

Decision on how the European Commission dealt with a request for public access to documents concerning the adoption of EU rules on real driving emissions values (case 1920/2022/NH)

Decision

Case 1920/2022/NH - Opened on 28/10/2022 - Decision on 22/03/2023 - Institutions concerned European Commission (No maladministration found) | European Commission (No further inquiries justified) |

The complainant, a journalist, asked the European Commission for public access to documents concerning the adoption of EU rules on real driving emissions values. The Commission refused to grant access. In doing so, it invoked an exception under the EU's legislation on public access to documents, arguing that disclosure could undermine legal proceedings, as the matter had previously been subject to court proceedings and could be again in the future.

The Ombudsman inquiry team inspected the documents in question and confirmed that they contain internal legal advice concerning a judgment of the General Court of 13 December 2018. The Ombudsman found that, in view of the specific context of the case, it was reasonable for the Commission to assume that the same subject matter would be challenged in court again.

She therefore considered that the Commission was justified in protecting the confidentiality of four out of five documents at this stage, and concluded that there was no maladministration.

The fifth document is an official Commission decision to appeal to the Court. The Ombudsman's view is that this document could be made public, in particular because the Commission's arguments (as presented to the Court) are reflected in the publicly available opinion of the Advocate General. However, since this document was not the main document at issue of the complaint, the Ombudsman does not find it justified to prolong the inquiry into this matter. She trusts that the Commission will look at the document again and reconsider its position.

Background to the complaint

1. In 2016, the European Commission adopted new rules [1] on emissions tests that new car models need to pass in real driving conditions ("Real Driving Emissions" – RDE) before they can be driven on European roads. The Commission adopted those rules under a "comitology"



procedure, under which the co-legislators (the Council of the EU and the European Parliament) delegate to the Commission the power to supplement or amend 'non-essential' elements of EU legislation.

2. On 13 December 2018, following legal action brought by three cities (Brussels, Paris and Madrid), the EU's General Court annulled the above-mentioned rules. [2] The court found that only the co-legislators, and not the Commission, could have lawfully adopted certain parts of the annulled rules as they modify an essential element of a legislative act.

3. The Commission appealed the judgment of the General Court and won the appeal on 13 January 2022. [3] As a result, the Court of Justice of the EU annulled the judgment of the General Court of 13 December 2018. The Court of Justice took no view on the issue of substance, namely whether the rules could have been adopted via a comitology procedure, but found that the General Court had no right to rule on the matter as the legal action brought by the three cities was inadmissible.

4. In March 2022, the complainant, a journalist, made a request for public access to documents [4] to the Commission. He requested access to documents containing the Commission's legal analysis of the above judgment of the General Court.

5. In reply to the complainant's request for public access to documents, the Commission refused access to the documents at issue: three notes prepared by the Commission's Legal Service, a draft Commission decision on the submission of an appeal before the Court of Justice and the final Commission decision on the submission of the appeal. The Commission refused to disclose the documents by invoking two exceptions under the EU's legislation on public access to documents [5], namely that disclosure could undermine the protection of court proceedings and legal advice and, regarding one document, that it would undermine the protection of personal data.

6. Dissatisfied with the Commission's refusal to grant access, the complainant asked the Commission to review its decision (by making a 'confirmatory application'). After a delay [6], the Commission confirmed its decision refusing access.

7. Dissatisfied with the Commission's decision, the complainant turned to the Ombudsman in October 2022.

The inquiry

8. The Ombudsman opened an inquiry into the Commission's refusal to grant public access to the documents requested.

9. In the course of the inquiry, the Ombudsman inquiry team inspected the five documents at issue. The Ombudsman gave the Commission the possibility to reply to the complaint but did not receive any comments from the Commission. The Ombudsman also presented the



complainant with an opportunity to give his comments on the inspection report and on her preliminary views in this case.

Arguments presented

By the Commission

10. In reply to the complainant's confirmatory application, the Commission stated that it could not disclose the requested documents because they contained legal advice and concerned court proceedings. [7] In particular, the documents included (i) notes containing its Legal Service's internal analysis of the judgment of the General Court of 13 December 2018, which had been carried out with a view to appealing the judgment, and (ii) its decision to lodge an appeal before the Court of Justice, including in draft version. The documents, the Commission said, thus contain its legal position on the subject of the court proceedings in question.

11. The Commission argued that the need to protect legal advice and court proceedings could also be invoked with respect to documents related to *closed* court proceedings, where release of the institution's arguments might undermine its position in future court proceedings. The Commission took the view that such proceedings do not need to be pending when a decision on public access is being taken, but that it is sufficient that they are potential or imminent.

