



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, submitted by the European Competitive Telecommunications Association, concerned the Commission's alleged failure to carry out an adequate public consultation, impact assessment and inter-service consultation before submitting, on 11 September 2013, its Proposal for a Regulation concerning the European single market for electronic communications and a Connected Continent. The legislative proposal was submitted little more than three months after the Commission publicly announced it on 30 May 2013. In its complaint, the complainant alleged that the Commission had wrongly invoked urgency stemming 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 a number of shortcomings in how the public consultation was carried out and made a critical remark. More particularly, she found that the Commission failed, following the announcement of its legislative proposal on 30 May 2013, to carry out a public consultation in accordance with the relevant general principles and minimum standards. She also made a further remark that should guide the Commission when organising inter-service consultations in the framework of future public consultations.

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"). One of the most important features of this proposal was the gradual phasing out of roaming surcharges.

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



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 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 for the first time by Commissioner Kroes in a speech of 30 May 2013 to the European Parliament's Internal Market and Consumer Protection (IMCO) Committee². In the period following the announcement of the legislative proposal, the Commission organised two events. More particularly, 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. On the occasion of a forum organised by the complainant on 3 July 2013 (where officials of the Commission's DG CONNECT³ were also 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.

In its submissions to the Ombudsman, the complainant stated that its allegation did not concern the substance of the Commission's legislative proposal, but only the procedural aspects of the public consultation carried out. 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 failed to (i) identify the different types of stakeholders that were to be consulted, (ii) address the points raised by the Impact Assessment Board ("IA Board"), (iii) carry out a proper Inter-Service Consultation ("ISC"), and (iv) had deliberately attempted to conceal the lack of a public consultation.

6. In her letter requesting the Commission to submit an opinion, the Ombudsman asked it 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

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

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



"[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 with this challenging time-table". The Ombudsman noted that the complainant seemed to be right in pointing out that this urgency stemmed from the Commission's self-imposed time frame and not from the European Council.

8. As regards the complainant's **claim** that the Commission should withdraw its legislative proposal, the Ombudsman informed the complainant and the Commission that she would not include it in the inquiry, since a possible proposal or recommendation that the Commission should withdraw its legislative proposal would trespass on Parliament's political role in the on-going legislative procedure and thus fall outside the Ombudsman's mandate.

9. 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

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

10. The Ombudsman notes that, at the time when the complainant turned to her (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). Although the above developments in the legislative procedure are not relevant for dealing with the present complaint (which concerns events prior to 11 September 2013), the Ombudsman takes the view that the position she adopts on this complaint will be relevant for the conduct of future public consultations by the Commission when proposing new EU legislation, in particular those based on its above-mentioned Communication.

(ii) Alleged lack of prior administrative approaches

11. In its opinion, the Commission submitted that the complaint was inadmissible on the basis of Article 2(4) of the Ombudsman's Statute since the complainant had not made the appropriate prior administrative approaches. The Commission argued that the complainant had merely made generic

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



requests for a wider public consultation before the adoption of the legislative proposal.

12. The Ombudsman is not convinced by this argument. She considers that the approaches made by the complainant before submitting the present complaint were sufficient.

13. In any event, the Ombudsman notes that the complaint raises an important issue of principle, namely the Commission's duty to carry out an adequate public consultation prior to proposing EU legislation. Therefore, even if the complainant had failed to make the appropriate prior approaches to the Commission, the complaint could also be considered as an action brought in the public interest (*actio popularis*) that can be examined by the Ombudsman even in the absence of any prior administrative approaches to the institution concerned.

1) Failure to carry out an adequate public consultation

Arguments presented to the Ombudsman

14. 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) TEU, ii) Article 2 of the Protocol No. 2 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.

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

16. The complainant stated that, although the Explanatory Memorandum of the Commission's legislative proposal mentioned that the Commission had extensively engaged with a wide range of stakeholders and organised several consultative events with them, the fact remained that none of the 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 also argued that the Commission had not made public any document which identifies the different types of stakeholders which have been consulted and their specific positions. Also, the Commission is not in a position to demonstrate that it has effectively consulted each of the different types of stakeholders.

