



Recommendation of the European Ombudsman in her strategic inquiry OI/6/2014/NF concerning the composition of Commission expert groups

Recommendation

Case OI/6/2014/NF - **Opened on** 12/05/2014 - **Recommendation on** 16/11/2017 -

Decision on 14/11/2017 - **Institution concerned** European Commission (Recommendation agreed by the institution) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

Abstract

The EU has the responsibility and challenge of proposing and agreeing policy and legislation which affects over 500 million Europeans.

*The development of policy, including policy that gives rise to proposals for new EU legislation, is one of the main tasks of the European Commission. While the Commission relies heavily on its internal expertise and experience in this work, it also relies on a wide range of external sources, such as specialised European agencies, studies carried out for it by experts and academics, feedback on its 'green papers', public consultations and hearings, and **over 800 expert groups** .*

If the Commission's policy development process is to be of high quality, comprehensive in terms of dealing with all relevant issues and legitimate insofar as it takes due account of the diverse interests and views that make up European society, the Commission must ensure that its consultation of external sources is, overall, well-balanced.

This strategic inquiry concerns one aspect of the Commission's reliance on external sources, namely its system of expert groups [2] . The Commission establishes expert groups to seek external advice and expertise from individuals, organisations and/or Member State authorities as it prepares legislative proposals and policy initiatives, drafts delegated acts, and implements existing legislation, programmes and policies. It is for the Commission to decide how to take into account the expertise and advice provided by its expert groups when carrying out its duties in the general interest of the Union. Unlike comitology committees [3] , which assist the Commission in exercising implementing powers that the EU legislature has given it, expert groups are not provided for in the Treaties.

The Commission has responded positively to a range of suggestions made by the Ombudsman in the course of this inquiry, thus building on the significant progress it has made over the past years in its management of its expert groups. It has agreed to make the selection procedure for expert group members more transparent, to overhaul its conflict of interest policy and to require relevant



organisations and self-employed individuals to be registered in the Transparency Register in order to be appointed to expert groups. On many aspects, little now separates the Ombudsman's position from that of the Commission.

As regards transparency, however, there is still significant room for improvement. It must be possible for the public to review the composition of expert groups, to follow the detail of their deliberations and to know, ultimately, whose viewpoints influenced the Commission. The Ombudsman thus makes a recommendation to the Commission to facilitate better public scrutiny of the work of expert groups.

The background to the own-initiative inquiry

1. The development of policy, including policy that gives rise to proposals for new EU legislation, is one of the main tasks of the European Commission. While the Commission relies heavily on its internal expertise and experience in developing policy, it also relies on a wide range of external sources, such as formal EU advisory bodies, the various specialised European agencies, specific studies carried out by experts and academics for the Commission, the feedback on 'green papers' published by the Commission, public consultations and hearings, and the work of over 800 expert groups.

2. Ultimately, the Commission must measure its policy outputs against the following end points: is the policy that has been developed technically sound, is it comprehensive in terms of dealing with all the relevant issues, and, importantly, is it legitimate in a democratic society insofar as it is generally accepted that it promotes the public interest, by taking due account of the diverse interests and views that make up EU society? If the Commission's policy development process is to meet the test of legitimacy, it is important that the Commission ensures that its use of external sources is, overall, well-balanced.

3. As of April 2015, there were 830 expert groups, comprising 25 000 members, advising the Commission on policy development issues. They are composed of all, or some, of the following types of members: (i) individuals appointed in their personal capacity, that is, as independent experts; (ii) individuals appointed to represent an interest shared by stakeholders in a particular policy area; (iii) organisations in the broad sense of the word, including companies, associations, non-governmental organisations, trade unions, universities, research institutions, Union agencies, Union bodies and international organisations; and (iv) Member States' authorities. [4] Expert groups play a crucial and privileged role in the development of EU policy [5] by producing influential opinions, recommendations and reports in relation to (i) the preparation of legislative proposals and policy initiatives in the context of the Commission's right of initiative, (ii) the preparation of delegated acts, and (iii) the implementation of existing Union legislation, programmes and policies. Thus, while the legitimacy of policy development must of course take into account whether the Commission has consulted with an appropriately diverse range of external sources, it is important that the contributions of expert groups are, **in and of themselves**, well-balanced, and are thus viewed as legitimate. To gain this legitimacy, the Commission should ensure that the public knows who the experts are, how they were chosen, and what work they deliver for the Commission.

4. This inquiry concerns one important aspect of the Commission's reliance on external



sources, namely its system of expert groups. Unlike comitology committees [6], which assist the Commission in exercising its implementing powers conferred on it by the EU legislature, expert groups are not provided for in the Treaties.

5. The Ombudsman recognises that the Commission has, over the past years, made **significant progress** in trying to promote more balanced interest representation in its expert groups and increasing their transparency. The Ombudsman also notes that it is clearly preferable for the Commission to have in place a relatively formalised system of expert groups, bound by 'horizontal' rules which apply across all its activities, rather than allowing the proliferation of *ad hoc* task forces and working groups that escape such rules. The Commission has signalled that it will, in the near future, reform its rules governing expert groups. Against this background, and in following up on her commitment to monitor the matter [7], in May 2014 the Ombudsman opened the present own-initiative inquiry [8]. The own-initiative inquiry

6. This inquiry seeks to identify and address systemic deficiencies which impact negatively on the balanced composition of expert groups and the transparency of their work. The scope of the inquiry covers Commission expert groups having, among their members, interest representatives (organisations or individual experts representing an interest) and/or independent experts appointed in their personal capacity. [9]

7. As a first step, the Ombudsman carried out a public consultation. Many stakeholders who submitted contributions were concerned that major deficiencies persist, notably as regards a disproportionate representation of corporate interests in expert groups.

8. The Ombudsman took into account the feedback received during the public consultation. She also looked carefully at the information available in relation to the expert groups register. [10]

9. The Ombudsman then asked the Commission to submit an opinion on a set of detailed suggestions for improvement, which built also on the Commission's existing efforts to improve the system. The Ombudsman received, and published, the Commission's opinion on her suggestions for improvement.

