



Decision

in case 904/2014/OV on the European Commission's public consultation prior to its legislative proposal for a Regulation concerning the European single market for electronic communications

This complaint concerns an alleged failure by the European Commission to carry out an adequate public consultation in advance of drawing up its Proposal for a Regulation concerning the European single market for electronic communications and a Connected Continent. The complaint was made by the Competitive Telecommunications Association. The Commission submitted its Proposal on 11 September 2013, a little more than three months after it had publicly announced it on 30 May 2013. The complainant alleged that the Commission had wrongly invoked urgency, arising from the Spring 2013 European Council, as a reason for rushing through the consultation process. In addition, the complainant argued that the Commission had failed (i) to identify the different types of stakeholders to be consulted, (ii) to address the points raised by the Impact Assessment Board, (iii) to carry out a proper inter-service consultation, and had also (iv) deliberately attempted to conceal the lack of a public consultation.

The Ombudsman found that the Commission's public consultation did not comply with the general principles and minimum standards which govern the conduct of such consultations. However, the Ombudsman considered the Commission's argument that there had been urgency, which resulted in a limited form of consultation, convincing. The Ombudsman therefore closed her inquiry with a finding of no maladministration.

The background to the complaint

1. This complaint, submitted by the European Competitive Telecommunications Association (ECTA), concerns the Commission's alleged failure to carry out an adequate public consultation and impact assessment prior to submitting, on 11 September 2013, its *Proposal for a Regulation of the European Parliament and Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent (COM/2013) final 627*¹ (hereafter "the legislative proposal"). An important feature of this proposal was the gradual phasing out of roaming surcharges.

2. The Commission presented its legislative proposal six months after the Spring European Council of 14-15 March 2013. In the Commission's view, the

¹<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0627&qid=1401294158152&from=EN>



European Council had underlined the urgent need for concrete proposals to be presented before the October 2013 European Council.

3. The legislative proposal itself was announced by Commissioner Kroes in a speech of 30 May 2013 to the European Parliament's Internal Market and Consumer Protection (IMCO) Committee². Subsequently, the Commission organised two events. On 17 June 2013, the Commission organised a public information session "*Telecoms Single Market*" (stakeholder workshop) in Brussels, in which the complainant took part. The Commission also organised, together with the Irish Presidency of the EU, a "*Digital Agenda Assembly*" in Dublin on 19-20 June 2013. At a forum organised by the complainant on 3 July 2013 (where officials of the Commission's DG CONNECT³ were present) and at a bilateral meeting with the Commission on 17 July 2013, the complainant called on the Commission to conduct a proper public consultation of all stakeholders.

4. The Commission's legislative proposal was discussed in the Council on 5 December 2013. On 3 April 2014, Parliament adopted its position at first reading, proposing a series of amendments. It is against this background that the complainant on 16 May 2014 submitted its complaint to the Ombudsman.

The inquiry

5. The Ombudsman opened an inquiry into the complaint and identified the following **allegation**:

The Commission failed to carry out an adequate public consultation and an impact assessment before adopting its Proposal for a Regulation (COM(2013) final 627) on 11 September 2013.

The complaint did not concern the substance of the Commission's legislative proposal, but only the procedural aspects of the public consultation. More particularly, the complainant argued that it was not the Spring 2013 European Council that had asked for an urgent adoption of the Commission's proposal but that it was the Commission itself which had created such urgency. In addition, the complainant argued that the Commission had failed (i) to identify the different types of stakeholders that were to be consulted, (ii) to address the points raised by the Impact Assessment Board ("IA Board"), (iii) to carry out a proper Inter-Service Consultation ("ISC"). The complainant also claimed that the Commission had deliberately attempted to conceal the lack of a public consultation.

6. The Ombudsman asked the Commission to explain whether it considered that it had carried out a proper public consultation, or whether there was an exceptional urgency for not conducting one.

7. The Ombudsman in this context referred to the Commission's statement in the Explanatory Memorandum of its legislative proposal which mentioned that "*[s]ince the Spring European Council set out in its conclusions the need for concrete proposals to be presented before its October European Council, public consultations had to be conducted within this challenging time-table*". The Ombudsman noted that the complainant seemed to be correct in pointing out that this urgency stemmed

² http://europa.eu/rapid/press-release_SPEECH-13-484_en.htm

³ Directorate-General for Communications Networks, Content and Technology.



from the Commission's self-imposed time frame and not from the European Council.

8. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Preliminary remarks

Developments as regards the Commission's legislative proposal after the complaint was submitted

9. By the time the complaint was made (16 May 2014), the European Parliament had already taken a position (on 3 April 2014) on the Commission's legislative proposal. Subsequently, on 9 July 2014, the Commission adopted its position on Parliament's amendments. On 4 March 2015, the Council agreed to give its Presidency the mandate to start negotiations with Parliament with regard to i) adopting new rules to cut mobile phone roaming fees and ii) safeguarding an EU-wide open internet access. The other parts of the Commission's legislative proposal were left out by common decision of the Council⁴. On 6 May 2015, the Commission presented its Communication on "A Digital Single Market Strategy for Europe", which will constitute the basis for several new legislative proposals. In that Communication, the Commission states that it "will engage in an ongoing dialogue with stakeholders to inform on policy-making" and that "[e]ach action will be subject to appropriate consultation and impact assessment" (pages 3 and 18 of the Communication).

1) Failure to carry out an adequate public consultation

Arguments presented to the Ombudsman

10. The complainant pointed out that the obligation to consult is set out in various legislative and administrative provisions. It referred in particular to i) Article 11(3) of the Treaty on European Union (TEU), ii) Article 2 of the Protocol No. 2 (to the EU Treaties) on the application of the principles of subsidiarity and proportionality, iii) the Commission Communication of 11 December 2002 "Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission"⁵ (hereafter "the 2002 Communication"), iv) the Commission Impact Assessment Guidelines (SEC(2009) 92) of 15 January 2009⁶ (hereafter "the 2009 Guidelines"), and v) the Commission Communication of 8 October 2010 on Smart Regulation in the European Union⁷.

⁴ <http://www.consilium.europa.eu/en/press/press-releases/2015/03/150304-roaming-and-open-internet-council-ready-for-talks-with-ep/>

⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0704&from=EN>

⁶ http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0543&from=EN>



11. The complainant pointed out that the Commission adopted its legislative proposal just six months after the Spring European Council of 14-15 March 2013. As regards the Commission's claim that an urgency justified curtailing the scope of the consultation to be carried out, the complainant argued that this was a self-imposed Commission deadline.

12. The complainant argued that none of the consultative steps undertaken by the Commission between March and September 2013 could be regarded as a proper and effective public consultation. The complainant in particular stated that the two stakeholder workshops organised by the Commission in Brussels and Dublin on, respectively, 17 and 19-20 June 2013, could not be considered as a public consultation. It argued that the Commission had not published any document which identifies the different types of stakeholders which have been consulted and their specific positions.

13. The **Commission** argued that the political and economic background for its legislative proposal was the Member States' and the European Union's determination to promote competitiveness, growth and jobs. On that basis, the 2013 Spring European Council had "*call[ed] for preparatory work to be conducted giving priority*" to specific issues which included the digital agenda and the related services, and noted the Commission's intention to report well before October on "*concrete measures to establish the single market in Information and Communications Technology as early as possible*". The Commission stated that the timing set by the European Council was an important contextual factor which could not be ignored. Furthermore, the difficult economic situation of the telecom sector called for swift action. At its October 2013 meeting, the European Council "*welcome[d] the presentation by the Commission of the "Connected Continent" package and encourage[d] the legislator to carry out an intensive examination with a view to its timely adoption*". This confirmed the urgency of the Commission's proposals and the need to prepare them in such a short space of time, taking also into account the forthcoming end of the mandate of both the Commission and Parliament. The need to act promptly was also fully endorsed by the European Parliament, which in a very short time fully and extensively examined the Commission's legislative proposal and adopted a final position before the end of its legislature.

14. The Commission stated that it had fully considered all the information and data gathered in the past in relation to the main issues at stake, and that it had actively described and discussed its forthcoming legislative initiative with all interested stakeholders. The Commission described in detail the various consultative steps and information gathering processes it had undertaken since 2010 on the different elements that were included in its legislative proposal.

