Ombudsman
Eorpach

Cinneadh i gcás 1275/2018/THH maidir le diúltú an Choimisiúin Eorpaigh rochtain phoiblí iomlán a dheonú ar mhiontuairiscí chruinnithe an Choiste Theicniúil maidir le Mótarfheithiclí ó mhí Mheán Fómhair 2016 go dtí mí Eanáir 2017

Cinneadh
Cás 1275/2018/THH - **Tosaithe an** 23/07/2018 - **Moladh faoi** 12/10/2018 - **Cinneadh an** 03/05/2019 - **Institiúid ábhartha** An Coimisiún Eorpach (Cásanna inar aimsíodh míriarachán)
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Bhain an cás le mainneachtain an Choimisiúin Eorpaigh trédhearcacht a áirithiú sa phróiseas faoina ndéanann ionadaithe Ballstáit plé agus cinneadh maidir le rialacha AE i ndáil le hastaíochtaí ó mhótarfheithiclí.

Fuair an tOmbudsman gurb ionann diúltú an Choimisiúin rochtain phoiblí a dheonú ar sheasamh ionadaithe na mBallstát a bhaineann le faisnéis faoin gcomhshaol agus míriarachán. Rinne sí moladh comhfhreagrach go ndeonódh an Coimisiún rochtain pháirteach bhreise ar na doiciméid ábhartha. Mar sin féin, dhiúltaigh an Coimisiún an moladh sin.

Dhún an tOmbudsman an fiosrúchán, dhearbhaigh sí a toradh míriaracháin agus d'athdhearbhaigh sí a moladh.

Background to the complaint

1. The complainant is a member of the European Parliament.

2. The Technical Committee on Motor Vehicles (the TCMV) is a "comitology" committee, chaired by the Commission, where civil servants representing each EU Member State discuss and provide opinions on technical matters relating to the regulation of motor vehicles. These opinions then form the basis of "implementing acts" which are adopted by the Commission with the agreement of the Member States. The TCMV is therefore a key player in areas such as regulating vehicle emissions, an issue of significant relevance to public health and the environment.

3. The complainant is a member of the European Parliament's Emission Measurements in the

Automotive Sector (EMIS) committee and therefore, because of this role, has access to copies of the TCMV meeting minutes. On 27 January 2017, the complainant requested that the European Commission grant public access to the minutes and summary records of the meetings of the TCMV, from September 2016 to January 2017. The object of this request for public access was for him to be able to make the minutes of the TCMV meetings accessible to the wider public.

4. The Commission responded to the complainant, informing him that the *summary records* of the five meetings were already publicly available in the Comitology Register. [1] It said that it could not release the full minutes of the five TCMV meetings since, in its view, public disclosure would undermine the decision-making process. [2]

5. The complainant requested a review of this decision, submitting a so-called confirmatory application to the Commission, reiterating his request for public access to the full minutes of the five meetings.

6. In response, the Commission granted partial access to the minutes of the five meetings of the TCMV.

7. The complainant was not satisfied and complained to the Ombudsman.

The Ombudsman's recommendation

8. On the basis of her inquiry into the complaint, the Ombudsman reached the following **conclusion: [3]**

The Commission's refusal to grant public access to all positions of the representatives of the Member States related to environmental information constitutes maladministration.

9. The Ombudsman **recommended** that:

The Commission should grant significantly increased partial access to the minutes of the meetings of the Technical Committee on Motor Vehicles from September 2016 to January 2017, disclosing at minimum all positions of the representatives of the Member States related to environmental information.

The Commission's reply to the Ombudsman's recommendation

10. In its reply to the Ombudsman, the Commission notes that significant parts of the five requested documents were released following the complainant's confirmatory application of 3 April 2017. It argues that the exceptions provided for in Article 4 of Regulation 1049/2001 were invoked for limited parts of the documents only and that the Ombudsman confirmed the

applicability of two out of three of those exceptions.

