

## **Decision in case 2204/2018/TE on how the European Commission dealt with comments submitted under the notification procedure set up by the EU Single Market Transparency Directive**

Decision

**Case 2204/2018/TE - Opened on 28/02/2019 - Decision on 19/09/2019 - Institution concerned** European Commission ( No maladministration found ) |

The European Commission runs a publicly accessible database, which informs interested parties about national technical regulations communicated to the Commission by EU Member States before their adoption. The database also allows interested parties to submit comments on the proposed national technical regulations.

The complainant is an international technical association for generation and storage of power and heat. It submitted comments on proposed technical rules that Germany intended to introduce.

As the German authorities had requested the Commission to keep information about the measures confidential, only limited information about these measures was accessible via the public database. The complainant took issue with this. The complainant was also concerned about how the Commission dealt with its comments, as it did not receive a substantive reply from the Commission after it made its comments.

The Ombudsman found no maladministration in how the Commission dealt with the complainant's comments made under the notification procedure. The Ombudsman suggested, however, that the Commission provide clear information in its acknowledgements of receipt and on the database website, as to what interested parties can expect in terms of the Commission's reply to their comments. Regarding the information that is made available, the Ombudsman expects the Commission carefully to monitor Member States' use of confidential notifications under the Single Market Transparency Directive and to take the necessary measures in case of suspected abuse of the confidentiality provision.

## **Background to the complaint**

1. The complaint concerns the "notification procedure" under the EU Single Market



Transparency Directive. [1] The purpose of the procedure is to allow the European Commission and EU Member States to examine national technical regulations that other Member States intend to introduce.

2. Once a Member State communicates a draft national technical regulation to the Commission, the Commission must immediately inform the other Member States of the draft regulation and all related documents, which have been forwarded to it. It may also refer the draft regulation to a Standing Committee, made up of Member State representatives and the Commission. There is then a three-month standstill period, during which the Member State in question must refrain from adopting the notified draft regulation. [2] If the Commission or other Member States consider that the draft regulation is incompatible with EU law, they may submit, in that three-month period, a detailed opinion or comments on it. [3] The submission of a detailed opinion from the Commission or a Member State prolongs the standstill period by another four months.

3. The Commission runs the Technical Regulations Information Systems (TRIS) database. The database gives the public access to information on the draft measures, in all EU languages. The extent of this information depends on whether the notifying Member State requested its drafts to be treated confidentially. [4] If confidentiality is requested, the TRIS database will list the notified draft using a reference number. It will also show the date the notified draft was received. However, the draft measure itself may not be accessible.

4. While the Directive itself does not expressly give a right to third parties to provide comments to the Commission, [5] the TRIS database allows interested parties to submit comments during the standstill period.

5. On 21 June 2018, the complainant, the international technical association for generation and storage of power and heat, submitted comments on four German draft technical regulations on the connection and operation of customer installations to the high-voltage grid.

6. On 19 July 2018, the Commission informed the complainant that its comments had been forwarded to the Commission department “*in charge of the matter for the appropriate follow-up*”.

7. The German authorities had requested that the notification in question be treated confidentially. On 17 August 2018, the complainant asked the Commission why the notification was confidential. It also asked to be informed of the date the standstill period would end. More generally, the complainant criticised the lack of transparency of the TRIS database.

8. On 7 September 2018, the Commission replied to the complainant, explaining that Germany had informed it that the relevant draft measures were confidential. Consequently, these drafts were not visible in the database. The Commission however informed the complainant of the date the standstill period had expired for the notifications in question.

9. Dissatisfied with the Commission’s reply, the complainant turned to the Ombudsman on 17



December 2018.

## The inquiry

**10.** The Ombudsman opened an inquiry into the complaint. The complainant's position is that the Commission:

- 1) Fails to ensure the transparency of the TRIS database, by not indicating the end date of the standstill period, or the title of the draft technical regulation; and
- 2) Failed to provide a substantive reply to its comments on the German draft technical regulations.

**11.** In the course of the inquiry, the Ombudsman received the reply of the Commission on the complaint. The Ombudsman invited the complainant to provide comments on the Commission's reply. The complainant did not provide any comments.

