

## **Besluit in zaak 476/2018/EA - Besluit in zaak 476/2018/EA over de door de Europese Commissie beschikbaar gestelde informatie over een "deskundigengroep" inzake defensieonderzoek**

Besluiten

**Zaak 476/2018/EA - Geopend op 22/02/2019 - Besluit over 22/02/2019 - Betrokken instellingen** Europese Commissie ( Opgelost door de instelling ) | Europese Commissie ( Oplossing gedeeltelijk bereikt ) |

De zaak betreft de door de Europese Commissie beschikbaar gestelde informatie over het As-If Programme Committee for Defence Research, dat de Commissie adviseert op het gebied van defensieonderzoek. Volgens de klager was de informatie in het Register van "deskundigengroepen" van de Commissie niet actueel.

De ombudsvrouw heeft geconstateerd dat de Commissie het register wel had bijgewerkt door de agenda's en notulen toe te voegen van verschillende door het Comité in 2017 en 2018 gehouden vergaderingen. De notulen van één vergadering ontbraken echter nog, evenals door deelnemers ingediende opmerkingen bij vorige vergaderingen. De ombudsvrouw heeft een oplossing voorgesteld aan de Commissie om deze kwesties aan te pakken en maatregelen te nemen om vertragingen bij het actualiseren van het register in de toekomst te voorkomen.

Aangezien de Commissie het register heeft bijgewerkt door de agenda's en notulen van vergaderingen toe te voegen en zich ertoe heeft verbonden vertragingen in de toekomst te voorkomen, is de ombudsvrouw van mening dat de zaak is afgedaan. De Commissie heeft ook toegezegd om na te gaan wat er in het register kan worden gepubliceerd wat betreft opmerkingen van deelnemers en andere achtergronddocumenten. De ombudsvrouw verzoekt de Commissie binnen drie maanden verslag te doen van de maatregelen die zij heeft genomen.

## **Background to the complaint**

1. The As-If Programme Committee for Defence Research (the As-If Committee) is an 'expert group' [1] that assists the European Commission in implementing the Preparatory Action on Defence Research (PADR) [2], as well as in preparing a future Research Programme on Defence Research. The Commission may consult the As-If Committee on any matter relating to defence research and technology.



2. The members of the As-If Committee are representatives of the EU Member States while Norway, the European Defence Agency and the EU Military Committee participate as observers. [3]

3. The As-If Committee was added to the Register of Commission expert groups and other similar entities (the register) [4] on 9 March 2017. [5]

4. In line with the Commission's rules on expert groups [6], the terms of reference and the rules of procedure for the As-If Committee state that the Commission's Directorate General for the Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), "*shall make available all relevant documents, including the agendas, the minutes and the participants' submissions either on the Register of expert groups or via a link from the Register to a dedicated website, where this information can be found. Access to dedicated websites shall not be submitted to user registration or any other restriction. In particular, DG GROW shall publish the agenda and other relevant background documents in due time ahead of the meeting, followed by timely publication of minutes. Exceptions to publication shall only be foreseen where it is deemed that disclosure of a document would undermine the protection of a public or private interest as defined in Article 4 of Regulation (EC) N° 1049/2001*". [7]

5. On 7 February 2018, the complainant, a Belgian non-governmental organisation called Vredesactie, pointed out to DG GROW that the information on the As-If Committee available on the register appeared to be incomplete. Apart from the agenda of a meeting held on 21 March 2017, the Commission had not made available any minutes, meeting agendas or comments submitted by the participants ahead of meetings.

6. On 16 February 2018, DG GROW responded that there was a delay in updating the register because of a busy workload.

7. As the entry concerning the As-If Committee was still not updated by 5 March 2018, the complainant turned to the Ombudsman.

## The inquiry

8. The Ombudsman opened an inquiry into the complainant's concern that the Commission had not updated the entry on the register of expert groups for the As-If Committee.

## The Ombudsman's proposal for a solution

9. While the Ombudsman's inquiry was underway, the Commission updated the information available on the register about the As-If Committee. It published the agendas of the meetings that took place in May, June, July and November 2017 and in February 2018, as well as the minutes for all but the last of these meetings. [8] The Commission also published an amended



version of the rules of procedure of the As-If Committee.

**10.** The Ombudsman considered that sufficient time had passed to allow for the minutes of the February 2018 meeting to have been published. The Ombudsman also noted that the Commission had not published any of the comments submitted by participants in the context of the As-If Committee's meetings in 2017 and 2018. [9]

**11.** The Ombudsman further considered that the delay of over a year in updating the register could not be justified, even taking into account a period of increased workload.

