

Decision in case 1944/2019/DL on the transparency of Member State positions on a proposal from the European Commission for a regulation implementing the Eco-design Directive

Decision

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 complainant made a request for public access to positions taken by Member States on an implementing regulation laying down eco-design requirements for electronic displays. The Commission identified four audio recordings, in which Member State civil servants debate amendments to this regulation, and a related email as falling within the scope of the request. The Commission refused access, arguing that disclosure would undermine its decision-making process and infringe the EU data protection rights of the civil servants.

The Ombudsman took the view that the Commission was wrong to refuse public access to the documents. Rather than undermining the decision-making process, disclosure would strengthen it, by enhancing its legitimacy in the eyes of citizens. Moreover, the Commission's arguments that public access would give rise to a data infringement lacked merit. She thus recommended the Commission to disclose the documents.

The Commission has chosen to reject the Ombudsman's recommendation. The Ombudsman is disappointed, especially given the importance of transparency in enabling citizens to hold Member States accountable for their positions taken on EU draft laws.

The Ombudsman confirms that the Commission's refusal to grant access to the audio recordings and the email constitutes maladministration and closes the case on this basis.

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 [1] , and a related email.



2. The Eco-design Directive [2] sets consistent rules at EU level for improving the environmental performance of energy-consuming products. The Directive is implemented through product-specific regulations that are adopted by the Commission [3] and directly applicable in all EU countries. These regulations are adopted through a so-called “comitology procedure” [4], in which a committee composed of representatives of all EU Member States is required to submit to the Commission a formal opinion on the proposed measures.

3. The complainant, an organisation that represents chemical companies, requested the Commission, in March 2019, to grant public access to documents related to the decision making process leading to the adoption of the Commission regulation laying down eco-design requirements for electronic displays.

4. 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 [5].

5. In May 2019, the complainant asked the Commission to review its decision. In particular, it asked whether the Commission had any documents which allowed for the identification of the Member States that had asked for amendments to the Commission’s proposal on the issue of halogenated flame retardants.

6. The Commission replied in September 2019. 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 [6]. It refused access to the recordings and the email based on the need to protect the privacy and integrity of the persons speaking in the recordings [7], and the need to protect its decision-making process. [8]

7. Dissatisfied with the Commission’s refusal to release the documents containing the position and identity of the Member States, the complainant turned to the Ombudsman in October 2019.

The Ombudsman’s recommendation

The recommendation

8. In her recommendation [9], the Ombudsman stated that the widest public access must be granted to documents in the possession of EU institutions that relate to the adoption of laws. [10] She considered that the audio recordings and email at issue, drawn-up in the context of a comitology procedure, should be considered “*legislative documents*” under the EU law on public access to documents. [11] Such documents should be made directly accessible to the widest possible extent. [12]

9. The Ombudsman found that the exceptions invoked by the Commission in refusing public



access, namely the protection of the decision-making process and the privacy and integrity of the Member State representatives, lacked merit.

10. The Ombudsman disagreed with the Commission that it is 'rule-bound' not to release the positions of Member States. The rules the Commission refers to are the 'comitology rules of procedure' [13] , which are administrative provisions adopted by the Commission to organise the committees' work. These rules are not legislation. The Ombudsman stated that the applicable EU legislation is the Comitology Regulation [14] , which does not entail any provision prohibiting disclosure of Member State positions.

11. In addition, the Ombudsman stated that citizens' ability to express their views on proposed legislation is an integral part of their democratic rights. The Commission had not demonstrated that disclosure would prolong or complicate the proper conduct of the decision-making in question. Even if it did, the Ombudsman considered that this result in the decision-making process being rendered more democratic and legitimate.

12. Therefore, the Ombudsman considered that public access to documents related to committee proceedings would, rather than seriously undermining the decision-making process, enhance its quality.

13. The Ombudsman further disagreed with the Commission that disclosure of the audio recordings and the comments in the email would undermine the rights of Member State representatives as regards the protection of their personal data.

