory text available on the Register in July 2013.



150. In the spring of 2012, the Commission instructed its services to conduct a review of groups which include members appointed in a personal capacity, with a view to ensuring that the rules are fully respected. As a result of this review, it emerged that a number of experts were displayed on the Register as experts appointed in a personal capacity, while in reality they were representatives of stakeholders or of Member States. This was corrected during the summer of 2012.

151. The Commission also referred to an annex to its reply. The annex is entitled “ *State of play concerning the conditions set by the European Parliament to lift the reserve in the 2012 budget with regard to groups of experts (EUR 2 Million)* ” and dates from 6 September 2012. One of the conditions set by Parliament to lift the reserve was to ban lobbyists and corporate executives sitting in expert groups in a ‘personal capacity’. Among the follow-up actions taken by the Commission in this regard, the annex records that the Commission embarked on a review of experts groups under its responsibility with a view to ensuring that rules on conflict of interests are respected. Moreover, the review revealed that some or all experts of 31 groups are actually representatives of stakeholders and, in some cases, of Member States, but not experts appointed in a personal capacity. According to the annex, making the necessary changes will require amending the Commission decisions which set up the groups concerned.

152. The Commission went on to state that since the summer of 2012 its services have been taking additional measures in relation to other problematic cases, also in response to requests from several stakeholders, including the complainant. In this regard, the Commission referred to two further annexes reporting on the state of play in February and June 2013 respectively, and another annex containing replies by individual Commission services to comments from stakeholders on specific expert groups. The Commission added that requests from stakeholders were conveyed to it either directly or through a group of ‘likeminded’ Members of Parliament (MEPs) with whom it established, in 2012, an informal dialogue on expert groups.

153. The Commission concluded that, in light of the above, it does not consider it necessary to define further specific criteria for categorising different entities represented in groups. Rather, the categorisation of members should be done on a case-by-case basis, in compliance with existing rules and in light of the information held by relevant Commission departments as regards individual members. This approach should also apply to categorising organisations (corporate, NGOs, universities, etc.). The Commission underscored its commitment to ensuring that this approach is applied consistently across DGs and that the names of the members of the expert groups are displayed on the Register appropriately. It also stated that, in doing so, it will continue to liaise with stakeholders and the Parliament.

154. With its reply, the Commission also enclosed an annex entitled “ *Groups where membership was clarified in the Register* ”. The annex records clarifications having been made in relation to a total of 31 expert groups.

155. In its observations, the complainant stated that the majority of all organisations not labelled as representing corporate interests have been categorized as ‘associations’. However, according to the complainant, this imprecise designation covering NGOs, trade unions, farmers



and cooperatives gives no indication what interest the organization in question may represent. The complainant also submitted that 'international organisation' is another vague and all-encompassing label allowing for covering corporate interests.

The Ombudsman's assessment after the friendly solution proposal

156. The Ombudsman takes note of the Commission's view that it is not necessary to define further specific criteria for categorising different entities represented in expert groups. She also acknowledges that the Commission underscored that the current rules already provide for a distinction between different entities. In this regard, she further notes that the Commission's Register now provides for a link entitled 'Expert Groups explained', which, among other things, explains the types of group members and, in so doing, points to the four categories of entities to which the Commission referred in its reply to the friendly solution proposal (see paragraph 149 above).

157. As for the category of 'organisations', the Register provides the following explanations: "*Organisations in the broad sense of the word including companies, associations, NGOs, trade unions, universities, research institutes, EU bodies and international organisations. These organisations nominate individuals as their permanent representatives in the group or appoint representatives on an ad hoc basis depending on the meeting agenda.*" It is therefore clearly correct to argue that members categorised as organisations may in fact be very different in nature and may thus be, for instance, corporate members, NGOs or research institutes. However, this does not give rise to concern as long as the name of the organisation is listed and thus allows having a precise idea of the area of activity of a particular group member.

158. However, the Ombudsman also recalls that the Register does not simply refer to institutional members of expert groups as 'organisations' but instead, under the heading of 'category', explains whether an organisation is an NGO, and association or a trade union, for instance. As stated in the friendly solution proposal, it can be a complex task to label a particular organisation as an association or an NGO, for instance.

159. While the Ombudsman continues to believe that it could be useful for the Commission to consider giving guidance to its staff as regards its precise understanding of notions such as 'NGO' or 'association', she also considers that even if such guidance were in place, as correctly stated by the Commission, a decision as to the proper categorisation of a particular member ultimately needs to be taken on a case-by-case basis.

