

Recommendation of the European Ombudsman in case 1944/2019/DL on the transparency of Member State deliberations on a Commission proposal for a regulation implementing the Eco-design Directive

Recommendation

Case 1944/2019/DL - Opened on 25/10/2019 - Recommendation on 27/07/2020 - Decision on 09/02/2021 - Institution concerned European Commission (Maladministration found) |

The complaint concerns the refusal by the Commission to grant public access to four audio recordings, in which Member State civil servants discuss a Commission proposal for a regulation implementing the Eco-design Directive, and an email relating to the same discussion. The Commission considered that disclosing the recordings and email would undermine its decision-making and infringe the EU data protection rights of the persons heard on the recording.

EU access to documents rules apply to audio and video recordings. The Ombudsman considers that public access to these recordings (and any other documents produced during the legislative process) ensures that EU citizens can better understand why legislation is adopted, can take part in the debate on the merits of EU legislation, and can hold the EU institutions, and their Member States, to account for the legislative choices they make on behalf of citizens.

The Ombudsman does not agree that public access would undermine the Commission's decision-making. Rather, access would strengthen the decision-making, by enhancing its legitimacy in the eyes of citizens.

The Ombudsman considers that the Commission's arguments that access would give rise to an infringement of the data protection rights of national officials (whose voices can be heard on the recordings) lack merit. Refusing access would be justified only if legitimate interests of the officials would outweigh the important public need served by granting access (namely, the need to give greater legitimacy to the legislative process). However, the Commission has not identified any legitimate interests that might be affected by public access to the recording.

The Ombudsman therefore considers that the refusal to grant public access to the recordings was maladministration and makes a recommendation that they should be released.

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



Background to the complaint

1. The complaint concerns the European Commission's refusal to grant public access to audio recordings, in which Member State civil servants debate amendments to a Commission proposal for a regulation on eco-design requirements for electronic displays [2] , and a related email.
2. The Eco-design Directive [3] provides for the setting of consistent EU-wide rules for improving the environmental performance of energy-consuming products, such as household appliances, computers and electric motors.
3. The Eco-design Directive is implemented through product-specific regulations adopted by the Commission [4] . Those regulations are adopted through a so-called "comitology procedure" [5] in which EU Member States participate.
4. In March 2019, the complainant, an organisation that represents chemical companies, requested public access to any 'documents' held by the Commission related to the decision making process leading to the adoption of the Commission regulation laying down eco-design requirements for electronic displays.
5. In April 2019, the Commission disclosed certain documents. However, the documents it released did not contain information on the identity of Member States that asked for amendments to the Commission's proposal on the use of halogenated flame retardants in products [6] .
6. In May 2019, the complainant submitted a request for review of the Commission's initial refusal (a so-called "confirmatory application"). In that confirmatory application, the complainant specifically asked whether the Commission had any documents in which the Member States that had asked for amendments to the Commission's proposal could be identified.
7. In September 2019, the Commission replied. It identified a number of audio recordings of the Eco-design Committee meetings (in which the Member States discussed the Commission proposal) and one email [7] . It refused access to the recordings based on the need to protect the privacy and integrity of the persons speaking in the recordings [8] , and the need to protect the decision-making process. [9] It also refused access to the email for similar reasons.
8. Dissatisfied with the Commission's reply, the complainant turned to the Ombudsman on 21 October 2019. It specified that the request related solely and specifically to documents containing the position and identity of the Member States asking for the tabling of amendments to the Commission's proposal on the issue of halogenated flame retardants.

The inquiry



9. The Ombudsman opened an inquiry into the Commission's decision not to grant access to the recordings requested by the complainant.

10. In the course of the inquiry, the Ombudsman's inquiry team met with the Commission's representatives and inspected the relevant file. The team were provided with a copy of the audio recordings of the Eco-design Committee. The Ombudsman also received the comments of the complainant on the inspection report.

Arguments presented to the Ombudsman

Arguments presented by the European Commission

Protection of privacy and integrity of the individual

11. The Commission states that the national civil servants, and the Commission staff speaking on the audio recordings are identifiable. Therefore, it argues, the recordings of the voices are 'personal data' of these persons.

