



Besluit in zaak 811/2017/EA inzake de transparantie van “adviesorganen” die de ontwikkeling van het Europese beleid beïnvloeden

Besluiten

Zaak 811/2017/EA - Geopend op 12/07/2017 - Besluit over 19/09/2018 - Betrokken instelling Europese Commissie (Geen wanbeheer vastgesteld) |

Deze zaak gaat over de transparantie van “adviesorganen” die de ontwikkeling van het Europese beleid beïnvloeden.

De ‘Groep vooraanstaanden’ werd opgericht door de commissaris voor Interne Markt, Industrie, Ondernemerschap en Midden- en Kleinbedrijf met als doel advies te verlenen over de manier waarop de EU onderzoek met betrekking tot het gemeenschappelijk veiligheids- en defensiebeleid kan steunen. Een ngo, het ‘European Network Against Arms Trade’, diende een klacht in bij de Ombudsvrouw over het gebrek aan transparantie betreffende de Groep vooraanstaanden. Zij merkte in het bijzonder op dat de Groep niet voorkwam op het register van deskundigengroepen van de Commissie en andere adviesorganen.

De Ombudsvrouw gaat akkoord dat, gezien de samenstelling ervan - hij omvat politieke leden zoals leden van het Europees Parlement, nationale Parlementen en de Commissie - het moeilijk is om de Groep vooraanstaanden te aanschouwen als een ‘deskundigengroep’. De Ombudsvrouw merkte echter op dat de Groep vooraanstaanden advies verstrekt met betrekking tot de voorbereiding van een beleidsinitiatief, op dezelfde wijze als een deskundigengroep, en dat een passend niveau van transparantie had moeten worden toegepast op zijn werk. De Ombudsvrouw stelt voor dat een passend niveau van transparantie met betrekking tot deze Groep retrospectief wordt gewaarborgd door de Commissie. Ze stelt ook voor dat de Commissie in de toekomst het publiek vertrouwen in haar werk versterkt door passende transparantiemaatregelen te garanderen voor elke nieuwe versie van de Groep vooraanstaanden en gelijkaardige adviesgroepen die belangrijke beleidsdomeinen beïnvloeden. De informatie die over dergelijke groepen moet worden verstrekt, omvat, met name, het lidmaatschap, de agenda’s en notulen van de bijeenkomsten, alsook de criteria voor de selectie van hun niet-politieke leden en de genomen maatregelen teneinde een evenwicht tussen de relevante belanghebbenden te waarborgen.

Background to the complaint

1. The Group of Personalities on the Preparatory Action on Common Security and Defence Policy-related research (‘Group of Personalities’) was convened in March 2015 by the Commissioner for Internal Market, Industry, Entrepreneurship and SMEs as a “ *high level*



group of politicians, academics, think tankers and defence company CEOs to advise on how the EU can support research related to the Common Security and Defence Policy” . [1] The group was chaired by the Commissioner. It was comprised of sixteen members, the majority of whom were working at the time for the defence industry, research and technology organisations. Two were members of national parliaments, one was a member of the European Parliament (‘MEP’), and one was a member of the Commission (the High Representative of the EU for Foreign Affairs and Security Policy and Commission Vice-President). A ‘Sherpa’ group was also appointed by the group’s members in order to prepare the discussions. The Group of Personalities met three times and was dissolved following the publication of its report on 23 February 2016. [2]

2. The complainant, the European Network Against Arms Trade, wrote to the Commission on 23 May 2016 regarding the transparency of the Group of Personalities, and in particular about the fact that it was not included in the Commission’s Register of expert groups and other similar entities (the ‘Register’).

3. On 25 November 2016, the Commission replied to the complainant saying that the Group of Personalities had concluded its work and no longer existed. It added that information on the work of the Group of Personalities was widely distributed, including to the European Parliament and all Member State permanent representations in the form of a report. The Commission provided the complainant with a link to that report.

4. In March 2017, responding to a question by an MEP [3] , the Commission put forward further arguments for not registering the Group of Personalities as an expert group, citing the political and strategic nature of the advice requested from it and the fact that it did not include technical experts.

5. The complainant was dissatisfied with the Commission’s response, and lodged a complaint with the Ombudsman on 12 May 2017.

The inquiry

6. The Ombudsman opened an inquiry into the complaint. The complainant claimed that the group should have been registered as an expert group, and that information regarding the Group of Personalities, including dates of meetings, list of participants in Group of Personalities and Sherpa meetings, as well as the minutes of these meetings should be published.