Recent developments relevant to the own-initiative inquiry

10. In her decision [11] closing own-initiative inquiry OI/7/2014/NF concerning a specific type of expert group (civil dialogue groups) brought together by the Commission's DG Agriculture, the Ombudsman put forward a number of suggestions that she will refer to, where relevant, in the present recommendation.

11. In September 2015, while this inquiry was still under way, the European Parliament's Directorate General for Internal Policies presented a study [12] it had commissioned entitled '**Composition of the Commission's expert groups and the status of the register of expert groups**'. The study found that the Commission had achieved only limited progress towards full compliance with Parliament's conditions, imposed on the Commission in the course of the budget procedure, and that serious data inconsistencies exist in the register. [13] The study concludes that were the Commission to reform its expert groups' system according to its May 2015 response to the Ombudsman's suggestions for improvement, it



would not achieve full compliance with Parliament's conditions for expert groups.

12. Parliament has also launched an own-initiative procedure looking into the 'control of the Register and composition of the Commission's expert groups' [14] as well as an own-initiative procedure concerning 'transparency, accountability and integrity in the EU institutions' [15].

The Ombudsman's assessment leading to a recommendation

The Ombudsman's detailed assessment

13. When opening the inquiry, the Ombudsman asked the Commission to respond to her assessment that it is currently not possible adequately and consistently to review the composition of specific expert groups because of deficiencies in the framework governing such groups, as well as in the expert groups register.

14. To address this shortcoming, the Ombudsman set out suggestions for improvement under five thematic headings and invited the Commission to submit an opinion on them. While all of the Ombudsman's suggestions are relevant for all expert groups covered by the inquiry, not all types of expert group members are concerned by each and every suggestion. The assessment below begins with those groups of suggestions that the Commission has, globally, accepted. The issue of balance is now dealt with under heading D. below (rather than heading A. in the Ombudsman's request for an opinion).

A. Calls for applications:

Public call for applications for every expert group

15. The Ombudsman suggested that, for every expert group, the Commission should publish a call for applications. This, to some extent, would help address the low number of eligible civil society organisations that seek to take part in expert groups. In her view, information about the creation of future expert groups should be widely and effectively disseminated, so that qualified individuals and organisations are made aware of them and encouraged to apply.

16. The **Commission has agreed to this suggestion**. Concretely, the Commission has announced that "*in principle the future selection of expert group members shall be carried out via public calls for application, except when members of expert groups are public authorities, such as Member States' and third countries' authorities, international organisations, Union bodies and EU agencies - as well as representative bodies established by Union legislation for advice in specific areas*".

17. The Ombudsman welcomes this commitment. She agrees that it may be justified not to use public calls for applications when the members sought are public authorities (certain expert groups are composed exclusively of public authorities [16], while certain others have mixed membership from the private sector and public authorities). As regards expert groups



with mixed membership, the Commission should, however, use public calls for applications for the selection of members who are not public authorities. The Ombudsman understands that this is what the Commission intends to do (see suggestion (a) below).

A single portal for calls for applications to expert groups

18. The Ombudsman **welcomes the Commission's commitment to enhance the visibility of calls for applications** by creating, on the expert groups register, a section exclusively dedicated to them. This section will include an e-mail alert system that will allow interested stakeholders to be informed of new calls for applications as well as of changes introduced in specific expert groups.

A standard minimum deadline for all calls for applications

19. The Ombudsman had suggested six weeks as a deadline for applications. However, she finds acceptable the Commission's decision to use a standard minimum deadline of four weeks for all calls for applications or to use continuously open calls. As to the Commission's mention of a possibility to deviate from the standard four week period in duly justified cases, the Ombudsman notes that there would need to be particularly compelling grounds to deviate from this relatively short period of four weeks.

B. Link to the Transparency Register:

Mandatory registration in the Transparency Register for appointment to expert groups

20. The Ombudsman suggested that the Commission require registration in the European Commission-European Parliament Transparency Register [17] for appointment to expert groups for those expert group members who are eligible for registration in the Transparency Register. The **Commission agreed to implement this suggestion** as regards (i) organisations falling within the scope of the Transparency Register and (ii) self-employed individuals representing a common interest shared by stakeholders. This is a major step forward towards enhancing transparency in expert groups.

Categorisation of members in Commission expert groups

21. Inconsistent categorisation of organisations appointed to expert groups is one of the main obstacles preventing stakeholders from being in a position to understand fully the composition of an expert group. Only if members can be easily identified and are categorised according to well-defined categories of stakeholders will the review of a group's composition be practically possible in the future. Given that registration in the Transparency Register is already a prerequisite for membership of certain expert groups, and given also that it is expected that a mandatory Transparency Register will be introduced in the near future, the Ombudsman suggested to the Commission that it use the Transparency Register's categorisation to categorise members in expert groups.



22. The Commission has informed the Ombudsman that it will, in order to avoid inconsistent categorisation of organisations, improve data availability and reliability on the expert groups register, in particular by better defining different types of organisations. The Commission has also stated that it may use, in the expert groups register, a number of categories currently used in the Transparency Register. The Ombudsman **welcomes the Commission's willingness to improve the categorisation of organisations** appointed to expert groups and urges it to follow-up on its stated intention to link to the Transparency Register, by systemically using the Transparency Register's categorisation for expert group member organisations falling within its scope, that is to say companies, associations, non-governmental organisations, trade unions, universities and research institutes (see suggestion (b) below).

Systemic checks of and link to a member's profile in the Transparency Register

23. The Ombudsman is satisfied that the Joint Transparency Register Secretariat, of which the Commission is a member, systematically screens all incoming new registrations in the Transparency Register in order to ensure registration in the correct section. Given, however, that the Ombudsman established, in own-initiative inquiry OI/7/2014/NF, that DG Agriculture found it necessary to re-classify organisations between sections II and III of the Transparency Register for the purpose of selecting members for its civil dialogue groups [18], the Ombudsman suggests further improving and intensifying the Joint Transparency Register Secretariat's systematic checks (see suggestion (c) below).

