

Decision in case 1100/2015/NF concerning the European Commission's Network on Unconventional Hydrocarbon Extraction

Decision

Case 1100/2015/NF - Opened on 18/08/2015 - Decision on 16/03/2017 - Institutions concerned European Commission (No maladministration found) | European Commission (No further inquiries justified) |

The case concerned a “Network”, set up in 2014 by the European Commission to study “unconventional hydrocarbon extraction” including “fracking”.

Two NGOs, one of which was initially a member of the Network, complained to the Ombudsman as they considered that the Network should be treated as a Commission “expert group”, and should therefore have to comply with specific, strict “expert group” rules on having a balanced membership, a high level of transparency and independence. The NGOs claimed that a disproportionate number of the Network’s members had links to the hydrocarbon extraction industry.

The Ombudsman inquired into the issue.

She examined the work that was actually carried out by the Network. She found that the Network gathered information for the Commission. However, unlike an “expert group”, the Network did not provide the Commission with assessments or policy advice. The Ombudsman thus found that it was not necessary to structure the Network as an “expert group”. She also noted that the Commission had in the meantime decided to disband the Network’s working groups and to carry out further research using its own in-house research services.

The Ombudsman found no maladministration arising from how the Network had actually worked. She suggested however that, in the event that the Commission were to reactivate the Network, and were to use the Network to obtain policy advice on issues such as fracking, it would be preferable to restructure the Network as an “expert group”, so as to ensure a balanced membership, and that that it will be transparent and independent.

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The background to the complaint

1. The complaint was made by two NGOs, Friends of the Earth Europe and Corporate Europe Observatory [1] . It concerns the manner in which the European Commission conducted research into “unconventional hydrocarbon extraction techniques and practices”. Unconventional hydrocarbon extraction techniques are used to search for and to extract hydrocarbons from underground deposits, in particular shale gas deposits. The techniques include the use of high-volume hydraulic fracturing (or “fracking”), which breaks up rocks and rock formations by injecting a special fluid into [cracks \[Link\]](#) to force them to open further. The larger fissures then allow more oil and gas to flow out of the rock formations and into a [wellbore \[Link\]](#), from where they can be easily extracted (other techniques include directional drilling). Fracking is currently used in some EU Member States for shale gas exploration and extraction. In March 2014, the Commission issued a non-binding **Communication** [2] outlining what the Commission considers to be the potential new “opportunities” and “challenges” stemming from shale gas extraction in the EU. [3] The Commission Communication also noted that the Commission would set up a “Network on Unconventional Hydrocarbon Extraction” alongside its other initiatives.

2. In July 2014, the Commission set up the European Science and Technology Network on Unconventional Hydrocarbon Extraction (the “Network”) with the stated aim of increasing its knowledge, in an open and transparent manner, on unconventional hydrocarbon extraction technologies and practices. The Network brought together practitioners from industry, research,



academia, as well as civil society stakeholders. [4] The Commission, at that time, stated that the work of the Network would involve collecting, analysing and reviewing results from exploration projects, as well as assessing the development of technologies used in unconventional gas and oil projects [5]. The Network was managed by the Commission's in-house science research service, the Joint Research Centre. It was guided by a Steering Group [6] comprising officials from different Commission Directorates-General.

3. In 2015, Friends of the Earth Europe and Corporate Europe Observatory contacted the European Commission with concerns they had about the Network. In their correspondence with the Commission, the two NGOs expressed their concern that the membership of the Network was dominated by industry and that this would not allow for a “*balanced exchange of views*”. They thus asked the Commission to ensure that the Network complied with the rules on Commission “expert groups”, such as having a “balanced” membership and members not having conflicts of interest.

4. The NGOs considered that the Commission’s responses did not address their concerns in a satisfactory manner. As a consequence, Friends of the Earth Europe, which was initially a member of the Network, decided to withdraw from the Network.

5. Later in 2015, the two NGOs complained to the Ombudsman.

6. At the Network’s annual conference on 23 February 2016, the Commission announced its decision to “*pause*” the Network’s activities and to disband the Network’s working groups. The Commission also announced that the Joint Research Centre will conduct the remaining research on unconventional hydrocarbon extraction.

The inquiry

7. The Ombudsman opened an inquiry into the complaint that the Commission has:

1) failed to recognise that the European Science and Technology Network on Unconventional Hydrocarbon Extraction constitutes an “expert group”;

2) failed adequately to respond to the complainants’ concern that the composition of the Network is unbalanced;

3) wrongly allowed members associated with the shale gas industry to act as chairmen of the Network.