15. The Commission argued that it also used other open consultation tools in order to give interested parties the possibility to participate in the debate. In particular, the intention of the Commission to proceed with a comprehensive legislative proposal, built upon the cumulative inputs received in the individual consultations mentioned above, was made public and discussed at the public event held on 17 June 2013. This public information session was accompanied by a background paper that referred to the various subjects that were finally addressed in the Commission's legislative proposal. Some 185 attendants, from 24 different countries representing different kinds of stakeholders (such as National Regulatory Authorities, other national administrations, telecom operators, content operators, investors, M2M providers, academia, journalists, civil society and consumer organisations, IT applications and manufacturing industry) participated in that event, including the complainant. Moreover, the



discussion held in the context of the 2013 Digital Agenda Assembly in Dublin on 19-20 June 2013 also offered to a wide range of stakeholders the possibility to discuss options for a possible legislative intervention by the Commission in the area of digital services.

16. Furthermore, Commissioner Kroes, who was in charge of the preparatory work for the proposal, spoke on several occasions about the forthcoming proposal in different *fora*. Likewise, senior Commission officials were involved in several events organised by stakeholders, in particular the 25 June 2013 Conference on a "Single Market for Telecoms" organised by the complainant itself. Finally, the above events triggered written inputs and contributions from some 30 stakeholders, including the complainant. A general overview of the stakeholders' views was included in the Impact Assessment.

17. The Commission stated that the minimum standards set out in the 2002 Communication and the Communication on Smart Regulation do not require that a specific consultation on the text of a legislative proposal must necessarily be carried out. Rather, the Commission must generally ensure to have publicly consulted on issues that will be reflected in policy initiatives. In this case, the Commission complied with the minimum standards either directly or by using wide consultations carried out by EU expert bodies concerning the specific issues dealt with in its legislative proposal.

18. In its observations, **the complainant** argued that it was clear that the Commission had acted under a self-imposed deadline, as the European Council had *never* requested the Commission to act with urgency, but merely to carry out preparatory work on specific issues, including the Digital Agenda.

19. The complainant stated that the Commission's references to instances of engagement with stakeholders all took place before the legislative proposal was adopted, in some cases several years before, and did not address the various measures which were finally included in the Commission's proposal.

The Ombudsman's assessment

Relevant provisions on public consultation

20. Article 1 TEU provides that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, "*in which decisions are taken as openly as possible and as closely as possible to the citizen*". The Lisbon Treaty introduced in the TEU the Title "*Provisions on Democratic Principles*" (Articles 9-12). Article 10(3) TEU states that every citizen shall have the right to participate in the democratic life of the Union and reiterates that "*[d]ecisions shall be taken as openly and as closely as possible to the citizen*". Article 11(1) and (2) TEU provide that the EU institutions shall, by appropriate means, give citizens and representative associations **the opportunity to make known and publicly exchange their views in all areas of Union action**, and that the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

21. As regards more specifically the role of the Commission, Article 11(3) TEU provides that "*[t]he European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent*". As regards the adoption of EU legislation, Article 2 of the Protocol n° 2 on the application of the principles of subsidiarity and proportionality



provides that, before proposing legislative acts, the Commission "*shall consult widely. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal*" (emphasis added).

22. The general principles and minimum standards for public consultation which were applicable to the consultation process that led to the adoption of the legislative proposal of 11 September 2013 are set out in the 2002 Communication.

23. Two preliminary observations are relevant. First, although the principles and standards set out in the 2002 Communication are not legally binding⁸, the Ombudsman considers that it is good administrative practice for the Commission to apply what it refers to as the 'minimum standards for consultation', unless there are valid reasons for not doing so in a given case.

24. Second, the 2002 Communication does not require that a specific consultation is necessarily carried out on the text of a legislative proposal. However, the 2002 Communication should be interpreted in the light of Article 2 of the Protocol n° 2 on the application of the principles of subsidiarity and proportionality. This provision requires that "[b]efore proposing legislative acts, the Commission shall consult widely" (emphasis added). This obligation on the Commission was already contained in the Protocol n° 7 annexed to the Amsterdam Treaty. The 2002 Communication refers to this Protocol on page 4, where it is stated that "*wide consultation is one of the Commission's duties according to the Treaties and helps to ensure that proposals put to the legislature are sound. This is fully in line with the European Union's legal framework, which states that "the Commission should [...] consult widely before proposing legislation and, wherever appropriate, publish consultation documents"*". The 2002 Communication also states that "[t]he Commission is committed to an inclusive approach when developing and implementing EU policies, which means consulting as widely as possible on major policy initiatives. *This applies, in particular, in the context of legislative proposals*" (emphasis added).

