

Reply of the European Commission to the European Ombudsman's recommendation regarding the transparency of Member State deliberations on a European Commission proposal for a regulation implementing the Eco-design Directive

- Complaint by Ms [REDACTED] reference 1944/2019/DL

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

In March 2019, the European Commission received an initial request for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation (EC) No 1049/2001')¹ submitted by an organisation that represents chemical companies (hereafter 'the complainant').

In its initial application, the complainant referred to the 'Meeting on 19 December 2018 of the Ecodesign and Energy Labelling Committee' and the 'vote on the Draft implementing measure/act) - COMMISSION REGULATION (EU) .../... of XXX laying down ecodesign requirements for electronic displays pursuant to Directive 2009/125/EC of the European Parliament and of the Council [...]' and requested:

- '1. Minutes of the meeting on the above vote;
2. The voting summary for the vote;
3. The Member States who asked for the tabling of an amendment to the Commission's proposal on halogenated flame-retardants;
4. The Impact Assessment and the Opinion of the Regulatory Scrutiny Board mentioned on page 9 of the Explanatory Memorandum to the proposal [...]'.

In its initial reply of 23 April 2019, the Directorate-General for Energy disclosed certain documents falling within the scope of the complainant's request.

As regards point 3 of the request ('the Member States who asked for the tabling of an amendment to the Commission's proposal on halogenated flame-retardants'), the Directorate-General for Energy considered that this part of the application had to be dealt within the context of Regulation (EC) No 1049/2001 and refused to grant access to comments provided by Member States. The refusal was based on Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

On 9 May 2019, the complainant lodged a confirmatory request against the initial reply of the Directorate-General for Energy, requesting the European Commission to 'provide access to the information on "the Member States who ask for the tabling of an amendment to the Commission's proposal on halogenated flame retardants" (i.e. document numbered 3)'.

At the confirmatory stage, the European Commission concluded that the complainant's request was an application for access to documents containing information on 'the Member States who ask for the tabling of an amendment to the Commission's proposal on halogenated flame retardants'.

¹ OJ L 145 of 31.5.2001, p. 43.

In its confirmatory decision of 26 September 2019, the European Commission identified a number of audio recordings of the Eco-design Committee meetings and one e-mail with its respective annexes. The European Commission confirmed its initial decision to refuse access to the documents in question, based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first subparagraph (protection of the decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

On 21 October 2019, the complainant complained to the European Ombudsman that the European Commission had refused to disclose the information on ‘the Member States who asked for the tabling of an amendment to the Commission’s proposal on halogenated flame retardants’.

III. THE EUROPEAN OMBUDSMAN’S RECOMMENDATION

On 25 October 2019, the European Ombudsman opened an inquiry into the European Commission’s decision not to grant access to the audio recordings of the Eco-design Committee meetings.

In the course of the European Ombudsman’s inquiry, the European Ombudsman’s inquiry team met with the relevant staff of the European Commission. The European Commission provided the European Ombudsman with a copy of the audio recordings.

On 27 July 2020, the European Ombudsman issued a recommendation in the present case. In its recommendation, the European Ombudsman considered that the European Commission’s refusal to grant public access to the audio recordings and the e-mail constitutes an instance of maladministration. In the European Ombudsman’s view, the European Commission should disclose the audio recordings and e-mail with the names or initials redacted.

The arguments provided by the European Ombudsman in support of its position can be summarised as follows.

Firstly, the European Ombudsman refers to its decision in case 1275/2018/EWM², where the European Ombudsman concluded that the rules on wider public access to documents also apply to procedures whereby the institutions adopt delegated or implementing acts, which are ‘directly binding on the Member States and, either directly or indirectly, on citizens’. In the European Ombudsman’s view, ‘[t]he public has a right to be informed, to the greatest extent possible, about how these laws were adopted’.

Secondly, the European Ombudsman takes the view that the disclosure of the positions of the Member States is not contrary to Regulation (EU) No 182/2011 (‘comitology’ Regulation)³ and provides a number of reasons to substantiate this conclusion.

Moreover, the European Ombudsman considers that ‘the Commission has not demonstrated that disclosure would prolong or complicate the proper conduct of the decision-making in question. Even if it did, this would only be a consequence of the decision-making process being rendered more democratic and legitimate’. Hence, in the

² <https://www.ombudsman.europa.eu/en/recommendation/en/113624>.

³ OJ L 55, 28.2.2011, p. 13.

European Ombudsman's view, 'rather than seriously undermining decision-making, greater public access to the committee's proceedings would enhance the quality of the decision-making, by rendering it more democratic and legitimate'.

Thirdly, the European Ombudsman considers that the European Commission was wrong in protecting parts of requested documents based on the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

IV. THE EUROPEAN COMMISSION'S POSITION ON THE RECOMMENDATION

The European Commission hereby submits the following observations on the European Ombudsman's recommendation.

The protection of privacy and the integrity of the individual

As regards the audio recordings, the European Ombudsman notes that 'the words spoken set out the position of the Member States'. In the opinion of the European Ombudsman '[the words spoken] are not the personal opinions of the individual members of the committee, who act strictly as representatives of their respective Member States. As such, were the contents of the audio recordings to be contained in a written transcript, they would not constitute "personal data"'. The European Ombudsman further argues that '[t]here is also no reason to suppose that rendering public their voices, speaking in a formal work context, would impact on any legitimate private or personal interest of the persons concerned'.