24. Finally, the Ombudsman **welcomes the Commission's acceptance of her suggestion regarding the creation of a link between expert group members and their profiles in the Transparency Register**. In the expert groups register itself, in the case of organisations falling within the scope of the Transparency Register, as well as of self-employed individuals appointed as representatives of a common interest shared by stakeholders, who are members of expert groups, there will now be a link to their profile in the Transparency Register.

C. Conflict of interest policy for individual experts appointed in their personal capacity:

25. Many expert groups will contain individual experts. Individual experts are appointed either (i) in their personal capacity, and thus have to be independent, or (ii) to represent a common interest shared by stakeholders in a particular policy area. While individual experts appointed in their personal capacity must not find themselves in a conflict of interest situation, individual experts appointed to represent a common interest shared by stakeholders have vested interests, because, for example, they are representatives of, or work closely with, certain companies or certain business sectors. The fact that individual experts may be appointed to represent an interest shared by stakeholders is not problematic, as such, provided their participation is transparent and sufficient information is available on the type of interest they represent. [19]



26. If an individual expert appointed in his/her personal capacity is incorrectly adjudged to be independent even though the expert has, or is seen to have, very close links to a vested interest, this will be problematic as regards the overall balance of an expert group. Finally, the internal work of an expert group may be negatively affected if views that are understood by expert group colleagues to be independent views, because they are put forward by individuals appointed in their personal capacity, are in fact the views of a person linked to an interested party.

27. In order to guarantee that individuals, who are appointed as members of expert groups in their personal capacity, do not find themselves in a conflict of interest situation, which would make them unsuited for that role, the Ombudsman suggested that the Commission revise its conflict of interest policy in this area and made concrete suggestions for improvement. The Ombudsman reiterates that these suggestions covered only experts appointed in their personal capacity. They did not, therefore, cover individual experts appointed to represent a common interest shared by stakeholders.

28. The Ombudsman **welcomes the Commission's decision to adopt new provisions on managing conflicts of interest of individual experts** appointed in their personal capacity. Importantly, the Commission has announced that the new provisions will specify the meaning of a 'conflict of interest' and provide for a standardised conflict of interest assessment to be performed by all Commission services. In addition, the Commission stated that it will prepare a standard declaration of interests form to be filled in by individual experts appointed in their personal capacity and which will be made publicly available on the expert groups register.

29. The Ombudsman understands that the new policy will be part of the new rules governing expert groups, which will be published in due course.

Annual update of declarations of interests

30. The Ombudsman repeats her suggestion that the Commission should require that declarations of interests be updated on a yearly basis. She does not share the Commission's view that relying on individual experts voluntarily to signal any change in interests is as effective as expressly requiring them to update their declarations once a year. In the Ombudsman's view, it is crucial that the Commission takes full responsibility for detecting conflicts of interest in order to take the necessary corrective measures. She therefore suggests that the Commission require that individual experts appointed in their personal capacity update their declarations of interests on a yearly basis (see suggestion (d) below). Requiring a yearly update will also raise awareness among individual experts appointed in their personal capacity of conflicts of interest issues and contribute to promoting integrity. The Ombudsman understands that the assessment of declarations of interests will be spread across the Commission's services. She is not, therefore, convinced that a yearly update would result in a disproportionate administrative burden.

D. The nature of the horizontal rules and achieving a



balanced composition:

31. The positive feedback from the Commission on the points outlined above should not only result in significant improvements in the composition of Commission expert groups but also facilitate the review of groups' composition. The Ombudsman also made a number of further suggestions, notably as regards the nature of the horizontal rules and achieving a balanced composition, not all of which have been accepted or adequately addressed in the Commission's opinion. These are addressed below.

32. The framework currently governing the Commission's expert groups consists of a set of horizontal rules provided for in an Annex to a Commission Communication. [20] The horizontal rules give the Commission a wide margin of discretion in deciding which requirements to apply in selecting members and operating a specific expert group. The Commission's view is that there would be no added value in laying down the framework for expert groups in a legally binding Commission decision.

33. The Ombudsman agrees that content is more important than form and legal force. What is of real importance is that the Commission introduce requirements as to the balance and transparency of its expert groups which are, at least, *binding on the Commission itself*. The Ombudsman therefore leaves it to the Commission's discretion to decide whether to enshrine such robust requirements for the composition and the functioning of its expert groups in a decision or a Communication.

The concept of balance

34. Beyond her suggestion in relation to the nature of the rules, the Ombudsman made a range of suggestions aimed at achieving a balanced composition of expert groups. These suggestions all rely on, or link to, the concept of 'balance'. In her decision closing own-initiative inquiry OI/7/2014/NF into the composition of DG AGRI's civil dialogue groups, the Ombudsman called on the Commission to define its concept of balance both in the case of DG AGRI's composition of civil dialogue groups and in the case of its expert groups more generally.

35. The Ombudsman points out that the Commission has not yet formally set out its concept of 'balance' in its rules governing expert groups. Given that it is impossible to assess whether expert groups are balanced without knowing precisely what the Commission understands by 'balance', she has decided to raise this issue in the present inquiry. It is against this background that the Ombudsman **suggests that the Commission formally set out its concept of 'balance'** in the horizontal rules governing expert groups (see suggestion (e) below).

36. Taken literally, 'balance' refers to a condition of equilibrium or parity. This is not, however, what the Ombudsman understands the Commission has intended for the composition of its expert groups and the representation of different interests in them.

37. The Ombudsman's view is that 'balance' needs to be understood in the context of the



specific **mandate of each expert group** . A Commission expert group could thus be found to be balanced if its composition accurately reflects **the different types of expertise sought by the Commission** which, taken together, enable the group **to fully carry out the mandate conferred on it** . [21] The expertise sought by the Commission in establishing an expert group should, by extension, be complemented by further external sources, as outlined in paragraph 2 above, to ensure the legitimacy of the entire policy development process of the Commission. The Ombudsman agrees that balance does not refer to a situation of arithmetic equilibrium or parity of the different interests represented in an expert group. In deciding whether a particular expert group's composition is balanced by reference to its tasks, the following criteria should be taken into account: firstly, the objective/tasks of the group and the technical expertise required; secondly, which stakeholders would most likely be affected by the matter, how those groups of stakeholders are organised, and, possibly, what the ratio should be between the economic and non-economic interests [22] represented [23] .

