



Public Consultation

European Commission Public Consultation on Stakeholder Consultation Guidelines 2014: Response of the European Ombudsman

Background

The European Commission has launched a public consultation in relation to its Stakeholder Consultation Guidelines 2014. The deadline for providing input to the public consultation is 30 September 2014.

According to the Commission, "[s]takeholder consultation helps to ensure that EU law making is transparent, well targeted and coherent. It is enshrined in the Treaties. Consultations - together with impact assessments, evaluations and expertise - are a key tool for transparent and informed policy making, facilitating decision making that respects the principles of proportionality and subsidiarity and that is based on evidence and the experiences and views of those affected by the policies and involved in their implementation.

The Commission consults widely, at each stage of the policy cycle, respecting principles of openness and transparency and following minimum standards, which are generally acknowledged as appropriate and meeting standards of international best practice. Over the last five years, stakeholders' views were sought through more than 500 open consultations published on the 'Your Voice in Europe' website.

(...) The 'Stakeholder Consultation Guidelines' (...) aim at strengthening the quality, scope and targeting of consultation. These guidelines are for Commission services carrying out consultations with stakeholders and citizens outside the European institutions. Their aim is to flag the relevant issues that should be considered when preparing and running consultations as well as to help Commission services define the approach that best fits with their needs.

The guidelines focus on consultations carried out in policy preparation (of new policies, (spending) programmes, legislative proposals, delegated and implementing acts – with or without an impact assessment). They also apply to consultations in the context of evaluations. (...)"



Input from the European Ombudsman's Office

1. Introduction

The Ombudsman regards the framework for consultations organised by the European Commission as a key aspect of good governance at the EU level. It is useful to explain at the outset why this is so. The explanation focuses on regulation, broadly understood to mean the adoption of general rules, whether legislative or non-legislative. A similar analysis could be made of spending programmes.

First, consultation is essential in order for regulation to be effective. The people whose actions the regulator wishes to influence are well-placed to provide information about the outcomes that are likely to occur in practice. This facilitates good regulatory design and helps minimise unintended consequences. The same logic applies to consultation of the people who are supposed to benefit from regulation; consumers, for example, or citizens in general.

Consultation is thus inherently linked to **impact assessment**, whether formal or informal.

Second, regulators cannot expect either the regulated, or the supposed beneficiaries of regulation, automatically to assume that they are impartial public servants pursuing the public interest. This applies to the Commission as much as it does to Member State authorities. Consultation can help build trust in the regulator and thereby ensure that the outcomes of the regulatory process are **legitimate** in the eyes of those affected.

Third, two key political rights of citizens generally are the **right to know** and the **right to participate**. Consultation can contribute to making a reality of these rights by informing citizens of what regulation is planned and providing a mechanism of participation in the regulatory process.

Consultation can therefore improve both the **quality** and the **legitimacy** of regulation. However, this desirable outcome depends on consultation being conducted as part of an overall landscape of good governance characterised by **transparency, accountability and opportunities for participation**. Within this landscape, arrangements for consultation need to be considered alongside those for regulation of lobbying; the proper management of conflicts of interest; impact assessment¹; and the composition and functioning of advisory groups of various kinds. For ease of reference, section 3 below contains a brief account of the Ombudsman's work in these areas.

Without such a framework, consultation might seem like just a way of creating opportunities for lobbying by well-organised special interests. Within such a framework, consultation can help structure lobbying and make it more transparent and accountable.

¹ The Commission is currently carrying out a public consultation on its Impact Assessment guidelines. The Ombudsman may consider an own-initiative inquiry in the future on the Commission's procedures for impact assessment.



An inherent problem of consultation

A well-known issue arises from differences in whether the costs and/or benefits of regulation are concentrated or widely diffused. The more they are concentrated, the greater is the incentive for relevant actors to organise themselves and to participate in consultation exercises. Conversely, such incentives are lower when costs and/or benefits are widely diffused. Consultation needs to be structured so as to mitigate this tendency, if possible, or at least not to exacerbate it.