12. In relation to the email, the Commission argues that it also contains personal data, such as the names and initials of individuals, as well as their contact details or job titles. The Commission states that this information constitutes personal data. [10]

13. The Commission argues that the complainant did not establish a need to transfer the personal data to him. [11] Notwithstanding this, even if the complainant had established such a necessity, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents.

Protection of the decision-making process

14. The Commission states that its decision-making process was not yet finalised, because the act had not yet been adopted by the Commission.

15. It then stated that its Standard Rules of Procedure provide that summary records of the meetings shall not mention the position taken by Member States in the committee's discussions and that those discussions shall remain confidential. [12] The Commission therefore argues that it cannot grant access to documents containing references to the Member States that expressed opinions in the framework of committee meetings, as this would result in the above-mentioned confidentiality requirements being deprived of their meaningful effect.



16. The Commission furthermore argues that Article 10 of the Comitology Regulation explicitly mentions the documents which should be made public. [13] Therefore, Article 10 of the Standard Rules of Procedure, adopted pursuant to that provision, implicitly determines which documents should not be subject to publication. Therefore, the Commission concludes, the individual positions of the Member States cannot be made public.

17. In relation to granting wider access to *“documents held by EU institutions when acting in their legislative capacity, including under delegated powers”* [14] , the Commission argues that it has already granted full access to four documents, and that there is a concrete and realistic risk that disclosure of the individual positions of Member States would undermine the mutual trust and therefore the effectiveness of the decision-making process.

Overriding public interest

18. The Commission considers that the complainant's argument regarding the public interest, namely *“ the need to enable interested parties to understand why and how the Commission integrated the amendment on halogenated flame retardants in the said implementing measure adopted under the Eco-design Directive”*, does not constitute an overriding public interest, but rather an individual interest. [15] The Commission said it could not establish an overriding public interest.

Arguments presented by the complainant

19. The complainant considers that the documents containing the views of Member States on the Commission's proposal should be disclosed.

20. The complainant maintains that the Commission wrongly relies on Article 9 of the Comitology Regulation, and Article 10 of the Standard Rules of Procedure adopted pursuant to that provision, to refuse access to the requested information. The complainant argues that Article 9 merely provides that the committees are also subject to Regulation 1049/2001. The complainant refers to the Ombudsman recommendation in case 2142/2018/TE [16] , where the Ombudsman found that *“ there is no provision in the Comitology Regulation which says that summary records shall not contain the individual positions expressed by the Member States representative within the scope of the committees' proceedings. Nor is there any other provision in the Comitology Regulation, which would impose confidentiality requirements on committee proceedings (...)”*

21. The complainant also contests the view that disclosing the Member States' names would undermine the Commission's decision-making process, since the opinion of the responsible committee was voted on 19 December 2018 and the scrutiny period had elapsed on 8 May 2019. .

22. The complainant points out that access to the name of a relevant Member State, and the



reasons a Member State puts forward when suggesting amendments, are essential in terms of understanding developments in the legislative process.

23. The complainant emphasises that wider access to documents should be granted in this case, as the Commission was acting, under delegated powers, in its legislative capacity. [17]

24. The complainant also believes that the positions expressed by the Member States in the documents constitute “environmental information” as defined in the EU Aarhus Regulation [18] , and that exceptions to the rights of access should therefore be interpreted restrictively.

25. Finally the complainant claims that it is not seeking access to ‘personal data’ (for example, the names, initials or contact details of the persons acting on behalf of the national authorities). The complainant’s request relates solely and specifically to the position and identity of the Member States.

The Ombudsman's assessment leading to a recommendation

26. Ensuring that laws are adopted in a transparent manner is a cornerstone of democracy. Accordingly, the widest public access must be granted to documents in the possession of the EU institutions that are linked to the adoption of laws. [19]

27. The Ombudsman has previously inquired into the Commission’s refusal to publicly disclose Member State positions expressed in the context of comitology procedures. [20] In those cases, she concluded that the rules on wider public access to documents also apply to procedures whereby the institutions adopt implementing acts or delegated acts, which are as much part of the EU legal order as legislative acts. All such acts are, to use the commonly used term, laws. They are directly binding on the Member States and, either directly or indirectly, on citizens. The public has a right to be informed, to the greatest extent possible, about how these laws were adopted. A failure to abide by this basic principle of democracy risks weakening trust in the EU and its institutions and undermining the legitimacy of EU law.

