

Complaint about maladministration

Date: 24/04/2019 09:05:02



Part 1 - Contact information

First name: Olivier

Surname: Hoedeman

On behalf of (if applicable): Corporate Europe Observatory (CEO)

Address line 1: Rue d'Edimbourg 26

Address line 2:

Town/City: Brussels

Postcode: 1050

Country: Belgium

Tel.: +32 (0)2 893 0930

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

European Commission

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

On February 28th 2019, Corporate Europe Observatory and Copenhagen City Councillor Ulrik Kohl wrote to European Commissioner Bieńkowska on behalf of 12 organisations, including both civil society groups and political parties involved in running major European cities (Amsterdam, Barcelona and Grenoble). The letter argued that DG GROW's preparation of the proposed Services Notification Procedure directive was seriously biased and violated the Commission's own rules. We asked the Commission for a response to our concerns, especially with regard to DG GROW's violation of the Commission's rules. We also asked which measures Commissioner Bieńkowska will take to avoid such flaws in the preparation of draft EU legislation in the future. The letter also refers to an indepth analysis published by CEO ("Veto power to please lobbyists – corporations behind Commission power grab over services", February 2018).

On April 10th, we received a response from the Commission that in a superficial manner rejected our concerns and failed to properly respond to the fact that specific rules were violated. The Commission's letter also failed to announce any measures to avoid that such flaws in the preparation of draft EU legislation are repeated in the future. We would like to complain about the Commission's decision to disregard well-documented criticism of DG GROW's violations of the Commission's own rules for consultation.

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

Documents released following a freedom of information request show that DG GROW's preparation of the proposed directive was biased and violated the Commission's own rules. When carrying out the public consultation that was held in spring 2016 and informed the draft Services Notification Procedure directive, the Commission failed to secure input from a broad range of stakeholders, leading to imbalanced conclusions. Only one trade union and not a single other civil society group contributed to the consultation. Only four municipalities (three Lithuanian, one Polish) and seven regional authorities (two Italian and one Lithuanian, as well as four ministries

from German Bundesländer) were included in the consultation. Not a single larger city was included, nor were any of the EU-level federations of municipalities. This is a remarkable failure, considering the far-reaching impacts the proposed directive would have for municipalities.

On the point of the public consultation, the Commission's response argues that it "has no control over who makes use of this possibility and thus cannot ensure that participation in the consultation is balanced between different stakeholders." While it is true that it is ultimately up to stakeholders to decide whether or not to participate in consultations, the Commission's own rules (see page 63-85 in "Better Regulation Guidelines, Commission staff working document, {COM(2015) 215 final}") instruct officials "to consult broadly and transparently among stakeholders who might be concerned by the initiative, seeking the whole spectrum of views in order to avoid bias or skewed conclusions ("capture") promoted by specific constituencies." Our letter to the Commission pointed out that "no such pro-active broad consultation appears to have taken place in preparation of the Notification Procedure Directive" and the Commission's response does not provide any evidence to the contrary. The Commission only states that the consultation "was public" and that "any organisation and citizen was welcome to participate". The failure to follow the Commission's own rules on this point is a serious matter, as DG GROW used the consultation responses to claim broad support for its approach for the Services Notification Procedure directive. In its report on the consultation, for instance, the Commission made the following claim about the views of public authorities: "Four out of five public authorities considered preventive examination necessary to ensure a more uniform application of single market rules for services whereas for business this is nearly 2 out of 3." As the consultation failed to involve public authorities in a meaningful way (virtually no municipalities nor their federations, and very few regional public authorities), these conclusions are arguably misleading. The Commission's report "Results of the stakeholders consultation" is online here:

<https://ec.europa.eu/docsroom/documents/17562/attachments/1/translations/en/renditions/pdf> (page 4).

Our letter pointed out that the Commission has failed to publish the individual consultation responses on its website, despite its own rules requiring disclosure. The Commission responded by pointing to the report they published summarising the outcome of the public consultation and to the rudimentary list of companies, groups and public authorities that participated in the consultation which DG GROW sent to CEO in response to an access to documents request. This list has still not been published on the Commission's website, nor have the submissions to the consultation. The Commission's response to our letter ignores the Commission's rules for consultations which state: "After a consultation has ended, the contributions made by stakeholders should be published. Written contributions should be made public on the dedicated consultation webpage." (page 80, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015SC0111&from=en>)

Our letter points out that documents released via CEO's access to documents requests reveal a very intimate working relationship between DG GROW and three major industry lobbying groups: BusinessEurope, EuroCommerce, and EuroChambres. While these lobby groups expressed full support for the Commission's proposed directive, the reaction by virtually all other respondents was negative. This includes strongly worded criticism by more than a dozen associations of engineers, tax advisers, architects, free professions and small services businesses. While these organisations seem to never have received a response from the Commission, DG GROW entertained an active correspondence and held several closed-door strategy sessions with big business lobby groups – a relationship that resembles a strategic partnership, not extended to any other stakeholders. The Commission's response claims that "the Commission services engaged with all interested stakeholders irrespective of their position". The Commission mentions that it "pro-actively reached out to stakeholders that could be expected to be critical of the proposal, such as the European Trade Union Confederation (ETUC)." Judging from the documents released as a result of our access to

documents requests, however, the email correspondence with ETUC (and the affiliated EPSU) appear to be the only example of the Commission pro-actively reaching out to critical voices. The Commission's letter fails to comment on the stark contrast between the unanswered critical letters mentioned above and the closed-door strategy sessions with big business allies.

Our letter pointed out that the biased approach "is undemocratic and unacceptable, it has favoured special interests and appears to almost certainly have contributed to a strong pro-corporate bias of the proposed directive." We also pointed out that Commission President Juncker in 2014 instructed his Commissioners to "ensure an appropriate balance and representativeness in the stakeholders they meet". We argued that "by logical extension, this should also apply to Commission officials involved in policy-making." These points were not addressed in the Commission's response.

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

The Commission should acknowledge that DG GROW's preparation of the proposed Services Notification Procedure directive was biased and failed to follow the Commission's own rules for public consultations. These rules clearly call for broad and pro-active outreach to affected stakeholders "to avoid bias or skewed conclusions ("capture") promoted by specific constituencies" and state that the responses to consultations should be published online, both of which DG GROW failed to do. The Commission should introduce ambitious measures to ensure that such flaws in the preparation of EU legislation are avoided in the future, including the introduction of mandatory, proactive measures to encourage a broad range of stakeholders to participate in consultations.

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

Yes (please specify and submit copies of the relevant correspondence)

The copies are attached under question one.

Part 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?

Not applicable

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

No

Part 9 - Please confirm that you have read the information below

You have read the information note on data processing and confidentiality

Part 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