7. In the course of the inquiry, the Ombudsman invited the Commission to address the matters raised by the complainant in a more detailed reply. The Ombudsman received the Commission’s response and, subsequently, the complainant’s comments on this response. The Ombudsman’s decision takes into account the arguments and views put forward by the parties.

The Ombudsman’s assessment

Whether the Commission should have registered the Group of Personalities as an “expert group”



8. The Commission considers that the Group of Personalities did not qualify as an “expert group” under the rules on expert groups applicable at the time of its creation [4] , or under the current rules adopted on 30 May 2016. [5] The Commission essentially argues that this is because i) the Group of Personalities had clear political prominence, and ii) the advice provided by it was political and strategic in nature.

I. The Membership of the Group of Personalities

9. The Commission argues that in view of their actual composition over the years and the provisions governing their role and membership, ‘*Commission expert groups*’ are to be considered as advisory bodies operating at technical and/or administrative level. According to the Commission, although the rules do not explicitly exclude the presence of members of Government or members of Parliament in expert groups, the wording and spirit of those rules clearly point in that direction. In this regard, the Commission says that the provisions on membership of expert groups provide that the Commission may interact with “*Member States’ authorities*”, which it considers to exclude the political level.

10. The Commission considers that, in contrast, the membership of the Group of Personalities had a clear political prominence, pointing to five of its members who had a political mandate.

11. The Commission further specifies that the Sherpa group - which prepared the Group of Personalities meetings - did not qualify as a Commission “expert group” either, as its members were nominated by and reported to the Group of Personalities, and not to the Commission.

12. The complainant points to the fact that the Group of Personalities’ report refers to the group as a “*group of experts*”. In its comments, the complainant remarks that it is arguable that only four of the sixteen Group of Personalities’ members could in fact be considered as having a political mandate. Indeed, while a further member is a former Minister, he was at the time a board member of a non-profit research organisation.

13. On the basis of the above, the Ombudsman concludes that it is correct to regard four members (an MEP, two members of national parliaments, and a Commissioner) as ‘*political members*’ participating in the Group of Personalities.

14. The Ombudsman further notes that both the previous “horizontal” rules on expert groups - applicable at the time of the Group of Personalities’ creation - and the current rules specify the various types of members from which expert groups may be composed. In considering the position of the ‘*political members*’ of the Group of Personalities, three of the various types of expert group members are relevant.

15. The first type concerns “*individuals appointed in their personal capacity*”. [6] The current rules add that these members are to act independently and in the public interest. The Ombudsman notes that the selection process for this type of member should normally be



carried out via public calls for applications. The Ombudsman considers it unlikely that individuals with specific political mandates (MEPs/ members of national parliaments/ Commissioners) could have been selected to participate in an expert group via a public call.

16. The other two types of expert group members of relevance are (1) “*Union agencies*” and “*Union bodies*” and (2) “*Member States’ authorities, at national, regional or local level*”. [7] The Commission takes the view that the reference to “*Member States’ authorities*” does not include the political level. The Ombudsman notes that this interpretation is made explicit in the current rules, which specify that representatives of Member States’ authorities or of Union bodies, offices or agencies must be civil servants or public employees. [8] The fact that the rules provide for the representation of Union **agencies, offices [9] or bodies**, suggests that individuals - such as an MEP or Commissioner - are not to be considered to be members of an expert group. [10]

17. On the basis of the above, the Ombudsman generally agrees with the Commission that the wording and spirit of the rules on expert groups, as well as their actual composition over the years, points in the direction that expert groups are not intended to involve ‘*political members*’. The Ombudsman further notes that as “expert groups” are to provide the Commission with specialist advice on policy and legislative matters, which is intended to inform the decision-makers, it would not be useful for members of the Commission and decision-makers to be included within them.

18. The Ombudsman thus considers that, in view of its composition, it would be difficult - strictly speaking - for the Group of Personalities to be considered as an “expert group”.