160. It should furthermore be noted that, with both the organisation's name and the category to which it belongs being public through the Register, any such decision is subjected to public scrutiny. Given that the Commission has repeatedly made it clear that it is ready to correct any mistakes which there may be and, in the course of the present inquiry, has in fact made a number of such corrections, the Ombudsman considers there to be no need to pursue this issue any further at present.



I. As regards the third limb of the Ombudsman's proposal ('Completing its Register')

The arguments presented to the Ombudsman after the friendly solution proposal

161. The Commission reiterated its belief that, with the new Register set up in December 2010, transparency in the area of expert groups was effectively enhanced in many ways. The Commission conceded that, given the huge amount of information to be treated, the transition from the old to the new version of the Register took longer than foreseen and was only completed at the beginning of 2012. At the same time, it pointed out that the Register is a 'living' instrument, which includes information on hundreds of groups placed under the responsibility of dozens of different Commission departments. The Register undergoes changes on a daily basis, in light of information encoded by relevant departments and validated by the Secretariat-General according to the applicable rules. The Commission submitted that, in this context, shortcomings or inaccuracies are sometimes not entirely avoidable.

162. The Commission regretted that information on the 'Advisory Group on the Energy 2050 Roadmap' was not published on the Register. Taking into account that work was performed in a few months, from May to September 2011, during which only three meetings took place, this group was considered as a series of ad hoc meetings rather than a proper Commission expert group. However, full transparency was ensured via a dedicated website [34] .

163. The Commission insisted, however, that possible inconsistencies detected on a particular day should not suggest that the Register as such is incomplete or fails to provide adequate transparency. It also put forward that a number of comments submitted by the complainant are not justified or do not take into account more recent developments or specific circumstances in which certain groups have operated. The Commission then commented on a number of groups for which, according to the complainant, information was not published on the Register.

164. According to the Commission's archives, information on the 'Clearing and Settlement Advisory and Monitoring Expert Group 2 (CESAME 2)' was published on the Register in October 2008 and was thus visible at the time the complaint was lodged. This group was closed in December 2010, which explains why it was no longer listed on the Register when the complainant submitted its observations to the Ombudsman in June 2011. In this regard, the Commission explained that the Register was initially conceived as a database hosting active groups only. As of April 2013, this group is listed in the Register as a closed group which is the result of improvements in the search engine introduced by the Commission which allow searching not only for active groups, but also for groups on hold and for closed groups.

165. The Commission insisted that information on 'CARS 21' was already published on the Register at the time the complainant submitted its observations to the Ombudsman in June 2011, as publication of this information took place in early May 2011. This group was put on



hold in February 2013 and then closed in June 2013. The Commission asserted that the same is true of the 'Legal Certainty Group' , which was closed in December 2010 and thus not visible on the Register until April 2013. Lastly, the 'Competitiveness in Biotechnology Advisory Group' was listed under this name on the Register in June 2006. In 2008, the name of this group changed to 'Ad hoc Advisory Group for Bio-based Products' , which explains why it could not be found on the Register under its original name when the complainant submitted observations to the Ombudsman in June 2011.

167. The Commission stated that it remains committed to ensuring that the Register provides for full transparency on expert groups, and underlined its readiness to correct inconsistencies and factual errors that are brought to its attention. It recalled that it has repeatedly taken action in this respect, also in response to specific comments and requests put forward by a number of stakeholders, including by the complainant.

168. The Commission also put forward that, in March 2012, as requested by Parliament and in line with the Ombudsman's proposal, it committed itself to further increasing transparency concerning the work performed by expert groups, by publishing all relevant documents (such as agendas, minutes and participants' submissions) either in the Register or *via* a link from the Register to a dedicated website. The Commission submitted that this commitment, which concerns documents produced as of 1 April 2012, responds positively to the proposal from the Ombudsman and is in line with the Guidelines on the Collection and Use of Expertise. The Commission confirmed its commitment and emphasised that it strives to make sure that all relevant documents are actually published.

169. The Commission expressed its belief that, although the level of detail as regards reports of meetings depends on a number of factors and thus cannot be fully standardised at Commission level, the publication of different relevant documents should allow the general public to be adequately informed as regards the work of expert groups. It added that exceptions to publication are possible where disclosure of a document would undermine the protection of a public or private interest as defined in Article 4 of Regulation 1049/2001 [35] . The Commission finally agreed with the Ombudsman that conflicts of interests can be more easily detected if adequate information on the members of expert groups and on the activities performed by groups is available on the Register.