12. The Commission contended that, despite the conclusion of the court proceedings in January 2022, when the Court of Justice annulled the judgment of the General Court of 13 December 2018, there are outstanding substantive legal issues related to the validity of the contested EU rules on RDE tests, which have not been adjudicated on. According to the Commission, it was likely that new judicial proceedings on the subject would be initiated in the near future, most notably as a result of actions brought before national courts, leading to subsequent requests for a preliminary ruling by the Court of Justice.

13. The Commission also said that one of the notes at issue (document 2) contained personal data of Commission staff and, as such, could not be disclosed based on the need to protect the privacy of the staff concerned. [8]

By the complainant

14. The complainant disagreed with the Commission's views. He argued that the Commission had failed to explain why it considered that it was likely that the EU rules on RDE tests would be the subject of future judicial proceedings. The complainant considered that the Commission's assumption was purely hypothetical and not based on a real and concrete assessment. He was not aware of any party announcing future judicial proceedings on that matter.

15. The complainant also said that the public interest in disclosure was far greater than the



Commission's desire to keep the documents confidential. The General Court had initially annulled the EU rules at stake because the Commission had overstepped its powers. The complainant argued that there was an overriding public interest in disclosing the Commission's legal view on the General Court's judgment, because the public had a right to know if the Commission was acting in line with the rule of law.

16. He also referred to another internal note by the Commission concerning the EU rules in question, dated June 2015, that he had obtained following an earlier request for public access to documents. In that note, a Commission official had acknowledged that the Commission's proposal for the EU rules in question lacked an “*appropriate legal justification*”, which, the complainant believed, could possibly have damaged public trust in the Commission.

17. In addition, the complainant argued that, following the first judgment annulling the rules at stake, the Commission had published a proposal in June 2019 [9] to restore the provisions annulled by the Court—this time in the ordinary legislative procedure. However, after the appeal judgment, the Commission announced that it intended to withdraw the proposal [10] because it was obsolete. The complainant argued that the Commission's intention to withdraw the proposal is at odds with its argument that court proceedings are likely to happen. If there is a high probability that the courts look at the contested rules again, the complainant said, then there is also a high probability that the original legislation would be annulled again, in which case the proposal that the Commission intends to withdraw would still be needed in future.

The Ombudsman's assessment

Regarding the three internal notes and the draft decision to lodge an appeal

18. It is settled EU case-law that the protection of internal documents drawn up for the purposes of specific court proceedings is justified by the principles of equality of arms and the sound administration of justice. [11] In other words, disclosure of an institution's position in ongoing court proceedings to another party could upset the balance between the parties to a dispute, in particular if only one party (the EU institution) would have to disclose its position.

19. The EU courts have clarified, however, that the exception to the right of access based on the protection of court proceedings can only apply under certain conditions. The requested documents must either have a relevant link with a pending dispute before the EU courts or before a national court, where a reference for a preliminary ruling appears particularly likely, or a relevant link with potential but imminent proceedings. [12]

20. The Ombudsman inquiry team reviewed the documents at issue and confirmed that they contain internal legal advice concerning the judgment of the General Court of 13 December 2018. They set out the Commission's legal position on the subject matter of the judgment.



21. The Commission argues that it is particularly likely and imminent that other court proceedings will look at the subject matter of the documents again.

22. As explained in paragraphs 1 to 3 above, the General Court annulled the 2016 EU rules on real driving emissions because it said that the Commission did not have the power to adopt those rules. Following an appeal, the Court annulled that judgment on procedural grounds, declaring that the three applicants - the cities of Brussels, Paris and Madrid - did not have legal standing and could not have gone to court in the first place. The appeal judgment did not take a position on the substance, that is, on whether the Commission had the power to adopt the 2016 rules under a comitology procedure. The rules are still applicable today and an answer to the question whether the Commission had the power to adopt those rules is still outstanding. In this specific context, the Ombudsman considers that it is reasonable for the Commission to expect that the issue will likely come back to court if national courts faced with examining the implementation of the EU rules at national level refer to the EU courts for a preliminary ruling.
[13]

23. The complainant argues that the above assessment is not (but should be) based on concrete evidence or facts, such as a party announcing that it will go to court on that issue. The Ombudsman notes that EU case law does not specify to what degree the court proceedings are likely to take place; it says that they should be “particularly likely” or “potential (but imminent)”, therefore leaving a certain degree of discretion. Given the views of the General Court on the issue of substance - that the measures adopted by the Commission should be annulled - and given the fact that the Court of Justice only annulled that General Court’s ruling on a point of procedure, it is reasonable for the Commission to take the view that it is “particularly likely” that interested parties, including but not limited to the litigants before the General Court, will use other means to bring the issue before the courts. The other means could be instigating litigation before a national court and asking the national court to refer the matter of law to the Court of Justice. In that context, the Commission’s explanations as regards the likelihood of court proceedings appear to be reasonable.