## 1. Lack of transparency of the TRIS database as regards confidential notifications

### Arguments presented to the Ombudsman

**12.** The **complainant** argues that there is a lack of transparency in relation to the TRIS database, as neither the end of the standstill period nor the title of the German draft technical regulations was included in the database.

**13.** The **Commission** noted in its reply to the Ombudsman that the national authorities decide how a draft measure is notified to it. However, if a Member State asks that a draft measure be treated confidentially, it has to justify its decision.

**14.** The Commission takes the view that, where confidentiality is requested and where the substance of the draft measure does not require absolute confidentiality (for example, if the measure related to the fight against terrorism), "*some information should be made publicly available in TRIS*". Such information should at least include "*(i) the title and the summary of the draft measure, (ii) the reason why only a summary is made available ... and information about where the relevant document in its entirety can be obtained from (if appropriate, against payment); and (iii) the date when the standstill period elapses*". The Commission has stated this position repeatedly, including in the relevant standing committee, the Committee on Technical Regulations, which includes Member State representatives. In the committee's meeting of October 2018, the Commission reminded Member States that:

*"... the use of confidential notifications should be exceptional and duly justified. Even in case of*



*confidential notifications, it is advisable that MSs find a compromise, for example provide, and allow to publish in TRIS, the title and a summary of the notified draft where confidential information is protected. The abuse in the use of confidential notifications could be brought to the CJEU, which could be driven by the transparency principle underlying the notifications under the SMTD [Single Market Transparency Directive]”. [6]*

**15.** The Commission clarified that, in the case at hand, Germany had notified the four draft technical regulations as confidential and decided not to include their title or the end of the standstill period in the TRIS database.

## The Ombudsman's assessment

**16.** The complainant's allegation as regards lack of transparency of the TRIS database relates *only* to the fact that the database does not indicate the end of the standstill period or the title of the notified measure. The specific allegation did not concern the fact that the TRIS database did not contain a **copy** of the notified measure. The Ombudsman understands that the complainant did not raise the latter issue in its complaint because the complainant had already obtained, from other sources, a copy of the notified measures (indeed, the complainant was able to provide the Commission with detailed comments on the draft measure).

**17.** As regards the alleged failure of the Commission to inform the complainant of the end of the standstill period, the Ombudsman notes that, in the case at hand, the Commission did, upon request, inform the complainant of the date the standstill period ended (see paragraph 7 above). The Ombudsman also notes that the TRIS database always indicates the date when a measure is notified to the Commission. Since the Directive establishes a statutory initial three-month standstill period, starting from when the measure is notified to the Commission, it is always possible for stakeholders to determine when the initial standstill period will end.

**18.** As regards the fact that the title of the specific notification was not included in the TRIS database, the Ombudsman notes that this point did not have any practical implications for the complainant. The complainant was clearly aware that the measure in question was notified to the Commission, since it submitted detailed comments to the Commission during the standstill period.

**19.** That said, while Article 5(4) of the Single Market Transparency Directive grants Member States the possibility to request confidentiality of draft technical regulations, that possibility should be exercised restrictively.

**20.** First, as required by Article 5(4) of the Single Market Transparency Directive itself, such requests must be reasoned. The Commission should include these reasons on the TRIS database. Moreover, certain basic information about the notified measure should always be made available on the TRIS database, such as the title of the measure. Should a request for public access be made for the documents provided to the Commission by the national authorities, these requests should be dealt with under Regulation 1049/2001 on public access



to documents [7] . Any request for access to documents should not be refused unless the refusal can be justified on the basis of one of the exceptions to public access set out in that Regulation.

21. The Ombudsman is thus encouraged by the fact that the Commission takes the view (see paragraph 13 and 14 above) that, in cases where confidentiality is requested, some information should be made publicly available in TRIS, including the title and the summary of the draft measure, the reason why only a summary is available, where the relevant document can be obtained, and the date when the standstill period ends.

22. The Ombudsman urges the Commission to ensure that this common sense, transparent and citizen-friendly policy **is consistently applied** . It was not in this case. Given the nature of the measures in question - they relate to what would seem to be a non-controversial issue, namely the connection and operation of customer installations to the high-voltage grid - the Ombudsman does not understand how such measures could validly be deemed confidential. At the very least, the title of the measures should have been made available.

23. The Ombudsman thus expects the Commission to monitor carefully Member States' use of confidential notifications under Article 5(4) and to take the necessary measures in case of suspected abuse of this provision. She will make a corresponding suggestion for improvement below.