25. The 2002 Communication provides, in summary, that the following five minimum standards must normally be observed when a consultation is carried out⁹:

- a) Clear content of the consultation process:** All communications relating to the consultation should be clear and concise, and should include all necessary information to facilitate responses;
- b) Consultation target groups:** When defining the target group(s) in a consultation process, the Commission should ensure that relevant parties have an opportunity to express their opinions; the target group should be clearly defined prior to the launch of the consultation process¹⁰;
- c) Publication:** The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences;

⁸ The 2002 Communication on page 15 explicitly states that "*When consulting on major policy initiatives the Commission will be guided by the general principles and minimum standards set out in this document. Neither the general principles nor the minimum standards are legally binding*".

⁹ These five minimum standards are described in more detail on pages 19 to 22 of the 2002 Communication.

¹⁰ Page 11 of the 2002 Communication.



- d) **Time limits for participation:** The Commission should strive to allow at least 12 weeks¹¹ for the reception of responses to written public consultations;
- e) **Acknowledgement and feedback:** The results of open public consultations should be displayed on websites linked to the single access point on the Internet. With regard specifically to legislative proposals, the 2002 Communication states that "*explanatory memoranda accompanying legislative proposals by the Commission ... will include the results of these consultations and an explanation as to how these were conducted and how the results were taken into account in the proposal.*" (emphasis added).

Compliance with the general principles and minimum standards of the 2002 Communication

26. The Ombudsman notes that the Commission itself, in the Explanatory Memorandum, referred to consultation that was carried out after the Spring European Council in March 2013. In fact, the Commission stated there that the public consultations had to be conducted "*within this challenging time-table*", which meant within the period starting on 13/14 March (the date of the Spring European Council) and finishing on 11 September 2013 (the date of the submission of the legislative proposal). However, the idea for a legislative proposal was made public for the first time on 30 May 2013, in a speech by Vice-President Kroes to Parliament's IMCO Committee. This implies that the potential for any public consultation was in practice limited to the period between 30 May and 11 September 2013, which is less than three and a half months. Considering the complexity of the various issues that were included in the legislative proposal, this was an extremely short time to carry out a public consultation.

27. The relevant section of the Explanatory Memorandum on the public consultations carried out is very short. It mentions that:

"In addition to specific formal consultations and consultative events, the Commission has engaged extensively with a wide range of stakeholder organisations to assess the general state of the electronic communications market and how to establish a single market. It has met and received submissions from stakeholders representing all industry segments, consumer organisations, civil society, and national regulators and governments.

On top of that, the Commission organised several consultative events attended by stakeholders representing all segments of the industry, consumers and civil society¹². These consultations have shown that a large majority of stakeholders share the Commission's problem analysis and recognise that urgent action is needed ...".

28. With the exception of the two events of 17 and 19-20 June 2013 that are mentioned, the Explanatory Memorandum refers, in very general terms and without mentioning any dates, to several consultations and consultative events carried out by the Commission. The Ombudsman does not therefore agree with the Commission's view that the Explanatory Memorandum explained the consultation approach *in a clear and thorough manner*.

¹¹ The Ombudsman notes that, in the light of concerns expressed for longer consultation periods, the **8 weeks** period provided for in the 2002 Communication was extended to **12 weeks** (namely 3 months) in the Communication on Smart Regulation (Communication COM(2010) 543 final of 8 October 2010). The 12 weeks consultation period applied as from 2012.

¹² The Commission referred in particular to the public information session it organised in Brussels on 17 June 2013 and to the event held in Dublin on 19-20 June 2013.



29. In the Ombudsman's view, the public consultation carried out in the present case does not comply with the minimum standards set out in the 2002 Communication. The Ombudsman takes the view that, in terms of the minimum standards, the public consultation was deficient because the Commission:

- failed to publish a consultation document;
- failed to identify the specific groups requiring to be targeted;
- failed to launch a consultation process publicly;
- failed to set a deadline (normally 12 weeks) by which submissions should be made; and
- failed subsequently to explain how the public consultation was taken into account in the legislative proposal.

