

Decisão sobre a forma como a Comissão Europeia realizou uma consulta pública sobre a iniciativa «Governança sustentável das empresas» (processo 1956/2021/VB)

Decisão

Caso 1956/2021/VB - **Aberto em** 08/12/2021 - **Decisão de** 12/12/2022 - **Instituição em causa** Comissão Europeia (Não se justificam inquéritos adicionais) |

Os autores da denúncia, um grupo de organizações da sociedade civil, estavam preocupados com a forma como a Comissão Europeia realizou uma consulta pública sobre a iniciativa «Governança sustentável das empresas», que visa incentivar as empresas a gerir melhor as questões de sustentabilidade nas suas operações. Em especial, os autores da denúncia alegaram que, no relatório de síntese factual publicado pouco depois do encerramento da consulta pública, a Comissão não apresentou adequadamente os pontos de vista dos cidadãos que apresentaram respostas através de plataformas de campanha em linha.

A Provedora de Justiça considerou lamentável que a Comissão não tenha adotado uma abordagem mais favorável aos cidadãos relativamente à forma como comunicou a consulta no relatório, nomeadamente fornecendo mais informações sobre as respostas recebidas dos participantes nas campanhas. A abordagem da Comissão de não prestar qualquer informação sobre o conteúdo das respostas da campanha no relatório de síntese factual pode desencorajar as organizações de lançarem campanhas no futuro. Tal prejudicaria a capacidade das consultas públicas para recolher os pontos de vista do público, bem como a participação dos cidadãos no processo decisório.

Uma vez que a Comissão adotou, desde então, a proposta de diretiva relativa ao dever de diligência das empresas em matéria de sustentabilidade, não se justificam novos inquéritos sobre esta questão. No entanto, a Provedora de Justiça apresentou uma sugestão de melhoria à Comissão, a fim de assegurar que, nos seus relatórios sobre os resultados de futuras consultas públicas, forneça melhores informações sobre as respostas recebidas dos cidadãos através de plataformas de campanha. Sugeriu igualmente que a Comissão prestasse informações claras às organizações sobre a melhor forma de ter em conta as respostas que recolhem através de campanhas no contexto das consultas.



Background to the complaint

1. From October 2020 to February 2021, the Commission organised a public consultation to collect the views of stakeholders and citizens on the 'Sustainable Corporate Governance initiative' [1].

2. The complainants, several organisations [2] represented by Friends of the Earth Europe (FoEE), organised online tools that allowed citizens to take part in the consultation by submitting a standardised response as well as providing their own particular contributions. The contributions were collected by two separate campaigns. The responses collected through the first campaign [3] were directly submitted through the Commission's consultation online portal. The ones collected through the second campaign [4] were partly sent through the consultation online portal and partly gathered as an online petition. The two campaigns collectively mobilised 595 390 responses.

3. During January and February 2021, FoEE had several exchanges with the Commission to agree on the best way to provide the Commission with signatures supporting the second campaign's response that were collected as an online petition. FoEE and the Commission agreed that a PDF document including the names of all those that had signed the petition (122 785) could be provided by email. FoEE requested the Commission to "*communicate the total number of citizen replies, rather than treating this as one reply to the consultation*" and to mention them in the impact assessment. The Commission agreed to "*reference the reply by indicating the number of respondents that [...] it represents*" and added that "*the number of signatures [would] be referred to in the impact assessment*".

4. In February 2021, FoEE sent two PDF documents to the Commission containing the 122 785 signatures.

5. In May 2021, FoEE contacted the Commission raising concerns about the fact that the factual summary report [5] published on the consultation website [6] following the closure of the consultation did not mention the 122 785 signatures. It argued that this was not in line with what it had agreed with the Commission, namely that the signatures would be treated as seriously as the responses sent through the consultation tool.

6. In July 2021, the Commission informed FoEE that it had updated the factual summary report to include a reference to the signatures. It added that responses submitted through campaigns are segregated and analysed separately from the non-campaign responses and that all stakeholder input would be referred to, analysed and included in the synopsis report [7] accompanying the impact assessment and published together with the proposal.