28. Everyone - citizen, organisation, lobbyist - should be in a position to understand the reasoning and arguments that go into shaping our laws. It is only through such transparency that the EU can be fully accountable for the laws it adopts and that the public can participate fully in the debate as regards the merits of those laws.

29. Greater transparency would, indeed, allow citizens and all interested parties to focus better their efforts of bringing their views to the attention of European lawmakers. Such an outcome should not be viewed as a threat. Rather, it should, in a well-functioning democracy, be a desired-for outcome.

30. Based on these considerations, in May 2019, the Ombudsman recommended [21] , that the Commission should disclose the Member States’ positions expressed in the context of a



comitology procedure.

31. On 11 November 2019, the Commission chose not to follow the Ombudsman's recommendation.

32. On 1 December 2019, a new College of Commissioners was appointed.

33. The recently elected college of commissioners has indicated transparency to be one of its highest priorities. The Ombudsman welcomes that in the mission letter addressed to the Vice President of the European Commission for Values and Transparency [22], the President of the Commission stated that “*Europe's democracy depends on the faith and trust of citizens in how it works and in their ability to hold to account the people and institutions that serve them*”. She indicated that part of the mission of the Vice President was to strengthen democracy and transparency also by “*bring(ing) more transparency to the legislative process*”.

34. It is also relevant to note that the Council of the EU has recently taken steps to strengthen legislative transparency, by making additional Council documents proactively available. [23] This confirms that efforts are being made, across the institutions, to enable members of the public better to exercise their democratic right to have their say in EU law making.

35. The present case also highlights one of the core challenges for transparency in EU decision-making, namely the challenge of ensuring that Member States can be held accountable, by citizens in those Member States, for the positions they take in EU decision-making, in particular when that decision-making relates to the adoption of EU law. Member States are, alongside the Parliament, at the centre of EU law-making. That privileged position brings with it responsibility. Citizens must be empowered to hold their governments to account for the positions they take, on citizens' behalf, in the context of EU law-making.

Application of the exceptions under EU rules on public access to documents

a) Whether access would seriously undermine decision-making

36. EU access to documents rules apply to content recorded in any medium. These rules therefore also apply to audio recordings.

37. The audio recordings and the email to which the complainant seeks access contain details of the views put forward by Member States in the context of a comitology procedure through which the Commission sought to adopt an 'implementing act'. Once adopted, the implementing act forms part of EU law.

38. The Commission claims that the public disclosure of these audio recordings, and the email, is contrary to its 'comitology rules of procedure' [24] which, it argues, explicitly exclude the disclosure of positions of individual Member States.



39. The Commission would be able to make a convincing argument that it is 'rule-bound' not to release the positions of Member States only if the rule preventing disclosure were contained in the Treaties or in EU legislation. The comitology 'rules of procedure' [25] are not legislation. They are administrative provisions, made by the Commission, as to how it chooses to organise the work of the Committees.

40. As regards whether the Commission is bound, by the Treaties or legislation, not to disclose the positions taken by Member States in Committee proceeding, the Ombudsman notes that the disclosure of Member State positions is not prohibited by the applicable EU legislation, namely the Comitology Regulation [26] .

41. Article 10 of the Comitology Regulation sets out that certain documents relating to Committee proceedings must be proactively published in a register of documents and forwarded to the Council and Parliament. The purpose of Article 10 is to ensure that the Council and the Parliament are informed about the work of the Committees, thus ensuring a minimum level of proactive transparency for the Council and the Parliament. There is nothing in Article 10 which implies that the **public** cannot obtain access to the same documents mentioned in Article 10 of the Comitology Regulation by virtue of their rights established under Regulation 1049/2001. Moreover, there is nothing in Article 10 of the Comitology Regulation which implies that any other documents relating to the work of the Committees which are not mentioned in Article 10, but which are in the possession of the Commission, cannot be disclosed under Regulation 1049/2001.