30. In fact, the Commission itself does not claim that its public consultation met those standards. In Annex I of the Impact Assessment ("*Detailed Overview of the Consultation of Stakeholders and other EU institutions*"), the Commission acknowledges that "*a fully-fledged public consultation on the specific measures in accordance with the Commission's guidelines could not be organized*". This non-compliance is evident also from the Commission's Impact Assessment Board (IA Board) reports of 19 July, 29 August and 6 September 2013. In particular, in its second negative opinion of 29 August 2013, the IA Board said that the IA report should outline "*the reasons why an open public Internet consultation has not been carried out for this initiative*". It added that the report "*should explicitly acknowledge that an open public consultation on the specific measures and their impacts has not been carried out, ...*". In its third report of 6 September 2013, the IA Board again referred to "*the absence of an open consultation*".

31. It is relevant to note that the IA Board issued its first opinion on 19 July 2013. As it is logical to assume that the Commission would consult its IA Board only after having carried out any consultation necessary, it appears that, in the Commission's view, the consultation was completed before 19 July 2013.

32. The Commission invoked three main arguments to justify its view that its consultation in the present case was sufficient. The sufficiency of the consultation must be assessed against the Commission's position that there was an urgency attaching to the matter and that this urgency warranted a departure from the minimum standards which would otherwise apply.

33. *First*, the Commission argued that the events on 17 June and on 19-20 June 2013 constituted consultation. *Second*, it argued that the 2002 Communication does not require that the consultation be carried out by reference to the text of a legislative proposal or a specific consultation document, but that the Commission must generally ensure having publicly consulted on issues that will be reflected in policy initiatives. *Third*, the Commission argued that there had been various consultations and consultative events prior to March 2013.

34. It is not necessary to engage in a detailed assessment of the merits of each of these arguments. Clearly, the two events in June 2013 constituted public consultation but not an extensive consultation. The absence of a consultation document, particularly where the subject matter was quite complex, inevitably inhibited the consultation. The fact that there had been various relevant



consultations and events prior to 2013 is certainly a positive factor but did not remove the need for more immediate consultation.

35. While the Commission did take certain steps to consult interested stakeholders, that consultation did not comply with the general principles and minimum standards set out in the 2002 Communication. However, it remains to be examined whether the Commission had valid reasons for its decision to curtail the consultation.

The urgency invoked by the Commission

36. The Commission has argued that it was operating under time constraints which limited the degree to which it could conduct a consultation.

37. Article 2 of Protocol n° 2 provides that the Commission, in cases of exceptional urgency, shall not conduct public consultations. In that event, however, it shall give reasons for its decision in its proposal. In this case, the Commission stated that "[s]ince the Spring [2013] European Council set out in its conclusions the need for concrete proposals to be presented before its October [2013] European Council, public consultations had to be conducted within this challenging time-table". It is thus clear that the Commission did not take the view that no consultation was possible in the present case but that, due to the urgency of the matter, the consultation needed to be adapted to the timeframe that was available. The Ombudsman considers this approach to be reasonable. If, according to Protocol n° 2, no consultation at all is to be carried out in cases of exceptional urgency, it clearly makes sense to carry out a limited form of consultation if the urgency is not such that it leaves no time at all for consultation.

38. In its Explanatory Memorandum, and on a number of occasions subsequently, the Commission referred to the Spring 2013 European Council conclusions as the main reason for the urgency it assumed to exist. It is true that, in these conclusions, the European Council "*notes the Commission's intention to report well before October on the state of play and the remaining obstacles to be tackled so as to ensure the completion of a fully functioning Digital Single Market by 2015, as well as concrete measures to establish the single market in Information and Communications Technology as early as possible before October 2013*". Read in isolation, this statement would appear to suggest that it was the Commission that intended to proceed rapidly, and that the European Council merely accepted this proposal. In that case, any possible urgency resulting from the European Council's conclusions would have been the Commission's own doing and could hardly be invoked to justify the absence of a proper public consultation.

39. However, regard needs to be had to the fact that the above-mentioned statement is preceded by the following text in the minutes of the meeting of the European Council: '*The European Council will hold, over the coming months, a series of thematic discussions on sectoral and structural aspects that are key to economic growth and European competitiveness. ... with a view to these discussions, it calls for preparatory work to be conducted giving priority to the following issues: ... (c) digital agenda and other services*'. It is thus clear from these conclusions that the European Council intended to hold a thematic discussion on the issue of the digital agenda and other services in October 2013. It is also clear that the European Council did indeed expect the Commission to submit concrete proposals as early as possible and in any event before October 2013. In these



circumstances, urgency clearly existed, as the Commission thus had little more than six months to prepare the necessary proposals.