38. The Commission appears to be reluctant to accept the principle that balance is mandatory and should be achieved in the composition of each individual expert group. To some extent, this may reflect a fear that 'balance' will be understood in a narrow way which fails to reflect the scale and diversity of expert groups. In the light of her explanation (above) of how she understands 'balance' in the context of expert groups, the Ombudsman believes that the Commission need not be concerned that she is proposing an approach to 'balance' which is inflexible and unrealistic. In fact, it would seem that the Commission's views on the matter overlap considerably with those of the Ombudsman, as set out above. Nevertheless, it would be helpful were the Commission to explain explicitly what precisely it understands by balance, in order to avoid misunderstandings on the part of stakeholders and the public.

Balance requirement

39. In her request for an opinion, the Ombudsman suggested that the Commission require, in the horizontal rules governing its expert groups, that expert groups be composed in a balanced manner. [24]

40. The Ombudsman reiterates that balance is not the result of an arithmetic exercise, but rather the result of efforts to ensure that the members of an expert group, together, possess the necessary technical expertise, and breadth of perspectives, to deliver on the mandate of the group in question. In light of this mandate-oriented concept of balance, the unbalanced composition of an expert group automatically impacts on the group's capacity to carry out its tasks.

41. The Ombudsman is aware that there is a great variety of expert groups and that no set of rigid criteria could adequately address the situation in all types of expert groups. However, by tying the concept of balance to each group's mandate, the Ombudsman is confident that the Commission can deal adequately with this question.

42. The Ombudsman **acknowledges that, in setting up any particular expert group, the Commission may encounter specific difficulties as regards the participation of civil**



society organisations . The Ombudsman believes that the range of measures announced by the Commission, and outlined in section A. above, should go some way towards mitigating the difficulties the Commission has faced in the past in attracting the full range of relevant applications for membership of its expert groups. Nevertheless, the Ombudsman recognises that the Commission at times faces a serious difficulty in this regard. The capacity in terms of resources of economic interest groups, to make themselves available to serve on expert groups, is almost always going to be greater than that of civil society organisations. It is the very nature of civil society organisations that they are neither commercial nor party political entities; they engage around issues of their own choosing and in their own fashion within their limited resources. The Ombudsman **suggests that the Commission should continue to explore with the legislature and civil society, options which will facilitate and encourage the greatest possible engagement by civil society organisations in the operations of expert groups.**

43. If, notwithstanding the Commission's efforts, it continues to face difficulties in achieving a balanced composition, the Ombudsman believes that the right approach is to allow for an exception from the balance requirement in duly justified cases. Such an exception should be applied restrictively and the Commission should provide detailed explanations as to why it needs to depart from a balanced composition. Before departing from the requirement of balance, the Commission should therefore consider amending the mandate of a group or reducing its size (see suggestion (f) below). [25] Given that the Commission appears to share the view that 'balance' essentially depends on the mandate of an expert group, the Commission should agree that having to depart from a balanced composition might in some instances render pointless the setting-up of an expert group. Where it proves impossible in any individual case to attain a balanced representation, and the group is nevertheless set up and asked to provide advice to the Commission, the Ombudsman trusts that the Commission will take account of this deficit in assessing whatever expert opinion is provided by that group. Any such deficit should also be highlighted in the reports and opinions of the particular expert group.

Individual definition of balance

44. The Ombudsman suggested that the Commission put in place an individual definition of balance for each expert group in order to make the review of a group's composition practically possible. [26] What the Ombudsman means by 'individual definition of balance' is a prior description by the Commission of what balance means **with regard to the mandate of a particular group** , taking into account the different factors mentioned above. [27] The individual definition of balance should set out, in a transparent manner, the rationale behind a particular group's composition. In effect, it amounts to a detailed **prior description of the types of representation being sought for each proposed expert group** (see suggestion (g) below).

45. The Commission expressed concern that setting out an individual definition of balance for each expert group would give rise to conceptual problems, be administratively burdensome and not effective in practice. At the same time, it effectively accepted this idea by declaring itself ready to outline, in public calls for application, the relevant expertise and



interests' representation sought by the Commission in relation to the work to be performed. The Ombudsman encourages the Commission to be as specific as possible in outlining how many members it is seeking in the case of each particular area of expertise and interest representation. At the same time, she recognises that it may be difficult to anticipate who will express an interest in being a member of a particular expert group, particularly now that calls for applications will be the norm. **Therefore, she agrees that a certain degree of flexibility is required.** The Ombudsman thus notes that the Commission could, and indeed should, review its description of the relevant expertise and interests' representation required for a particular expert group, if circumstances so require.

General criteria for the categorisation of economic and non-economic interests

46. The Ombudsman suggested that the Commission define general criteria for the categorisation of economic and non-economic interests in expert groups and set out this definition in the horizontal rules governing its expert groups. The Commission has not responded substantively to this suggestion.

47. The Ombudsman maintains her view that a categorisation of economic and non-economic interests is necessary to allow for a review of the ratio of these interests represented in those expert groups whose balanced composition, because of their mandate, depends, among other factors, on such categorisation. The Ombudsman recognises that the categorisation of economic and non-economic interests will not be a criterion of balance for all expert groups.

48. As previously stated, the establishment of such criteria would, in the Ombudsman's view, primarily entail the Commission expressly stating which groups of stakeholders it deems to represent economic interests and which groups of stakeholders it deems to represent non-economic interests. [28]

49. The Ombudsman notes that the Commission's DG Agriculture, for the purpose of selecting members of its civil dialogue groups, stipulated a criterion for distinguishing between organisations representing economic and non-economic interests based on the sections and sub-sections of the Transparency Register. [29] The Ombudsman believes that, in the same way and in relation to the full range of expert groups, it would be sensible for the Commission to rely on the sections and sub-sections of the Transparency Register in undertaking this exercise (see suggestion (h) below).