170. In its observations, the complainant argued that the creation of the Register and its gradual improvement has allowed the public to gain a better understanding of expert groups. The complainant also noted that pressure from civil society and from MEPs had prompted the Commission to upload all relevant documents to the Register, including agendas, minutes and contributions during meetings. At the same time, the complainant took the view that, as regards new expert groups, it was not yet possible to assess whether the Commission had fulfilled its promises. While recognising “ *definite improvements* ”, the complainant also pointed to problems in ascertaining for how long groups have been active.

The Ombudsman's assessment after the friendly solution proposal



171. The Ombudsman takes note of the Commission's submission that the Register was completed in early 2012 and applauds the Commission's decision to provide transparency also in relation to closed groups.

172. As underlined in the friendly solution proposal, it is essential that the information made available in the Register is complete and reliable. This means that the Register should provide information also in relation to those groups which make available information on their work on individual websites. It moreover means that any changes occurring in the course of the existence and operation of an expert group will be recorded on the Register in a timely manner.

173. In the given context, the Ombudsman notes with satisfaction the Commission's renewed commitments to keep the Register complete and up to date and to make available, on the Register, the substance of the work of expert groups, including agendas, minutes and participants' submissions.

174. Also considering that the complainant, in its observations, recognised that improvements had been made, the Ombudsman concludes that the Commission has accepted the third limb of the friendly solution proposal. The Ombudsman takes note of the complainant's concern regarding the unavailability of information concerning the date when groups commenced their activities and invites the Commission to take it into account. Moreover, as regards groups which during their existence have changed their name, the Ombudsman considers it useful to record both the old and the new name in the Register in order to allow for the possibility of retrieving groups in the Register when searching for either of these names.

175. The Ombudsman finally notes that, in its observations, the complainant referred to groups established after 20 September 2012 and, in relation to those groups, put forward that it was not yet possible to assess whether the Commission had complied with its commitments. While the Ombudsman considers that this fact does not affect the above conclusion, she reserves the right to include this aspect in her own-initiative inquiry concerning expert groups that is envisaged for 2014 (see paragraph 194 below).

J. As regards the fourth limb of the Ombudsman's proposal ('Reviewing the user-friendliness and accessibility')

The arguments presented to the Ombudsman after the friendly solution proposal

176. In its reply to the Ombudsman's friendly solution proposal, the Commission argued that, over the past few years, it had significantly improved both the user-friendliness and the accessibility of the information included in the Register. Specifically, the Commission pointed out that:



- (i) the accuracy and readability of data encoded have constantly been improved;
- (ii) in August 2012, a 'News Section' was introduced on the Register providing for, *inter alia*, a single access point to information about new calls for applications related to groups listed or to be listed in the Register facilitating, among other things, easy access by the general public and by experts interested in becoming members of groups;
- (iii) the search engine has been improved and, as of April 2013, allows to search for closed groups, whereas information on closed groups was previously removed from the Register; and
- (iv) since April 2013, all data is downloadable from the Register in a machine-readable format.

177. In its observations, the complainant did not specifically revert to this issue.

The Ombudsman's assessment after the friendly solution proposal

178. The Ombudsman considers that the Commission has made important progress in this area on a number of levels and attaches special importance to the fact that the Register now consistently allows to retrieve information also in relation to closed groups. She therefore concludes that the Commission has accepted the fourth limb of her friendly solution proposal.

K. As regards the fifth limb of the Ombudsman's proposal ('ensuring ... a balanced representation

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The arguments presented to the Ombudsman after the friendly solution proposal

179. In its reply to the Ombudsman's friendly solution proposal, the Commission noted with satisfaction the Ombudsman's view that it has appropriate rules in place so as to ensure a balanced representation of different interests in its expert groups. The Commission moreover considered it noteworthy that the Ombudsman is in agreement with it that the degree of overall participation and representation of stakeholders should be assessed in light of all initiatives taken by the Commission and that ensuring a balanced and pluralistic dialogue cannot be likened to an exercise in arithmetic.