11. The Commission indicates that various parts of the five documents which the Ombudsman qualified as " *environmental information* ":
- contain information on the voting behaviour of the relevant Member States,
- concern procedural aspects of the decision-making process as a whole, or
- are of a purely administrative nature.

12. These sections were redacted in order to protect the Commission's decision-making process. [4] In the view of the Commission, this information cannot be considered as " *environmental information* " within the meaning of Article 2(1)(d) of the Aarhus Regulation. [5]

13. Moreover, the Commission argues that the obligation to interpret the exceptions in Article 4 of Regulation 1049/2001 restrictively, as laid down in Article 6(1) of the Aarhus Regulation, applies only when emissions into the environment are at stake, not in relation to any environmental information.

14. The Commission considers that the Ombudsman did not take into account the confidentiality provisions of Article 10(2) and 13(2) of the Standard Rules of Procedure for Committees, [6] which the Commission referred to in its confirmatory decision of 29 April 2017. These provisions state that summary records of meetings shall not mention the position of individual Member States in the committee's discussions and that the committee's discussions shall be confidential.

15. The Commission states that the Standard Rules were adopted on the basis of Article 9 of Regulation 182/2011 (hereafter "the Comitology Regulation"). [7] According to the Commission, Article 10 of the Comitology Regulation sets out the information on committee proceedings which can be made public; the information included in the requested documents is not part thereof. The Commission argues that the provisions of Regulation 1049/2001 must be in applied in conformity with the Comitology Regulation, so that the confidentiality requirement is not deprived of its meaningful effect.

16. The Commission also argues that the nature of the decision-making process in this case is not "legislative", as the procedure at issue here does not lead to the adoption of a "legislative act" within the meaning of the Treaty. [8] As such, the higher level of transparency that might apply to legislative decision-making does not apply here.

17. The Commission therefore considers that it applied the provisions of Regulation 1049/2001 correctly and in line with the applicable case law.

The complainant's comments

18. The complainant considers that decisions which are binding on the Member States, and which have a direct impact on the environment (air quality) and the health of European citizens

should be subject to the highest standards of transparency, in line with the EU treaties and the relevant case-law of the Court of Justice of the European Union.

19. The complainant argues that the decision-making process within which the TCMV plays a role is legislative in nature and, as such, the Commission is required to ensure a high degree of transparency. In the complainant's view, the role of the TCMV in implementing legislation, the establishment of the EMIS committee and the findings of the EMIS committee concerning the TCMV's capacity to undermine established legislation, all support the legislative character of the decision-making process of which the TCMV is a part.

20. The complainant states that the Commission has failed to establish any specific, foreseeable and not purely hypothetical risk that the disclosure of the positions of the Member States would undermine the decision-making process. On the contrary, he emphasises his view that the greater risk lies in *not* disclosing the Member States' positions, referring to the EMIS committee's findings that " *some Member States presented a different position to the public from that they presented to the participants of the TCMV* ".

21. The complainant disagrees with the Commission's arguments that the requested information does not constitute " *environmental information* ". He contests the Commission's arguments (which referred to the fact the information concerns voting behaviour, or is about procedural and administrative aspects of the decision-making process), stating that the decision-making process in this case is precisely about emissions from vehicles into the environment, and the levels at which these emissions should be capped in order to protect the environment and public health. He points to the recent judgment in which the Court of Justice stated that substances which are discharged into the environment are foreseeable emissions in the sense of the rules on access to environmental information. [9]

22. Addressing the Commission's argument that the Ombudsman had not taken into account the confidentiality provisions of the Standard Rules of Procedure for Committees and the Comitology Regulation, the complainant argues that Article 9 of the Comitology Regulation merely gives committees the power to establish their own procedural rules. This means that Regulation 1049/2001 remains applicable to committees and that they should decide on access to documents on the basis of Regulation 1049/2001. He highlights Article 13(1) of the Standard Rules of Procedures for Committees which states that " *[r]equests for access to committee documents shall be handled in accordance with Regulation (EC) 1049/2001.* "

