

COMPLAINT ABOUT MALADMINISTRATION

1. First name: Yiorgos
Surname: Vassalos
On behalf of : Alliance for Lobbying Transparency and Ethics Regulation in the European Union (ALTER-EU)
Address line 1: Mundo B, Rue d'Edinburg 26
Town/City: Brussels
Postcode: 1050
Country: Belgium
Tel.: 0032 2 8690930

- 2. Against which European Union (EU) institution or body do you wish to complain?

European Commission

- 3. What is the decision or matter about which you complain? When did you become aware of it?

We want to complain about the European Commission's refusal to act against the fact that a number of its expert groups are dominated by business interests. The Commission's stance violates the Commission's codes of conducts on consultation standards (COM(2002)704) and the use of expertise (COM(2002)713), as well as the White Paper on good governance (COM(2001)428).

Its position also contradicts Article 9 of the Treaty of Lisbon on European Union which says that 'the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.'¹

It is also in breach of the Charter of Fundamental Rights that stresses the Right to Good Administration (Article 41).²

The European Ombudsman's European Code of Good Administrative Behaviour stresses that:

'When taking decisions, the official shall respect the fair balance between the interests of private persons and the general public interest.' (Article 6)³

Specifically, we want to complain about the Commission's reply to our complaint about Expert Groups sent on October 23, 2009.⁴ The Commission has repeated its position in a response to the Parliamentary Question tabled by MEPs Diana Wallis and Dennis De Jong (P-2425/10, P-2426/10) on May 19, 2010.⁵

We think the Commission's position violates the abovementioned codes in 4 regards:

1. The Commission wrongly considers that expert groups in which commercial interests are in the majority among the non-governmental members do not breach the codes of conduct and the principles of the Union

In the official response to our complaint (23/10/09) the Commission said:

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF>

² http://www.europarl.europa.eu/charter/pdf/text_en.pdf

³ <http://www.ombudsman.europa.eu/resources/code.faces>

⁴ http://www.alter-eu.org/sites/default/files/documents/2009.10.Com_Response_complaint.pdf

⁵ <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-2425&language=EN>

‘In your letter you argue that many expert groups have a biased composition in favour of business interests or are completely controlled by business. The membership of expert groups is determined, first of all, by the mandate/tasks of the group and the specific expertise required’.

In other parts of the response it says:

‘There can be cases where the selection of members of expert groups is de facto strictly determined by the concrete work to be accomplished’

(...)

‘Thus, the participation of members issued from Industry can be justified in light of the work to be accomplished.’

Trying to justify the unbalanced composition of the expert groups on financial issues, a Commission official told the media: "If you want financial advice you don't ask a baker".⁶

Our research found that a large number of expert groups (more than 110) have a biased composition in favour of business interests. This suggests that the Commission considers that getting balanced advice is not obligatory but only desirable. According to this interpretation, the codes of conduct merely require that the Commission aims to have balanced expert groups, but does not actually have to achieve a balance.

We therefore consider the Commission’s justification as a very lax interpretation and implementation of the codes of conduct that result in a departure from their original purpose to secure a sound and balanced knowledge basis for the Commission’s decision making, as well as departing from the Union’s principles of Equal Attention and Good Administration.

2. The Commission wrongly claims that industry representatives can participate “in a personal capacity”

According to the Commission, expert group members who are there in a personal capacity “have to act independently and, each year, they have to make a written declaration of commitment to act in the public interest, together with a declaration as to whether there is any interest which would prejudice their independence”(E-6705/08, E-6706/08).

In its response to our complaint (23/10/ 2009) the Commission argued that members ‘in their personal capacity’ can also come from industry:

‘Thus, the participation of members issued from Industry can be justified in light of the work to be accomplished.’

However, conflicts of interests and links that prejudice the independence of the experts ‘in a personal capacity’ are rather obvious in a number of cases (listed non-exhaustively in section 4) and yet they are granted expert group membership ‘in a personal capacity’. Employees of a company are bound to support the interest of the company and should therefore not be invited to take part in an expert group in a personal capacity. We also believe that a (potential) conflict of interest cannot be annulled with a declaration of commitment to the public interest.