The issue of languages

In the EU context, where there are 24 official languages, making a reality of the citizen's rights to know and to participate necessarily imposes translation costs. It may also tend to slow the process down. However, failure to use all the languages when consulting restricts the right to know and the right to participate to those who speak the relevant language. It also exacerbates the difficulty of encouraging participation when costs and/or benefits are widely diffused.

2. Global and international standards

For the reasons explained in the introduction, the Ombudsman's suggestions to the Commission as regards consultation need to be placed in the context of broader arrangements for good governance by the EU institutions in general and the Commission in particular.

The EU should aspire to be a global leader in good governance. The Ombudsman tries to help by encouraging the EU institutions to benchmark their operations by reference to international and global standards.

The OECD and OGP

The Organisation for Economic Cooperation and Development (OECD) has taken the lead in formulating standards and identifying best practice in areas such as managing conflicts of interest, controlling lobbying, avoiding corruption in public procurement and encouraging whistleblowing.

A further valuable international source of inspiration is the Open Government Partnership (OGP). The four interlocking themes of the OGP are: accountability, citizen participation, transparency and the facilitating role of new technologies. Although the EU as such has not asked to join the OGP, 20 of the EU Member States do now participate.

The Aarhus Convention

In the field of the environment, the EU is a Party to the Aarhus Convention (the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.) The Convention [Implementation guidelines](#), published in June 2014, and the [Maastricht recommendations on promoting effective public participation in environmental matters](#) constitute useful resources that the Commission might refer to, if it has not already done so.



ReNEUAL

The Ombudsman has also worked closely with a group of academic lawyers from across Europe on the drafting of a set of [Model Rules on EU Administrative Procedure](#), including rulemaking procedures. The Research Network on EU Administrative Law (ReNEUAL) published the final version of the Model Rules on 1st September 2014. The work accomplished by ReNEUAL and embodied in the Model Rules makes more visible, and more understandable, the administrative framework through which the EU institutions carry out their functions. It could have a significant long-term impact in helping the EU institutions to act fairly, transparently, effectively and in a way that is open to participation by affected interests and by citizens generally.

The Ombudsman has encouraged the European Central Bank, the European Investment Bank and the EU Regulatory Agencies to take inspiration from the Model Rules on **rulemaking procedures**.

3. The Ombudsman's work on good governance

The Ombudsman's five [Public Service Principles](#) (commitment to the European Union and its citizens; integrity; objectivity; respect for others; transparency) constitute a high-level distillation of the ethical standards for EU civil servants.

The Ombudsman's inquiries provide guidance on how the EU institutions should make the principles operational in concrete situations.

(i) Conflicts of interest

A conflict of interest occurs when a civil servant's private interests or activities could improperly influence the performance of their official duties and responsibilities. Drawing on the OECD's work, the Ombudsman has emphasised that a situation that looks like a conflict of interest may be enough to undermine public confidence, regardless of whether there is evidence of an actual conflict (see, for example, Cases [2522/2011/CK](#) and [0297/2013/FOR](#)).

The Institutions need to be particularly alert to conflicts of interest (and the appearance of such conflicts) when members of staff leave to take up positions in the private sector, or join from the private sector ("revolving doors"). The Ombudsman has recently given guidance to the Commission on the proper handling of revolving doors cases (see Cases [2077/2012/TN](#) and [1853/2013/TN](#)).

(ii) Lobbying

In a democracy, lobbying is a legitimate activity provided that it is properly regulated and transparent: the citizen's right to know includes knowing which interests are lobbying the EU institutions and for what purposes. The proper functioning of the Transparency Register of EU interest representatives is essential (see Case [277/2012/RA](#)). The Ombudsman has also encouraged the Commission to instruct its officials not to discuss policy with unregistered lobbyists.



(iii) The composition and functioning of advisory groups

The Ombudsman has given guidance to the European Banking Authority and the European Securities and Markets Authority on the composition of stakeholder groups (see Cases [1966/2011/LP](#) and [1967/2011/LP](#)). Two own-initiative inquiries are also currently examining (i) the composition and transparency of the Commission's expert groups and (ii) the 14 "civil dialogue groups" which will serve as advisory bodies for the common agricultural policy (see Cases [OI/6/2014](#) and [OI/7/2014](#) respectively).