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>



17. In its opinion, 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. As also stressed in the Explanatory Memorandum, 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.

18. The Commission stated that it had fully taken into consideration 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. In its opinion, it described in detail the various consultative steps and information gathering processes it undertook since 2010 on the different elements that were included in its legislative proposal, namely i) net neutrality, ii) end-users' rights, iii) spectrum, iv) the single EU authorisation, v) Virtual Access Products and vi) roaming.

19. 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.

20. 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.

21. The Commission underlined 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 is necessarily 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.

22. 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.

23. 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

24. 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.

25. 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).

26. 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.



27. In this respect, two preliminary observations need to be made. First, although the principles and standards set out in the 2002 Communication are not legally binding⁸, the Ombudsman considers that it is clearly good administrative practice for the 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.

28. Second, the Ombudsman notes that, as stated by the Commission, 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 also 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).

29. The 2002 Communication containing the general principles and minimum standards for consultation 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. In particular, best practice requires that the target group should be clearly **defined prior to the launch of the consultation process**¹⁰;
- c) **Publication:** The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences;
- d) **Time limits for participation:** The Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least 12 weeks¹¹ for the reception of responses to written public consultations;

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.

¹¹ The Ombudsman notes that, in the light of concerns expressed for longer consultation periods, the **8 weeks** period foreseen in the 2002 Communication was extended to **12 weeks** (namely 3 months) in the



e) **Acknowledgement and feedback:** Receipt of contributions should be acknowledged. 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).

30. The Ombudsman will now examine whether the Commission carried out a public consultation in compliance with the above general principles and minimum standards and whether a failure to comply with them could still be justified by the legislative-driven urgency invoked by the Commission. Since the consultation of target groups is one of the five minimum standards, the Ombudsman will also deal in this section with the complainant's second supporting argument that the stakeholders were not properly identified.

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

31. The Ombudsman will examine below (point 46) the relevance of the various consultations and consultative steps prior to March 2013 to which the Commission referred in its opinion. The Ombudsman notes, however, 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 very idea for a legislative proposal by the Commission was presented and 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 in relation to the announced legislative proposal 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 August holiday period, as well as 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.

32. 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.

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.



These consultations have shown that a large majority of stakeholders share the Commission's problem analysis and recognise that urgent action is needed ...".

33. The Ombudsman notes that, 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*.

34. On the basis of the five minimum standards set out in the 2002 Communication (see point 29 above), it follows that the sequence for a public consultation normally comprises the following steps: (i) the Commission prepares a document on which to consult; (ii) the Commission identifies the target groups that need to be addressed; (iii) the consultation is launched publicly and the consultation document is brought to the attention of these target groups; (iv) a sufficient period of time is granted for contributions; and (v) the feedback received is examined and used for the legislative proposal and the explanatory memorandum explains how the public consultation was carried out.

35. In the Ombudsman's view, the public consultation carried out in the present case does not comply with the above minimum standards. More particularly:

36. As regards minimum standard i), it appears that no consultation document was prepared by the Commission on its forthcoming legislative proposal. In this regard, neither the Explanatory Memorandum nor the Commission's opinion make reference to a consultation document which described the "*context, scope and objectives*" of the consultation on the Commission's forthcoming legislative proposal. In fact, they do not even refer to any *written public consultation* initiated by the Commission between 30 May and 11 September 2013 in relation to the announced legislative proposal;

37. As regards minimum standard ii) concerning the identification of target groups, the Ombudsman notes that the Commission enclosed with its opinion a "*list of [29] stakeholders that provided written input*". Annex I of the Impact Assessment ("*Detailed Overview of the Consultation of Stakeholders and other EU Institutions*") refers to reactions received from several categories of stakeholders in the context of the two events of 17 June and 19/20 June 2013 organised by the Commission in Brussels and Dublin. The above list and Annex 1 of the Impact Assessment show that a considerable number of stakeholders provided input to the Commission prior to the adoption of its legislative proposal. However, there is no indication that the Commission ever identified the target groups that needed to be consulted as regards the legislative proposal, as foreseen by the minimum standards set out in the 2002 Communication.

