

**Written reply by the European Commission to the complaint from the European Ombudsman against ‘the Commission’s failure to ensure proper record keeping in relation to meetings with interest representatives’.**

– Complaint by M [REDACTED], ref. 204/2024/MIG

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## **I. SUMMARY OF THE FACTS**

Between 17 and 24 August 2023, the complainant submitted to the Commission eight initial applications for access to documents<sup>1</sup> under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>2</sup> (hereinafter ‘Regulation (EC) No 1049/2001’).

In his initial applications, the complainant requested access to

*‘[a]ll documents related to [58 specific] meetings [allegedly held by certain] representatives [or representatives of certain services] of the [...] Commission [with interest representatives]’.*

Between 31 August and 22 September 2023, the Commission replied to the complainant’s initial applications.

By its replies, the Commission informed the complainant that:

- either the complainant himself or the organisation he represented had already effectively requested access to the same documents in relation to 30 of the meetings concerned, referring him to the Commission’s prior replies to his and his organisation’s respective previous applications;
- it had already made available the requested documents related to eight of the meetings concerned, providing the complainant with information on how to access them;
- it held 14 relevant documents related to 10 of the meetings concerned, of which four contained minutes of five of the meetings concerned;
- public access was thereby granted to each document either in full or in part;
- it held no relevant documents related to the remaining 10 meetings concerned.

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<sup>1</sup> Applications registered under Commission internal reference numbers EASE 2023/4861, EASE 2023/4872, EASE 2023/4873, EASE 2023/4930, EASE 2023/4934, EASE 2023/4935, EASE 2023/4936 and EASE 2023/4992.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43.

Between 5 September and 18 October 2023, the complainant submitted to the Commission eight confirmatory applications contesting the Commission's position outlined in its replies to his initial applications.

Specifically, the complainant contested the Commission's statement that it did not hold any relevant documents related to 10 of the meetings concerned and any documents containing minutes of another five of them.

Between 8 December 2023 and 17 January 2024, the Commission replied to the complainant's confirmatory applications by its respective decisions<sup>3</sup> adopted pursuant to Article 4 of the Implementing Rules to Regulation No (EC) 1049/2001<sup>4</sup>.

By its decisions, the Commission informed the complainant that:

- in its replies to his initial applications, it had in fact effectively identified – and granted public access to – a document containing minutes of two of the 15 meetings concerned;
- it held six further relevant documents related to five of the 15 meetings concerned, of which two contained minutes of two respective meetings;
- public access was thereby granted to each document either in full or in part;
- it held no relevant documents related to the remaining eight meetings concerned.

In sum, further to the Commission's processing of the complainant's initial and confirmatory applications, it was affirmed that with regard to the 20 meetings concerning which the Commission had not previously made publicly available the related documents and/or the complainant (or the organisation he represented) had not already requested access to any such documents by means of previously submitted applications, at the time of the Commission's adoption of its decisions, the Commission held:

- 20 relevant documents, which were related to 12 meetings;
- no relevant documents in relation to the remaining eight meetings;
- six relevant documents containing minutes of seven meetings;
- no documents containing minutes of the remaining 13 meetings.

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<sup>3</sup> Commission Decisions C(2023)8808 final, C(2023)8869 final, C(2023)8931 final, C(2023)8932 final, C(2023)8936 final, C(2023)8937 final, C(2023)8938 final and C(2024)396 final.

<sup>4</sup> OJ L 345, 29.12.2001, p. 94.

## **II. THE COMPLAINT TO THE OMBUDSMAN**

By her letter of 16 February 2024, the Ombudsman informed the Commission about the receipt of the complaint in question.

The Ombudsman explained that

*‘[t]he complaint is about the Commission’s failure to draw up minutes of high-level meetings with interest representatives. Specifically, the complainant is concerned that the Commission does not always document what Commissioners (and/or members of their Cabinets) and its Directors-General discuss with representatives of industry or civil society when they meet.’*

Finally, the Ombudsman also informed the Commission about her decision to open an inquiry into the matter.

