

Decision in case 624/2020/MIG on the European Commission's refusal of public access to documents concerning the classification of a product by the World Customs Organization

Decision

Case 624/2020/MIG - Opened on 08/04/2020 - Decision on 22/06/2020 - Institution concerned European Commission (No maladministration found) |

The case concerned a request for public access to documents held by the European Commission and pertaining to the classification of a smartphone by the World Customs Organization (WCO). The Commission consulted the author of the documents, the WCO, who objected to their disclosure. The Commission therefore refused to give public access relying on the need to protect the EU's international relations with the WCO and its members.

The Ombudsman found that the Commission's decision to refuse public access was reasonable and that it had provided the complainant with a sufficient explanation. She thus closed the inquiry finding no maladministration.

Background to the complaint

1. In September 2019, the complainant, a Brussels-based lawyer, requested [\[1\] \[Link\]](#) the Commission to grant public access to documents concerning the classification of smartphones by the WCO and drawn up in 2018 or 2019.
2. The Commission identified two documents, namely a note by the WCO on a request for the classification of a smartphone by one of its member states and an annex summarising the request and the WCO Secretariat's preliminary position thereon. The Commission refused public access to these documents relying on the need to protect the public interest as regards international relations.
3. In November 2019, the complainant requested a review of the Commission's decision (by making a so-called 'confirmatory application'), asking it to give him at least partial access to the documents.
4. The Commission maintained its decision to refuse access.



5. Dissatisfied with this outcome, the complainant turned to the Ombudsman in April 2020.

The inquiry

6. The Ombudsman opened an inquiry into the complainant's position that the Commission was wrong to refuse public access to the requested documents (in their entirety).

7. In the course of the inquiry, the Ombudsman's inquiry team inspected the requested documents.

Arguments put forward

8. As the documents to which the complainant is seeking access originate from a third party, the WCO, the Commission consulted the third party before assessing the complainant's request for access.

9. The WCO objected to the disclosure of the documents. It stated that the documents remained its property and were inviolable and immune from any legal process. It also said that it would publish such documents once its decision-making was finalised, any necessary redactions had been made and the documents had been cleared by its member state concerned.

10. Taking into account the WCO's reply, the Commission considered that disclosure of the requested documents would violate the WCO's confidentiality rules and thus negatively affect the EU's relations with the WCO and its members.

11. The complainant questioned whether the WCO could legitimately rely on the immunity of the documents. He argued that the Commission should not have relied on the WCO's assessment, but should instead have examined whether, by transferring the documents to it, the WCO had implicitly waived the immunity.

12. The complainant also considered that there was an overriding public interest in ensuring legal certainty for the industry, which depends on the classification of smartphones, as 'mobile phones', or as other devices.

13. The Commission replied that it could not waive the immunity to which the documents are subject and that the WCO had clarified that its reply should not be interpreted as a waiver of any of its privileges and immunities.

14. Regarding the need to protect international relations, the Commission stated that it enjoyed wide discretion. It considered that the documents constituted an "inseparable whole" and refused access to the documents in their entirety. The Commission explained that the note in question contained the name of the WCO member state that had requested the classification of



a certain type of smartphone from a specific producer, the request itself and a technical description of the smartphone at issue. Disclosure by it, it said, would thus breach confidentiality as regards the identity of the requesting member and potentially, the commercial interests of the producer of the smartphone. Concerning the annex to the note, the Commission explained that it contained the request and classification opinion of the requesting member state, and the preliminary opinion of the Secretariat of the WCO. Disclosure of this document before the Harmonized System Committee passed its decision would very likely disturb the WCO's decision-making procedure by triggering unsolicited external pressure.

15. The Commission concluded that disclosure would violate (i) the WCO Convention, (ii) the commercial interests of the producer of the smartphone, (iii), the WCO's decision-making process and (iv) the WCO's own rules on public access. It thus found that disclosure of the documents would jeopardise the EU's international relations with the WCO and its member states.