Inconsistent treatment of organisations

50. In her request to the Commission for an opinion, the Ombudsman noted that the Commission had treated certain organisations inconsistently and asked whether it has also inconsistently treated other organisations appointed to expert groups. Specifically, the Ombudsman pointed out that the Commission inconsistently appointed the organisations European Farmers ('COPA') and European Agri-cooperatives ('COGECA') as one single member in some expert groups ('COPA-COGECA') and as two distinct members in other expert groups ('COPA' and 'COGECA').



51. The Ombudsman understands that the intention to link, in the future, expert group membership to the Transparency Register will resolve this matter as regards 'COPA' and 'COGECA'. As regards the treatment of other organisations in expert groups, the Ombudsman welcomes the Commission's pledge to review the classification of expert group members in the expert groups register in order to avoid inconsistent treatment of organisations.

E. Transparency, including improvement of data availability on the register:

Preliminary remark

52. In requesting an opinion from the Commission, the Ombudsman stated that the aim of her inquiry is to promote transparency and, in a constructive manner, support efforts towards achieving a more balanced composition of Commission expert groups. The Ombudsman **acknowledged that the goal of achieving a balanced composition is a complex and challenging task**. She thus welcomes the progress made by the Commission on all of the aspects outlined in sections A.-D. above.

53. The Ombudsman believes, however, that there is significant room for improvement in the transparency of the functioning of expert groups. The key role played by these groups in contributing to the development of EU legislation and policy makes clear that every effort should be made so that the public can scrutinise and trust their work. It must be possible for the public to be aware of the composition of expert groups, to follow the detail of their deliberations and to know, ultimately, whose viewpoints influenced the Commission.

54. The Commission expressed the concern that full transparency as regards the work of expert groups might impact negatively on their smooth functioning. The Ombudsman notes however that the Treaty on European Union requires that decisions are taken as openly as possible and as closely as possible to the citizen. [30] The Commission utilises its expert groups as part of its internal decision-making process. The Commission's rules governing expert groups must therefore comply with the Treaty provisions.

55. The Ombudsman considers that the Commission's existing transparency arrangements in relation to expert groups are not sufficient. She considers that the present arrangements do not adequately facilitate public scrutiny of the advice and expertise that the Commission obtains at the expert group stage. To this extent, the Ombudsman believes that these arrangements do not comply with the relevant Treaty provisions. The Ombudsman finds that this constitutes maladministration. The Commission should take measures to enhance the transparency of its expert groups' output. The Ombudsman makes a corresponding recommendation, consisting of two main elements, as explained in paragraphs 56-62 below. She also makes a number of suggestions for improvement in this area.

Transparency of deliberations and minutes of meetings



56. At present, the general rule is that the deliberations of expert groups are confidential. While minutes of the meetings of expert groups are published, these minutes are inadequate both in terms of content and of timeliness. The Ombudsman understands that a certain degree of flexibility may be necessary to address exceptional circumstances in which an expert group's deliberations may justifiably be treated as confidential. Nonetheless, the Ombudsman **believes that openness and transparency in recording expert groups' and their subgroups' meetings, including deliberations, should be the rule, not the exception** . This is particularly the case when the work of the expert group feeds into the Commission's deliberation resulting in the adoption of proposals for legislation.

57. The Ombudsman therefore recommends that the Commission reverse the arrangements provided for in its standard rules of procedure for expert groups. Specifically, Article 14 of the standard rules of procedure should provide that a group's deliberations shall, in principle, be transparent unless voted otherwise by the particular group and with the consent of the Commission. At a minimum, ensuring that expert group deliberations are transparent will require, in each case, prior publication of the agenda and of the background documents followed by timely publication of adequate minutes of the particular expert group meeting. The Commission might also consider whether some expert group deliberations might be fully open to the public, for example, by way of web streaming. Following this approach, a decision to hold meetings in closed session would need to be specifically justified in the minutes (see recommendation below). [31] [32]

58. As regards minutes of meetings, the Ombudsman asked the Commission to seek to ensure that the minutes of the meetings and deliberations of expert groups, and of their subgroups, are as meaningful as possible. The Ombudsman notes that it is good practice to take proportionate and adequate minutes of meetings that relate to the issues set out in the mandate of the expert group and, prior to making them public, to circulate draft minutes to members for the purpose of checking their accuracy. [33] **Minutes are not verbatim accounts of what was said and debated at a meeting , but rather outline the main points made and any conclusions drawn on the substantive issue under discussion . The persons making points and the persons taking a position on conclusions should normally be identified.**

59. The Ombudsman maintains this view regarding the minutes of the meetings and deliberations of expert groups. The Ombudsman believes that the Commission should be guided by two main principles when determining the content of the minutes of the meetings and deliberations of its expert groups. First, published minutes should, as a minimum standard, be **as detailed as necessary to enable the public to effectively understand the process in the course of which a group's opinion was developed** . Second, it appears sensible to take into consideration the provisions of Regulation 1049/2001 [34] and the case-law of the Court of Justice of the EU ('CJEU') on public access to documents held by the EU institutions, including the applicable exceptions to public access, when deciding on the actual content of such published minutes. In this regard, it would seem sensible to anticipate the type of content which, were public access to the document sought under Regulation 1049/2001, would be excepted from public disclosure. Clearly, in so far as such minutes are



directed at the members of the expert group, it may be appropriate that they sometimes contain material which is necessary for them to see but which may not be appropriate to disclose to the public generally. However, **while recognising that minutes of expert group meetings may sometimes have to be redacted prior to general publication**, the Ombudsman cautions that, in the spirit of transparency recognised in Regulation 1049/2001, **any redactions should be no more than is strictly necessary to protect whatever legitimate interests are at stake**. It follows that the Commission should include in its published minutes of meetings all other necessary information which does not fall under any of the applicable exceptions set out in Regulation 1049/2001.