3. The Commission wrongly refuses to develop new selection criteria

Both in its response to our complaint and its recent answer to two MEPs,⁷ the Commission has stated that:

⁶ <http://euobserver.com/9/28947>

⁷ <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-2425&language=EN>,
http://www.alter-eu.org/sites/default/files/documents/2009.10.Com_Response_complaint.pdf

‘At this stage, the Commission does not consider [it] neither necessary nor appropriate to draw up new general criteria for selecting members for expert groups. In fact, the selection of members depends on a number of different factors, such as the field concerned, the mandate of the group, the specific expertise required, as well as possible selection procedures which may be fixed by the legislator when establishing expert groups. Thus, selection of members has to be carried out on a case-by-case basis, in light of the abovementioned elements.’

We disagree and argue that there is a need for such selection criteria in order to implement the Codes of Conduct, the White Paper on Good Governance and the Lisbon Treaty, as well as the Principles on Good Administration.

4. All membership, agendas and minutes should be available on-line

The Guidelines on the Use of Expertise (COM(2002)713) stress that ‘the main documents associated with the use of expertise on a policy issue, and in particular the advice itself, should be made available to the public’ (see also the rationale in page 18) of the same document.⁸

In its response on October 23, 2009, the Commission engaged to ‘improve the reliability and presentation of the data encoded in the current register’.

Nonetheless, the agendas, minutes and participants’ submissions are not available through links to the respective DG’s webpage for the vast majority of expert groups. The membership of a number of expert groups also remains unclear. There are expert groups like the High-Level Expert Group on Key Enabling Technologies that are not included in the Register at all.⁹

4. What do you consider that the EU institution or body has done wrong?

We are responding regarding each point separately 1,2, 3 and 4.

1.The Commission wrongly considers that groups where commercial interests have the majority of the non-governmental members are not breaching the codes of conduct and the principles of the Union

The claim that imbalance in the composition of an expert group ‘can be justified in light of the work to be accomplished’ and by the ‘specific expertise required’ is based on a passage from the Consultation Standards that states that ‘arrangements for collecting and using expertise should be designed in proportion to the task in hand, taking account of the sector concerned, the issue in question’.

In our view there can be no ‘concrete work to be accomplished’ that requires advice only or primarily from business interests. EU bodies make legislation in the public interest. Experts from diverse backgrounds, including non-governmental interests (environmental, consumer, labour, social etc.) representing perspectives that differ from a commercial view, as well as independent academics, should always collectively outnumber business representatives. Otherwise, there is discrimination towards a special category of interests: business interests.

The Commission argues that since expert groups are ‘but one mode of collecting expertise or seeking the views from stakeholders’, we should assess the ‘overall participation and involvement

⁸ http://ec.europa.eu/governance/docs/comm_expertise_en.pdf

⁹ http://ec.europa.eu/enterprise/sectors/ict/key_technologies/kets_high_level_group_en.htm

of stakeholders on a given matter’, ‘not by simply looking at the composition of individual expert groups’ but all the instruments ‘such as studies, public consultations, European agencies, Green papers and hearings’.

We believe this claim to be problematic for two reasons. Firstly, the expert groups play a very specific and highly important role in the crucial first stages of EU decision-making. Capture of expert groups by special interests is therefore unacceptable, regardless of which other forms of participation by stakeholders are used.

It should moreover be noted that the Commission does not provide the public with the information needed to assess ‘overall participation and involvement of stakeholders on a given matter’. It doesn’t publish a comprehensive overview of its meetings with lobbyists (let alone details about the content of these meetings) and does not have a webpage compiling all the consultation and expertise seeking activities for the different policy and legislative initiatives. Ideally, the Commission should provide full information about all its meetings with external actors.¹⁰ For the time being, introducing safeguards against capture by special commercial interests of every single expert group would be an important step towards more balanced decision making.