38. As regards minimum standard iii), it appears that no consultation document on the forthcoming legislative proposal was ever made public. The background paper that was made available in relation to the public event held on 17 June 2013 would not appear to be sufficient in this context, as this paper sets out (as its name indicates) the background of (what would become) the legislative proposal, but does not specify in sufficient detail the possible contents of that proposal. It should also be noted that neither in the Explanatory Memorandum nor in its opinion did the Commission explain when the public consultation it claims to have carried out was launched.



39. Similarly, as regards minimum standard iv), it appears that no deadline was set for submitting contributions. As mentioned above, a deadline of 12 weeks should normally have been granted for this purpose.

40. The Commission's failure to comply with this specific minimum standard is acknowledged by the Commission itself in its Impact Assessment¹³. In the section "*Consultation and Expertise*" (page 13), the Commission acknowledges that "*due to time constraints a full (12 weeks) public consultation could not be organized*".

41. Finally, as regards minimum standard v), the Explanatory Memorandum does not explain how the results of the public consultation carried out were taken into account in the legislative proposal. Moreover, there is no reference to a dedicated website link where the results of the consultation and an eventual summary report could be found.

42. The Ombudsman's above conclusion that the public consultation carried out by the Commission cannot be said to comply with the general principles and minimum standards is also supported by the three consecutive opinions of the Commission's Impact Assessment Board (IA Board) of 19 July, 29 August and 6 September 2013. In particular, in its second negative opinion of 29 August 2013, the IA Board underlined 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*". It appears useful to note that the IA Board issued its first opinion on 19 July 2013. As it is logical to assume that the Commission should usefully consult its IA Board only after having carried out any consultation that was needed in relation to a given case, the Ombudsman is led to conclude that, in the Commission's view, the consultation was completed before 19 July 2013.

43. The Ombudsman notes that even though the Commission did not provide an unambiguous answer to the question she put to it on this issue, it does not wish to claim that the minimum standards for consultation set out in the 2002 Communication were respected in the present case. In fact, 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*".

44. Apart from the urgency (which is dealt with below), the Commission invoked three main arguments to justify why the consultation it carried out in the present case was nevertheless sufficient:

45. *First*, the Commission argued that the two events it organised on 17 June and on 19-20 June 2013 constituted consultation. The Ombudsman notes that the complainant does not dispute that these events were useful in that they provided stakeholders with an opportunity to express their views in relation to the issues on which the Commission intended to submit a legislative proposal. However, the complainant argues that these events (and the further meetings and speeches the Commission refers to in this context) cannot be considered to qualify as a proper public consultation. The Ombudsman finds this argument convincing. The public information session "*Telecoms Single Market*" organised

¹³ Commission Staff Working Document "Impact Assessment" SWD(2013) 331 final of 11 September 2013: <https://ec.europa.eu/digital-agenda/en/news/impact-assessment-connected-continent>



by the Commission on 17 June 2013 in Brussels was a one-day event. The background paper that was circulated by the Commission for that event¹⁴ did underline the need for concrete measures to be taken and outlined various elements that would be integrated in what would become a legislative proposal. However, this background paper did not mention that that information session was being held in the context of an upcoming legislative proposal. Nor did the Commission argue that interested stakeholders were formally invited, either in the background paper or at the event, to submit their views to the Commission. The same conclusions can be made with regard to the 19-20 June 2013 "Digital Agenda Assembly" conference in Dublin.

46. *Second*, the Commission argued that the 2002 Communication does not require that the consultation is carried out as regards 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. The Ombudsman agrees that the 2002 Communication does not require that interested stakeholders need to be consulted on the very (draft) text of a legislative proposal. However, in order to be useful, a consultation would normally need to be carried out on the basis of a document setting out the issues on which the Commission wishes to consult interested stakeholders. The Ombudsman considers that the Commission's position could be acceptable in cases where it is sufficiently clear to interested stakeholders what the Commission's intentions are. However, this was hardly the case here, since the Commission's legislative proposal of 11 September 2013 dealt with a very large spectrum of very complex electronic communications issues.