14. First, as regards the comments made in the email, the Ombudsman argued that this could be resolved by redacting the names or initial of the persons concerned.

15. Second, as regards the voices heard in the audio recordings, the Ombudsman argued that these were not the personal opinions of the civil servants, but rather reflected the positions of the Member States they represented. If those positions were contained in a written transcript, they would not be personal data. However, even if it were argued that these voices were personal data, the Ombudsman said that the recordings should still be disclosed since there is a necessity in having the data transmitted for a specific purpose in the public interest, namely the need to know the positions expressed by Member States in a legislative process. Moreover, there were no reasons to assume that rendering public the representatives' voices would prejudice their legitimate interests. [15] Therefore, regardless of whether the recorded voices are 'personal data', the Ombudsman considered that releasing the recordings would be lawful under EU data protection rules.

16. In light of the above, the Ombudsman found that the Commission's refusal to grant public access to the audio recordings and the email was maladministration. She therefore made the following recommendation (in accordance with Article 3(6) of the Statute of the European Ombudsman):

The Commission should grant public access to the requested documents, namely the



relevant audio recordings and email (with names or initials redacted).

The Commission's reply to the recommendation

17. The Commission rejected the Ombudsman's recommendation.

18. The Commission reiterated that the 'comitology rules of procedure' prevented public access to the audio recordings and email insofar as they preserve the confidentiality of the individual positions of Member States. Disclosing Member State positions before the College of Commissioners had the opportunity to pronounce itself on the draft implementing act would seriously undermine the Commission's leverage to consult Member State representatives free from external pressure.

19. The Commission further emphasised that the names and initials of the individuals, as well as their contact details and job titles contained in the requested e-mail, are 'personal data' [16]. The same applied to the voices of Member State representatives and Commission staff members [17] captured in the audio recordings. The Commission argued that the fact that parts of the interventions were made on behalf of the authorities of the Member States has no bearing on this conclusion, nor does the hypothetical transcription of the content of the audio recordings in a written format.

20. The Commission reiterated that neither in the initial nor in the confirmatory request did the complainant establish a necessity for having the personal data transferred. Even if this were the case, the Commission considered there were reasons to assume that there was a real and non-hypothetical risk that granting public access to the documents would harm the privacy of the representatives and would subject them to unsolicited external contacts. Since they are well-known to industry representatives, the Commission argued that disclosure of their personal data would expose them personally.

21. In light of the above, the Commission confirmed its view that access to the audio recordings of the committee meeting and the requested e-mail was to be refused on the grounds of the protection of privacy and the integrity of the individual and the protection of the ongoing decision-making process.

The Ombudsman's assessment after her recommendation

22. The Ombudsman is disappointed with the Commission's reply to her recommendation.

23. The Ombudsman maintains her view that the Commission was wrong to refuse public disclosure of the audio recordings and the email containing the identity of Member States that asked for amendments to the Commission's proposal on the use of halogenated flame retardants in products.



24. Contrary to what the Commission argues, disclosure would be lawful under EU data protection rules and would not undermine the Commission's decision-making process, for the reasons set out in the Ombudsman's recommendation.

25. The Ombudsman wishes to emphasise that the requested documents concern eco-design requirements for electronic displays. The legislation on eco-design and energy labelling aims at improving the energy efficiency and sustainability of products. By proposing EU-wide rules in this field, the Commission is playing a central role in ensuring consistent application of rules on energy savings and sustainable consumption.

26. Transparency of Member State positions would not only allow citizens to fully comprehend Member States' efforts (or lack of) in this field, but also to scrutinise their positions in relation to sustainability measures. Understanding which positions the different Member States hold is vital in a democratic system and enables citizens to hold their representatives accountable. Disclosing Member State positions in comitology committees would go some way to tackling the 'blame Brussels culture' and enhancing the EU's legitimacy.

