

The European Ombudsman's own-initiative inquiry OI/6/2014/NF concerning the composition of Commission expert groups

Commission's opinion on the European Ombudsman's recommendations and suggestions

I. Background

On 19 December 2013, the European Ombudsman closed her inquiry into complaint 1682/2010/(ANA)BEH lodged by Alter-EU against the Commission for maladministration in the area of expert groups.

On 12 May 2014, the European Ombudsman informed the Commission of her decision to open an own-initiative inquiry into the composition of Commission expert groups. According to the Ombudsman, this own-initiative inquiry aimed at promoting transparency and supporting efforts towards achieving a more balanced composition of Commission expert groups.

On 27 January 2015, the European Ombudsman wrote to the Commission in order to communicate (i) the feedback she received to the public consultation¹ carried out in the context of the above-mentioned inquiry, (ii) her preliminary views on the issues involved, and (iii) a set of suggestions to which the Ombudsman invited the Commission to respond.

On 29 May 2015, the Commission submitted its opinion on the European Ombudsman's suggestions.

On 29 January 2016, the European Ombudsman issued two recommendations to the Commission, as well as a number of suggestions inviting the Commission to respond.

II. Commission's introductory remarks

The revised horizontal rules on expert groups adopted on 30 May 2016² and attached hereto respond positively to many suggestions made by the Ombudsman and reflect the Commission's determination to improve the overall management of these groups.

The revised horizontal rules were adopted by the Commission in the form of a Commission Decision providing the Commission departments with a set of specific instructions on the creation and operation of expert groups, accompanied by a Communication³ explaining the main aspects of the new rules.

On the one hand, the revised horizontal rules fully deliver on the commitments taken by the Commission in its reply to the Ombudsman of 29 May 2015 by:

- making it mandatory for Commission departments to select expert group members

¹ The public consultation took place between mid-May and the end of August 2014.

² C(2016) 3301

³ C(2016) 3300

through public calls for applications, under certain conditions⁴;

- significantly improving conflict of interest management in relation to individuals appointed in a personal capacity⁵;
- foreseeing that a new version of the Register of Commission expert groups and other similar entities ('the Register of expert groups') reflecting the revised horizontal rules should be put in place, and ensuring for the first time synergies between the Register of expert groups and the Transparency Register⁶, and
- streamlining the classification of group members in order to bring more clarity and transparency with respect to the membership of expert groups⁷.

On the other hand, the revised horizontal rules include other important novelties, for example:

- the minimum number of members (six) as a criteria to classify a consultative entity as a 'Commission expert group' was removed⁸, with a view to enhancing transparency. Thus, consultative entities which were not classified as 'Commission expert groups' or 'other similar entities' for the sole reason that they are composed of less than six members, shall be subject to the revised horizontal rules by the end of 2016.
- in order to ensure political control of the creation of expert groups, a Commission department wishing to set up an informal group shall request the agreement of the responsible Commissioner and Vice-President⁹. Of course, it will continue to be possible to set up formal expert groups via a Commission decision, which by definition engages the responsibility of the College.
- the role of observers has been specified. The revised horizontal rules now clarify that observers and their representatives may be permitted by the Chair to take part in the discussions of the expert group and provide expertise, but shall not have voting rights and shall not participate in the formulation of recommendations or advice of the expert group¹⁰.
- the revised horizontal rules specify that Member States and other public bodies, such as third countries, can only be represented by civil servants or public employees.

In light of the above, the Commission considers that the revised horizontal rules constitute a solid framework, ensuring a smooth, transparent and coherent functioning of these groups, in line with the Ombudsman's requests.

III. Ombudsman's recommendations

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

⁴ See Heading IV a) for more details.

⁵ C(2016) 3301, Article 11.

⁶ C(2016) 3300, chapter 2, p. 5.

⁷ C(2016) 3301, Article 7.

⁸ C(2016) 3301, Article 1.2.

⁹ Idem, Article 4.5.

¹⁰ Idem, Article 16.

- **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.**

Commission's opinion

In line with the Ombudsman's requests, the revised horizontal rules further enhance transparency.

As requested by the Ombudsman, the revised horizontal rules foresee that minutes should be meaningful and complete¹¹.

As suggested by the Ombudsman, the revised horizontal rules instruct Commission departments to ensure prior publication of the agenda and of the background documents in due time ahead of the meeting, followed by timely publication of adequate minutes of the particular expert group meeting¹². This is part of the long-standing general Commission commitment to publish all relevant documents (see Heading IV i)).