The Commission should secure equal access to commercial and non-commercial sectors in all stages of decision-making. Guaranteeing balanced composition and safeguards against capture by special commercial interests of every single expert group is an indispensable part of this.

The Commission's claim that the codes of conduct do not apply to each and every expert group is a matter of maladministration.

The explanations given in the Commission’s response to our complaint as to how the following groups conform to the codes are highly inadequate. We consider that an act of maladministration.

1. CARS21 (**DG Enterprise and Industry**) **dissolved**
2. HLG on Competitiveness, Energy and the Environment (**DG Enterprise and Industry**) **dissolved**
3. HLG on Competitiveness of the Chemical Industry (**DG Enterprise and Industry** - Public: 12, Industry: 14, Consumers: 2, NGO: 1, Academics: 1)
4. The Competitiveness in Biotechnology Advisory Group – CBAG (**DG Enterprise and Industry** – 20 industry, 6 academics)
5. Strategic Advisory Board on Competitiveness and Innovation – STRABO (**DG Enterprise and Industry** – 16 industry, 4 academics)
6. Ore Agglomeration and Ironmaking (**DG Research** – 9 industry, 3 academics)
7. European Securities Markets Expert Group (**DG Markt** – 21 industry)
8. EU Clearing and Settlement Advisory and Monitoring Expert Group 2 - CESAME2 (**DG Markt** - 31 industry representatives)
9. Information and Communication Technologies – ISTAG (**DG Information Society** - Industry 33, Public 1, Academics 5)
10. Expert Group on Alternative Fuels (**former DG Transport and Energy** - Industry 46, NGO 5, Academics: 6, Public: 1, Professionals: 1, hybrid: 2) **dissolved**

In our view, in addition to the seven groups mentioned above that are still in operation, there are many more expert groups that do not comply with the codes of conduct as corporations and their as-

¹⁰This would be in line with the provision of Article 17 of the Guidelines on the Use of Expertise: ‘As a general rule, any proposal submitted by departments for Commission decision should be accompanied by a description of the expert advice considered, and how the proposal takes this into account’. - COM(2002) 713

sociations are in the majority among non-governmental entities: see 111 examples in the appendix (including those listed here that haven't been dissolved)

We believe the Ombudsman should determine whether the composition of these 111 expert groups is a matter of maladministration or not.

The Principles and Guidelines on the Collection and Use of Expertise state that:

- “The final determinant of quality [of expert advice] is pluralism”
- [Commission] “departments should aim to ensure that the different disciplines and/or sectors concerned are duly reflected in the advice provided”
- “the aim is to minimise the risk of vested interests distorting the advice”
- “Wherever possible, a diversity of viewpoints should be assembled. This diversity may result from differences in scientific approach, different types of expertise, different institutional affiliations, or contrasting opinions over the fundamental assumptions underlying the issue.”

ALTER-EU has consistently argued that there is no real pluralism when industry dominates other types of non-governmental interests, such as independent academics, consumer groups, social and environmental organisations or trade unions. By giving the majority of the seats of an expert group to corporations or business associations which have a commercial interest in the policy area at hand, there is a risk that they will distort the advice given. There is no real diversity of viewpoints when people representing a single type of interest (in this case business) so clearly outnumber other points of view.

According to the General Principles and Minimum Standards for Consultation of Interested Parties, the Commission departments should:

- “reduce the risk of policymakers just listening to one side of the argument or of particular groups getting privileged access”
- and not underestimate “the challenge of ensuring an adequate and equitable treatment of participants”

Industry interests have privileged access when they far outnumber other non-governmental groups.

Commission departments underestimate the challenge of ensuring equitable treatment when they let commercial points of view prevail over all other considerations.

The Commission's response (23.10.2009) to our complaint does not give any explanation for these contradictions with the rules.

The Commission is not applying its own guidelines for use of expertise and minimum standards for consultation. As a result, a large number of expert groups have a biased composition which favours industry representatives. The composition of these groups (111) chosen by the Commission is a matter of maladministration.

