

Decision of the European Ombudsman closing his inquiry into complaint 375/2013/ANA against the European Commission

Decision

Case 375/2013/ANA - **Opened on** 07/03/2013 - **Decision on** 27/09/2013 - **Institution concerned** European Commission (No further inquiries justified) |

The complaint is about access to documents relating to the review of the Regulations on CO 2 emissions from vehicles and was submitted by Greenpeace, a non-governmental environmental organisation.

In this context, the complainant asked the Commission for access to its exchanges with German car manufacturers and automobile trade associations from 15 May to 15 July 2012. The Commission granted access to all documents it identified as falling within the complainant's request.

In its complaint to the Ombudsman, the complainant argued that the disclosed documents do not constitute a coherent set of correspondence. The complainant therefore alleged that the Commission did not make a complete disclosure of the requested documents.

Given that the thrust of the complaint was the disagreement as to the existence of certain documents, the Ombudsman decided, as a first step of his inquiry, to carry out an inspection of documents. In order to establish whether any documents may have been misplaced, the Ombudsman's services inspected a wider category of documents than those falling within the scope of the complainant's applications for access.

On the basis of the inspection of documents, the Ombudsman identified two additional documents which the Commission ought to have identified in its reply to the complainant's request. However, taking into account that the Commission had already given access to the first document and that the full contents of the second document were disclosed to the complainant in the report on the inspection, the Ombudsman considered that there were no grounds for further inquiries concerning these two documents.

On a more general level, the Ombudsman considered that there was nothing to suggest that the Commission held any other documents from car manufacturers and automobile associations other than those already disclosed to the complainant. Moreover, the Ombudsman considered that the content of the inspected documents explained the presumed lack of coherence in the



disclosed documents.

In light of these considerations, the Ombudsman found that no further inquiries were justified and he therefore closed the case.

The background to the complaint

1. The complaint is about access to documents held by the European Commission relating to the review of the Regulations on CO₂ emissions from vehicles (Regulation 443/2009 [1] and Regulation 510/2011 [2]) and was submitted by Greenpeace, a non-governmental environmental organisation.

2. On 25 July 2012, the complainant made an initial request both to the Directorate-General Enterprise ('DG ENTR') and to the Directorate-General Energy ('DG ENER') of the Commission for public access under Regulation 1049/2001 [3] and Regulation 1367/2006 [4] to information concerning the EU's review of the Regulations on CO₂ emissions from vehicles. More specifically, the complainant asked for access to the Commission's exchanges of correspondence, during the period from 15 May 2012 until 15 July 2012, with (a) car manufacturers Volkswagen, BMW, Daimler (Mercedes-Benz), and (b) the automobile trade associations *Verband der Automobilindustrie* ('VDA') and the *European Automobile Manufacturers' Association* ('ACEA').

3. On 10 September 2012, DG ENTR granted access to the following documents:

(1) The "*Position paper of the VDA on DG CLIMA's draft version of the proposal on the review of Regulation 443/2009*" (hereinafter, the 'VDA position paper');

(2) An exchange of e-mails on 14 June 2012 relating to the 'VDA position paper'.

4. On 14 September 2012, DG ENER identified the following documents as falling within the scope of the request and granted access to them:

(1-2) Commissioner Oettinger's letter to Daimler and Volkswagen of 12 July 2012 with two enclosures: (a) a note by Commissioner Hedegaard on the 'Limit Curve Value' dated 10 July 2012 and (b) a declaration to the minutes by Commissioner Oettinger regarding the proposal for a Regulation of the European Parliament and of the Council amending Regulation 443/2009 to define the modalities for reaching the 2020 target to reduce CO₂ emissions from new passenger cars;

(3) A letter from Volkswagen to Commissioner Oettinger of 5 July 2012 enclosing an initial assessment of the proposal amending the Regulations on CO₂ emissions from vehicles;

(4-5) Two e-mails from Daimler to Commissioner Oettinger's Cabinet of 6 July 2012, the first



enclosing a powerpoint presentation with a compromise solution on the draft proposal;

(6-7) Two e-mails from the VDA to Commissioner Oettinger's Cabinet of 5 and 6 July 2012, the second e-mail also enclosing an analysis entitled " *Assessment Burden Sharing (Slope)* ".