180. Concerning its implementation of existing rules on the composition of expert groups, the Commission stated that it attached great importance to the Ombudsman's invitation to address problematic cases. The Commission posited that, in fact, over the past few years, it had already taken significant measures to remedy possible imbalances. In particular, in the spring of 2012, Commission departments carried out an overall review of expert groups which are not



exclusively composed of public authorities. The Commission's review resulted in the composition of a number of groups mentioned by the complainant being modified or being in the process of being modified. The Commission added that these actions were taken also in response to requests from stakeholders, whether sent directly to the Commission or via the aforementioned group of 'like-minded' MEPs.

181. For more detailed information, the Commission referred to the annexes mentioned above (see paragraph 151 and 152 above).

182. The Commission went on to explain that, in several cases, despite calls for applications and direct invitations from Commission departments, it was not possible to appoint a sufficient number of new members. In some cases, it was not possible to appoint any new members at all. This was often due to the limited number of applications received and to the fact that many of the applications were not suitable in relation to the work to be performed. The Commission added that it repeatedly informed stakeholders and MEPs that its departments are ready to examine additional applications from interested NGOs or civil society, in order to find a better balance for those groups where the balance is still not optimal.

183. For further details, the Commission referred to the annexes mentioned above (see paragraph 151 and 152 above).

184. In its observations, the complainant acknowledged that, as a consequence of public campaigning and pressure from some MEPs, certain DGs have taken action which has resulted in some corporate-dominated expert groups being abolished or subjected to new rounds of calls for applications. The complainant also took note of the Commission's acceptance that corporate interests should not be allowed to dominate expert groups.

185. However, the complainant went on to argue that, as regards groups created between 20 September 2012 and 20 September 2013 (henceforth referred to as 'new expert groups'), the Commission's informal dialogue with MEPs had proved unsuccessful with the Commission appearing " *to have broken its promise* ". More specifically, the complainant put forward that corporate interests continue to dominate new expert groups hosted by key Commission DGs, such as DG Taxation and Customs Union, DG Enterprise and the Commission's Secretariat-General. According to the complainant, across the Commission, " *there are more corporate representatives sitting in new Expert Groups (52%) than all other stakeholders combined, with SMEs and Trade Unions accounting for only 3% of seats each.* " The complainant provided detailed figures in support of its view and, for instance, in relation to the 'CARS 2020' group, argued that it " *still has 10 out of 16 spots filled by corporate interests* ".

The Ombudsman's assessment after the friendly solution proposal

186. In the friendly solution proposal, the Ombudsman asked the Commission to take further measures towards ensuring a balanced representation of relevant areas of expertise and interest in expert groups.



187. It emerges from the information submitted by the Commission, and in particular from the annexes to its reply containing detailed information as regards action taken, that the Commission has made important progress towards a rebalancing of expert groups. Thus, for instance, the three reports concerning the state of play in relation to the Commission's review of existing groups show that the Commission has committed itself to rebalancing the membership of more than fifty groups. Concretely, the Commission's state of play report of February 2013 records that thirteen groups within DG ENTR have been rebalanced on the basis of a single call for expressions of interest. Moreover, the same report records that a number of groups in relation to which an imbalanced composition was alleged has been closed. Concerning specifically the "CARS 2020" group, to which the complainant referred in its observations and which succeeded "CARS21", the same report shows that the Commission invited two further non-industry members for the first meeting of the new group in February 2013 with a view to improving the balance of interests. The Commission added that *" a public hearing is planned for this group in early summer, so all interested parties will have the opportunity to express their views and opinions on the topics the group deals with. "*

188. To be sure, the picture is not perfect and the Commission itself pointed to problems in its quest to achieve a balanced representation. In particular, the Commission referred to the number of groups concerned, the complexity of modification processes and institutional constraints as a consequence of which some time was required to fully implement its firm political commitment to ensure a balanced composition of these groups. The Commission also stated that in spite of calls for applications and direct invitations from Commission departments, it was not possible to appoint a sufficient number of new members in certain groups, for instance in a number of groups hosted by DG ENTR. Nevertheless, the Ombudsman notes that DG ENTR, in the state of play report of June 2013, confirmed its readiness *" to examine additional applications from interested NGOs or civil society, in order to find a better balance for those groups where the final result is still not optimal. "*

189. In its observations, the complainant acknowledged that progress had been made in relation to existing groups. Other than that, the complainant referred to problems with new expert groups, namely, those which have been set up between 20 September 2012 and 20 September 2013.

190. As regards these new expert groups, the Ombudsman recalls that the present complaint was submitted in 2010 and referred to a large number of expert groups in existence at that time. Consequently, the Ombudsman's friendly solution proposal and the Commission's reply thereto concerned the groups which the complainant had included in its complaint.

