

## **Recommendation of the European Ombudsman in case 1275/2018/EWM on the European Commission's refusal to grant full public access to the minutes of the meetings of the Technical Committee on Motor Vehicles from September 2016 to January 2017**

Recommendation

**Case** 1275/2018/THH - **Opened on** 23/07/2018 - **Recommendation on** 12/10/2018 - **Decision on** 03/05/2019 - **Institution concerned** European Commission ( Maladministration found ) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

### **Background to the complaint**

1. The complaint concerns the transparency of the process by which Member State representatives discuss and decide upon EU rules regarding emissions from motor vehicles.
2. The complainant is a member of the European Parliament. On 27 January 2017, he asked the European Commission to give him public access to the minutes and summary records of the meetings of the Technical Committee on Motor Vehicles (the "TCMV"), from September 2016 to January 2017. The TCMV is a "comitology" [2] committee, chaired by the European Commission, where civil servants representing each EU Member State discuss and provide opinions on technical matters relating to the regulation of motor vehicles. These opinions then form the basis of "implementing acts" for adoption by the Commission. The TCMV is therefore a key player in the area of vehicle emissions, an issue of significant relevance to public health and to the environment.
3. The complainant is a member of the European Parliament's Emission Measurements in the Automotive Sector (EMIS) committee. All members of Parliament's EMIS committee had access to unredacted copies of TCMV meeting minutes. The complainant's wishes to make the minutes of the TCMV meetings accessible to the wider public.
4. In its reply to the complainant on 13 March 2017, the Commission stated that *summary records* of the five meetings were already publicly available, in the Comitology Register [3] . It said that it could not release the full minutes of the five TCMV meetings since, in its view, public



disclosure would undermine the decision-making process. [4]

5. The complainant then submitted to the Commission, on 3 April 2017, a request for review, a so-called “confirmatory application”.

6. On 29 May 2018, the Commission granted partial public access to the relevant minutes. The complainant was not satisfied and turned to the European Ombudsman on 12 July 2017.

## The inquiry

7. The Ombudsman opened an inquiry into the complaint that the Commission had wrongfully refused full public disclosure of the minutes of the meetings of the TCMV from September 2016 to January 2017 (the “minutes”).

8. The Ombudsman considered the documentation provided by the complainant and reviewed unredacted versions of the minutes. The Commission did not provide any additional views.

## Arguments presented by the parties

### Complainant’s arguments

9. The complainant argued that the Commission had taken an overly restrictive view as regards releasing the minutes. He noted that the TCMV discusses and votes on detailed implementing measures setting out how EU legislation is applied. Even if TCMV discussions are usually technical in nature, they also have, he insisted, a wider political significance. He argued that the EU needs to ensure transparency and accountability of decision-making, in particular in areas where the key decision-making processes directly affect public health and the environment.

10. The complainant considered that there is an overriding public interest in disclosure of the minutes and that the “Dieselgate” scandal undermined public health, consumer rights and citizens’ trust in the regulators.

11. He contended that, pursuant to the EU Regulation concerning public access to information in environmental matters (the “Aarhus Regulation” [5] ) an overriding public interest always exists where the requested information relates to “emissions into the environment”. In his view, information about the implementation of Union legislation as regards vehicle pollutant limit values, such as the information in minutes of meetings the EMIS committee, constitutes information about emissions into the environment.

12. More generally, the complainant stated that the TCMV and other relevant committees should be more transparent. He argued that the minutes of the meetings of comitology committees, such as the TCMV, should be made public as a matter of course.



## **Commission's arguments**

**13.** As regards the redaction of the names of participants in TCMV meetings, the Commission considered that such disclosure would undermine the protection of privacy and the integrity of the persons concerned. [6] The Commission also claimed that the complainant has failed to establish any necessity of transferring the personal data to him and that it could not be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure. [7]

**14.** As regards the redaction of information in the minutes relating to (i) the type-approval of a steering system developed by a car manufacturer, and (ii) the state of play of infringement proceedings, the Commission argued that disclosure of this text would undermine the protection of commercial interests. [8] Consequently, it redacted this information as well as the names of two car manufacturers.