2. Corporate representatives participating “in a personal capacity”

The Commission says that when experts are ‘appointed in a personal capacity, they are bound to sign a written declaration to act in the public interest, together with a declaration as to whether there is any interest which would prejudice their independence. If the experts refuse to sign these declarations they are excluded from expert groups.’

The fact, however, that these experts are listed as being there in a ‘personal capacity’ makes it

impossible for the public to judge the background of these expert group participants.

In its response to the MEPs Diana Wallis and Dennis De Jong, the Commission said it ‘always seeks to organise the selection process in such a way that guarantees a high level of expertise (...) while avoiding any conflict of interests’.

However, conflicts of interests and links that prejudice the independence of the experts acting in a personal capacity are obvious in a number of cases and yet these experts are granted expert group membership ‘in a personal capacity’.

This is the case in eight out of ten of the expert groups with business participation on financial issues:

1. **Clearing and Settlement Advisory and Monitoring Expert Group 2** (31 industry)
2. **EU Clearing and Settlement: Fiscal Compliance group** (9 industry, 3 government, 1 academic, 1 'private expert')
3. **EU Clearing and Settlement: Legal Certainty group** (22 industry, 6 government, 7 academic, and 1 ‘private expert’)
4. **Payment Systems Expert Group** (35 industry, 2 government, and 3 NGO). The Commission has recently (16.06.10) removed the names of the companies represented from the register.
5. **Payment Systems Market Expert Group** (43 industry, 2 government, 1 academic, 1 trade union, and 3 NGO representatives). The Commission has recently (16.06.10) removed the names of the companies represented from the register.
6. **Expert Group on Financial Education** (14 industry representatives and ‘5 private experts’). The Commission has recently (16.06.10) removed the names of the companies represented from the register.
7. **European Securities Markets Group** (21 business). The group has been completely removed by the register.
8. **Group of Experts on Banking Issues** (33 industry, 2 consumers, 2 academics, 1 public bank, 1 cooperative bank)

In these eight groups there are 208 financial industry representatives that are supposed to have signed declarations to serve the public interest. This lacks all credibility, specifically in the light of the current financial crisis, where weak EU policies on financial markets strongly contributed to this crisis. Many of these policies were based on the work of the above mentioned expert groups. Employees of a company are bound to support the interest of the company and should therefore not be invited to take part in an expert group in a personal capacity. We also believe that a (potential) conflict of interest cannot be annulled with a declaration of commitment to the public interest.

There are many more groups where corporate lobbyists sit ‘in a personal capacity’, for example:

1. Groupe Politique d'entreprise - Chambre Professionnelle,
2. ISTAG - Information Society Technology Advisory Group,
3. Ore agglomeration and Ironmaking,
4. Factory-wide control, social and environmental issues,
5. Casting, reheating and direct rolling,
6. Coal preparation, conversion and upgrading,
7. Strategic Advisory Board on Competitiveness and Innovation.
8. Stakeholder dialogue group
9. Coal combustion, clean and efficient coal technologies, CO2 capture

The guidelines on use of expertise suggest that “a possible general rule would be to exclude an expert declaring a conflict of interest from chairing a group or acting as its rapporteur. It may also be necessary to replace such experts or to require them to abstain from part of the discussion”.

DG Sanco's guidelines to deal with conflicts of interest state:

'The simplest way to handle conflicts of interest is to avoid them altogether. For example, someone who is known to work for an organisation with a 'vested interest' on a particular policy issue and is appointed advisor, should simply not be appointed.'¹¹ This clearly reflects that a conflict of interest can not be annulled by a declaration of commitment to the public interest.

We believe that in order to be coherent with the expectation that experts acting in a personal capacity are committed to serve the public interest, DG Sanco's principle should be followed by all Commission's departments.

ALTER-EU argues that appointing experts working for companies or industry associations with a vested interest, in expert groups 'in a personal capacity' is a matter of maladministration.