II. The Role of the Group of Personalities

19. Regarding the political and strategic nature of the advice provided by the Group of Personalities, the Commission argues that the group formulated high-level recommendations, which required further elaboration in order to develop the Preparatory Action on Common Security and Defence Policy-related research (the ‘Preparatory Action’) and the future defence research programme. In this regard, the Commission acknowledges that it used the Group of Personalities’ recommendations as a “*strategic and political source of input*” for the European Defence Action Plan (‘EDAP’) adopted on 30 November 2016. However, it states that the Group of Personalities was not consulted in the preparation of the EDAP, as it had ceased to exist in February 2016. The Commission adds that two expert groups, which are included in the Register, were subsequently set up in order to elaborate on the advice on the Preparatory Action provided by the Group of Personalities. [11]

20. On this issue, the complainant again points to the fact that the Group of Personalities’ report states that the group had presented “*specific proposals*” and “*a clear vision of the scope of the Preparatory Action, a workable format for its implementation*”. The complainant therefore considers that this constitutes advice on “*the preparation of legislative proposals and policy initiatives*”. [12]



21. The Ombudsman reiterates the comments made in her letter opening the inquiry, in which she remarked that the Group of Personalities seems to have played a significant role in preparing the Commission's EDAP, especially as regards the European Defence Fund.

22. For example, the Ombudsman notes that the Group of Personalities' report proposed a total budget of at least EUR 3.5 billion for the period 2021-2027 to ensure the credibility of the European Defence Research Programme. While the Commission argues that the Group of Personalities was not consulted in the preparation of the EDAP, as it had ceased to exist in February 2016, this proposal was followed in a European Parliament's report on the European Defence Union [13] and was included by the Commission in the EDAP. The Ombudsman considers that this is arguably a specific proposal going beyond general strategic advice.

23. The Ombudsman further notes, with regard to the Preparatory Action, that the Group of Personalities' report also includes recommendations on its scope, governance, modalities, principles, and resources.

24. The Ombudsman considers all of the above recommendations as constituting ' *advice* ' on the preparation of a policy initiative.

25. The Ombudsman points out that increased transparency in the preparation of policies contributes to greater legitimacy for those policies.

26. The Ombudsman thus considers that, although the Group of Personalities appears to have been an *ad hoc* structure, which it would be difficult to consider as an "expert group" in view of its composition, it should still have been subject to appropriate transparency requirements.

27. This is particularly important where the advice provided by the Group of Personalities is "high-level" or "strategic", and where it concerns the preparation of " *legislative proposals and policy initiatives* ". Even if the Group of Personalities was not to be registered as an expert group in view of its composition, it is especially important for such advisory bodies to be as transparent as possible, given their potential impact on the direction taken by EU legislation and policy.

28. The Ombudsman further remarks that if hybrid entities such as the Group of Personalities are allowed to operate entirely outside of appropriate transparency requirements, simply because of the presence of ' *political members* ', this would make it relatively easy to circumvent the rules and principles on transparency. Indeed, it defies common sense that the Commission could avoid complying with the standards on transparency simply by appointing a Commissioner, or an MEP, or a member of a national parliament, to an advisory body.

29. Likewise as regards the Sherpa group that advised the Group of Personalities. Its work should not be allowed to escape public scrutiny simply because it reports to the Group of Personalities and not directly to the Commission.



30. The Ombudsman notes that under the current transparency regime for expert groups, the Commission “[...] shall make available all relevant documents of expert groups and sub-groups, including the agendas, the minutes and the participants’ submissions, either on the Register of expert groups or via a link from the Register to a dedicated website where this information can be found. Access to such website shall not be submitted [sic] to user registration or any other restriction. In particular, departments shall ensure publication of the agenda and other relevant background documents in due time ahead of the meeting, followed by timely publication of minutes. Exceptions to publication shall only be foreseen where it is deemed that disclosure of a document would undermine the protection of any public or private interest as defined in Article 4 of Regulation (EC) N° 1049/2001 ”. [14]

31. The Ombudsman considers that an equivalent degree of transparency should apply for the Group of Personalities and any other bodies with a similar advisory role, which are not registered as expert groups. In the case of the Group of Personalities, and similar groups, transparency measures should include the publication of meeting agendas and minutes, and participants’ submissions except for cases where disclosure would undermine the protection of a public or private interest as defined in Article 4 of Regulation (EC) N° 1049/2001.