**15.** Lastly, as regards the redaction of information in the minutes relating to the positions taken by individual Member States in relation to the matters discussed in the TCMV, the Commission argued that disclosure of this information would undermine the protection of the decision-making process within the TCMV. [9] It therefore redacted this information arguing that it was in line with the Standard Rules of Procedure for all Committees. Those rules state that summary records of meetings shall not mention the positions of individual members and that the committee's discussions shall be confidential. [10] The Commission further argued that relevant undisclosed parts of the requested documents contain the discussions within the TCMV Committee regarding the Commission's proposals for several pending legislative acts. In its view, public release of the undisclosed parts of the minutes would significantly increase the risk of targeted pressure by various external actors on the representatives of the Member States in the Committee.

**16.** The Commission considered that there is no overriding public interest in the full disclosure of the minutes. In its view, the summary records of the meetings that are publicly accessible on the Comitology Register, and other available documents, allow the public closely to follow the legislative process. The Commission said that the summary records were prepared on the basis of the full minutes and contained the same information as the minutes, apart from the detailed Member States' positions.

## **The Ombudsman's assessment leading to a recommendation**

### **Public access to the names and contact details of the participants in the TCMV meetings**



17. EU law requires that an applicant seeking access to personal data, such as the names of persons, has to substantiate why it is necessary to have the personal data transferred. [11] The Ombudsman notes that the complainant has not specified in his request for public access or in his request for review to the Commission, why there is a necessity to transfer the names and contact details of the participants in the TCMV meetings to him. [12] The Ombudsman says that the Commission was therefore justified in refusing access to the names and contact details of the meeting participants.

18. The Ombudsman also notes that the Commission did not redact certain useful related information, such as the identity of the various national authorities that participated in the TCMV meetings. These were, principally, authorities in charge of transport issues or authorities in charge of environmental matters. The actual names of their representatives, present at the meetings, are thus less relevant in public interest terms.

## **Public access to information on two car manufacturers**

19. The Commission redacted a discussion about a new steering system developed by a car manufacturer on the basis that disclosure of this information would undermine commercial interests. Article 4(2) first indent of Regulation 1049/2001 allows for the redaction of information when disclosure would undermine commercial interests. The steering system in question is a novel technological innovation. The Ombudsman considers that, at the time when the access request was made, it was reasonably foreseeable, and not purely hypothetical, that commercial interests would have been undermined if information on such a new technology had been made publicly accessible.

20. The complainant has not challenged this specific redaction on public interest grounds but argued that in general, the information relates to environmental information, and more specifically to emissions into the environment. He considers that the public interest in access to environmental information should override any company's commercial interest. This is, in general a convincing argument. However, as regards **this specific redaction**, the Ombudsman considers that the notion of "environmental information", as set out in the Aarhus Regulation, does not cover information about the steering assistance systems themselves. [13]

21. As regards the redaction of information on the state of play of a Commission infringement procedure, the minutes contain a very limited reference to an on-going infringement procedure. It does not appear that the infringement procedure relates to emissions into the environment. Bearing in mind that a general presumption of non-disclosure applies to on-going infringement procedures, the Ombudsman does not consider that there are grounds to inquire further into this very limited redaction.

## **Public access to the positions of the representatives of the Member States in the TCMV**



22. Regarding the Commission's refusal to grant access to the positions expressed by the representatives of the Member States in the TCMV, however, the Ombudsman recognises that ensuring that citizens are able to follow the progress of legislation is a cornerstone of EU democracy. Under the EU Treaties, every citizen has "the right to participate in the democratic life of the Union" and EU decisions must be taken "as openly and as closely as possible to the citizen" [14].

23. The EU proposes and agrees policy and legislation which affects over 500 million European citizens. Given the importance of a transparent legislative process in a democratic society, the Ombudsman has carried out a number of inquiries into various aspects of the EU's legislative activities including the transparency of discussions on draft legislation in the over 150 preparatory bodies of the Council of the EU, [15] into the transparency of Trilogues, informal negotiations between representatives of the Council, the European Commission and the European Parliament, through which the vast majority of draft EU laws pass before being finalised, [16] and into how the more than 800 Commission's expert groups that advise the Commission on the preparation of legislation and its implementation can be more balanced and transparent. The Ombudsman has made a number of recommendations and suggestions on how to make the EU's legislative activities more transparent and accountable.