5. On 27 September 2012, the complainant made confirmatory applications for access to documents vis-à-vis both DG ENTR and DG ENER. In its applications, the complainant took the view that the Commission's disclosure of documents was incomplete for the following reasons:

(I) As far as DG ENTR was concerned, the complainant observed that, because of DG ENTR's involvement in shaping the original Regulations and in the early stages of their review, it was unlikely that the exchanges between itself and car manufacturers and automobile trade associations could have begun and ended on 14 June 2012.

(II) As far as DG ENER was concerned, the complainant argued that:

(a) In his letters to Daimler and Volkswagen, Commissioner Oettinger indicated that a measure of flexibility had been introduced to the proposal so as to lower the burden on the industry, including " *the prolongation of eco-innovation credits and the reintroduction of super-credits* ". However, no document disclosed by DG ENER mentioned a request by the two car manufacturers in relation to the measures described in Commissioner Oettinger's letters.

(b) In the same letters, Commissioner Oettinger also reassured Daimler and Volkswagen that the Commission had made no commitment to setting new targets for the period after 2020. The disclosed documents did not contain any demand made by a car manufacturer that the Commission should not commit itself to new targets for the period after 2020.

(c) In its first e-mail, the VDA announced the submission of a further set of figures to show what the impact of the so-called " *phase-in* " would be for car manufacturers. That submission was not included in the documents disclosed by DG ENER.

(d) The disclosed documents did not include any correspondence with BMW, notwithstanding the fact that this company had a clear interest in the legislative proposal and that its initiatives were often coordinated with those of the other German car manufacturers.

(e) On 13 June 2012, the VDA sent its position paper to Commissioners Tajani and Oettinger. However, that statement was not included in the disclosed documents.

6. On this basis, in its confirmatory application, the complainant asked the Commission to disclose the following documents:

(1) Any correspondence, notes or any other document originating from Daimler and Volkswagen and in possession of Commissioner Oettinger and/or his Cabinet, requesting or referring to the introduction of specific flexibilities in order to mitigate the impact of the legislative proposals on these manufacturers;



(2) Any correspondence, notes or any other document originating from Daimler and Volkswagen and in possession of Commissioner Oettinger and/or his Cabinet, discussing the possibility that the Commission should introduce new CO₂ reduction targets for the period after 2020;

(3) Any other document taken into account by Mr Oettinger in the preparation of his letters of 12 July 2012;

(4) Any document submitted by the VDA after 5 July 2012, containing data with the purpose of assessing the impact of a " *phase in* " for each manufacturer;

(5) Any correspondence between BMW and Commissioner Oettinger and/or his Cabinet, in relation to the EU's review of the Regulations on CO₂ emissions from vehicles;

(6) The VDA statement to Commissioners Tajani and Oettinger of 13 June 2012 and respective correspondence; as well as any other correspondence between the VDA and Commissioner Oettinger and/or his Cabinet, in relation to the EU's review of the Regulations on CO₂ emissions from vehicles.

7. In its reply to the complainant's confirmatory applications of 15 October 2012, the Commission argued that both DG ENER and DG ENTR had verified their records and confirmed that they do not hold any documents or parts of documents falling within the scope of the complainant's request for access other than those which were disclosed in their replies to the complainant's initial applications. The Commission confirmed that this also applies to the more specific categories mentioned in the confirmatory application with regard to DG ENER. The Commission pointed out that " *as Regulation (EC) No 1049/2001 covers documents which are in the possession of the institution receiving the request, your confirmatory applications are, therefore, devoid of purpose.* "

8. On 19 February 2013, the complainant lodged the present complaint with the European Ombudsman.

The subject matter of the inquiry

9. The Ombudsman opened an inquiry into the following allegation and claim.

Allegation:

The Commission did not make a complete disclosure of the requested documents.