23. The complainant argues that, even if the decision-making process were to be seriously undermined, Regulation 1049/2001 requires transparency to be ensured where there is an overriding public interest in disclosure. His view is that there is clearly an overriding public interest in this case as regards disclosing information relating to the emissions of motor vehicles. In this context, the complainant refers to a study published in May 2017 on deaths related to excessive emissions [10] , as well as the decision of the Court of Justice in December 2018 in which it ruled against the Commission in the area of automotive emissions. [11]

The Ombudsman's assessment

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

25. As regards the Commission's Standard Rules of Procedure for Committees, the Commission has stated that they do not require the identity of Member States to be included in the minutes of committee meeting. As a general point, the Ombudsman notes that, equally, the rules do not preclude the recording of Member Stats' positions. She also points out that she has stated on a number of occasions that it would be good practice for Member States' positions to be recorded in such minutes. In any event, in this case, the Ombudsman has inspected the documents and notes that the minutes in question *do* identify the relevant Member States' positions when taken on specific points.

26. In its reply to the Ombudsman's recommendation, the Commission again relied on its Standard Rules of Procedure for Committees [12] and the Comitology Regulation [13] to justify its refusal to disclose the positions of the Member States' representatives. The Ombudsman understands that the basis for the adoption of the comitology rules of procedure is Article 9 of the Comitology Regulation. However, there is no provision of that Regulation which prohibits disclosure of the minutes of a Committee, nor of Member State positions revealed during such a meeting.

27. The Ombudsman does not agree that these Rules can be used to derogate from Regulation 1049/2001 and the body of case-law through which the Courts have interpreted this Regulation. Put simply: rules of procedure cannot overrule a Regulation.

28. The Ombudsman disagrees with the Commission's approach in not considering the relevant sections of the requested documents to be " *environmental information* " under the Aarhus Regulation. [14] The Ombudsman notes that the legislation in question is concerned with the amount of emissions into the environment. The Ombudsman reaffirms her view that, as such, the requested documents *do* contain information on measures likely to affect emissions into the environment and thus this clearly constitutes environmental information.

29. The Ombudsman remains satisfied that, since the documents are not only part of the legislative process but also contain environmental information, any exception to public access invoked by the Commission should be applied all the more restrictively. [15]

30. The Ombudsman disagrees with the Commission's interpretation of Article 6(1) of the Aarhus Regulation (referred to in paragraph 13 above.) The Ombudsman notes that it reads: "As regards the other exceptions..." (that is, other than Article 4(2) first and second indents) "the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment." The Commission is wrong to say that this provision applies only in respect of information relating to emissions into the environment. Where the relevant information does relate to emissions into the environment, the public interest in disclosure is all the greater.

31. In its reply to the Ombudsman's Recommendation, the Commission argued that the nature of the decision-making process at issue in this case differs from that which applied in the scenario leading to the *ClientEarth v Commission* case, which involved a Commission proposal to be adopted through the ordinary legislative procedure. [16]

32. The Ombudsman's position on this is clear and has been set out in great detail on a number of occasions: the Ombudsman considers that transparency within the legislative process forms the cornerstone of the EU's democracy. In support of this position, the Ombudsman has referred to the Treaty, [17] two former strategic inquiries, [18] and case-law of the General Court. [19] The Ombudsman's view is that public access to the positions of the representatives of the Member States in so-called "comitology" meetings should be viewed in this broader context. EU rules provide for wider access in cases where the institutions are acting in their legislative capacity, **including when they are doing so under delegated power** . When the Commission adopts an implementing act it is acting under such delegated power. In the light of this, the Ombudsman is clear that documents relating to how that implementing act was adopted should be made accessible to the greatest possible extent. [20] Understanding how an implementing act comes about, and which positions the different Member States held in the process, is vital in a democratic system where public representatives, including those from Member States, must be capable of being held accountable to citizens.