The complainants wished the Commission to put the Network on the expert groups' register and to apply the rules on Commission expert groups to the Network, including the rules on conflicts of interest.

Alternatively, in the event that the Commission refuses to agree that the Network is an “expert



group”, the complainants wished the Commission to recognise that the Network is an entity *similar to* an “expert group” and that it should therefore, by analogy, apply to the Network the rules governing Commission expert groups, in particular as regards a balanced membership, the absence of conflicts of interest and transparency.

As a second alternative, the complainants wished the Commission to abolish the Network.

8. The Commission replied to the complaint and the complainants subsequently commented on that reply. The Commission also provided a second reply in response to the Ombudsman’s request for information on how the Network, and in particular its working groups, will operate following the annual conference held on 23 February 2016. The complainants also commented on that reply. The Ombudsman’s decision takes into account the arguments and views put forward by the parties. It also takes into account publicly available information related to the Network, such as on its mandate, the minutes on working group meetings, and the Network’s annual report 2015. [7]

9. The Ombudsman considers it useful to deal with all three allegations together.

Allegations relating to how the Network was structured and operated

Arguments presented to the Ombudsman

10. The complainants’ overall contention is that since the Network was dominated by industry, it was not capable of objectively advising the Commission on unconventional hydrocarbon extraction technologies and practices. The complainants considered that the Commission should apply to the Network all the rules and safeguards governing the functioning of Commission “expert groups”, which, if applied, would ensure that the Network had a balanced membership, that members would not have conflicts of interest and that it would be transparent.

11. As regards the membership of the Network being unbalanced, the complainants stated that the Network’s members came predominantly from industry. More than 70% of the members, they stated, directly represent, or have financial links with, the fracking industry. Less than 10% of the members were, they stated, “civil society” representatives. Consequently, they insisted, the membership of the Network was not “balanced”. This meant that the Network could not hold fair discussions. It also called into question the Network’s ability to act in the public interest.

12. The complainants were also concerned about the appointment of four (vice-)chairs to the Network’s two working groups; they regarded them as being both industry-friendly and fracking-friendly. The complainants considered that this ran counter to the Network’s goal of having a fair and balanced exchange of views. Their concern was, they stated, accentuated by the role of the chairs, which was to summarise, harmonise and approve the working groups’ output.



13. In its reply, the Commission stated that it sought the broadest possible input of scientific and technical data on unconventional hydrocarbons by bringing together researchers, academics, industry representatives and civil society representatives. It stated that it used the Network to collect scientific and technical data and improve its knowledge. The Network did not, as contended by the complainants, advise the Commission on policy nor did it participate in the preparation of legislative proposals or the implementation of existing Union legislation or policies. Moreover, the Network was managed and guided by a Commission Steering Group and staffed by personnel from several Commission Directorates-General. In the Commission's view, the mandate and structure of the Network were not comparable with the standard structure of an "expert group".

14. On the membership of the Network, the Commission stated that all those potentially able to contribute data were encouraged to join the Network through a continuously open call for expressions of interest. The Commission had not prevented anyone from joining. Thus, the composition of the Network in 2015 was the result of the applications received. According to the Commission, the Network participants came from the following areas: 54% from research and academia, 31% from industry and consultants, 2% from public bodies with technical/research related expertise, and 13% from civil society. While the Commission insisted on a fair and balanced exchange of views within the Network, it was not within its power to achieve a "balance" in terms of the number of participants from each stakeholder group; it noted that it received fewer applications from civil society than from industry representatives. The Commission added that it had encouraged Friends of the Earth Europe to continue contributing to the work of the Network and had invited both complainants to (re)join the Network.

15. The Commission disagreed with the complainants' view that the composition of the Network could have led to biased output. The participants were asked to contribute to the data collection and data examination. They were not asked to give their policy views on unconventional hydrocarbons, given that this was not part of the Network's mandate.

16. On the matter of the chairs of the Network's working groups, the Commission said that the Network's Steering Group had chosen the chairs for the Network's working groups from amongst the Network participants, based on their knowledge and on the topics to be dealt with by the working groups. The chairs had been appointed for one year with the possibility of renewal for a maximum of a further two years. At the end of the one year appointment the Steering Group, made up of Commission staff, was to evaluate if the chairs had properly fulfilled their task to steer and moderate the discussions of the working groups in a spirit of open dialogue and collaboration. The Commission would, it stated, have intervened, if these principles had not been followed. In the Commission's view, the fact that one vice-chair was employed by the oil and gas exploration and production industry does not constitute maladministration. It noted that the two chairs and the other vice-chair were employed by technical-scientific **public bodies** from countries with different policy orientations on shale gas extraction.