4. The Ombudsman's work on consultation

The Ombudsman has dealt with a number of complaints about consultations and meetings with stakeholders, mostly against the Commission. Here are some key points from these cases:

The Commission's minimum standards on consultation² are sufficiently clear for the Ombudsman to evaluate whether the Commission has complied with them. This finding was without prejudice to the complainant's view that the Commission should supplement a sectoral approach to consultation by a more cross-sectoral and holistic one, particularly when its proposals have an impact on a wide range of interests (see Case [948/2004/OV](#)).

Given the issue on which the Commission had to report (application of Treaty provisions on citizenship), it is very difficult to imagine that a report could usefully be written without collecting information from third parties. Consulting interested parties would therefore have been good administrative practice (see Case [406/2008/VIK](#)).

If the Commission organises meetings with stakeholders and requests their views on a given matter, it should make sure that it properly records the opinions expressed by producing accurate minutes (see Case [0097/2008/JF](#) and compare Case [1935/2008/FOR](#)).

When submitting a legislative proposal, the Commission should be able to provide a complete and easily understood account of the steps undertaken and the entities involved in its preparation (see Case [875/2011/JF](#)).

The Commission should ensure that all European citizens are able to understand its public consultations, which should, as a matter of principle, be published in all the official languages (see Cases [0640/2011/AN](#) and [875/2011/JF](#)).

Equal participation is put at risk if relevant information concerning a proposal is made available in one language only (see Case [3419/2008/KM](#)).

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



Ongoing inquiries

For information, the Ombudsman is currently carrying out inquiries into the following **allegations** by complainants:

that the Commission failed to carry out adequate public consultation and impact assessment before adopting a proposal for a Regulation on a European single marker for electronic communications (COM(2013) final 627) (see Case [904/2014/OV](#)).

that the Commission failed to comply with the minimum standards on consultation with regard to the list of projects submitted to be considered as potential Projects of Common Interest in energy infrastructure (see Case [240/2014/SID](#)).

that the public consultation by the European Food Safety Authority (EFSA) on the renewal of the approval of glyphosate is not user friendly because it imposes (i) the mandatory use of an electronic template, as well as (ii) the signature of a disclaimer in order to obtain a copy of the renewal assessment report (see Case [0952/2014/OV](#)).

that EFSA failed properly to address the issue of ingestion of Genetically Modified Insects in its draft Guidance document for Environmental Risk Assessment on Genetically Modified Animals which it issued for consultation in June 2012 (see Case [0346/2013/SID](#)).

5. A European Law of Administrative Procedure

On 14 January 2013, the European Parliament adopted the Berlinguer Report, which requests the Commission to submit a proposal for a regulation on a European Law of Administrative Procedure. The Ombudsman has publicly stated that it would be in the interests of citizens, and of the EU institutions, for the Commission to respond positively to the Berlinguer Report. When it responds to the Report, the Commission could take the initiative to include a provision on consultation³. The following could provide a starting point:

The preparation by the Commission of each major policy initiative and of each proposal for a significant legal act of general application (whether legislative or non-legislative) shall normally include (a) an impact assessment and (b) wide consultation with affected interests.

(a) The Commission shall organise and conduct impact assessments according to the following principles:

(...)

(b) The Commission shall organise and conduct consultations (including consultations that form part of impact assessments) according to the following principles:

³ The Commission could also include a provision on impact assessment, although this aspect is not dealt with here.



- (i) Timeliness. Consultation aims to involve interested parties in the development of a policy at a stage where they can still have an impact on the formulation of the main aims, methods of delivery, performance indicators and, where appropriate, the initial outlines of that policy.*
- (ii) Clarity. All communications relating to consultations should be clear and concise, and should include all necessary information to facilitate responses. Consultations which are addressed to the general public shall be published in all the official languages.*
- (iii) Transparency. Notice of all consultations with interested parties shall be published in the Official Journal. The notice shall include a concise statement of the issues that will be developed, who will be invited to respond and the mechanisms that will be used. Consultation documents shall be made available to the public, at least on request. Responses to consultations shall be accessible to the public in accordance with Regulation 1049/2001. Where possible, such responses shall be made available on-line.*
- (iv) Public participation. Any person may respond to a consultation, whether invited to do so or not.*