When opinions, recommendations or reports are given by the expert groups, the members that voted against them or abstained shall have the right to have a document summarising the reasons for their position annexed to the opinions, recommendations or reports¹³.

As regards the confidentiality of expert group deliberations, the work carried out by expert groups is a collective one, which very often leads to conclusions being reached by consensus, in a spirit of mutual trust. Experts should be able to contribute freely to the work of expert groups in closed discussions. However, as it was done in the past, an expert group may, by a simple majority of its members, and in agreement with the relevant Commission department decide that deliberations shall be public¹⁴. The revised rules thus offer sufficient space to the groups to decide how they want to operate, in a flexible way, in light of specific circumstances. We believe that with this set of provisions, a reasonable balance is struck between transparency and confidentiality needs.

IV. Ombudsman's suggestions

- (a) **The Ombudsman suggested that the Commission commit to always using public calls for applications for the selection of expert group members who are not public authorities.**

Commission's opinion

The Commission confirms its position as expressed in its reply to the Ombudsman of 29 May

¹¹ Idem, Article 13.7.

¹² Idem, Article 26.1

¹³ Idem, Article 13.8.

¹⁴ Idem, Article 13.6.

2015. In particular, the Commission confirms that, as a general rule, the selection of expert group members shall be carried out *via* public calls for application, except for public authorities, as well as certain representative bodies established by Union legislation for advice in specific areas¹⁵. Calls for applications shall be published on a dedicated section of the Register of expert groups, with a minimum deadline of four weeks. In addition, calls may also be published through other means, for example on dedicated websites.

The Commission also confirms that it may depart from the above-mentioned provisions, where this is deemed justified by overriding priorities or conditions of urgency. Where the Commission decides that a public call is not a suitable instrument for the selection of the members of a specific expert group, the choice of experts shall be made on the basis of objectively verifiable criteria, which are published on the Register of expert groups.

The Commission also maintains that if the necessary expertise can be obtained via a continuously open call, which in any event will also be published on the Register of expert groups, a specific new call may not be necessary.

- (b) The Ombudsman suggested that the Commission 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.**

Commission's opinion

The Commission confirms its position as expressed in its reply to the Ombudsman of 29 May 2015. In particular, taking into account that the two Registers are very different in nature and purpose, the Commission does not deem it appropriate to fully replicate the Transparency Register's categorisation to categorise members of expert groups. However, many categories currently used in the Transparency Register will be used also in the new Register of expert groups, thus ensuring a high degree of harmonisation.

- (c) The Ombudsman suggested that the Commission 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.**

Commission's opinion

The current Inter-institutional Agreement¹⁶ does not foresee formal ex-ante vetting of new registrants. All organisations on the Transparency Register are, however, bound by the Transparency Register's Code of Conduct, according to which the onus is on registrants to ensure that to the best of their knowledge the information they provide is complete, up-to-date and not misleading.

The Joint Secretariat is committed to achieving overall data quality while ensuring effective, non-bureaucratic monitoring within the limits of its resources. The Secretariat also acts

¹⁵ Idem, Article 10.

¹⁶ Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation. OJ L 277/11: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=urisrv:OJ.L_.2014.277.01.0011.01.ENG

promptly upon complaints and alerts it receives. The Register offers a user-friendly registration/update process accompanied by comprehensive guidelines. All new incoming registrations are subject to an eligibility check which, *inter alia*, assesses the appropriateness of the section chosen by the registrant based on their profile and activities. Efforts to improve data quality will continue to intensify. The ongoing public consultation on a mandatory transparency register will also allow stakeholders to express their views on how to improve the user-friendliness and the overall quality of the data included in the Register.

- (d) **The Ombudsman suggested that the Commission require that individual experts appointed in their personal capacity update their declarations of interests on a yearly basis.**

Commission's opinion

Giving the high number of experts appointed in a personal capacity, especially in expert groups managed by certain Commission departments, the Commission considers it disproportionate for DGs to deal with annual updates of the declarations of interest where no changes occurred in the expert's situation. However, the revised horizontal rules foresee that experts appointed in a personal capacity shall be required to promptly inform the competent Commission department of any relevant change in the information previously provided including upcoming activities in which case they must immediately submit a newly completed declaration which describes that change, so that the Commission departments can assess it in due course. In addition, the revised horizontal rules provide that the chair of each expert group, at the first meeting of each calendar year, shall remind all concerned members of this obligation¹⁷.