47. *Third*, the Commission argued that there had been various consultations and consultative events prior March 2013. In its opinion, the Commission described these consultations and events in detail. The list provided by the Commission includes more than 40 events organised since the year 2010, concerning several aspects which were ultimately included in the Commission's legislative proposal. The Ombudsman considers that it is clear that, prior to March 2013, the Commission consulted interested stakeholders on certain issues that were to be relevant for the legislative proposal it submitted in September 2013. However given the complexity of many of the specific issues that had to be tackled in the legislative proposal, the Ombudsman is not convinced that these previous consultations, even if considered together with the more specific events that were held in June/July 2013, can be considered sufficient. It should be stressed that the Ombudsman's examination in this respect is guided by considerations of good administration. In her view, it would have been good administrative practice to carry out (subject to any limitations that might have been necessary on account of urgency) a proper public consultation based on the standards set out in the 2002 Communication once the Commission had decided to work on a legislative proposal in this case.

48. On the basis of the above, the Ombudsman concludes that, although the Commission did take certain steps to consult interested stakeholders, the consultation which it carried out falls short of the general principles and minimum standards set out in the 2002 Communication. However, it remains to be examined whether the Commission could rightly invoke urgency in order to justify its limited public consultation.

The urgency invoked by the Commission

¹⁴ <http://ec.europa.eu/digital-agenda/en/news/background-paper-public-information-session-telecoms-single-market>



49. Both in its Explanatory Memorandum and in its opinion, the Commission argued that there had been time constraints that had an impact on the consultation that was carried out.

50. Article 2 of Protocol n° 2 provides that the Commission, in cases of exceptional urgency, shall not conduct public consultations. In that case however, it shall give reasons for its decision in its proposal. As regards the case under consideration, in the Explanatory Memorandum accompanying the Commission's legislative proposal, the Commission explained 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 with 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.

51. The Ombudsman notes that, in its Explanatory Memorandum, the Commission referred to the Spring 2013 European Council conclusions as the main reason for the urgency it assumed to exist. In its opinion, and in reply to the Ombudsman's request better to explain the reasons for the invoked exceptional urgency, the Commission again referred to the European Council's conclusions. It is true that, in these conclusions, the European Council called for preparatory work to be conducted *giving priority* to several issues, which included the 'digital agenda and other services'. The conclusions also state that "*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*". It emerges from the conclusions that the European Council intended to hold a thematic discussion on these issues in October 2013. It is thus 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.

52. However, regard needs to be had to the fact that, in its conclusions, the European Council did not ask the Commission to submit these proposals before October 2013 but referred to the "*Commission's intention*" to do so. Even though it is clear, as noted above, that the European Council expected to receive such proposals before October 2013, the conclusions do not prove that it was the European Council or the Commission that created the urgency. The conclusions suggest that it was the Commission that took the initiative in this respect, given that they refer to the '*Commission's intention*'. If it was indeed the Commission that committed itself, of its own volition, to preparing the legislative proposal in such a short period of time, its argument that this meant that no fully-fledged consultation could be carried out would not be convincing. In fact, it would then have been the Commission itself that created the urgency that it subsequently invoked. In the Ombudsman's view, this would only be acceptable if there was indeed urgency from an objective point of view, which has not been established in the present case (see point 54 below).



53. It cannot be excluded that, notwithstanding the wording used in its conclusions, it was indeed the European Council that insisted that the legislative proposal be submitted before October 2013. However, the Commission would have needed to establish that this was indeed the case. The Ombudsman notes that the Commission has failed to do so, even though she made it clear to the Commission, already in her letter opening this inquiry, that the complainant's argument that the urgency had been caused by the Commission itself appeared to be persuasive.