Claim:



The Commission should grant full access to the requested documents.

The inquiry

10. On 7 March 2013, the Ombudsman opened an inquiry into the complainant's allegation and claim. Given that the thrust of the complaint is the disagreement as to the existence of certain documents, the Ombudsman informed the Commission that an inspection of the file was needed so as to allow him to ascertain whether any other documents falling within the complainant's request are held by the Commission.

11. On 29 April 2013, the Ombudsman's services inspected the Commission's file regarding the complainant's case. A copy of the inspection report was forwarded to the complainant with an invitation to submit observations. The Ombudsman received the complainant's observations on the inspection report on 1 July 2013.

The Ombudsman's analysis and conclusions

A. Allegation that the Commission did not make a complete disclosure of the requested documents and related claim

Arguments presented to the Ombudsman

12. In its complaint to the Ombudsman, the complainant argued that the disclosed documents do not constitute a coherent set of correspondence for reasons that can be summarised as follows:

(i) It was unlikely that the exchanges between DG ENTR, the car manufacturers and the car associations could have begun and ended on 14 June 2012, as was suggested by the disclosed documents.

(ii) In his letter of 12 July 2012, Commissioner Oettinger addressed a wider range of issues than those raised in the companies' submissions received. In contrast, although the VDA had announced that it would send further documents, the disclosed documents did not include any additional correspondence from the VDA. Moreover, the disclosed documents did not contain any document or correspondence from or to BMW, notwithstanding the relevance of this company in the debate on car emissions.

The inspection of the Commission's file

13. In order to take account of the fact that the complaint concerns the existence of the



requested documents, the Ombudsman framed the scope of his inspection broadly so as to cover " *all the documents in the Commission's possession relating to the review of the Regulations on CO₂ emissions from vehicles* ". The aim of this inspection was to enable the Ombudsman to establish whether any documents covered by the complainant's requests for access may have been misplaced or misinterpreted.

14. Moreover, in addition to the documents held by DG ENTR and DG ENER, the Ombudsman asked the Commission to be allowed to inspect also any documents held by Directorate-General Climate Action ('DG CLIMA') as well as any documents held by the Cabinet of Commissioner Oettinger.

15. Given that a large number of persons and documents were involved, the first part of the Ombudsman's inspection concerned the documents held by DG ENER and the Cabinet of Commissioner Oettinger. In addition to documents already disclosed to the complainant, that part of the inspection revealed the existence of (a) letters from a Trade Association and German Federal and State authorities to Commissioner Oettinger, (b) the Commissioner's replies, (c) the VDA's position paper, and (d) an e-mail from the VDA informing the Cabinet of Commissioner Oettinger that its position had changed and that its position paper should not be disclosed to anyone.

16. As regards the second part of the inspection, the documents held by DG ENTR revealed the existence of letters from (e) consumer and professional associations and individuals, (f) Dutch authorities, and (g) internal and inter-service consultation documents. In addition, DG ENTR's file also contained (h) a letter from another car manufacturer. The inspection of the documents held by DG CLIMA did not reveal any document of relevance to the complainant's application for access.

The complainant's observations

17. In its observations, the complainant expressed its appreciation that the Ombudsman had taken its concerns seriously and opened an inquiry. The complainant pointed out, however, that the inspection report did not settle its doubts that motivated it to complain to the Ombudsman.

The Ombudsman's assessment

18. At the outset, it is appropriate to note that the present inquiry is about whether any additional documents falling within the complainant's request for access actually exist. In its reply to the complainant's confirmatory application, the Commission pointed out that it does not possess any additional documents.

19. In accordance with the presumption of legality attaching to acts of the EU institutions, where the institution concerned asserts that a particular document to which access has been sought does not exist, there is a presumption that it does not. That, however, is a presumption



that the applicant may rebut in any way by relevant and consistent evidence [5] .