27. The Commission has already committed [18] to increasing transparency and accountability in comitology procedures in the context of a previous Ombudsman inquiry. This commitment is also reflected in the Commission's proposal amending the Comitology Regulation [19], in particular by its suggestion to make public the votes of Member States representatives at Appeal Committee stage.

28. In its recent amendments to the Commission's proposal [20], the European Parliament emphasised the importance of transparency of delegated rule-making by proposing that Member States' votes should not only be public at appeal stage, but "*throughout all stages of the advisory and examination procedures*". Parliament moreover called for the disclosure of more detailed information regarding votes in particularly sensitive areas [21], as well as greater transparency about the composition of committees, meeting agendas and the documents and draft texts being discussed. The Ombudsman welcomes these initiatives to enhance the transparency of comitology procedures.

29. Having said that, the Ombudsman has repeatedly stated [22] that disclosure of Member State positions put forward in Committee discussions is not contrary to the Comitology Regulation as it stands. The 'comitology rules of procedure' the Commission is relying on to refuse access to Member State positions are administrative provisions adopted by the Commission to organise the committees' work. These rules cannot take legal precedence over a regulation. For instance, any rules of procedure have to comply with the EU rules on access to documents. Therefore, the Commission cannot avail itself of the Comitology rules of procedure to deny public access to documents if primary or secondary EU law requires their disclosure. The Ombudsman regrets that the Commission has not addressed this point in this or previous inquiries.

30. The Ombudsman considers that the Commission should act upon its commitment to render



the adoption process for implementing acts more transparent. She calls upon the Commission, once more, to live up to the obligations set out in the Treaty on European Union, and in particular the principles set out in its Article 10, according to which every citizen has “ *the right to participate in the democratic life of the Union*” [23] and EU decisions must be taken “ *as openly and as closely as possible to the citizen* ”. [24]

31. In light of the above, the Ombudsman reaffirms her conclusion that the Commission’s refusal to grant public access to the audio recordings and the email was maladministration.

Conclusion

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

The Ombudsman is not satisfied with the European Commission’s reply to her recommendation. The Ombudsman reiterates that the Commission should grant public access to the requested documents, showing the positions of Member States on the Commission proposal for a regulation implementing the Eco-design Directive, in line with the principles set out in her recommendation and in this decision.

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

Emily O'Reilly European Ombudsman

Strasbourg, 09/02/2021

[1] 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].

[2] 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].

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

[4] For a brief overview of “comitology”, see: <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home> [Link].



[5] 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.

[6] 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_thjgTGaMIi2.

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

[7] 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].

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

[9] The Ombudsman's recommendation is available at:
<https://www.ombudsman.europa.eu/en/recommendation/en/130710> [Link]

[10] Recital 6 and Article 12(2) of Regulation 1049/2001.

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

[12] Recital 6 of Regulation 1049/2001.

[13] The Commission referred to 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> [Link].

[14] 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].

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

[16] As defined in Article 3(1) in Regulation 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies



and on the free movement of such data, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1725> [Link].

[17] Staff not forming part of the Commission's senior management.

[18] See the Commission's reply in case 2142/2018/EWM, available at:

<https://www.ombudsman.europa.eu/en/correspondence/en/121412> [Link].

[19] The Commission proposal of 14 February 2017 for a Regulation amending Regulation 182/2011 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://ec.europa.eu/info/sites/info/files/comm-2017-085_en.pdf [Link].

[20] Outcome of the European Parliament's proceedings (Brussels, 14 to 18 December 2020) on the Commission Proposal of 14 February 2017, available at:

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14314_2020_INIT&from=EN [Link].

[21] Such as the protection of consumers, the health or safety of humans, animals or plants, or the protection of the environment.

[22] See, for example, the decision in case 1275/2018/THH, available at

<https://www.ombudsman.europa.eu/en/decision/en/113361> [Link] and the decision in case 2142/2018/EWM, available at:

https://www.ombudsman.europa.eu/nl/decision/en/122313#_ftn13 [Link].

[23] Article 10 of the Treaty on European Union (TEU).

[24] Articles 1 and 10(3) TEU.