## **III. THE OMBUDSMAN’S INQUIRY**

By informing the Commission about her decision to open an inquiry, the Ombudsman summarised the content of the complaint and shared some preliminary observations on the substance of the matter.

Subsequently, the Ombudsman suggested that

*‘[a]s a first step in [the] inquiry, [...] it would be useful to receive a written reply from the Commission on the complaint.’*

In that respect, the Ombudsman also proposed that

*‘in its reply, the Commission could [...] provide information on whether and, if so, how it monitors compliance with its internal transparency rules and, in particular, the [alleged] requirement to draw up meaningful minutes of meetings with interest representatives.’*

The Ombudsman also informed the Commission that its reply and related enclosures are likely to be sent to the complainant for comments and published.

Finally, the Ombudsman enclosed the complaint along with a list of 15 of the meetings concerned that the Ombudsman found to be relevant in the context of the inquiry.

## **IV. THE COMMISSION’S REPLY**

As per the Ombudsman’s request, the Commission hereby submits a written reply to the Ombudsman’s letter of 16 February 2024.

In accordance with the Ombudsman’s suggestions, the reply will, first, address the content of the complaint and, secondly, provide the relevant information solicited by the Ombudsman.

*On the complainant's arguments as to the Commission's alleged wrongdoing*

The complainant puts forward three main arguments, each supported by excerpts from one of the following documents:

- Decision of the European Ombudsman of 19 December 2023 on the European Commission's interactions with interest representatives of the tobacco industry (case OI/6/2021/KR)<sup>5</sup>;
- European Ombudsman's *Public service principles for the EU civil service*<sup>6</sup>;
- Note of 27 January 2021 by the Secretary-General of the Commission for the attention of Heads of Cabinet entitled 'Transparency policy – handling of access to document requests and other transparency related obligations'.

First, the complainant seeks to draw an analogy from the Ombudsman's inquiry in case OI/6/2021/KR concerning the transparency of Commission's interactions with representatives of the tobacco industry. The complainant's argument reads as follows:

*'In case OI/6/2021/KR, the EU Ombudsman dealt with the European Commission's complaint concerning the provision on tobacco lobbying under the World Health Organisation's Framework Convention on Tobacco Control (FCTC). The Ombudsman concluded that some Commission officials failed to keep minutes of meetings with tobacco industry representatives. The Ombudsman's conclusion is as follows: "The failure by the Commission to ensure a comprehensive approach across all its departments to transparency of meetings with representatives of the tobacco industry constitutes maladministration."*

*The cases I have described do not involve interactions with representatives of the tobacco lobby. Nevertheless, in my view, this constitutes maladministration.'*

In this respect, it should be recalled that the Ombudsman's inquiry in case OI/6/2021/KR concerned the Commission's compliance with certain provisions of the Framework Convention on Tobacco Control (hereinafter 'FCTC') of the World Health Organization (hereinafter 'WHO').

Specifically, the Ombudsman looked into how the Commission – bound by the FCTC on the account of the European Union being a party thereto – implemented Article 5.3 FCTC concerning protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry, as clarified by the WHO in its 2013 Guidelines for implementation of Article 5.3<sup>7</sup>.

It should be emphasised that the inquiry in case OI/6/2021/KR concerned exclusively the

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<sup>5</sup> Available at: <https://www.ombudsman.europa.eu/en/decision/en/179448>.

<sup>6</sup> Available at: <https://www.ombudsman.europa.eu/en/document/en/11650>.

<sup>7</sup> Available at: <https://fctc.who.int/publications/m/item/guidelines-for-implementation-of-article-5.3>.

implementation of transparency obligations stemming from international law, and only with respect to representatives of, specifically, the tobacco industry<sup>8</sup>. The conclusion and suggestions for improvement issued by the Ombudsman in her decision on that inquiry concerned the Commission's administrative practices related to meetings with representatives of – exclusively – the tobacco industry. In addition, none of the Commission's interlocutors at the meetings concerned by the complaint at hand represented the tobacco industry. Therefore, no analogy can be drawn between that inquiry and its particular context with the complaint under examination.