3. Commission wrongly rejects new selection criteria

According to President Barroso "the Commission does not consider it necessary to draw up general selection criteria".¹²

The guidelines on use of expertise, however, provide that "transparency is required; particularly in relation to the way [...] experts are selected". They also say that transparency "also implies a strategy for proactive communication [...] in which the Commission should constantly seek ways to better publicise and explain its use of expertise to interested parties and the public at large".

The General Principles and Minimum Standards for Consultation of Interested Parties state that the Commission should "ensure that there is consistency and transparency in the way its departments operate their consultation processes".

However, the Commission has failed to explain to ALTER-EU or the public at large how members of experts groups have been selected in most of the cases. Concentration of industry dominated expert groups in specific DGs (Enterprise and Industry, Agriculture, Internal Market)¹³ also shows that there is no consistency in the way that the Commission selects members of expert groups.

DG Sanco's guidelines on conflicts of interests are in sharp contrast to the overall situation in the Commission's expert groups.

In 2008, the European Parliament asked the Commission to develop, before the end of 2008, "an open, transparent and inclusive process for selecting members of new expert groups" and to "inform Parliament no later than February 2009 of the new selection criteria".¹⁴

The current selection process for expert groups members is not in line with the Commission's codes of conduct [COM(2002)713 and COM(2002)704] or the EP's 2008 request. This is a matter of maladministration. The Commission should therefore develop general criteria and processes for selecting members for expert groups.

¹¹ http://ec.europa.eu/dgs/health_consumer/sdg/docs/conflict_interest_SANCO.pdf

¹² <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-2425&language=EN>

¹³ Secrecy and Corporate Domimance, ALTER-EU, p. 9 & Gornitzka, Åse and Sverdrup, Ulf (2008) 'Who consults? The configuration of expert groups in the European union', West European Politics, 31:4, 725 — 750 - <http://www.informaworld.com/smpp/content~db=all?content=10.1080/01402380801905991>

¹⁴ (2007/2141(INI)) Committee on Budgetary Control, Rapporteur: Jose Javier Pomes Ruiz A6-0010/2008 <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0051&language=EN&ring=A6-2008-0010>

4. All membership, agendas and minutes should be available on-line

For the vast majority of expert groups, agendas and minutes are still not available on line via links from the Expert Groups Register to the respective DG's web pages. The membership of a number of expert groups also remains unclear. There are expert groups like the High-Level Expert Group on Key Enabling Technologies that are not included in the Register at all.¹⁵

This is in breach with the Guidelines on the Use of Expertise (COM(2002)713), which stress that 'the main documents associated with the use of expertise on a policy issue, and in particular the advice itself, should be made available to the public' (see also the rationale in page 18 of the Guidelines).¹⁶

The non-publication of the expert groups' agendas and minutes, submissions and other documents is a matter of maladministration. The fact that the membership of some groups remains unclear is also a matter of maladministration.

5. What, in your view, should the institution or body do to put things right?

1. Accept that industry-dominated groups do not comply with the rules and act accordingly

The Commission should recognise that expert groups in which more than half of the non-governmental members come from a single type of interest (and big business in particular) violate the guidelines on use of expertise and the standards on consultation.

Their membership should be reviewed in order to create a balance between special economic interests and the public interest. When the membership remains imbalanced, the expert group in question should be dissolved.

In general, the Commission should focus more on knowledge and expertise that is produced for the public interest by public universities, public interest civil society groups and organisations with mass membership (trade unions, consumers groups). The Commission should cease defining public interest as the summing up of various commercial interests and act in line with Article 6 of the European Ombudsman's Code of Good Administrative Behaviour¹⁷.