17. The Commission then stated that the initial objectives of the two existing working groups



had been broadly achieved with the publication of the Network's annual report 2015 and that it had now "paused" the Network's activities. [8] It was not envisaged, for the time being, setting up any new working groups. It added that the Commission's Joint Research Centre would continue the relevant work.

The Ombudsman's assessment

18. The development of policies (including policies that give rise to proposals for EU legislation, to delegated acts, to implementing acts, to policy "initiatives", to policy "programmes" ...) is one of the core tasks of the European Commission. While the Commission can call on its internal expertise, its knowledge base and its experience to develop such policies [9] , it also relies on a wide range of external sources of expertise, knowledge and experience. One such source is "expert groups", composed of a) individual experts, b) Member State authorities, c) specialised organisations, and d) other public entities . Because "expert groups" are subject to strict rules which seek to ensure that they are **transparent, independent** and **balanced** [10] , obtaining policy advice from an "expert group", rather than from other less formal sources, helps enhance the legitimacy, in the eyes of the public, of the policies and legislative proposals eventually adopted by the Commission.

19. There are no legal rules requiring the Commission to use an "expert group" for any given task. It is for the Commission to decide if it needs the input of an "expert group" on a specific matter. However, it is the Ombudsman's view that it would be preferable for the Commission to choose to use an "expert group" if it wishes to obtain significant advice on important policies.

20. If the Commission decides to structure a policy group as an "expert group", this will have consequences for the membership of the group. Members of "expert groups" who are individuals or organisations should be appointed following a formal selection process. Interested parties submit applications in response to a public call for applications. The applications are then assessed against specific pre-defined eligibility and qualification criteria based on the expert group's mandate. [11] Only those who meet the required eligibility and qualification criteria may become expert group members. When selecting members of an "expert group", the Commission should seek to ensure that there is an appropriate balance between the different members of the group (so that the different types of expertise gathered in the group enable it to fully carry out the mandate conferred on it). [12]

21. There is no doubt that the Network was not structured as an "expert group". The Commission says so explicitly (see paragraph 13 above). It is true that persons from industry, research, academia and civil society were eligible to join the Network. It is also true that the Commission secured some funding for the participation of civil society organisations (the participation of other types of members, such as industry representatives, was not reimbursed or otherwise funded). Members joined the Network by completing a simple registration process. [13] They were **automatically** allowed to join provided they were able to contribute with evidence based knowledge to the Network's analysis and assessment, or to provide views without having to contribute to the scientific and technical work. **Everyone** who expressed



interest in joining the Network and who met the aforementioned threshold was accepted as a member. [14] Also, admission to the Network was possible on a continuous basis as the work progressed. Since many persons affiliated to entities that deal with fracking – such as research bodies, consultancies and national authorities – expressed an interest in joining, the overall membership of the Network was, in that sense, tilted in favour of participants with links to the fracking industry.

22. It is clear from all of the above that the Network was not set up as, nor did it operate as, an “expert group”. The key question is, however, **should it have been set up and operated as an “expert group”**. The answer to this question depends upon actual work carried out by the Network.

23. It is for the Commission to decide if it needs the input of an “expert group” on a specific matter. Where the Commission seeks in-depth, objective, independent advice and expertise – in relation to legislative proposals, policy initiatives, delegated acts, or the implementation of legislation and policies – it would, in the Ombudsman’s view, be preferable that it use an “expert group”. Choosing to structure a group as an “expert group” will have a positive impact on the eventual legitimacy, in the eyes of EU citizens, of the policies to the development of which that group has contributed. In contrast, if the Commission is not seeking policy advice, but is, for example, simply gathering information, it may be appropriate to choose lighter and more flexible structures.

The Network’s tasks

24. The core task of the Network was to enhance the Commission’s knowledge base on unconventional hydrocarbon extraction technologies and practices. In this context, the Network was given two work packages, to be carried out by two working groups.

25. Working group 1 gathered data about exploration, demonstration, production and research projects carried out in the EU (see Annex I to this decision for the complete description of the work package). The detailed work programme of working group 1 identifies this task as a data collection exercise. As is set out in Annex II to this decision, working group 1 produced a preliminary version of a list of existing and planned unconventional hydrocarbon wells in the EU (‘the well list’). It also produced a first version of a database containing information on the wells on that list. The database, however, does not contain any assessment of data gathered. Nor did working group 1 undertake any comparative analysis of projects assessed (see Annex II to this decision for an overview of the work performed by working group 1 in 2015.)