42. Moreover, Recital 19 and Article 9 of the Comitology Regulation make express reference to the right of public access to documents being applicable to committees and their proceedings in accordance with Regulation 1049/2001.

43. In light of the above, the Ombudsman takes, once again, the view that the disclosure of the position and identity of the Member States asking for the tabling of amendments to the Commission's proposal on the issue of halogenated flame retardants is not contrary to the Comitology Regulation. [27]

44. As regards whether access could be refused, Regulation 1049/2001 creates a rebuttable presumption that documents in the possession of the EU institution should be made public on request. This presumption of transparency is reinforced in respect of documents relating to the process by which EU law is adopted, by the requirement that they should be made directly accessible to the greatest possible extent.

45. This principle applies to documents held by the Commission on the adoption of delegated acts, since these acts are as much EU law as are Directives and Regulations. [28]

46. The Commission argues that the disclosure of Member State positions would significantly increase the risk of external pressure on the representatives of Member States in the Committee.



47. The Ombudsman states again that citizens' ability to express their views on proposed legislation is an integral part of their democratic rights.

48. The Commission has not demonstrated that disclosure would prolong or complicate the proper conduct of the decision-making in question. Even if it did, this would only be a consequence of the decision-making process being rendered more democratic and legitimate.

49. In conclusion, the Ombudsman considers that, rather than seriously undermining decision-making, greater public access to the committee's proceedings would enhance the quality of the decision-making, by rendering it more democratic and legitimate.

b) Whether access would undermine data protection rights

50. The Commission further claims that the content of the audio recordings, and the comments in the email, relate to identified or identifiable natural persons, and that disclosure would thus undermine the persons' rights as regards the protection of their personal data.

51. As regards the comments in the written document, this issue can easily be resolved by redacting the names or initials of the persons concerned.

52. As regards the voices heard on the audio recordings, the Ombudsman first notes that the words spoken set out the position of the Member States. They are not the personal opinions of the individual members of the committee, who act strictly as representatives of their respective Member States. As such, were the contents of the audio recordings to be contained in a written transcript, they would not constitute 'personal data'.

53. Even if it were argued that the voices heard on recordings, rather than the content of what the persons say, are 'personal data', the recordings should still be disclosed if there is a necessity in having the data transmitted for a specific purpose in the public interest and if there are no reasons to assume that the data subject's legitimate interests might be prejudiced. [29]

54. The complainant has identified an important necessity which will be served by granting public access to the recordings, namely the need to know the positions expressed by Member States in a legislative process, so as to ensure that the legislative process is rendered more democratic and legitimate. It is only by revealing the positions taken by Member States that Member States can be made accountable to citizens for the position taken on their behalf by Member States.

55. The Ombudsman accepts that meeting this need is certainly 'in the public interest'.

56. Having established a strong necessity, in the public interest, for disclosing the recordings, the next step is to consider whether the legitimate interests of the members of the committee could be prejudiced by disclosing the recordings.



57. As regards the specific words spoken, the committee members do not express their personal views, but, as noted above, express the views of the Member States they represent.

58. There is also no reason to suppose that rendering public their voices, speaking in a formal work context, would impact on any legitimate private or personal interest of the persons concerned. No such reason has been advanced by the Commission in responding to the complainant's access to documents requests or in the course of this inquiry.

59. Therefore, the Ombudsman considers that, regardless of whether the recorded voices are 'personal data', the release of the recordings would be lawful under the EU data protection rules.

60. For the above reasons, the Ombudsman finds that the Commission's refusal to grant public access to the audio recordings and the email was maladministration. Therefore, in accordance with Article 3(6) of the Statute of the European Ombudsman, she recommends their release.

Recommendation

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

The Commission should grant public access to the requested documents, namely the relevant audio recordings and email (with names or initials redacted).

The European Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the European Commission shall send a detailed opinion by **27 October 2020**.