7. In August 2021, FoEE welcomed the amendment of the factual summary report but asked the Commission to include not only a reference to the number of contributions received but also their key messages. It also requested the Commission to modify the pie chart on the consultation website to include the 122 785 signatures.



8. In September 2021, the Commission said that the factual summary report is not meant to include a detailed description of contributions from members of the public, but to provide an overview. Thus, it considered that it was not necessary to amend it further.

9. Dissatisfied with the Commission replies, the complainants turned to the Ombudsman in November 2021.

The inquiry

10. The Ombudsman opened an inquiry into how the Commission (i) reported on the substance of the contributions collected through the two campaigns in the factual summary report and (ii) reflected the number of contributions received on the public consultation website.

11. In the course of the inquiry, the Ombudsman received the reply of the Commission and, subsequently, the comments of the complainants in response to the Commission's reply.

How the Commission reported on the campaign contributions in the factual summary report

Arguments presented to the Ombudsman

12. The **Commission**'s view is that it treated all contributions equally and adequately presented the results of the campaign as required by the 'Better Regulation Guidelines' [8] (Guidelines).

13. The Commission considered that it complied with what it had agreed on in its correspondence with FoEE. It referenced the contributions by indicating the number of respondents that they represented, referred to them in the impact assessment and considered all contributions in the context of the consultative activities preparing its initiative. The Commission stated that input collected through campaigns was given full consideration in the synopsis report accompanying the impact assessment.

14. The Commission noted that the factual summary report includes the number of contributions received, including campaign replies. Following the amendment, it also refers to the 122 785 signatures.

15. It added that while the Guidelines recognise that campaigns are very effective to generate interest amongst stakeholders and to highlight key messages for policymakers, they also mention that campaigns are a challenge for those analysing the responses. In this sense, the 'Better Regulation Toolbox' [9] (Toolbox) considers it essential to identify campaigns, analyse them separately and present results adequately.

16. In relation to the factual summary report, the Toolbox provides that the Commission should give a concise and balanced overview of contributions received during a specific consultation activity. The Commission therefore argued that the report is not meant to



provide a detailed description of the content of contributions but only an overview thereof. However, all campaign responses were segregated and analysed separately in annex II to the impact assessment, as provided for in the Toolbox, and published in the Commission document register. [10] Thus, the Commission considered that it was justified that the factual summary report included only an overview of these replies.

17. The **complainants** disagree with the Commission. They noted that the factual summary report is a concise document of eight pages, which the Commission presented as the summary of the outcome of the consultation. It was also publicly available during the crucial stage of the proposal's development. In the factual summary report, the Commission broke down 855 stakeholders' responses while the 473 461 campaign responses were presented only *after* the launch of the proposal in a section of a 247-page annex to the impact assessment. In the complainants' view, it is unlikely that people involved in the preparation of the proposal and in the decision-making process would pay the same attention to the annex and to the factual summary report.

18. The complainants also argued that by excluding the content of campaign replies from the factual summary report, the Commission did not comply with the Guidelines and the Toolbox nor did it follow up on what it had agreed with FoEE. By separating campaign contributions from input received from businesses and associations, the Commission created a two-tier system, which penalised citizens and led to an unbalanced and unfair reporting exercise. In the complainants' view, this cannot be considered equal treatment.

19. The complainants said that public consultations are one of the few means that citizens have to engage in policy making at EU level. In their view, citizens' responses should be analysed and reported in the same way as any other response to public consultations.

The Ombudsman's assessment

20. The Treaty on European Union states that decisions should be taken as openly as possible and as closely as possible to the citizens. [11] It also states that citizens have the right to participate in the democratic life of the EU [12] and that EU institutions should give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of EU action [13]. Public consultations are a key tool to ensure citizens' involvement in the democratic life of the EU and in the decision-making process.

21. When planning, preparing or proposing new EU laws and policies, the Commission follows its 'Better Regulation agenda' with a view to ensuring evidence-based and transparent law making, and to take into account the views of those who may be affected [14]. In 2021, following a revision of the existing tools and guidelines, the Commission published updated versions of the Better Regulation Guidelines and Toolbox.