24. The Ombudsman's work has been reinforced recently by the EU courts [17], including a recent judgment about the transparency of the process for the adoption of EU environmental legislation. [18]

25. The complainant's request for public access to the positions of the representatives of the Member States in comitology committee meetings, and the Commission's subsequent refusal to disclose these parts of the documents, must therefore be viewed in the context outlined above.

26. According to EU rules, wider access must be granted to documents in cases where the institutions are acting in their "legislative capacity", **including under delegated powers**. [19] Such documents should be made accessible **to the greatest possible extent**. [20] Those rules state that "*legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should, subject to [specific exceptions], be made directly accessible.*" [21] The information covered in the minutes mainly relates to implementing acts. Implementing acts are adopted by the Commission after involving a comitology committee based on a fixed set of procedural rules. Committees are composed of representatives from all EU Member States who come together to discuss and amend implementing acts to be voted on by the Member States' representatives. Implementing acts are legally binding and directly applicable in all Member States. The Ombudsman therefore considers that Commission **implementing acts have to be considered legislative activity within the meaning of the EU rules on public access to documents**.

27. Openness enables greater legitimacy and accountability for the EU institutions. [22] The possibility for citizens to scrutinise and be made aware of all the information forming the basis for "EU legislative action", understood broadly, is a precondition for the effective exercise of their



democratic rights as recognised, in particular, in Article 10(3) TEU. [23] In particular, granting public access to the minutes of a committee meeting in which **implementing acts** are discussed and voted on enables citizens to understand the options discussed and considerations underlying this particular “legislative action” of the European Union. Understanding how an implementing act comes about and **which positions the different Member States’ representatives hold** is vital in a democratic system which is accountable to its citizens.

**28.** Therefore, when it comes to legislative activity, all exceptions to public access have to be interpreted in a particularly restrictive way.

**29.** The Ombudsman agrees that the requested **documents contain environmental information** within the meaning of the Aarhus Regulation. [24]

**30.** Such information includes all factors affecting or likely to affect the elements of the environment including air and atmosphere, water, soil and land. All measures, affecting or likely to affect those elements and factors, constitute environmental information. The minutes contain an exchange of information and views and voting behaviour on Commission draft proposals regarding a real-driving emissions test procedure better reflecting emissions measured on the road, a new regulatory test procedure for measuring CO<sub>2</sub> emissions and fuel consumption from light duty vehicles and related acts for heavy-duty vehicles and non-road mobile machinery. These measures aim at reducing emissions of air pollutants from vehicles. They therefore **contain information on legislation likely to affect emissions into the environment**, and thus **clearly qualify as environmental information**.

**31.** The Aarhus Regulation aims at ensuring that environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination. The purpose of access to this information is to promote more effectively public participation in the decision-making process, thereby increasing the accountability of decision-making and contributing to public awareness and support for the decisions taken. [25] In this spirit, the Aarhus Regulation provides that the exception that public access to a document shall be refused if disclosure would seriously undermine the institution’s decision-making process [26] has to be interpreted in a restrictive way as regards environmental information, taking into account the public interest served by disclosure of the requested information, thereby aiming for greater transparency in respect of that information. [27]

**32.** As the requested documents are part of a legislative process and, moreover, contain environmental information, the Ombudsman notes that the exception invoked by the Commission to refuse public access to the positions of Member States’ representatives must be applied **all the more restrictively**. [28]

**33.** The Commission claims that public release of the undisclosed parts of the minutes would significantly increase the risk of targeted external pressure on the representatives of the Member States in the committee.