50. Having regard to the assessment above, the Ombudsman finds that the Commission had valid reasons for curtailing its public consultation in this case and that its failure to abide by the minimum standards, as laid down in the 2002 Communication, was justified. On this basis, the Ombudsman finds that there was no maladministration by the Commission arising from its curtailed public consultation.

2) Alleged insufficiency of the Impact Assessment

Arguments presented to the Ombudsman

51. The complainant alleged that the Impact Assessment did not comply with the Commission's Impact Assessment Guidelines of 15 January 2009 (the '2009 Guidelines'). *First*, the Commission twice failed to obtain the approval of the IA Board. *Second*, even if, in its third opinion of 6 September 2013, the IA Board acknowledged some improvements in the Impact Assessment, it still highlighted several points that needed to be addressed. However, in the complainant's view none of the points raised by the IA Board in its final opinion were addressed by the Commission in the final Impact Assessment.

52. The Commission stated that the final version of the Impact Assessment contains a complete overview of the way the preceding IA Board's recommendations were taken into account.

The Ombudsman's assessment

53. Verification of Impact Assessments can involve complex technical and scientific questions. That task has been entrusted to a specific independent body with expert knowledge, that is the Commission's IA Board which is independent of the Commission's policy making departments¹³. The fact that the Commission's draft Impact Assessment report twice received a negative opinion from the IA Board cannot be considered as maladministration. The Commission submitted a third version of its Impact Assessment report to the IA Board, which then delivered its final opinion, upon which the Commission adopted the final version of its Impact Assessment report.

54. The issue here for the Ombudsman is whether the Commission complied with the procedural rules for impact assessments, and, in particular, what action it took following the final opinion of the IA Board. Section 2.5 of the 2009 Guidelines specifically provides that "[t]he final version of the IA report should briefly explain how the Board's recommendations have led to changes compared to the earlier draft".

¹³ http://ec.europa.eu/smart-regulation/impact/iab/iab_en.htm



- 55.** The IA Board's third and last opinion of 6 September 2013 pointed out that the report had been improved to a fair extent following its previous recommendations. However, it still contained the following 4 recommendations for (further) improvements: "(1) Further improve the problem definition and clarify the overall objective; (2) Better describe the content of the preferred option; (3) Improve the assessment of impacts; (4) Better incorporate stakeholders' views".
- 56.** The Commission's final Impact Assessment report of 11 September 2013,¹⁴ which accompanies its legislative proposal, explains how the report was revised and which further changes were made following the IA Board's recommendations. The complainant's allegation that "none of the points raised" by the IA Board was addressed by the Commission, prior to the publication of its legislative proposal, is therefore not correct.
- 57.** The complainant raised four specific arguments in this regard: 1) Failure to present an adequate problem definition, 2) Operational objectives not defined, 3) Insufficient assessment of the impact of the proposals on SMEs and 4) Choice of legal instrument and subsidiarity not properly substantiated. The complainant does not link these arguments directly to the final recommendations of the IA Board. The Ombudsman will deal with those arguments only to the extent that they concern one of the four recommendations made by the IA Board in its final opinion of 6 September 2013.
- 58.** Argument 1) concerns the problem definition which is the subject of the IA Board's first recommendation, according to which "[t]he report should still better explain how the list of regulatory shortcomings has been identified and should substantiate further how such regulatory shortcomings affect supply and demand for cross-border services. It should justify the level of ambition by explaining what this initiative can realistically achieve in terms of a genuine single market given the effect of other factors (economic crisis, cultural diversity, divergence in wider regulatory issues)". The Ombudsman notes that, in its final impact assessment report, the Commission tried to accommodate the IA Board's concerns. It is not clear whether the IA Board would have considered the changes the Commission made to the Impact Assessment Report as sufficient. The European Parliament's Impact Assessment Unit, in an opinion of October 2013 on that report, considered that the changes were not sufficient. However, it is not for the Ombudsman to examine the merits of the final Impact Assessment Report. What the Ombudsman needs to ascertain is whether the Commission failed to address the comments made by the IA Board. The Ombudsman takes the view that this has not been established.
- 59.** In the case of the complainant's arguments 2), 3) and 4), the points in question were not raised in the IA Board's final recommendations and it is not necessary for the Ombudsman to consider them further.
- 60.** On the basis of the above, the Ombudsman concludes that the complainant has *not* established that the Commission failed to take into consideration the IA Board's final recommendations of 6 September 2013 in its Impact Assessment report. The Ombudsman, therefore, has not found any maladministration with regard to this aspect of the complainant's allegation.