In addition, the European Ombudsman considers that '[t]he complainant has identified an important necessity which will be served by granting public access to the recordings, namely the need to know the positions expressed by Member States in a legislative process, so as to ensure that the legislative process is rendered more democratic and legitimate'.

The audio recordings which the applicant seeks to obtain concern a meeting of the Eco-design Committee, which took place on 19 December 2018. The audios were recorded in the framework of the discussions in the committee, with the purpose of allowing *ex-post* verification of the positions expressed during the meeting.

The information captured in these recordings are the voices of Member State representatives and European Commission staff members not forming part of the senior management. The voices heard on the recordings thus relate to identified or identifiable natural persons, namely the intervening participants. This information clearly falls within the (broad) definition of personal data provided for under Article 3(1) of Regulation (EU) 2018/1725⁴: 'any information' relating to an identified or identifiable natural person ('data subject'). The fact that parts of the interventions were made on behalf of the authorities of the concerned Member States has no bearing on this conclusion, nor the hypothetical transcription of the content of the audio recordings in a written format.

The European Commission therefore maintains its view that that the audio recordings concerning the above-referred committee meeting constitute personal data in the sense of

⁴ OJ L 295, 21.11.2018, p. 39.

Article 3(1) of the Data Protection Regulation. In addition, the names and initials of individuals, as well as their contact details and job titles reflected in the requested e-mail constitute personal data for the reasons detailed above.

Hence, the processing of the personal data contained in the requested documents must be done in conformity with the European Union legislation concerning the protection of personal data. These rules are laid down in Regulation (EU) 2018/1725, which sets out the conditions for the lawful transmission of the personal data.

In accordance with Article 9(1)(b) of this Regulation, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

However, neither in his initial or confirmatory request did the complainant establish the necessity of having the personal data transferred. The European Commission notes that, in fact, most of the content of the audio recordings falls beyond the scope of the complainant’s request, as the complainant requested to know only ‘the Member States who asked for the tabling of an amendment to the Commission’s proposal on halogenated flame retardants’.

Even if the applicant had established the necessity to have the personal data transmitted, the European Commission considers that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data.

Indeed, data subjects concerned (i.e. the Member States’ representatives in the Committee) are representing their Member State, but they are often experts in the field of ecodesign and energy labelling. They are therefore present in the related fora (e.g. Ecodesign and Energy Labelling Consultation Forum meetings, stakeholder meetings) and thus well known to industry representatives who also attend those fora. As a consequence, in many instances mentioning the Member State is equivalent to mentioning the name of one individual expert, and disclosing this information would expose these individuals personally. Furthermore, the further processing requested would not be a fair and lawful processing according to Article 4(1) of Regulation (EU) 2018/1725.

Hence, there is a real and non-hypothetical risk that granting public access to the audio recordings and the relevant part of the e-mail would harm the privacy of the individuals concerned and subject them to unsolicited external contacts. It is worth noting that, as confirmed by the Court of Justice in Case C-465/00, the expression private life must not be interpreted restrictively. In this judgment, the Court of Justice also concluded that ‘there is no reason of principle to justify excluding activities of a professional ... nature from the notion of private life’⁵.

Consequently, the European Commission considers that access to the personal data was prevented on the grounds of the protection of privacy and the integrity of the individual,

⁵ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

as laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001.

The protection of the decision-making process

The European Ombudsman takes the view that the disclosure of the positions of the Member States is not contrary to Regulation (EU) No 182/2011. Moreover, it considers that the European Commission ‘has not demonstrated that disclosure would prolong or complicate the proper conduct of the decision-making in question’.

The European Commission would like to refer to the reasons provided in this respect in its confirmatory reply of 26 September 2019, further clarified in the course of the European Ombudsman’s inquiry. There, the European Commission explained that the disclosure of the positions held by individual Member States, before the College had the opportunity to pronounce itself on the draft implementing act, would seriously undermine the leverage of the European Commission to consult Member States’ representatives free from external pressures.

Indeed, the European Commission notes that the decision-making process was ongoing at the point of the adoption of the confirmatory decision, as the act was not yet adopted by the College. In this context, public access would seriously impair the willingness of Member States to express their views freely in the run up to and during the committee meetings. Hence, the disclosure of the requested documents would seriously undermine the protection of the decision-making process in the sense of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

In addition, public access to the documents is prevented on the basis of the rules applicable to comitology procedures, insofar as they preserve the confidentiality of the individual positions of the Member States. The European Commission considers that these reasons have been sufficiently detailed in its confirmatory reply of 26 September 2019 and would like to refer to them on this point.

The European Commission would like to underline, nevertheless, that, contrary to the case which led to the decision of the European Ombudsman cited in its recommendation of 27 July 2020 (Case 2142/2018/EWM), the documents at issue were (partially) refused on the basis of the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual), in addition to the exception protecting the decision-making process (first subparagraph of Regulation (EC) No 1049/2001).

IV. CONCLUSIONS

For the reasons set out above, the European Commission considers that the confirmatory decision of 26 September 2019 was legally and factually correct at the point in time it was taken and that access to the audio recordings of the committee meeting and the requested e-mail was prevented on the grounds of the protection of privacy and the integrity of the individual and the protection of the ongoing decision-making process, as laid down in the exceptions of Article 4(1)(b) and the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, respectively.

For the Commission
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