Second, to support his argument, the complainant alleges that the '*Commission's practice violates the Public Service Principles that should guide the EU Ombudsman's officials*', in particular point 5 thereof. Nonetheless, in her above-mentioned Decision of 19 December 2023, the Ombudsman did not find the Commission to have violated the *Public service principles for the EU civil service*, despite instances of non-existing minutes of relevant meetings held by Commission civil servants. In this light, the Commission finds the complainant's claim to be unfounded.

Third, the complainant's final argument reads as follows:

*'Furthermore, the Commission is also acting against its own voluntary commitment. A "Note for the Attention of the Heads of Cabinet" by Ilze Juhansone, [the Secretary-General] of the European Commission, entitled "Transparency policy - handling of access to documents requests and other transparency related obligations" from 2020 states that*

*"There is an increased public interest in and scrutiny of relations with interest representatives. Therefore, it is in line with the principle of good public administration to draft concise minutes of these meetings. The minutes should state the date, place and the purpose of the meeting as well as the main points raised, any conclusions and next steps, if applicable. The minutes need to be registered in ARES since these minutes can be the subject of access to documents requests."*

The note of 27 January 2021 by the Secretary-General of the Commission for the attention of Heads of Cabinet entitled '*Transparency policy – handling of access to document requests and other transparency related obligations*', quoted by the complainant, recalls, first and foremost, the transparency-related legal obligations binding upon Members of the Commission and members of their Cabinets. Listed among them are relevant obligations in the areas of access to documents, meetings with interest representatives and mission expenses.

The document expressly notes the legally binding nature of those obligations, each time making a clear reference to the corresponding legal basis.

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<sup>8</sup> Ombudsman Decision of 19 December 2023 on the European Commission's interactions with interest representatives of the tobacco industry, point 28.

Such is also the case of the part concerning meetings with interest representatives, where the obligations to meet only those interest representatives who are registered in the Transparency Register and to subsequently publish information on such meetings are recalled along with – respectively – Article 7(1) of Commission Decision of 31 January 2018 on a Code of Conduct for the Members of the European Commission<sup>9</sup> and Article 7(2) of that Decision in conjunction with Commission Decision of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals (2014/839/EU, Euratom)<sup>10</sup>.

The note relays, in addition, some complementary practical guidance and information for the consideration of Heads of Cabinet, including on drafting minutes of meetings with interest representatives. Drafting minutes of such meetings in that context refers to an internal recommendation and not to any legally binding requirement applicable in the Commission. The aim of that recommendation is to encourage Heads of Cabinet to contribute to improve further the Commission’s already developed administrative practice in the area of transparency of meetings with interest representatives, for the sake of facilitating even further the public scrutiny of the institution’s activities.

*On the complainant’s remarks on how to remedy the Commission’s alleged wrongdoing*

In the subsequent part of the complaint, the complainant submits certain observations in respect of the Commission’s archival and document management policy with regard to meetings held by Commission representatives with interest representatives. In particular, he argues that

*‘[i]f no minutes were taken of the meetings, it will not be possible today to find out what was discussed in the past.*

*However, there needs to be a fundamental change of practice within the Commission when it comes to which documents relating to meetings with external stakeholders are filed in the archive. All e-mails or text messages exchanged before a meeting should be filed in a standardised way. All materials exchanged during and after a meeting should also be filed here. Any follow-up contact after a meeting should also be filed in the archive.*

*In addition, the Commission should take minutes of all meetings with external stakeholders and file them in its archives. To this end it should follow the [above-mentioned note of 27 January 2021 by the Secretary-General of the Commission for the attention of Heads of Cabinet]’.*

As regards the part of the complainant’s statement, which concerns the technical aspects of the Commission’s archival and documents management policy, the Commission would like to

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<sup>9</sup> OJ C 65, 21.2.2018, p. 7–20.

<sup>10</sup> OJ L 343, 28.11.2014, p. 22–24.

refer to the detailed explanations that it has previously provided to the Ombudsman in the framework of the latter's past inquiries<sup>11</sup>.