26. Working group 2 updated, complemented and further deepened the Commission’s Joint Research Centre’s 2013 technical report [15] , based on practical experience with these technologies (see Annex I to this decision for the complete description of the work package). Given that the Joint Research Centre’s 2013 report is of a purely descriptive nature, the aim of working group 2 was to underpin the report with data and to update it. The work programme of working group 2 describes the task as consisting in establishing a list of emerging technologies that could be used as alternatives to the current hydraulic fracturing technologies in the EU.



Working group 2 was supposed to produce a yearly report including an *assessment of economic, environmental and climate change related pros and cons in comparison to currently used fracking techniques* . However, as set out in Annex II, working group 2 simply produced a table on the status of current technologies and made an effort to produce a first rudimentary version of a list of emerging technologies. However, working group 2 did not assess the emerging technologies in terms of cost, maturity level, and their pros and cons. (See Annex II for more information on this.)

27. Irrespective of how the Network’s tasks were formulated on paper, it may well have been that the complainants, one of them having initially been a member of the Network, were led to believe that some of the members were hoping to influence the Commission’s future policy on fracking through their involvement in the Network [16] . It is thus understandable that the complainants were concerned and made a complaint to the Ombudsman. However, the Ombudsman has established that the tasks actually carried out by the Network were the collection and processing of data on exploration projects and techniques for the exploration and extraction of shale gas. Essentially, in the Ombudsman’s view, the work amounted to a “mapping exercise” rather than a “policy development exercise”. In the Ombudsman’s view, it was not necessary to use a group structured as an “expert group” in order to carry out this “mapping exercise”.

28. The Ombudsman does note that the Network’s work packages also contained certain tasks which might be categorised as “assessment tasks”. However, the Network never got around to carrying out these tasks and no assessments were ever made by either of the two working groups. [17] It is thus not necessary for the Ombudsman to arrive at any definitive conclusions in this inquiry as regards the precise nature of that proposed work.

29. In conclusion, the Ombudsman is of the view that there was nothing in the manner in which the Network actually worked which reflected maladministration on the part of the Commission. The tasks actually undertaken by the Network were not of a kind which warranted the higher standards of balance and freedom from conflict of interest which are the standards expected of an “expert group”.

30. However, the Ombudsman considers it useful to make a number of suggestions to the Commission.

31. Should the Commission wish to reactivate the Network, the Commission should examine carefully the tasks to be carried out by the Network. If the tasks relate to providing in-depth, objective, independent advice and expertise in relation to legislative proposals, policy initiatives, delegated acts, or the implementation of legislation or policies, it would, in the Ombudsman’s view, be preferable to restructure the Network as an “expert group”.

32. Regarding the transparency of the Network, the Ombudsman welcomes the fact that the Network already has a dedicated website, where information on the work carried out in 2015 is publicly available. Should the Commission wish to reactivate the Network in the future, the Commission should increase transparency further by obtaining and publishing participants’



declarations of interests.

33. The Ombudsman also invites the Commission to clearly explain, in the mandate of any relevant group it sets up to provide it with assistance, whether it considers the group to be an “expert group”. If it does not consider it to be an expert group, it should explain, in the mandate, why it has taken this view.

Conclusion

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

There was no maladministration arising from how the Network actually worked. In the case of those tasks contained in the work packages which were not actually performed by the Network, it is not now necessary to make further inquiries.

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

The Ombudsman makes the following suggestions for improvement.

Suggestions for improvement

1) Should the Commission wish to reactivate the Network, it should examine carefully the tasks to be carried out by the Network. If the tasks relate to providing in-depth, objective, independent advice and expertise in relation to legislative proposals, policy initiatives, delegated acts, or the implementation of legislation or policies, it would be preferable to restructure the Network as an “expert group”.

2) The Commission should increase the transparency of groups such as the Network by obtaining and publishing participants’ declarations of interests.

3) The Commission should clearly explain, in the mandate of any relevant group it sets up to provide it with assistance, whether it considers the group to be an “expert group”. If it does not consider it to be an expert group, it should explain, in the mandate, why it has taken this view.

Strasbourg, 16/03/2017

Emily O'Reilly European Ombudsman

- Annex I - The Mandate of the European Science and Technology Network on Unconventional Hydrocarbon Extraction [Link]



- [Annex II - Annual Report 2015 of the European Science and Technology Network on Unconventional Hydrocarbon Extraction \[Link\]](#)
- [Annex III - European Commission Expert Groups \[Link\]](#)

[1] Friends of the Earth Europe's activities focus on environmental issues, while Corporate Europe Observatory monitors corporate lobbying in the EU.