¹⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0331&from=EN>



3) Alleged failure to carry out a proper Inter-Service Consultation (ISC)

Arguments presented to the Ombudsman

61. The complainant alleged that the Commission failed to finalise the Impact Assessment report before the launch of the Inter-Service Consultation ('ISC') and that the latter was therefore flawed. It argued that the IA Board's recommendations and considerations should, as a matter of principle, be addressed *before* any draft proposal is submitted to inter-service consultation.

62. The Commission argued that this allegation impinged on the internal functioning of its services and went well beyond the need to ensure compliance with the principles of transparency and impartiality¹⁵. In any event, the Commission argued that, overall, the services consulted had ample opportunity to provide their views.

The Ombudsman's assessment

63. The Ombudsman notes that Article 23 of the Commission's Rules of Procedure provides as follows:

"2. The department responsible for preparing an initiative shall ensure from the beginning of the preparatory work that there is effective coordination between all the departments with a legitimate interest in the initiative by virtue of their powers or responsibilities or the nature of the subject.

3. Before a document is submitted to the Commission, the department responsible shall, in accordance with the implementing rules, consult the departments with a legitimate interest in the draft text in sufficient time".

64. In this case, the complainant has not demonstrated that DG CONNECT, which was the lead DG for the legislative proposal, failed to consult adequately with the Commission's other DGs with a legitimate interest in the proposal. It appears from the Commission's opinion that DG CONNECT consulted a total of 7 other DGs as well as the Secretariat-General of the Commission and that at least three meetings between the services concerned were held between 4 and 15 July 2013.

65. The ISC in this case started on 8 July and lasted until 22 August 2013. This means that the ISC started before the IA Board delivered its first opinion on 19 July 2013 and that it terminated before the IA Board delivered its second opinion on 29 August 2013 and its final opinion on 6 September 2013. It is thus clear that the ISC was not carried out in full compliance with the 2009 Guidelines. However, the complainant did not explain how this could have affected the substance of the legislative proposal. In fact, as the Commission stated, the comments of the IA Board were forwarded to the competent services on 19 July, 29 August and on 6 September 2013. The Ombudsman therefore considers that there are no grounds for further inquiries into this allegation.

¹⁵ The Commission also pointed out that the details provided in the complaint seemed to suggest that the complainant may have had direct access to internal documents which are not publicly available.



4) Alleged attempt to conceal the lack of public consultation

Arguments presented to the Ombudsman

66. The complainant argued that, in the recitals of its Proposal for a Regulation, the Commission deliberately attempted to convey the idea that it had engaged in detailed consultations with stakeholders prior to the adoption of its legislative proposal.

67. In its opinion, the Commission argued that, in line with the current practice for legislative proposals, the Explanatory Memorandum explained the consultation approach in a clear and thorough manner while the Impact Assessment - to which the Explanatory Memorandum refers - broadly gives an overview of the consultation process and of the stakeholders consulted.

The Ombudsman's assessment

68. The Ombudsman has already found above that the section of the Explanatory Memorandum of the Commission's legislative proposal dealing with "*Views of stakeholders*" was very short and general in describing the public consultations that were carried out. However, there is nothing to support the complainant's view that the Commission deliberately tried to conceal the lack of a public consultation. The complainant's allegation is also contradicted by the Impact Assessment report which describes in much more detail the various consultative steps which, in the Commission's view, were relevant for its legislative proposal. The Ombudsman thus finds no maladministration with regard to this allegation.

Conclusions

On the basis of her inquiry into this case, the Ombudsman reaches the following conclusions:

There are no grounds for further inquiries into the allegation that the Commission failed to carry out a proper inter-service consultation.

As regards the remainder of the case, including the main allegation that the Commission failed to conduct an adequate public consultation, no maladministration was found.

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

[SIGNATURE]
Emily O'Reilly

Strasbourg, XX/XX/2015