22. The Guidelines and Toolbox set out the principles followed by the Commission when



preparing new initiatives and proposals and when managing and evaluating existing legislation. They also set out the procedure and rules that the Commission should follow when carrying out public consultations. [15] The Ombudsman has consistently taken the view that EU institutions and bodies should apply the rules they have established for themselves. This ensures consistency, transparency and avoids any sense of arbitrariness in the way the EU administration works.

23. At the same time, the Guidelines and its associated Toolbox should always be applied with a view to achieving their stated purpose, namely to ensure a transparent, evidence-based and inclusive policy and law-making process. Otherwise, these rules risk turning into a mere tick-box exercise. Flexibility in the application of the guidelines may be required and the Commission enjoys a margin of appreciation when evaluating what the rules entail in an individual case.

24. In this case, the Commission took the view that it is in line with the provisions of the Guidelines and Toolbox not to include an overview of the content of the responses submitted through campaigns in the factual summary report.

25. Regarding the factual summary report, the Guidelines state that it should include “ *the key issues raised in the public consultation*” [16] . The Toolbox adds that, “[i]f campaigns are identified, they should be referred to in the factual summary report as well in the synopsis report. Reporting on campaigns should include the number of respondents supporting the campaign **as well as the summary of their points of view** [...]” (emphasis added) [17] .

26. The Ombudsman acknowledges that the Toolbox states that campaign replies should be segregated and analysed separately from non-campaign responses [18] . However, this seems to refer to the analysis of the responses rather than to the reporting on their content.

27. The Ombudsman notes that the Better Regulation Guidelines and the Toolbox seem to leave some room for interpretation when it comes to whether the Commission should present the content of campaign results in the factual summary report. However, the Guidelines and Toolbox are an expression of the better regulation principles, whose objective, among others, is to involve citizens in the decision-making process. When interpreting them, the Commission should take this into account and opt for the interpretation that is more favourable for the citizens.

28. The Ombudsman considers that, while it is important to allow the public to make their views known in relation to proposed policies and decisions by organising public consultations, it is equally important to present all views in a balanced and fair manner. There is a clear difference for responses to be described in the factual summary report or in an annex to the impact assessment only. The factual summary report is available at an earlier stage than the impact assessment and it is directly and easily accessible on the consultation website. In addition, as the complainant noted, it is a significantly more concise document. It is clear that the responses included in the factual summary report are



given more prominence than those included in an annex to the impact assessment.

29. Organisations invest time and resources in launching campaigns and collecting citizens' responses in the context of public consultations. The Commission's approach not to report at all on the content of campaign responses in the factual summary report risks discouraging organisations from launching campaigns in the future. This would be detrimental to the capacity of public consultations to collect views from the public and to citizens' involvement in the decision-making process.

30. In light of the above, the Ombudsman considers it appropriate and fair that an overview of the content of citizens responses submitted through campaigns is included in the factual summary report. While the volume of campaign responses can be a challenge for the Commission, the content of these responses is, to a large extent, identical. The number of replies received through campaigns should thus not represent a major obstacle for their inclusion in the factual summary report. On the contrary, as campaign responses largely include the same key messages, they are a sufficiently homogeneous group to be summarised in the factual summary report.

31. It is regrettable that the Commission did not apply the Better Regulation Guidelines and Toolbox in a more citizen-friendly way, notably by providing more information on the responses received through campaigns in its factual summary report. However, as the Commission has since adopted the resulting proposal for a Directive on Corporate Sustainability Due Diligence [19], no further inquiries into this issue are justified.

32. To improve the overall fairness of how the Commission reports on public consultations, the Ombudsman considers that, in the future, the Commission should include a short overview of the positions expressed in responses collected through campaigns in the factual summary report together with stakeholders' responses. The Ombudsman will make a suggestion for improvement to the Commission to this end.

How the Commission presented the signatures provided by email on the consultation website

Arguments presented to the Ombudsman

33. The **complainants** argued that the Commission counted the 122 785 signatures submitted by email as a single contribution and reported as such on the consultation website. They said that, despite their request to include them on the website, the Commission did not do so.