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing in the EU, 17 March 2014, COM(2014)23 final/2.

[3] There is no EU legislation regulating the exploration and production of hydrocarbons. However, the Commission has, for a number of years, worked on developing a "framework" for safe and secure unconventional hydrocarbon extraction in the EU. In 2014, it issued a non-binding Recommendation on minimum principles for the exploration and production of hydrocarbons by means of high volume hydraulic fracturing (Commission Recommendation 2014/70/EU on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing, OJ 2014 L 39, page 72). The stated aim of the Recommendation was to support those Member States that wish to carry out fracking and to foster a level playing field for industry. It contains "minimum principles" which, the Recommendation states, aim to ensure that public health, the climate and environment are safeguarded, that resources are used efficiently, and that the public is kept well-informed.

[4] The provisions governing the Network are set out in the Commission document 'Mandate of the European Science and Technology Network on Unconventional Hydrocarbon Extraction' of 7 July 2014 (Ref. Ares(2014)4022184 - 02/12/2014), available here: https://ec.europa.eu/jrc/sites/jrcsh/files/Mandate_and_ROP_attached_to_note_to_JS.PDF [Link]

[5] Communication from the Commission, COM(2014)23 final/2, page 10.

[6] Directorates-General Environment (DG ENV), Energy (DG ENER), Research and Innovation (formerly DG RTD), Climate Action (DG CLIMA), Enterprise and Industry (DG ENTR) and the Joint Research Centre.

[7] Available here: <https://ec.europa.eu/jrc/en/uh-network> [Link]

[8] Available at:

<https://ec.europa.eu/jrc/sites/jrcsh/files/UH%20Network%20Annual%20Report%202015%20Science%20for%20Policy%20and%20Action.pdf> [Link]

[9] When a policy relies on scientific expertise, evidence and advice, this can be provided, for example by the Commission's Joint Research Centre.



[10] For an overview of the most important features of expert groups, see Annex III to this decision. The Commission has set up at least three “expert groups” that deal with matters related to fracking: (i) Technical Working Group on environmental aspects of unconventional fossil fuels, in particular shale gas; (ii) Groupe des autorités du pétrole et du gaz en mer de l'Union européenne; and (iii) Technical Working Group for the HYDROCARBONS BREF.

[11] Whenever a call for applications is not reasonably practicable, the choice of experts shall be made " *on the basis of objectively verifiable criteria* " (see Rule 9(1) of the then applicable horizontal rules and Article 10(4) of Commission Decision C(2016) 3301 in force since 30 May 2016).

[12] For more background information on the matter see the Ombudsman’s own-initiative inquiry OI/6/2014/NF concerning the composition and transparency of Commission expert groups: <http://www.ombudsman.europa.eu/en/cases/case.faces/en/43789/html.bookmark> [Link]

[13] Articles 6 and 9.2. of the Network's mandate.

[14] According to the Commission, the only exception that would have applied related to " *people with only political or journalistic concerns, that didn't intend to contribute to the working groups and the objectives of the Network* " .

[15] The 2013 report is entitled 'An overview of hydraulic fracturing and other formation stimulation technologies for shale gas production' (available at: https://ec.europa.eu/jrc/sites/default/files/an_overview_of_hydraulic_fracturing_and_other_stimulation_technologies [Link])

[16] See, for example, the minutes of the 10 June 2015 meeting of working group 1 where the following is stated: “ *When the discussion deviated from the core mandate of the WG, an EC participant reminded the audience to focus on the collection of exploration data collection, and not on politics, best practices or starting to formulate research projects.* ”

[17] The Ombudsman understands from the publicly available information on the work of the Network, in particular the minutes on the working group meetings (<https://ec.europa.eu/jrc/en/uh-network> [Link]) and the annual report 2015, that the working groups ran behind schedule and were not able to produce all the work assigned to them. The working groups appear to have faced a number of difficulties, among them that not enough data on unconventional hydrocarbon extraction is readily available in the EU, given the little practical experience with shale gas extraction. The Ombudsman understands from the Network’s annual report 2015 that, **as a consequence of the difficulties faced by the working groups, the work produced in 2015 is in a provisional state only . The work performed was of a technical nature** and consisted of **the collection and processing of data . The working groups did not undertake any assessment of the collected and processed data . Annex II to this decision** gives an overview of the concrete work performed by the working groups, based on the information in the Network’s annual report 2015.