60. The Ombudsman notes that the Treaty requires that decisions are taken as openly as possible and as closely as possible to the citizen. [35] In the context of this requirement, the Ombudsman cautions against any reliance by the Commission on a general presumption that public disclosure of the identities of expert group members, or of the opinions they express at meetings, would undermine their integrity by exposing them to undue external pressure. The CJEU has made it clear in its case-law on access to documents that the Commission's reliance on such a general presumption of the presence of a risk, unsupported by evidence is not sufficient to establish the existence of that risk. [36] The CJEU has also held, in the context of access to documents, that the Commission cannot justify refusing access to recordings of a meeting on the alleged basis of a necessity to protect experts from external pressure and in order to preserve a climate of confidence favourable to frank discussions and one in which experts will continue to feel free to express their opinions. [37]

61. In the light of these considerations, the Ombudsman recommends that the Commission amend Article 9 of the standard rules of procedure for expert groups. These amendments should provide that the minutes of a meeting must cover the discussion on each point on the agenda, including which members expressed what viewpoints on the essential issues of discussion, as well as the opinions delivered by the group as a whole (see recommendation below). [38] [39]

62. As proposed in Paragraph 59, the Commission remains free to assess whether, with regard to particular minutes to be published on the expert groups register, any of the exceptions to the right of public access to documents provided for in Regulation 1049/2001 are applicable, for example data protection concerns under Regulation 45/2001 [40] [41].

Publication of documents

63. The Ombudsman suggested that the Commission see to it that (i) documents on expert groups' and their subgroups' work are published systematically and in a timely manner, where possible in advance, and that (ii) publication takes place by uploading the documents on the expert groups register so that the public can search them through the register's search function.

64. While the Commission states its commitment to systematic and timely publication of documents, it adds that it intends to maintain "*the current arrangements in the way relevant documents are made publicly available*" and expresses the view that its current arrangements



provide for " *sufficient* " transparency on the activities of expert groups. In the Ombudsman's view, transparency will be guaranteed only if all final documents are uploaded, at the earliest date possible, on the expert groups register so that they are accessible in one place and can be searched by interested stakeholders through the register's search function.

65. In short, the Ombudsman **suggests that the Commission agree to systematic and timely publication of all documents on the expert groups register** , except those covered by one of the exceptions laid down in Regulation 1049/2001 and then only to the extent that a relevant exception applies (see suggestion (i) below).

Publication of information on the common interest shared by stakeholders represented by an individual expert

66. It is essential that the public will have clear and accurate information on the members of each expert group and, in particular, regarding the type of interest (if any) represented by an individual expert. In the particular case of individual experts, who are appointed to represent a common interest shared by stakeholders, it is essential that the public has clear and comprehensive information on the interests they represent or with which they have strong links. Any lack of clarity or accuracy in this regard will be damaging, not just to the integrity of the expert group system, but also to the integrity of the EU policy development system. The Ombudsman is however satisfied with the Commission's commitment to provide, on the expert groups register, more information on the interest represented by individual experts appointed to represent a common interest shared by stakeholders. The Ombudsman will keep a watchful eye on how the Commission, in practice, implements its commitment.

Re-design of the 'statistics' tab

67. The Ombudsman welcomes the Commission's announcement to look into making technical adjustments to the expert groups register, in particular by redefining the 'statistics' tab to show additional information and provide a better view on the composition of expert groups.

Concluding remarks

68. The Ombudsman had asked the Commission to consider (i) adopting a decision laying down the general framework for expert groups and (ii) reviewing the composition of expert groups which are active or on hold, once this decision has been adopted. The Ombudsman notes that, while the Commission may not ultimately adopt a 'decision' [42] , it is in the process of reviewing the general framework for expert groups. This is a welcome development. As regards (ii), the Commission informed the Ombudsman that it reviews the composition of its expert groups on a regular basis and it has agreed to address any perceived imbalance on a case-by-case basis. The Ombudsman therefore finds no need to pursue these points further.

69. Before proceeding to her recommendation, **t he Ombudsman takes note of, and very**



much welcomes, the Commission's commitment to :

- i. Enhance the visibility of calls for applications by creating, on the expert groups register, a section exclusively dedicated to them;
- ii. Use a standard minimum deadline of four weeks for all calls for applications, with the possibility to deviate from this period in duly justified cases or to use continuously open calls for applications;
- iii. Require registration in the Transparency Register for appointment to expert groups of organisations falling within the scope of the Transparency Register and self-employed individuals representing a common interest shared by stakeholders;
- iv. Link organisations falling within the scope of the Transparency Register and self-employed individuals appointed as representatives of a common interest shared by stakeholders, who are members in expert groups, to their profile in the Transparency Register;
- v. Adopt a new conflict of interest policy for individual experts appointed in their personal capacity;
- vi. Review the classification of expert group members in the register in order to avoid inconsistent treatment of organisations;
- vii. Provide, on the expert groups register, more information on the interest represented by individual experts appointed to represent a common interest shared by stakeholders.

70. As regards matters on which there is room for improvement , the Ombudsman suggests that the Commission:

- (a) Commit to always using public calls for applications for the selection of expert group members who are not public authorities;
- (b) Commit to using the Transparency Register's categorisation to categorise, in the expert groups register, expert group member organisations falling within the scope of the Transparency Register;
- (c) See to it that the Joint Transparency Register Secretariat further improves and intensifies its systematic checks of incoming new registrations as regards the correct section of registration;
- (d) Require that individual experts appointed in their personal capacity update their declarations of interests on a yearly basis;
- (e) Explain, in the horizontal rules governing expert groups, what the Commission means by 'balance';



(f) Require that expert groups have a balanced composition. The Commission may allow for an exception from the balance requirement in duly justified cases;

(g) Set out and explain, with primary reference to the mandate of a group to be established, which composition is sought and why, taking into account the following criteria: the objective/tasks of the group and the expertise required, which stakeholders would most likely be affected by the matter, how those groups of stakeholders are organised, and possibly what the ratio of the represented economic and noneconomic interests should be;

(h) Define general criteria for the categorisation of economic and non-economic interests in expert groups;

(i) Provide for the systematic and timely publication, on the expert groups register, of all documents on expert groups' and their subgroups' work (including minutes of meetings), except for those documents, or parts of documents, covered by one of the exceptions laid down in Regulation 1049/2001 to the extent that a relevant exception applies.