34. The **Commission** said that it did not count the 122 785 signatures as a single contribution and they are also not missing on the consultation website. The relevant documents for the preparation of the impact assessment are the factual summary report and, more importantly, annex II to the impact assessment, where the signatures are mentioned. The pie chart on the consultation website is a statistical representation of the valid feedback instances and, as such, cannot technically include the signatures provided



by email. It is a simple visual aid and does not constitute a complete representation of all input received.

The Ombudsman's assessment

35. The Ombudsman notes that, while the information in the pie chart is not a complete representation of the input received, it is a very useful visual aid and it allows to quickly identify the type of responses received. In this sense, the Ombudsman understands that the complainant wishes for the signatures provided by email to be included in the pie chart.

36. However, the Ombudsman takes note of the Commission's explanation that it was impossible, from a technical perspective, to include them in the pie chart on the consultation website.

37. The Ombudsman regrets that the complainants were not informed, in their exchanges with the Commission, that it would not have been possible to include signatures submitted by email in the pie chart. The complainants had made it clear that they expected the signatures to be treated equally to other consultation responses and the total number of campaign replies to be reflected in the Commission communication on the consultation.

38. Despite the technical limitations, the Commission could have mentioned on the consultation website that, in addition to the feedback mentioned in the pie chart, it had also received replies signed by 122 785 individuals. However, as the Commission proposal has now been adopted, no further inquiries into this issue are justified.

39. In the future, the Commission should provide clear information to organisations on how responses they gather through campaigns can best be taken into account in the context of consultations. The Ombudsman will make a corresponding suggestion below.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

No further inquiries are justified.

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

Suggestions for improvement

In future public consultations, the Commission should include an overview of the responses collected through campaigns in the factual summary report.

The Commission should provide clear information to organisations on how responses they gather through campaigns can best be taken into account in the context of consultations.



Emily O'Reilly European Ombudsman

Strasbourg, 12/12/2022

[1] The initiative aims to improve the EU regulatory framework on company law and corporate governance. More information on the initiative is available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-govern>. On 23 February 2022, the Commission adopted the proposal for a directive on Corporate Sustainability Due Diligence, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0071>.

[2] Friends of the Earth Europe (FoEE), Anti-Slavery International, Austrian Chamber of Labour (AK), Austrian Trade Union Federation (ÖGB), European Coalition for Corporate Justice (ECCJ), European Trade Union Confederation (ETUC), Clean Clothes Campaign – International Office, Global Witness, SumOfUs, WeMove.

[3] The first campaign was led by Global Witness, Anti-Slavery International and Clean Clothes Campaign, in partnership with Avaaz.

[4] The second campaign was led by FoEE, the European Trade Union Confederation, the European Coalition for Corporate Justice, the Austrian Chamber of Labour and the Austrian Trade Union Federation, in partnership with WeMoveEurope and SumOfUs and backed by more than 150 civil society groups.

[5] A factual summary report is published on the consultation website shortly after the closure of a public consultation to give a short factual summary of the key issues raised in the public consultation.

[6] <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-govern>.

[7] A synopsis report is prepared at the end of the consultation activity and is attached to the impact assessment as an annex and accompanies the initiative through the procedure leading to the Commission's adoption.

[8] Better Regulation Guidelines, https://ec.europa.eu/info/sites/default/files/swd2021_305_en.pdf.

[9] Better Regulation Toolbox, https://ec.europa.eu/info/sites/default/files/br_toolbox-nov_2021_en_0.pdf.



[10] Commission staff working document - impact assessment report accompanying the document proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence,

[https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2022\)42&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2022)42&lang=en) .

[11] Treaty on European Union, Articles 1 and 10(3),

https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&f

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[12] Treaty on European Union, Article 10(3).

[13] Treaty on European Union, Article 11(1).

[14] More information on the Better Regulation agenda is available at

<https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how>

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[15] The relevant chapters for public consultations are chapter 2 in the Better Regulation Guidelines and chapter 7 in the Better Regulation Toolbox.

[16] Better Regulation Guidelines, page 21.

[17] Better Regulation Toolbox, page 478.

[18] Better Regulation Toolbox, pages 476 and 478.

[19]

https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en