**34.** The Ombudsman notes that the expression by the public or the interested parties of their views on the legislator's choices made and the policy options envisaged, in particular in environmental matters, is an integral part of the exercise by EU citizens of their democratic rights. [29]

**35.** The Commission has not established that the external pressure to which it might be subjected in the event of disclosure of the undisclosed parts of the minutes would be such as to risk impeding its capacity to act in a fully independent manner and exclusively in the general interest. The Commission has also not substantiated that disclosure would seriously affect, prolong or complicate the proper conduct of its decision-making. [30]

## Conclusion

**36.** The Ombudsman therefore finds that the Commission's refusal to grant public access to all positions of the representatives of the Member States related to environmental information constituted maladministration, in line with the principles explained above. She therefore recommends as below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

## Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the Commission:

**The Commission should grant significantly increased partial access to the minutes of the meetings of the Technical Committee on Motor Vehicles from September 2016 to January 2017, disclosing at minimum all positions of the representatives of the Member States related to environmental information, in line with the principles explained above.**

The Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion **by 12 January 2019** .

Emily O'Reilly

European Ombudsman

Strasbourg, 12/10/2018



[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] "Comitology" refers to a set of procedures through which EU Member States control how the European Commission implements EU law. Before it can adopt measures which implement EU legislation, the Commission must consult, for the detailed implementing measures it proposes, a specialised committee where every EU Member State is represented. The committee in question then provides an opinion on the Commission's proposed measures. These opinions can be more or less binding on the Commission, depending on the particular procedure specified in the legal act being implemented. For a brief overview of "comitology", see <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home>

[3] See <http://ec.europa.eu/transparency/regcomitology/index.cfm?CLX=en>

[4] In accordance with Article 4(3) of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1> [Link].

[5] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R1367> [Link].

[6] Article 4(1)(b) of Regulation 1049/2001.

[7] In accordance with Article 8(b) of Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001R0045> [Link].

[8] Article 4(2), first indent, of Regulation 1049/2001.

[9] Article 4(3) of Regulation 1049/2001.

[10] Articles 10(2) and 13(2) of the Standard Rules of Procedure for Committees - Rules of Procedure for the [Name of the committee] committee, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011Q0712\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011Q0712(01)) [Link].

[11] Judgment of the Court of Justice of 29 June 2010 in case C-28/08 P, Commission v Bavarian Lager, at para. 63, available at



<http://curia.europa.eu/juris/document/document.jsf?text=&docid=84752&pageIndex=0&doclang=EN&mode=lst&dir=>  
[Link].

[12] Requirement under Art. 8(b) of Regulation 45/2001.

[13] Article 2(1)(d) of Regulation 1367/2006.

[14] Articles 1 and 10(3) of the Treaty on European Union (TEU).

[15] Strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process.

[16] Strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues.

[17] See judgment of 22 March 2018 in Case T-340/15, *De Capitani v Parliament*, at paras. 77, 81, available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=200551&pageIndex=0&doclang=en&mode=lst&dir=>  
[Link].

[18] See Case C-57/16 P, *ClientEarth v Commission*, in which the Court of Justice's Grand Chamber has overturned a judgment the General Court of the European Union had rendered in 2015. The Court of Justice has ruled in this judgment that the Commission cannot presume that disclosure of documents drawn up by the Commission in the context of a legislative procedure would seriously undermine its decision-making processes. The judgment is available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=205322&pageIndex=0&doclang=EN&mode=req&d>  
[Link].

[19] Recital 6 of Regulation 1049/2001.

[20] Recital 6 of Regulation 1049/2001.

[21] Article 12(2) of Regulation 1049/2001.

[22] Judgment of the Court of Justice of 4 September 2018 in case C-57/16, *ClientEarth v Commission*, paragraph 75.

[23] Judgment of the Court of Justice of 4 September 2018 in case C-57/16, *ClientEarth v Commission*, paragraph 84.

[24] Article 2(1)(d) of Regulation 1367/2006.

[25] Judgment of the Court of Justice of 4 September 2018 in case C-57/16, *ClientEarth v Commission*, paragraph 98.

[26] Article 4(3) of Regulation 1049/2001.



[27] Article 6(1) second sentence of Regulation 1367/2006; see also Judgment of the Court of Justice of 4 September 2018 in case C-57/16, ClientEarth v Commission, paragraph 100.

[28] Judgment of the Court of Justice of 4 September 2018 in case C-57/16, ClientEarth v Commission, paragraph 101.

[29] *Idem*.

[30] See also judgment of the Court of Justice of 4 September 2018 in case C-57/16, ClientEarth v Commission, paragraph 108.