Emily O'Reilly European Ombudsman

Strasbourg, 27/07/2020

[1] Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom):
<https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:31994D0262> [Link].

[2] The proposal passed into law on 1 October 2019 as Regulation 2019/2021 laying down eco-design requirements for electronic displays pursuant to Directive 2009/125/EC of the



European Parliament and of the Council, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576033291584&uri=CELEX:32019R2021> [Link].

[3] Directive 2009/125/EC establishing a framework for the setting of eco-design requirements for energy-related products, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0125> [Link] .

[4] See: https://ec.europa.eu/commission/presscorner/detail/en/qanda_19_5889 [Link] .

[5] For a brief overview of “ *comitology*”, see:

<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home> [Link].

[6] Flame retardants are chemical substances that are supposed to slow ignition and prevent fires. They are broadly classified into halogenated and non-halogenated flame retardants. Bromine, chlorine, fluorine and iodine, are the elements in the chemical group known as halogens. Halogenated flame retardants act directly on the flame, the core of the fire.

[7] 1. Audio recordings *of the Regulatory Committee meeting under Directive 125/2009/EC of 19 December 2018, reference CCAB_2C_2-11_EN_19122018_1000_cBwzNBxGSJ2.*

2. Audio recordings *of the Regulatory Committee meeting under Directive 125/2009/EC of 19 December 2018, reference CCAB_2C_2-11_EN_19122018_1430_UyhdcPdeiA2 .*

3. Audio recordings *of the Regulatory Committee meeting under Directive 125/2009/EC of 19 December 2018, reference CCAB_2C_2-11_EN_19122018_1650_thjgTGaMli2.*

4. Preliminary comment *on the proposals for Light sources and Display Regulations of 13 December 2018, reference Ares(2019)4090864 .*

[8] Article 4(1)(b) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at:

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049> [Link].

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

[10] Article 3(1) of Regulation 2018/1725.

[11] As required in Article 9(1)(b) of Regulation (EU) 2018/1725.

[12] Article 10(2) and 13(2) of the Standard Rules of Procedure for Committees (2011/C 2016/06), available at:

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011Q0712%2801%29>.

[13] Regulation 182/2011 of the European Parliament and of the Council of 16 February 2011



laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, available at:
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011R0182> [Link].

[14] Recital 6 of Regulation 1049/2001.

[15] Judgment of the General Court of 26 May 2016, *International Management Group v European*

Commission, T-110/15, EU:T:2016:322, paragraph 56.

[16] Recommendation of the European Ombudsman in case 2142/2018/TE on the European Commission's refusal to grant access to Member State positions on a guidance document concerning the risk assessment of pesticides on bees, available at:
<https://www.ombudsman.europa.eu/en/recommendation/en/113624> [Link].

[17] Recital 6 of Regulation 1049/2001.

[18] Article 2(d)(iii) of Regulation 1367/2006 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:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006R1367> [Link].

[19] See Recital 6 and Article 12(2) of Regulation 1049/2001: *"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."*

[20] See decision in case 1275/2018/THH and decision in case 2142/2018/EWM.

[21] Recommendation and Decision in case 2142/2018/EWM, available at:
<https://www.ombudsman.europa.eu/en/recommendation/en/113624> [Link]

[22] Mission letter addressed to Vice President Věra Jourová on 1 December 2019, available at:
https://ec.europa.eu/commission/commissioners/sites/comm-cwt2019/files/commissioner_mission_letters/mission-le
[Link].

[23] Presidency/General Secretariat of the Council (9 July 2020) 'Item note 9493/20: Strengthening legislative transparency'.

[24] Standard Rules of Procedure for Committees (see footnote 12).

[25] In particular, article 10(2) stating that summary records of meetings shall not mention the individual position of the members in the committees discussions and article 14(2) stating that



the committee's discussions shall be confidential.

[26] Regulation 182/2011; See also Decision of the European Ombudsman in case 2142/2018/EWM.

[27] Recommendation and decisions in cases 1275/2018/THH and 2142/2018/EWM .

[28] Recital 6 of Regulation 1049/2001.

[29] Article 9(1)(b) of Regulation 2018/1725.