32. The current rules on expert groups provide that the selection of members [15] shall be carried out via public calls for applications, which shall clearly outline the selection criteria, including the required expertise and, where existing, the interests to be represented. Where the Commission decides that a public call is not a suitable instrument, the choice of experts shall be made on the basis of objectively verifiable criteria, which are published on the Register. [16]

33. The current rules also provide that, when selecting the members of groups, Commission departments shall aim at ensuring, as far as possible, a high level of expertise, a geographical balance, as well as a balanced representation of relevant “knowhow” and areas of interest, taking into account the specific tasks of the expert group, the type of expertise required and the response received to calls for applications. [17] The Ombudsman believes that these rules and principles should have applied in a transparent manner to the selection of the **non-political members of the Group of Personalities** .

34. Transparency in this regard should have been especially important in the case of the Group of Personalities given that companies represented within the group could be eligible for funding under the programmes that it was advising on. In fact it is the case that companies represented within the group did subsequently receive such funding. [18]

Conclusion

The Ombudsman concludes that the Commission’s decision not to register the Group of Personalities as an expert group does not constitute maladministration, given that it would be difficult to consider it as an “expert group” in view of its composition which included individuals with a political mandate at Member State level or at EU institutional level. However, ensuring appropriate transparency in relation to the work of the Group of Personalities should not be dependent on that Group being categorised as an “expert group”. The Ombudsman stops short of finding maladministration in the failure of the



Commission to ensure appropriate transparency regarding the work of the Group. Nevertheless, given the role of the Group, it is clear that a level of transparency, broadly equivalent to that applicable in the case of an “expert group”, would have been appropriate. The Ombudsman makes a suggestion in this regard below.

Furthermore, the Ombudsman considers that, for the future, the Commission should take measures to ensure that groups that influence the development of EU policy, such as the Group of Personalities, are subject to appropriate transparency requirements.

Suggestions for improvement

In the case of the Group of Personalities, the Commission should now publish its meeting agendas and minutes as well as its participants’ submissions (except where disclosure would undermine the protection of a public or private interest as defined in Article 4 of Regulation (EC) N° 1049/2001) .

In future, the Commission should ensure that the transparency rules which apply to expert groups, or broadly equivalent rules, should apply to any new version of the Group of Personalities and to any similar bodies which influence the development of EU policy.

Emily O'Reilly

European Ombudsman

Strasbourg, 19/09/2018

[1]

<https://ec.europa.eu/growth/content/commissioner-bie%C5%84kowska-launches-high-level-group-defer>

[2] European Commission Institute for Security Studies, *Group of Personalities: European Defence Research - The case for an EU-funded defence R&T programme* , February 2016, available at the following link: https://www.iss.europa.eu/sites/default/files/EUISSFiles/GoP_report.pdf

[3] Answer given by the Commission on 14 March 2017 to parliamentary question No E-009217/16, available at the following link: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-009217&language=EN>

[4] Communication from the President to the Commission of 10 November 2010, Framework for Commission expert groups: Horizontal rules and public register, C (2010) 7649 final.

[5] Commission Decision of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups, C (2016) 3301 final.



[6] C (2010) 7649, Rule 8 (1) and C (2016) 3301, Article 7, para 2 (a).

[7] C (2010) 7649, Rule 8 (3), (4) and C (2016) 3301, Article 7, para 2 (d), (e).

[8] C (2016) 3301, Article 9, para 2.

[9] The term “offices” appears in the current rules but not in the previous rules.

[10] The previous and current rules on expert groups refer to the possible participation of ‘*European Parliament experts*’ in expert group meetings. It is unclear though in which capacity this participation is to take place, as the applicable rules provide that they can be invited to “*attend*” meetings. In any case, the denomination of ‘*European Parliament experts*’ is arguably not intended to cover MEPs.

[11] “As-If Programme Committee for Defence Research” (E03524); “Advisory Group for the Preparatory Action on Defence Research” (E03523).

[12] C (2010) 7649, Rule 3 (Role of expert groups) - C (2016) 3301, Article 3, para 1 (a).

[13] European Parliament report of 31 October 2016 on the European Defence Union, 2016/2052(INI).

[14] C (2016) 3301, Article 26.

[15] With the exclusion of certain categories of members as outlined in C (2016) 3301, Article 10, para 1.

[16] C (2016) 3301, Article 10, para 1, 2, 4.

[17] C (2016) 3301, Article 10, para 5.

[18] According to the complainant’s website, the biggest project awarded under the Preparatory Action, Ocean2020, has been granted to a consortium led by the company Leonardo S.p.A (previously Finmeccanica). The CEOs/ Presidents of the leading company and of other beneficiaries were members of the Group of Personalities.