24. The complainant further argues that the Commission’s intention to withdraw the legislative proposal (adopted in response to the judgment of the General Court) renders its argument that court proceedings are imminent even less convincing. In this context, the Ombudsman notes that the withdrawal of the proposal and the likelihood of court proceedings are not necessarily linked. The need for new legislation will depend on whether the Commission wins or loses in court (it would then need to make a new legislative proposal). This eventuality does not change the fact that there is a high probability of court proceedings.

25. Finally, the Ombudsman does not find anything in the complaint that would show that there is an overriding public interest in disclosure at this stage. The complainant argues that there is a public interest in understanding how the Commission respects the rule of law. Such a general interest does not prevail over the need to preserve the equality of arms of parties during court proceedings.

26. The Ombudsman inquiry team examined the requested documents in order to assess



whether the Commission should have partially disclosed certain parts of the documents, in particular those relating to matters where court proceedings are definitively closed (procedural issues on whether the three cities' action before the General Court was admissible). However, the Ombudsman finds that it would serve no useful purpose to disclose only those limited parts. The Ombudsman notes that they concern only a technical procedural issue and not the issue of substance, which she understands to be of interest to the complainant.

27. The Ombudsman inquiry team also confirmed that one of the documents contained personal data and that it would serve no useful purpose to grant partial access to it. That document was also covered by the exception concerning the protection of court proceedings and legal advice.

28. Overall, the Ombudsman is therefore satisfied that there was no maladministration by the Commission when it decided not to disclose the four documents at issue.

Regarding the final decision to lodge an appeal

29. The formal decision to lodge an appeal sets out the Commission's view on the judgment of the General Court, and was signed by the Commission President. It is not an internal note. It is difficult to see why the public should be prevented from seeing this document, which sets out the legal view defended by the Commission in court. [14] This is particularly the case because the Commission's arguments (as presented to the Court) are reflected in the Advocate General's opinion, which is available on the Court's website. [15]

30. However, since the decision was not the main document at issue in this complaint, the Ombudsman does not find it justified to prolong the inquiry into this matter. She trusts that the Commission will look at the document again and reconsider its position.

Conclusions

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

There was no maladministration by the European Commission in its decision to refuse public access to four of the five documents at issue.

No further inquiries are justified as regards the Commission's refusal to disclose the final decision to lodge an appeal.

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

[1] Commission Regulation (EU) 2016/646 as regards emissions from light passenger and commercial vehicles, available at:



<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0646> [Link].

[2] Judgment of the General Court of 13 December 2018, *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v European Commission*, Joined Cases T-339/16, T-352/16 and T-391/16, available at: <https://curia.europa.eu/juris/liste.jsf?num=T-339/16> [Link]

[3] Judgment of the Court of 13 January 2022, *Federal Republic of Germany and Others v European Commission*, Joined Cases C-177/19 P to C-179/19 P, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-177/19&language=en> [Link]

[4] Under Regulation (EC) 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].

[5] See previous footnote.

[6] Which was the subject of a previous Ombudsman inquiry (1594/2022/NH, available at <https://www.ombudsman.europa.eu/en/case/en/62369> [Link]).

[7] See Article 4(2) second indent of Regulation (EC) 1049/2001.

[8] See Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) 1049/2001.

[9] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 715/2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (COM(2019) 208 final).

[10] See Annex IV of the Commission's 2023 work programme, available at: https://ec.europa.eu/info/strategy-documents/commission-work-programme_en [Link]

[11] See the judgment of the General Court of 15 September 2016 in case T-18/15, *Philip Morris Ltd v European Commission*, available at <https://curia.europa.eu/juris/liste.jsf?language=en&num=T-18/15> [Link], in particular paragraph 64.

[12] Paragraph 65 of the *Philip Morris* judgment.

[13] Under the preliminary reference procedure, set out in Article 267 of the Treaty on the Functioning of the EU, national courts may refer a question of EU law to the European Court of Justice for a preliminary ruling so as to enable the national court, on receiving that ruling, to decide the case before it.



[14] The legal view of an institution, party to a case before the Court of Justice, is also set out for instance in the 'report for the hearing'. The reports for the hearings historically set out in detail the legal view defended by the parties, and thus also the institutions, and were published in the case law reports, without that causing detriment to the institutions, see for instance the ruling in Case C-213/89 *Factortame I*,

https://eur-lex.europa.eu/resource.html?uri=cellar:ff8d6d63-022c-4f23-9cea-4e79f37ca53f.0002.03/DOC_1&format=pdf

. Moreover, recently the Court of Justice has allowed streaming of hearings, which will also allow citizens to know in more detail the legal view defended by institutions in court (see https://curia.europa.eu/jcms/jcms/p1_1477137/en/ [Link]).

[15] The Advocate General set out the Commission's legal view of the Commission in paragraphs 119 to 121 of his Opinion and examined that view in paragraphs 123 to 141,

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=242581&pageIndex=0&doclang=en&mode=lst&di>
[Link]