**12.** The Ombudsman therefore made the following proposal for a solution:

**- The Commission should update the information on the register regarding the As-If Committee, so that it includes the comments submitted by participants to previous meetings, as well as the minutes of the February 2018 meeting.**

**- The Commission should take appropriate measures to ensure that, in the future, the agenda and other relevant background documents are published in due time, ahead of the meetings of the As-If Committee, and that the minutes are published in a timely manner thereafter.**

## The Commission's reply

**13.** The Commission acknowledged that there had been serious delay in keeping the register up to date with information on the As-If Committee. It detailed the measures it had taken to update the register, including publishing the minutes of the As-If Committee's meeting in February 2018. It added that it had taken measures to avoid a delay in the future.

**14.** The Commission also stated that it would examine how to implement the Ombudsman's proposals about the comments submitted by participants to meetings and other relevant background documents, taking into account the sensitivity of defence matters.

**15.** The Commission considers that it would be justified in not disclosing such documents under the exceptions provided for in the EU's rules on public access to documents (Regulation 1049/2001). [10]

**16.** Since the members of the As-If Committee are representatives of EU governments, the Commission argued that their comments could not be made available without their prior agreement.

**17.** The Commission further considered that the opinions of individual Member States concerning which research and technology projects could be funded in the context of the PADR are for internal use as part of deliberations and preliminary consultations. It would therefore not make these public, as they could be relevant for preparing future scoping papers or funding



programmes.

**18.** Lastly, the Commission stated that it would not make available ‘ *sensitive documents* ’ [11] . Such documents will be treated in accordance with the Commission security rules for protecting EU classified information. [12]

## The complainant’s comments

**19.** The complainant argued that, according to the rules of procedure of the As-If Committee, the Commission should proactively publish all relevant documents, including comments submitted by participants. [13]

**20.** The complainant recognised that, given their nature, some of the participants’ comments would be legitimately withheld under the exceptions provided for in Regulation 1049/2001. However, it considered that these exceptions cannot be used to justify a blanket refusal to disclose participants’ comments. The complainant referred to EU case-law, which established that, for the application of an exception to be justified, the institution should explain how disclosure of a document could specifically and effectively undermine the interest that the exception aims to protect. Moreover, the risk of that undermining should be “ *reasonably foreseeable and not purely hypothetical* ”. [14]

**21.** The complainant stated that, where it refuses to disclose ‘sensitive documents’, the Commission is obliged to give reasons for this.

**22.** Finally, the complainant argued that, in accordance with Regulation 1049/2001, only those parts of the comments covered by the exceptions should be withheld, and the rest should be disclosed. [15]

## Further clarifications from the Commission

**23.** Given the default rule is that participants’ comments and other background documents should be made available, the Ombudsman’s preliminary view was that the Commission’s practice to date seemed to be questionable.

**24.** Before reaching her assessment in this case, the Ombudsman asked for further clarifications from the Commission as regards how it intended to determine what participant comments it could and could not disclose. In particular, she asked whether the Commission meant that it would assess what participant comments and other background documents would be published on the register – both for past and future meetings of the committee - taking into account the sensitivity of defence matters.

**25.** The Commission replied that DG GROW is making an assessment to be able to determine, on a case-by-case basis, what documents to publish (either fully or partially) on the register,



including participants' comments and other background documents. It will then review whether the information on past meetings already available in the register also needs to be updated.

## The Ombudsman's assessment

**26.** The Ombudsman welcomes the measures taken by the Commission to update the register to include meeting agendas and minutes of the As-If Committee. She also welcomes its statement that it has taken measures to avoid delays in updating the register in the future. The Ombudsman notes that the information on the register concerning the As-If Committee is currently up-to-date. [16]

**27.** However, as of yet, the register does not include any comments submitted by participants to the As-If Committee's meetings or other relevant background documents.

**28.** According to the applicable rules [17], the Commission should make public all relevant documents, including the comments submitted by participants. These should be made available either on the register or through a link on the register to a dedicated website. The rules also state that the Commission should publish the agenda and **other relevant background documents** in due time ahead of the meetings, except where one of the exceptions provided for under Regulation 1049/2001 applies.

**29.** The Ombudsman notes the Commission's intention to examine how her proposal could be implemented, taking into account the sensitivity of defence matters. She welcomes, in particular, the Commission's clarification that, from now on, it will assess on a case-by-case basis which documents to publish on the register, either fully or partially, including participants' comments and other background documents, and that it will also then review the information available on past meetings.

**30.** The Ombudsman understands that publishing some of these documents may indeed undermine interests protected by the exceptions provided for under Regulation 1049/2001, and that some of these documents may need to be treated as 'classified' or 'sensitive non-classified information' in accordance with the applicable rules.

**31.** However, the Ombudsman points out that it would be problematic to systematically withhold all comments submitted by participants and other background documents, without any consideration of their specific content.