54. In its opinion, the Commission invoked two other reasons to explain why it had to act urgently, that is to say i) the difficult economic situation of the electronic communications sector as well as ii) the upcoming end of the mandate of both the Commission and the European Parliament. As regards i) the difficult economic situation of the electronic communications sector, in the Explanatory Memorandum of its legislative proposal, the Commission compares the situation of the EU electronic communications markets with those of the US and China. However, the mere need for the EU legislator to take into consideration and respond to parallel developments in non-EU markets cannot as such be relied upon to justify an alleged exceptional urgency, as it is expected that EU legislation should always try and adapt to external market forces or market developments that could adversely affect the EU single market. As regards ii), even if the upcoming end of the Commission's and Parliament's mandate could have given rise to a situation of urgency, it should be noted that the Commission did not refer to this consideration in the Explanatory Memorandum accompanying its legislative proposal as a justification for the (limited) public consultation. The Ombudsman is therefore not convinced that this consideration was indeed the reason for the need to submit the legislative proposal before October 2013.

55. Thus, in the absence of sufficient evidence to show that it was the European Council that requested the Commission to adopt a legislative proposal before October 2013, and not the Commission that volunteered to do so of its own volition, and of any other consideration which could have justified an urgent action on behalf of the Commission, the Ombudsman concludes that the Commission has not established that the limited public consultation carried out in the present case was justified.

56. In the Ombudsman's view, the Commission therefore failed to carry out an adequate public consultation in accordance with the general principles and minimum standards set out in the 2002 Communication without providing a sufficient explanation to justify the limited consultation it did carry out. This constitutes an instance of maladministration. However, given that the legislative proposal that the Commission submitted to the EU legislator has already been examined and processed by the latter, it is neither necessary nor appropriate for the Ombudsman to pursue this issue. The Ombudsman will therefore make a critical remark instead.

2) Alleged insufficiency of the Impact Assessment

Arguments presented to the Ombudsman

57. 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.

58. The complainant enclosed with its complaint an Annex "*Failure to conduct a proper impact assessment in accordance with Impact Assessment Guidelines 2009 (SEC) 92 (in particular Sections 5 and 6)*" in which it set out 4 additional arguments why the Impact Assessment was not in accordance with the Guidelines (see below).

59. 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

60. At the outset, the Ombudsman notes that the task of verifying whether the Impact Assessment as such was carried out adequately, which may involve complex technical and scientific questions (especially with regard to a legislative proposal such as the present one), has been entrusted to a specific independent body with expert knowledge, that is the Commission's IA Board. The IA Board, which was created in 2006, is a central quality control and support function of the Commission. It is independent from the Commission's policy making departments¹⁵. The fact that the Commission's draft Impact Assessment report twice received a negative opinion from the IA Board cannot as such be considered, as the complainant has argued, as an instance of maladministration. In fact, 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.

61. In that respect, what the Ombudsman *can* examine 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.

62. The procedural rules for impact assessments are set out in the 2009 Guidelines. More particularly, section 2 of the Guidelines contains a table with the "*Summary of the key procedural steps*" for the impact assessment, steps 7 and 8 of which read as follows:

"7. *Present the draft IA report together with the executive summary to the Impact Assessment Board (IAB) and take into account the possible time needed to resubmit a revised version.*

8. *Finalise the IA report in the light of the IAB's recommendations*".

63. In respect to the final version of the Impact Assessment report, section 2.5 of the Guidelines specifically provides that "[t]he final version of the IA report should

¹⁵ http://ec.europa.eu/smart-regulation/impact/iab/iab_en.htm



briefly explain how the Board's recommendations have led to changes compared to the earlier draft".

64. In the present case, 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 the IA Board's 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*".

65. The Commission's final Impact Assessment report of 11 September 2013,¹⁶ which accompanies its legislative proposal, explains how the report was revised and which further changes were introduced 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.

66. The complainant raised four specific arguments in order to support its view that the Commission failed to comply with the 2009 Guidelines, namely: 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 Ombudsman notes that the complainant does not link those arguments directly to the final recommendations of the IA Board. The Ombudsman should therefore 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. Indeed, what matters in this case is to ascertain whether the IA Board's recommendations were duly taken into consideration by the Commission.