## 2. Failure to provide a substantive reply to the complainant's comments

### Arguments presented to the Ombudsman

24. The **complainant** considers that the Commission should have provided it with a substantive reply to its comments on the German draft technical regulations.

25. The **Commission** explained in its reply to the Ombudsman that, once comments from interested parties are received, they are translated into English and forwarded to the responsible Commission department, which assesses them. The Commission clarified that comments submitted by interested parties cannot bind the Commission, as different stakeholders may submit comments with different or even conflicting positions.

26. The Commission also takes the view that it is not in a position to provide a substantive reply to each submission. From an administrative perspective, the deadlines for the Commission and other Member States to respond to notified draft measures are very short. From a substantive perspective, Commission departments cannot, at their level, take a position, which completes, or develops further, the arguments put forward in the Commission's formal response to the notified measure, or which justifies the fact that the Commission as an institution may choose not to respond formally.



## The Ombudsman's assessment

27. The Directive states that the responsible Standing Committee and the national authorities may *seek* expert advice from physical or legal persons in the private sector. The Directive does not oblige the Commission to take into consideration advice that stakeholders choose to share with it.

28. That said, it is good administration for the Commission to acknowledge receipt of such comments, to transfer the comments to the relevant Commission departments for appropriate follow-up and to communicate clearly to stakeholders the follow-up they can expect.

29. The Ombudsman considers the Commission's explanation, as to why it is not in a position to provide a substantive reply to *each* submission made by interested parties, to be reasonable. This is particularly the case, given the strict timeline imposed on the Commission and the fact that it receives several hundred annual notifications of national draft technical regulations. [8] The Ombudsman therefore concludes that the Commission's policy of not providing a substantive reply to each individual submission does not constitute maladministration.

30. Having said that, the Ombudsman understands why some of the Commission's statements may have led the complainant to believe that it would receive feedback. In particular,

- the wording of the acknowledgement of receipt informed the complainant that its comments had been forwarded to the Commission department "*in charge of the matter for the appropriate follow-up*". The reference to an "*appropriate follow-up*" could have been misunderstood by the complainant as an indication that it would be contacted by the Commission; and

- the TRIS database states that "[t]he Technical Regulation Information System ... allows you to participate in the 2015/1535 procedure". There is no further explanation as to how the Commission processes comments made by interested parties.

31. The Ombudsman thus considers that, with a view to managing the expectations that interested parties might have when submitting comments on draft technical regulations, the Commission should provide clear explanations as to what interested parties should and should not expect. These explanations should be included on the TRIS website and in any acknowledgement of receipt.

## Conclusions

Based on the inquiry, the Ombudsman closes this case with the following conclusions:

**The Ombudsman has found no maladministration in how the Commission handled comments submitted by the complainant under the notification procedure set out in the**



**Single Market Transparency Directive regarding German draft technical regulations.**

**As regards the alleged failure to provide the complainant with the date the standstill period ended, the Commission did provide this information to the complainant on request.**

**As regards the alleged failure to provide the complainant with the title of the notified measures, no further inquiries are justified since the complainant was, from other sources, aware of the title.**

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

## **Suggestions for improvement**

**The Commission should explain clearly what interested parties can expect in terms of the Commission's reply after comments have been submitted under the notification procedure, both in the acknowledgement of receipt and on the TRIS website.**

**The Commission should carefully monitor Member States' use of confidential notifications under Article 5(4) of the Single Market Transparency Directive, and take the necessary measures in case of suspected abuse of that provision.**

Emily O'Reilly

European Ombudsman

Strasbourg, 19/09/2019

[1] Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services ('Single Market Transparency Directive'):

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L1535> [Link].

[2] Article 6 of the Single Market Transparency Directive.

[3] Article 6(2) of the Single Market Transparency Directive.

[4] Article 5(4) of the Single Market Transparency Directive.

[5] It states that the Standing Committee and the national authorities may *seek* expert advice



from physical or legal persons in the private sector.

[6] Minutes of the 130th meeting of the Committee on Technical Regulations, Brussels, 19 October 2018, p. 5:

<https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=33980>  
[Link]

[7] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN> [Link].

[8] The Commission stated that it received 713 notifications of national draft technical regulations in 2018.