The recommendation

On the basis of the inquiry, the Ombudsman makes the following specific recommendations to the Commission:

The Commission should revise its standard rules of procedure as regards:

- **the content of published minutes and provide that, in the normal course , the published minutes will be as meaningful as possible and, in particular, set out the positions expressed by the members;**
- **the confidentiality of expert group deliberations, and provide that, as a general rule, these deliberations should be transparent and that only in exceptional cases, following a majority vote within the group and with the consent of the Commission, would an expert group's deliberations be confidential. Transparency in this context requires, as a minimum , prior publication of the agenda and of the background documents followed by timely publication of adequate minutes of the particular expert group meeting.**

The Commission will be informed of these recommendations. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 30 April 2016. The detailed opinion could consist of the acceptance of the recommendation and a description of how it has been implemented.

Strasbourg, 29/01/2016

Emily O'Reilly

European Ombudsman



[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] For an overview of the Commission's expert groups system, see the register of Commission expert groups and other similar entities:
<http://ec.europa.eu/transparency/regexpert/>

[3] For an overview of the Commission's comitology committees, see the Commission's comitology register: <http://ec.europa.eu/transparency/regcomitology/index.cfm?CLX=en>

[4] Commission Communication: Framework for Commission Expert Groups: Horizontal Rules and Public Register, 10.11.2010 (C(2010) 7649 final, SEC(2010) 1360), Annex Rule 8.

[5] Expert groups provide the Commission with advice and expertise in relation to (i) the preparation of legislative proposals and policy initiatives in the context of the Commission's right of initiative; (ii) the preparation of delegated acts; and (iii) the implementation of existing Union legislation, programmes and policies as well as coordination and cooperation with Member States and stakeholders in that regard. See Framework for Commission Expert Groups: Horizontal Rules and Public Register, 10.11.2010 (C(2010) 7649 final, SEC(2010) 1360), Annex Rules 2 and 3.

[6] Comitology committees, which are made up of representatives of the EU Member States, control how the Commission exercises its powers to adopt uniform rules for implementing EU legislation (see Article 291(2) to (4) Treaty on the Functioning of the European Union and Regulation 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011 L 55, p.13).

[7] At the end of 2013, the Ombudsman closed her inquiry into complaint 1682/2010/BEH, concerning the transparency and balanced composition of Commission expert groups. The Ombudsman's decision is available here:
<http://www.ombudsman.europa.eu/cases/decision.faces/en/52942/html.bookmark>

[8] All correspondence in this own-initiative inquiry is available here:
<http://www.ombudsman.europa.eu/en/cases/initiatives.faces>

[9] The inquiry does not look into Commission expert groups which are composed of Member State authorities only. The Commission may, however, consider applying the measures it adopts in response to this inquiry also to such groups.

[10] The register of Commission expert groups is accessible here:
<http://ec.europa.eu/transparency/regexpert/>

[11] The Ombudsman's decision closing OI/7/2014/NF is available here:
<http://www.ombudsman.europa.eu/en/cases/initiatives.faces>



[12] Available at:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/552301/IPOL_STU\(2015\)552301_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/552301/IPOL_STU(2015)552301_EN.pdf)

[13] In particular, the study suggests that the Commission should adopt a systemic approach to balance, including an individual definition of balance for each expert group, and promote full transparency of expert groups' meetings.

[14] The procedure file on own-initiative procedure 2015/2319(INI) is available here:

[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2015/2319\(INI\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2015/2319(INI))

[15] The procedure file on own-initiative procedure 2015/2041(INI) is available here:

<http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2015/2041%28INI%29&l=en#>

[16] 'Public authorities' refers to Member States' and third countries' authorities, international organisations, Union bodies and EU agencies as well as representative bodies established by Union legislation for advice in specific areas.

[17] The EU Transparency Register is a public register run jointly by the Commission and the European Parliament and that seeks to provide information on the organisations and interest representatives which interact with the institutions. While registration is currently not mandatory, all organisations and self-employed individuals engaged in activities carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions are, with some exceptions, expected to register in the Transparency Register. See Interinstitutional Agreement between the European Parliament and the European Commission on the transparency register, OJ 2014 L 277, p.11.

[18] See decision of the European Ombudsman closing her own-initiative inquiry OI/7/2014/NF concerning the composition of Civil Dialogue Groups brought together by the European Commission's DG Agriculture, paragraphs 42 and 43, available at:

<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/60873/html.bookmark>

[19] See paragraph 66 below on the publication of information on the common interest shared by stakeholders represented by an individual expert.

[20] Framework for Commission Expert Groups: Horizontal Rules and Public Register, 10.11.2010 (C(2010) 7649 final, SEC(2010) 1360).

[21] For the Ombudsman's mandate-oriented concept of balance, see also her decision closing own-initiative inquiry OI/7/2014/NF concerning the composition of Civil Dialogue Groups brought together by the European Commission's DG Agriculture, paragraphs 13 to 15.

[22] The Ombudsman understands that, generally, an expert group member is representative of economic interests if it itself undertakes profit-making activities or if it



represents, in the expert group, (interests of) entities which are profit-making. See also paragraph 48 below and its footnote 28.

[23] Whether it is sensible to look at the ratio of economic and non-economic interests represented in an expert group as a factor of determining balance will depend on the expert group's mandate.

[24] The horizontal rules currently provide that where individual experts are appointed to represent an interest or where organisations are appointed as members of expert groups, "*the Commission services shall, as far as possible, ensure a balanced representation of relevant stakeholders*". See Rule 9(2) of the horizontal rules governing expert groups.