20. In this regard, the complainant emphasised that, while it did not suggest that the Commission deliberately withheld any document related to its request, it could not rule out that pieces of correspondence may have been left out of the file. In support of this position, the complainant argued that, as regards letters from car manufacturers and associations, there are gaps both *ratione temporis* (for instance, exchanges with DG ENTR appear to have taken place only on one day) and *ratione personae* (for instance, BMW appears not to have made a submission to the Commission). Moreover, in the absence of additional letters from the car manufacturers and associations, the Commission's letters addressing a wider scope of issues are difficult to understand.

21. The Ombudsman considers that the documents he inspected enable him to address the complainant's arguments under the following headings: (a) car manufacturers, (b) automobile associations, (c) Commissioner Oettinger.

22. As regards (a), the Ombudsman's services identified a letter from another car manufacturer. However, the Commission explained that this same letter had already been disclosed to the complainant in response to a different request for access and produced the relevant file. In addition, an e-mail from BMW enclosing the VDA's position paper, which was included in the exchange of e-mails to which DG ENTR had granted access (paragraph 3 above), was the only correspondence from BMW that the Ombudsman was able to identify. The Ombudsman considers that there is nothing to suggest that the Commission holds any other documents from car manufacturers falling within the scope of the complainant's applications for access.

23. As regards (b), the Ombudsman's inspection revealed that the Cabinet of Commissioner Oettinger possessed (i) the VDA's position paper and (ii) an e-mail from the VDA informing it that its position had changed and that its position paper should therefore not be disclosed to anyone. The Ombudsman considers that, in its reply to the complainant's initial application, DG ENER ought to have discussed the possibility of granting access to these two documents as well and either disclosed them or explained the reasons for refusing access to them. In so far as these documents are concerned, the Commission did therefore not adequately and correctly deal with the complainant's request for access. However, the Ombudsman notes that the complainant had already been given access to the VDA's position paper by the Commission. As regards the e-mail from the VDA, it should be noted that the full content of that e-mail was disclosed to the complainant in the report on the inspection carried out by the Ombudsman's services. In its observations, the complainant did not address this issue. In view of these circumstances, the Ombudsman considers that there are no grounds for further inquiries concerning the above-mentioned two documents. On a more general level, it should be noted that the Ombudsman's services have not been able to identify any further correspondence from the VDA that would be covered by the complainant's request for access. The Ombudsman therefore considers that there is nothing to suggest that the Commission holds any other documents from automobile associations falling within the scope of the complainant's applications for access.



24. As regards (c), in particular, the alleged lack of coherence between the incoming correspondence from car manufacturers and the outgoing letters from Commissioner Oettinger, the Ombudsman inspected a number of documents coming from different sources, each with different views and proposals in relation to the ongoing review. It appears, however, that the Commissioner provided the same reply to all contributors, in which, rather than replying to the specific issues put forward, he made a general presentation of the Commission's proposal on the matter. The Ombudsman considers that this explains the lack of coherence and addresses the complainant's doubts.

25. On the basis of the above considerations, the Ombudsman finds that there are no grounds for further inquiries into the complaint. He, therefore, closes the case.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

There are no grounds for further inquiries.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 27 September 2013

[1] Regulation (EC) No 443/2009 of the European Parliament and of the Council of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO₂ emissions from light-duty vehicles (Text with EEA relevance), OJ 2009 L 140, p. 1.

[2] Regulation (EU) No 510/2011 of the European Parliament and of the Council of 11 May 2011 setting emission performance standards for new light commercial vehicles as part of the Union's integrated approach to reduce CO₂ emissions from light-duty vehicles Text with EEA relevance, OJ 2011 L 145, p. 1.

[3] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, 31.5.2001, p. 43.

[4] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 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, OJ 2006 L 264, p. 13.

[5] Case T-311/00 *British American Tobacco (Investments) Ltd v Commission* [2002] ECR II-2781, at paragraph 35.