191. While the Ombudsman could in principle extend her inquiry so as to look into the new expert groups which the complainant referred to in its observations and which have been created in the course of the inquiry, she does not consider it appropriate to do so, bearing in mind the interest of procedural economy.

192. In view of the clear improvements made by the Commission in relation to the expert



groups referred to in the complainant's complaint, the Ombudsman therefore concludes that the Commission has accepted the fifth limb of the friendly solution proposal.

193. This finding notwithstanding, the information provided in the complainant's observations gives rise to concerns as regards new expert groups. The Ombudsman therefore considers it imperative to keep a watchful eye on the situation.

194. More specifically, the Ombudsman envisages opening an own-initiative inquiry into the issue of the composition of Commission expert groups in 2014. This will not only allow her to take a close look at any further developments in the Commission's practice, in particular in relation to groups set up from September 2012 onwards. Launching such an own-initiative inquiry will also give all stakeholders taking an interest in the issue an opportunity to make their views known, thus allowing the Ombudsman to take these views into account.

L. Conclusions

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

The Commission has accepted the first and the third to fifth limbs of the Ombudsman's friendly solution proposal.

As regards the second limb, there is presently no need for further action on the Ombudsman's part.

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

Emily O'Reilly

Done in Strasbourg on 19 December 2013

[1] On the Collection and Use of Expertise by the Commission: Principles and Guidelines, "Improving the knowledge base for better policies", COM(2002)713 final, Brussels, 11.12.2002.

[2] Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002)704, Brussels, 11.12.2002.

[3] DG stands for Directorate-General.

[4] "- *The Competitiveness in Biotechnology Advisory Group (CBAG)*



- *The High-Level Group on Competitiveness of the European Chemicals Industry*
- *The European Security Research Advisory Board*
- *The High Level Group on Competitiveness, Energy and the Environment*
- *Surveillance de la moyenne des émissions spécifiques de CO₂ dues aux véhicules particuliers neufs*
- *Coal combustion, clean and efficient coal technologies, CO₂ capture "*.

[5] C(2010) 7649 final of 10 November 2010.

[6] The Code is available on the Ombudsman's website:
<http://www.ombudsman.europa.eu/resources/code.faces#/page/1>

[7] C(2005) 2817 of 27 July 2005.

[8] See footnote 5 above.

[9] SEC(2010) 1360 final.

[10] See footnote 3 above.

[11] See footnote 2 above.

[12] Green Paper, The European Transparency Initiative, COM(2006) 194 final, 3 May 2006.

[13] A White Paper on European Governance, COM(2001) 428 final, Brussels, 25 July 2001.

[14] See footnote 11 above.

[15] See: http://ec.europa.eu/energy/energy2020/roadmap/doc/sec_2011_1569_1.pdf

[16] p. 19. Emphasis added.

[17] See footnote 8 above.

[18] Emphasis added.

[19] See footnote 10 above.

[20] COM(2010) 543 final.

[21] Emphasis added.



[22] Emphasis added.

[23] Emphasis added.

[24] See Footnote 8 above.

[25] Commission Decision 2004/391/EC of 23 April 2004 on the advisory groups dealing with matters covered by the common agricultural policy, OJ 2004 L 120, p. 20.

[26] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version), OJ 2008 L 24, p. 8.

[27] Council Decision 2008/114/EC of 12 February 2008 establishing Statutes for the Euratom Supply Agency, OJ 2008 L 41, p. 15.

[28] See Footnote 25 above.

[29] Decision closing the Ombudsman's inquiry into complaint 2558/2009(TN)DK, paragraph 8 and 9.

[30] Decision closing the Ombudsman's inquiry into complaint 2558/2009(TN)DK, paragraph 12; Decision closing the Ombudsman's inquiry into complaint 2097/2011/RA, paragraph 32; Draft Recommendation in complaint 1151/2008/ANA, paragraph 70.

[31] Decision closing the Ombudsman's inquiry into complaint 2558/2009(TN)DK, paragraph 13; Decision closing the Ombudsman's inquiry into complaint 2097/2011/RA, paragraph 33; Draft Recommendation in complaint 1151/2008/ANA, paragraph 70.

[32] C(2010) 7649 final of 10 November 2010, Section II.2.

[33] p. 9.

[34] http://ec.europa.eu/energy/energy2020/roadmap/index_en.htm [Link].

[35] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.