[25] Advisory groups in the UK and the US, which are comparable to Commission expert groups, are subject to a balance requirement which, in both cases, appears to be essentially mandate-oriented. The UK Code of Practice for Scientific Advisory Committees in its Chapter 2, Balance of expertise, point 20, provides that the balance of a scientific advisory committee is determined with reference to "*the core skills, expertise and experience required to help deliver the business of the committee*". The UK Code of Practice for Scientific Advisory Committees is available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278498/11-1382-code-o

Similarly, the US Federal Advisory Committee Act requires the membership of an advisory committee to be balanced "*in terms of the points of view represented and the functions to be performed by the advisory committee*". The US Federal Advisory Committee Act is available at: <http://www.gsa.gov/portal/content/100916>

[26] In at least one Member State, the United Kingdom, and in the US, the setting out of a type of individual definition of balance is a standard exercise in the composition of advisory groups. The Implementing Regulations to the US Federal Advisory Committee Act require the establishment of a 'Membership Balance Plan' for discretionary federal advisory committees and strongly encourage the setting out of such a plan for non-discretionary federal advisory committees. **The Membership Balance Plan is a stand-alone document that describes how it is intended to achieve balance in terms of the points of view represented and the functions to be performed by a federal advisory committee**. The plan is submitted when a federal advisory committee is established and it is updated whenever a committee is renewed or re-established or when a committee's charter is amended. For background information on the Membership Balance Plan, see US General Services Administration (GSA) Committee Management Secretariat, Federal Advisory Committee Membership Balance Plan, January 2011, available at:

https://www.whitehouse.gov/sites/default/files/microsites/ostp/b_flak_balance_plan.pdf

Similarly, the UK Code of Practice for Scientific Advisory Committees provides that, for each committee, a '**membership template**' **setting out the core skills, expertise and experience required to help deliver the business of the committee** is to be drawn up. **The purpose of the membership template is to ensure a balance of expertise**. It is to be reviewed regularly and may be amended if the range of expertise required in a particular



committee changes over time. See UK Code of Practice for Scientific Advisory Committees Chapter 2, Balance of expertise, points 20 to 22.

[27] See paragraph 37 above.

[28] A categorisation of economic and non-economic interests would naturally only concern organisations in the narrow sense, that is, companies, associations, non-governmental organisations, trade unions, universities and research institutes, and individual experts appointed to represent a common interest shared by stakeholders.

[29] According to the criterion used in DG Agriculture's "*Internal Guidelines for Selection Panels for the selection of member organisations and the allocation of expert seats in civil dialogue groups*" all organisations registered in section II (covering "In-house lobbyists and trade/business/professional associations") of the Transparency Register were deemed to represent economic interests, while organisations registered in any of the other five sections of the Transparency Register were deemed to represent non-economic interests.

[30] Articles 1(2) and 10(3) Treaty on European Union.

[31] The Commission may want to consider, in this context, the fact that the US Federal Advisory Committee Act provides, as a general rule, that "*[e]ach advisory committee meeting shall be open to the public*". See Federal Advisory Committee Act §10(a)(1).

[32] It is relevant, in this regard, that the CJEU has held, in the context of public access to documents, that the fact that an institution promised to respect the confidentiality of discussions between its staff and experts cannot justify protection of the opinions expressed to an extent that goes beyond the exceptions provided for in Regulation 1049/2001. See judgment of the Court of First Instance of 18 December 2008, *Muñiz v Commission*, T-144/05, ECLI:EU:T:2008:596, para. 92; judgment in *Borax Europe* T-121/05, cited above, ECLI:EU:T:2009:64, para. 34; and judgment in *Borax Europe* T-166/05, cited above, ECLI:EU:T:2009:65, para. 41.

[33] See judgment of the Court of First Instance of 25 April 2007 in Case *WWF European Policy Programme v Council*, T-264/04, ECLI:EU:T:2007:114, para. 61: "*It would be contrary to the requirement of transparency which underlies Regulation No 1049/2001 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities*".

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

[35] Articles 1(2) and 10(3) Treaty on European Union.

[36] Judgment of the Court of First Instance of 11 March 2009, *Borax Europe v Commission*,



T-166/05, ECLI:EU:T:2009:65, para. 51. The Court of First Instance continued to hold, in the same paragraph, that " *[t]he same reasoning [that disclosure would undermine experts' integrity by exposing them to undue external pressure], were it to be accepted, could be applied to all the meetings organised by the Commission for the purpose of obtaining the opinion of experts prior to the adoption of decisions of any nature having effects on the activities of economic operators in the sector concerned by those decisions, whatever that sector might be* ". See also judgment of the Court of First Instance of 11 March 2009, *Borax Europe v Commission* , T-121/05, ECLI:EU:T:2009:64, para. 44.

[37] See judgment in *Borax Europe* T-121/05, cited above, ECLI:EU:T:2009:64, para. 67; and judgment in *Borax Europe* T-166/05, cited above, ECLI:EU:T:2009:65, para.102.

[38] On the issue of disclosing the names of experts so that a particular comment can be linked to a particular expert, the Court of Justice, while recognising that no automatic priority can be conferred on the objective of transparency over the right to protection of personal data, held in its judgment of 16 July 2015 in Case *ClientEarth and PAN Europe v EFSA* , C-615/13, ECLI:EU:C:2015:489, at para. 55, that disclosure of such information was necessary to ensure the transparency of the process of adoption of a measure likely to have an impact on the activities of economic operators, in particular, in order to appreciate how the form of participation by each expert in that process might have influenced the content of the measure in question. In addition, the CJEU held, at para. 69 of the same judgment, that disclosure would, by itself, have made it possible for the suspicions of partiality in question to be dispelled or would have provided to experts who might be concerned with the opportunity to dispute, if necessary by available legal remedies, the merits of allegations of partiality.

[39] The Commission may find it interesting, as a point of reference, that the US Federal Advisory Committee Act provides that "*[d]etailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee* ". The US Federal Advisory Committee Act also provides that meeting minutes, together with other documents made available to or prepared for or by each advisory committee, shall be available for public inspection. See Federal Advisory Committee Act §10(b) and (c).

[40] Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2001 L 8, p.1.

[41] It should be noted that the General Court recently held in its judgement of 13 November 2015 in Case *ClientEarth v Commission* , T-424/14, ECLI:EU:T:2015:848, para. 97 to 100, that the general presumption that the disclosure of documents drawn up in the context of preparing legislative or policy proposals would, in principle, seriously undermine the Commission's decision-making process may apply only for as long as the Commission has not made a decision regarding a potential proposal or policy, that is to say, until a policy or legislative initiative has been either adopted or abandoned. Absent an appeal on this case, it



stands as law.

[42] See paragraphs 32 and 33 above.