16. The complainant argued that the reasons for non-disclosure put forward by the WCO were formalistic and generic in nature. He contended that the Commission was not bound by the WCO rules, given that the EU is not a full member of the WCO [\[2\] \[Link\]](#). In the complainant's view, the Commission could have redacted the name of the member state at issue or contacted the WCO again at the confirmatory stage to verify whether the documents had been redacted in the meantime.

17. The complainant also stated that, in the future, smartphones would be classified under a new heading under the WCO Harmonised System 2022 nomenclature [\[3\] \[Link\]](#), so that the confidentiality of the requested documents was no longer warranted.

The Ombudsman's assessment

18. If a member of the public requests access to a document that was not drawn-up by the EU institution in question, but received by it from a third-party, the EU institution is required to consult the third party before taking a decision on whether disclosure of the requested document is possible under the EU rules on public access to documents. [\[4\] \[Link\]](#) This requirement does not apply if it is clear that a specific document must or must not be disclosed. [\[5\] \[Link\]](#)

19. The EU courts have recognised that the EU institutions enjoy a wide discretion when determining whether the protection of the public interest as regards international relations, could be undermined by the disclosure of documents. [\[6\] \[Link\]](#)

20. The requested documents in this case originate from the WCO. The Commission consulted the WCO about the request for access to documents. The WCO objected to their disclosure by the Commission. Specifically, the WCO explicitly stated that it had not waived the immunity to which the documents are subject when sending them to the Commission, and that it would reserve its right to maintain the confidentiality of the documents. The WCO also indicated that it



would make the documents available to the public once the requirements for their release under its own rules were met.

21. Taking into account the WCO's view, the Commission concluded that disclosure of the documents at issue would jeopardise the EU's international relations with the WCO and its member states.

22. Having examined the documents at issue in the present case, and given the WCO's view on the matter, the Ombudsman considers that it was reasonably foreseeable that the release of the documents by the Commission, even in part, would have had a negative impact on the EU's diplomatic relations with the WCO and its members. Disclosure of the documents, or parts thereof, by the Commission would very likely have been perceived as a violation of the WCO rules and a breach of trust. The Ombudsman therefore finds that the Commission's decision to rely on the need to protect international relations was reasonable.

23. In addition, the Commission set out, in sufficient detail, the reasons for its refusal of public access. It provided general information on the nature of the documents, and explained the context in which they had been drawn up and why it considered that their release, in itself, would jeopardise the EU's international relations with the WCO.

24. The Ombudsman also notes that the WCO indicated that it would release the documents once its decision-making process has been finalised, and after a consultation with its member state concerned and necessary redactions have been made. To date, the WCO has not yet published the documents on its website. [\[7\] \[Link\]](#) Thus, while the WCO's decision-making as regards the classification of the smartphone at issue may have been finalised, it remains clear that disclosure of the documents by the Commission acting on the complainant's request would still have undermined the relations with the WCO. There was no need for the Commission to consult the WCO again at the confirmatory stage.

25. The Ombudsman notes that, under EU rules on public access to documents, the protection of the public interest as regards international relations cannot be overridden by any other public interest. [\[8\] \[Link\]](#)

26. The Commission was therefore justified in refusing access to the documents at issue.

Conclusion

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

There was no maladministration by the European Commission in refusing public access to the documents at issue.

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



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Strasbourg, 22/06/2020

[1] [Link] Under Regulation 1049/2001 on 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].

[2] [Link] The EU enjoys rights and obligations similar to those of the WCO members. For more information, visit:

https://ec.europa.eu/taxation_customs/business/international-affairs/international-customs-cooperation-mutual-administration/ [Link].

[3] [Link] The updated version of the WCO HS Nomenclature will enter into force on 1 January 2022. For more information, visit:

<http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2022-edition.aspx> [Link].

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

[5] [Link] Ibid.

[6] [Link] See, for example, judgment of the General court of 11 July 2018, *ClientEarth v Commission*, T-644/116:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=203913&pageIndex=0&doclang=EN&mode=fulltext> [Link]

[7] [Link] See

http://www.wcoomd.org/en/topics/nomenclature/resources/hs_historical-documents.aspx [Link].

[8] [Link] Article 4(1) of Regulation 1049/2001.