33. The Ombudsman considers that the Commission did not take these factors sufficiently into account in its reply.

34. On the basis of the above, the Ombudsman reaffirms her conclusion that the Commission's refusal to grant public access to all positions of the representatives of the Member States related to environmental information constituted maladministration.

Conclusion

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

The Ombudsman is not satisfied with the Commission's reply to her recommendation. The Ombudsman reiterates her recommendation that the Commission should grant significantly increased partial access to the minutes of the meetings of the Technical Committee on Motor Vehicles from September 2016 to January 2017, disclosing at minimum all positions of the representatives of the Member States related to environmental information.

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

Emily O'Reilly

[1] See http://ec.europa.eu/transparency/regcomitology/index.cfm?CLX=en [Nasc].

[2] In accordance with Article 4(3) of Regulation 1049/2001 of the European Parliament and of the Council

of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1 [Nasc].

[3] Recommendation of the European Ombudsman in case 1275/2018/EWM on the European Commission's refusal to grant full public access to the minutes of the meetings of the Technical Committee on Motor Vehicles from September 2016 to January 2017, available at https://www.ombudsman.europa.eu/en/recommendation/en/105278 [Nasc].

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

[5] 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, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1367&from=EN [Nasc]

[6] Standard rules of procedure for Committees rules of procedure for the committee (2011/C 206/06): https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:206:0011:0013:EN:PDF [Nasc]

[7] Regulation (EU) No 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/TXT/PDF/?uri=CELEX:32011R0182&from=EN [Nasc]

[8] Article 289 of the Treaty on the Functioning of the European Union (OJ C326 of 26 October 2012) available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN [Nasc]

[9] Judgment of the General Court of 7 March 2019 in Case T-329/17 *Heidi Hautala and Others*

v European Food Safety Authority ECLI:EU:T:2019:142, paragraph 89, available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=001F3FC1339666D6CDEE98CBDA33B377?text=&do [Nasc]

[10] Susan C. Anenberg et al. *Impacts and mitigation of excess diesel-related NO emissions in 11 major vehicle markets,* Nature 545, 467-471 (25 May 2017), see https://www.nature.com/articles/nature22086 [Nasc]

[11] Judgment of the Court of Justice in Joined Cases T-339/16 *Ville de Paris v Commission* , T-352/16 *Ville de Bruxelles v Commission* and T-391/16 *Ayuntamiento de Madrid v Commission* of 13 December 2018, ECLI:EU:T:2018:927, available at http://curia.europa.eu/juris/liste.jsf?num=T-339/16 [Nasc]

[12] In particular, Articles 10(2) and 13(2)

[13] In particular, Article 10

[14] Article 2(1)(d) of Regulation 1376/2001

[15] Judgment of the Court of Justice of 4 September 2018 in case C-57/16 *ClientEarth v Commission* ECLI:EU:C:2018:660, at paragraph 101, available at http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0057&lang1=en&type=TXT&ancre [Nasc]

[16] Article 289 of the Treaty on the Functioning of the European Union. See, for example, paragraphs 87, 88, 89, 91 and 92 of the *ClientEarth* judgment

[17] Articles 1 and 10(3) of the Treaty on European Union (OJ C326 of 26 October 2012), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2012.326.01.0001.01.ENG#C_2012326EN.0100 [Nasc]

[18] Strategic inquiry 0I/2/2017/TE on transparency of the Council legislative process, available at https://www.ombudsman.europa.eu/en/decision/en/94896 [Nasc] and strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues, available at https://www.ombudsman.europa.eu/en/decision/en/69206 [Nasc]

[19] Judgment of the General Court of 22 March 2018 in case T-540/15 *De Capitani v Parliament* , in particular paragraphs 77 to 81, available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=FA64F14433D803AA33237E9032D894F9?text=&doc [Nasc]

[20] Recital 6 of Regulation 1049/2001