**32.** The Ombudsman understands that a Member State must be consulted about the publication of a document that it submitted [18], but stresses that this cannot be used as a general rule to justify withholding relevant documents from the register. The assessment being carried out by the Commission concerning what documents to publish should take account of the need to consult Member States and their possible objections about the publication of such documents. According to EU case-law, this consultation should not, however, translate into a general and unconditional veto on the part of Member States as to what can or cannot be published. [19]



**33.** The Commission should take the above points into account to ensure that the register continues to be updated in a timely way and that participants' comments and other relevant background documents concerning the committee's work are made available to the greatest extent possible, both for past and future meetings. [20]

**34.** The Commission should therefore conduct the planned assessment **as soon as possible** . The Ombudsman makes a suggestion for improvement to this end below. Given the importance of this matter, the Ombudsman will ask the Commission to report back within three months.

## Conclusion

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

**The Commission has updated the register of expert groups by adding agendas and minutes regarding the meetings of the As-If Committee, and made a commitment to avoid future delays. This aspect of the case has therefore been settled.**

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

## Suggestion for improvement

**Since comments submitted by participants and other background documents should be made publicly available, the Commission should carry out the planned assessment as soon as possible to determine what it will publish on the register.**

Emily O'Reilly

European Ombudsman

Strasbourg, 22/02/2019

[1] Expert groups are consultative bodies, made up of experts from outside the Commission, which provide advice to the Commission in specific policy areas. More information: <http://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faq&aide=2> [Link].

[2] The PADR is an initiative on defence research, organised under the EU's European Defence Fund, with a budget of EUR 40 million in 2018. More information [https://ec.europa.eu/growth/content/preparatory-action-defence-research-description-2018-topics\\_en](https://ec.europa.eu/growth/content/preparatory-action-defence-research-description-2018-topics_en)



[Link] .

[3] Certain expert groups are composed exclusively of public authorities, while certain others have mixed membership from the private sector and public authorities.

[4] The register aims to ensure transparency on the expert groups that advise the Commission. More information: <http://ec.europa.eu/transparency/regexpert/> [Link].

[5] As-If Programme Committee for Defence Research (E03524)  
<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3524&news=1>  
[Link].

[6] Commission decision of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups, Article 26 “Publication of documents related to expert groups”.

[7] See Point 12, para 3 of the terms of reference and Article 15 of the rules of procedure. Both documents are available on the register:  
<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3524>  
[Link]

[8] The Commission also published the agendas and minutes of the meetings of the Committee’s sub-groups, which took place in September, October, and December 2017, as well as in January 2018.

[9] Participants submitted comments ahead of meetings. For example, according to the minutes of the Committee’s meeting of 20 November 2017, point 3.1 concerning the discussion of the 2018 work-programme: “[...] *Some of the comments in writing ahead of the meeting from a number of Member States experts (MS) were taken on board, others needed discussion [...]*”.

[10] In particular, it referred to the exceptions for protecting defence and military matters and decision-making processes, provided for under Article 4 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:  
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001R1049&from=EN>  
[Link].

[11] Documents relating to public security, defence and military matters, in accordance with Article 9 of Regulation 1049/2001.

[12] Commission Decisions (EU, Euratom) 2015/443 on Security in the Commission (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D0443>) and 2015/444 on the security rules for protecting EU classified information (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D0444>).



The transparency provisions in the terms of reference and the rules of procedure of the As-If Committee mention that information related to the committee is treated according to Commission Decision 2015/443.

[13] The complainant referred to Article 15 of the rules of procedure.

[14] See, for example, Judgment of the Court of 28 November 2013, *Ivan Jurašinović v Council*, C-576/12 P, para 45

[<http://curia.europa.eu/juris/document/document.jsf?jsessionid=F097601859DD1F8879D2DF91EBEFFC96?text=&d> and Judgment of the Court of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, para 54

[<http://curia.europa.eu/juris/document/document.jsf?text=&docid=143182&pageIndex=0&doclang=EN&mode=lst&di>

[15] The complainant referred to Article 4(6) of Regulation 1049/2001.

[16] It includes agendas regarding the As-If Committee's meetings until December 2018, as well as the minutes for all but the last of these meetings.

[17] The Commission's rules on expert groups, as well as the terms of reference and rules of procedure of the As-If Committee.

[18] Unless it is clear to the Commission that the document should not be disclosed.

[19] If the Member State objects, it needs to state reasons with reference to the exceptions of Regulation 1049/2001. In such cases, the institution should examine whether the Member State has based its objection on the substantive exceptions provided for in Regulation 1049/2001 and whether it has provided a proper statement of reasons with regard to those exceptions. See

Judgment of the Court of 18 December 2007, *Sweden v Commission*, Case C-64/05 P,

[<http://curia.europa.eu/juris/document/document.jsf?text=&docid=71934&pageIndex=0&doclang=EN&mode=lst&dir>

Judgment of the General Court of 14 February 2012, *Germany v Commission*, T-59/09,

[<http://curia.europa.eu/juris/document/document.jsf?text=&docid=119422&pageIndex=0&doclang=EN&mode=lst&di>

[20] Where disclosure would not undermine the protection of any of the interests provided for under the exceptions set out in Article 4 of Regulation 1049/2001.