- (e) **The Ombudsman suggested that the Commission explain, in the horizontal rules governing expert groups, what the Commission means by 'balance'.**
- (f) **The Ombudsman suggested that the Commission require that expert groups have a balanced composition. The Commission may allow for an exception from the balance requirement in duly justified cases.**
- (g) **The Ombudsman suggested that the Commission 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 non-economic interests should be.**
- (h) **The Ombudsman suggested that the Commission define general criteria for the categorisation of economic and non-economic interests in expert groups.**

Commission's opinion

The revised horizontal rules reconfirm the Commission's strong commitment to strive for a balanced composition of expert groups. In their selection of members of the expert groups the Commission departments must aim at ensuring not only a high level of expertise but also a

¹⁷ Idem, Article 11.6.

geographical balance, a balanced representation of relevant know how and areas of interest and a gender balance.¹⁸

The revised horizontal rules make clear that such balanced composition must be ensured by taking into account the specific tasks of the expert groups and the type of expertise required in view of the mandate of the group. Transparency in the selection of experts through mandatory public calls for applications will become one of the main levers to achieve this balance. In particular, the revised rules foresee that calls for applications should clearly outline the selection criteria including the required expertise and, where existing, the interests to be represented in relation to the work to be performed. These requirements give adequate guidance to the Commission's departments in ensuring a balanced composition for their experts groups, without there being any need for laying down more specific *ex ante* requirements for individual groups. On this point, the Commission also refers to the reasons set out in the Commission's reply to the Ombudsman of 29 May 2015. Ultimately, the Commission wishes to underline that the final balance achieved in expert groups also depends on the number and quality of responses which it receives to its calls for applications.

In contrast, the composition of expert groups should not be designed by introducing a cap or quota for each interest category, irrespective of the concrete circumstances in which these groups operate and of the interest shown by stakeholders concerned during the selection procedure, because this would often result in an artificial composition of groups, which would then be incapable of providing the Commission with the added value it needs and why the group is set up. In light of this, the Commission also maintains that it is neither appropriate nor useful to draw up a theoretical definition of balance or a definition of balance for every group, also for the reasons outlined in its reply to the Ombudsman of 29 May 2015.

As public calls give equal opportunities to all parties concerned, the Commission cannot subscribe to the Ombudsman's view that if the Commission faces difficulties in achieving a fully balanced composition, it should consider modifying the mandate of the group, reducing its size or even deciding not to set it up at all. This would, in fact, significantly diminish the Commission's capacity to have access to the expertise and views that it really needs, which goes against the very purpose of setting up expert groups.

As regards the lack of suitable applications from civil society organisations, the Commission is of the opinion that one possible solution would be for these organisations to propose experts not only from within the European headquarters, but also from their national member organisations or individual experts proposed by these.

As stated in previous correspondence with the Ombudsman, the Commission maintains that the degree of involvement of stakeholders should be assessed in light of all initiatives taken by the Commission on a given subject, not just in light of the composition of expert groups. As was done in the past, Commission departments may continue to use various tools supplementing the work of expert groups, such as public consultations, conferences and studies, in particular in order to gather the expertise and views of those who, for different reasons, do not participate in the activities of a given group.

In light of experience gained, the Commission does not deem it appropriate to define general criteria for the categorisation of economic and non-economic interests in expert groups. As indicated in the Commission's reply to the Ombudsman in relation to her own-initiative inquiry OI/7/2014/NF concerning the composition of the Civil Dialogue Groups (CDGs), it proved to

¹⁸ Idem, Article 10.5 and 10.6

be impossible to establish a reliable classification method. Again, the nature of the interests represented should be assessed on a case-by-case basis in the framework of calls for applications.

- (i) **The Ombudsman suggested that the Commission 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.**

Commission's opinion

The revised horizontal rules explicitly include a commitment taken by the Commission vis-à-vis the European Parliament in 2012 to make available all relevant documents of an expert group, 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 found¹⁹. As pointed out in previous correspondence with the Ombudsman, exceptions to publication are possible only 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.

The Commission cannot agree with the Ombudsman's view that transparency is guaranteed only if all documents are uploaded on the Register of expert groups so that they are accessible in one place. For the sake of proportionality and in order to avoid unnecessary administrative workload, the Commission maintains that the above-mentioned flexible arrangements currently used concerning publication allow the general public to be adequately informed and are therefore justified.

Through the new version of the Register of expert groups synergies are ensured between this Register and the Transparency Register for the first time, in particular by linking organisations and individuals representing a common interest published on the Register of expert groups to the profile of these members in the Transparency Register. In this context information on the common interest represented shall be provided in both Registers.

Given the significant resources required to release a new version of the Register of expert groups it was not possible to include certain new features at this stage, including the redesign of the statistics tab. The Commission will reconsider this issue in the future.

¹⁹ Idem, Article 26.