2. Ban lobbyists and corporate executives sitting in expert groups in a "personal capacity"

The Commission should clarify whether members of an expert group are there as stakeholders or as experts committed to acting in the public interest. The mandates of many expert groups are contradictory with the information given about them in the Expert Groups Register.¹⁸

We believe that experts working for corporations or industry associations with financial or commercial interests in the issues dealt with by an expert group, cannot be members 'in a personal

¹⁵ http://ec.europa.eu/enterprise/sectors/ict/key_technologies/kets_high_level_group_en.htm

¹⁶ http://ec.europa.eu/governance/docs/comm_expertise_en.pdf

¹⁷ <http://www.ombudsman.europa.eu/resources/code.faces>

¹⁸ The mandate for instance of the Group of Experts on Banking Issues states: 'The range of different interests represented in the group will ensure a better understanding of the likely impact of the policies under consideration on the banking industry and particular segments differentiated by size, business model and geographical location. The consumer participation in the group will help to better identify the likely impact of possible policies on retail customers and small and medium sized businesses.' http://ec.europa.eu/internal_market/bank/docs/calls/expert_group/mandate_gebi_en.pdf In the Expert Groups register it states (16/06/2010) that everybody is there 'in their personal capacity' and consequently has signed a commitment to act in the public interest. <http://ec.europa.eu/transparency/regexpert/detail.cfm?ref=2412>

capacity'. It should be clear that they act on behalf of that interest and the balance of each group should be judged in this light.

The Commission should disclose online the “declarations of commitment to act in the public interest” and “declarations as to whether there is any interest which would prejudice their independence” signed by individuals participating to expert groups in a “personal capacity”.

3. Introduce new selection criteria

In order to properly implement its codes of conduct the Commission needs to draw up new general selection criteria as requested by the European Parliament.

We believe that the following principle outlined in DG Sanco’s guidelines for dealing with conflicts of interest should be the basis of new selection criteria applied to all Commission Directorate Generals.

‘It is essential that external experts are free from financial self-interest when performing their duties as advisors; that they have no parallel loyalty to another organisation; that they are not burdened with competing personal or professional agendas or compromising personal or professional relationships. Divided loyalties and self-interest of any kind create the danger of skewed advice. Such a threat robs the entire advisory process of meaning, and hurts the institution's integrity.’

When expert groups include external stakeholders, there should always be a numerical balance between commercial and non-commercial interests.

4. All membership, agendas and minutes should be available on-line

Agendas and minutes, participants’ submissions etc. should be available through links from the Expert Groups register to the respective DGs’ web-pages.

There should be clear information on the membership of all the groups. Once they are set groups should be immediately put in the Register.

6. Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes (please specify)

No

1) Letter to Commissioner Barnier, February 18, 2010 - http://www.alter-eu.org/sites/default/files/documents/2010.02.Letter_to_Barnier_final-1.pdf

2) Complaint to the Secretariat-general, October 23, 2009 - <http://www.alter-eu.org/documents/2009/10/23/complaint-on-expert-groups>

3) Letter to the Secretary General Catherine Day, December 16, 2008 - <http://www.alter-eu.org/documents/2009/03/09/correspondence-with-the-commission-on-expert-groups>

4) Letters to President Barroso and Commissioners Kallas, Dimas, Piebalgs, Potocnik, Vassiliou, Verheugen, August 8, 2008 - <http://www.alter-eu.org/documents/2009/03/09/correspondence-with-the-commission-on-expert-groups>

MEPs have also asked the Commission to take actions similar to those demanded by

ALTER-EU:

1) Cornelis de Jong and Diana Wallis, April 12, 2010 - <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2010-2426&language=EN>

2) Erik Meijer, January 13, 2009 - <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2008-7074+0+DOC+XML+V0//EN>

3) Erik Meijer, December 16, 2008 - <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2008-6706+0+DOC+XML+V0//EN>

- 7. If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

Yes (please
specify)

No

It does not concern work relationships

- 8. Has the object of your complaint already been settled by a court or is it pending before a court?

Yes (please
specify)

No

- 9. Please select **one** of the following two options **after having read the information in the box below**:

Please treat my complaint publicly

I require that my complaint be treated confidentially

- 10. Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?

Yes

No

Date and signature:

28/07/2010



The European Ombudsman — 1 Avenue du Président Robert Schuman — CS 30403 — FR- 67001
Strasbourg Cedex — France