67. In this respect, the complainant's argument 4) concerns the choice of the legal instrument and the question of subsidiarity, which are not part of the IA Board's final recommendations. There is therefore no need for the Ombudsman to deal with it. The same applies for the complainant's argument 2) which is phrased in very general terms. The only more specific statement made by the complainant is that the Commission did not explain "*how the acceleration in the roadmap to eliminate roaming tariffs is supposed to help those operators that allegedly have financial difficulties in investing in new networks*". However, this is not mentioned in the IA Board's recommendations.

68. The complainant's argument 3) that no specific assessment of the impact of the proposals on SMEs was made is also not a recommendation as such. Recommendation 3 of the IA Board in relation to roaming states that the IA report "*should explain if smaller operators could be placed at a disadvantage given the possible greater difficulty in entering collective roaming agreements with sufficient pan-European coverage*" (emphasis added). The Ombudsman in any event notes that the complainant's argument that no assessment of the impact of the proposals on SMEs was made would appear to be contradicted by the Impact Assessment report. The Executive Summary of the report has a title "How will businesses, SMEs and micro-enterprises be affected?" (emphasis added) and the report itself, under section 8 "*Analysis of Impacts*" has at least two references to the impact on SMEs, with regard to rules on net neutrality (page 63 and 78).

¹⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0331&from=EN>



69. Finally, the complainant's 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 sufficient. The European Parliament's Ex-Ante 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, in the present case, 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.

70. 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. No instance of maladministration was therefore found with regard to this aspect of the complainant's allegation.

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

Arguments presented to the Ombudsman

71. 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.

72. 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 impartiality¹⁷.

73. The Commission also pointed out that the ISC is an internal process of cooperation between its services and that it made sure that the review of the Impact Assessment was fully transparent to the services concerned.

74. The Commission argued that, overall, the consulted services had ample opportunity to provide their views.

75. In its observations, the complainant argued that the IA Board's recommendations and considerations should, as a matter of principle, effectively be addressed *before* any draft proposal is submitted to inter-service consultation.

¹⁷ 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.



The Ombudsman's assessment

76. 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".

77. In this case, the complainant has not demonstrated that DG CONNECT, which was the lead DG for the legislative proposal, failed adequately to consult the Commission's other DGs with a legitimate interest in the proposal. It appears in fact 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.

78. As regards the complainant's specific allegation that the Commission failed to finalise the Impact Assessment report before beginning the ISC, it follows from the 2009 Guidelines that the *"IA report and IAB opinion(s) go into inter-service consultation alongside the proposal"* and that *"[i]f the responsible Commissioner concludes from the IA that action is necessary, a corresponding proposal will be finalised and put into ISC, together with the IA report (with annexes) and the IAB opinion(s). The final version of the IA report should briefly explain how the Board's recommendations have led to changes compared to the earlier draft."* Thus, on the basis of the Guidelines, the ISC should start only after the Impact Assessment report has been finalised.

79. In this case - as indicated by the Commission in its opinion - the ISC 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. She will however make a further remark below that could guide the Commission in future ISCs.

4) Alleged attempt to conceal the lack of public consultation

Arguments presented to the Ombudsman

80. The complainant finally argued that, in the recitals of its Proposal for a Regulation, the Commission deliberately attempted to convey the idea that it



engaged in detailed consultations with stakeholders prior to the adoption of its legislative proposal.

81. 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 modalities and of the stakeholders consulted.

The Ombudsman's assessment

82. 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 instance of maladministration with regard to this allegation.

Conclusion

On the basis of her inquiry into part 1) of the allegation, the Ombudsman makes the following critical remark and further remarks:

The Commission failed to carry out an adequate public consultation in accordance with the general principles and minimum standards of its Communication COM(2002) 704 final of 11 December 2002 without providing a sufficient explanation to justify the limited consultation it did carry out. This constitutes an instance of maladministration.

As regards part 3) of the allegation, there are no grounds for further inquiries, but the Ombudsman makes the further remark below.

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

Further remark

In carrying out future public consultations in relation to its legislative proposals, the Commission should make sure that the Inter-Service Consultation is carried out in compliance with the procedure set out in the Commission's Impact Assessment Guidelines of 15 January 2009

Emily O'Reilly

Strasbourg, 07/08/2015