As concerns the complainant's repeated observation about the internal recommendation made by the Secretary-General of the Commission to the Heads of Cabinet in her note of 27 January 2021, the Commission would like to refer, first, to its extensive observations in the preceding section of this reply and, secondly, to the judgment of the Court of First Instance of 25 April 2007 in Case *European Policy Programme v Council*<sup>12</sup>.

The judgment in question concerns a decision of the Council of the European Union on an application for access to documents under Regulation (EC) No 1049/2001, confirming the lack of minutes of a meeting of a Council committee, understood as a preparatory body within the meaning of Article 19 of Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU)<sup>13</sup>.

In that judgment, the Court of First Instance found that, whereas

*'[i]n order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities [,] it is not possible to conclude that the Council acted in an arbitrary or unpredictable manner by failing to produce minutes on [a certain] item at the meeting.'*<sup>14</sup>

According to the Court of First Instance,

*'[i]t cannot therefore be concluded that the Council, in claiming that such minutes do not exist, infringed the applicant's right of access to documents conferred by Regulation No [(EC)] 1049/2001.'*<sup>15</sup>

The judgment confirmed the legality of the Council decision confirming the absence of any documents that would contain minutes of a meeting of a statutory body of the Council. It also confirmed that Regulation (EC) No 1049/2001 and related case-law do not impose an obligation on institutions to prepare minutes of all meetings held by them.

The Commission Secretary-General's recommendation to Heads of Cabinet to draft minutes of meetings with interest representatives to enable access to records of such meetings under Regulation (EC) No 1049/2001 demonstrates that, notwithstanding the fact that the

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<sup>11</sup> Most recently, such explanations were provided to the Ombudsman at the meeting of 5 October 2021 between its inquiry team with representatives of the Commission, the report of which is available at: <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/150175>

<sup>12</sup> Judgment of the Court of first Instance of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, ECLI:EU:T:2007:114 (hereinafter '*WWF v Council* judgment').

<sup>13</sup> OJ L 325, 11.12.2009, p. 35.

<sup>14</sup> *WWF v Council* judgment, paragraph 61 and 63.

<sup>15</sup> *WWF v Council* judgment, paragraph 63.

Commission is not legally required to take minutes of all meetings, it welcomes public scrutiny and strives to uphold an ever-higher level of transparency of its activities in the area of interest representation.

The Commission submits that its concrete policy to lead by example in transparency in its administrative practice is well evidenced by its handling of the complainant's overall request for information about various meetings held by the Commission with interest representatives, not limited to, but reaching far beyond the meetings concerned by the complaint, as outlined below.

Between 17 August and 13 October 2023, the complainant made 48 initial applications for public access to documents related to meetings held by representatives of the Commission with interest representatives. Due to the very large number of meetings concerned by those applications, combined with the fact that some of the applications were repetitive or broad in their material or temporal scope and that certain meetings indicated by the complainant did not in fact take place<sup>16</sup>, it would require a disproportionate amount of resources to provide, for the purpose of this reply, comprehensive and precise numerical data on the exact material scope of all the applications and on the outcome of their processing by the Commission.

However, a cursory inspection of the records of the Commission's processing of all of them confirms that the Commission did hold in its archives relevant documents – including minutes – related to the vast majority of well above 100 meetings concerned. This would evidence the adherence, by an overwhelming percentage, of the services concerned with the recommendation to take minutes of such meetings. On numerous occasions, further to the Commission's due processing of the complainant's initial or confirmatory applications, public access to those documents was granted, satisfying the complainant's request and interest in accessing those documents.

With respect to, specifically, the meetings concerned by the complaint, it must be clarified that:

- no meeting was held by the Director-General for Internal Market, Industry, Entrepreneurship and SMEs on 7 February 2022 with Montanuniversitaet Leoben and on 16 June 2022 with Association of the Automotive Industry;
- minutes of the meetings held by the Director-General for Internal Market, Industry, Entrepreneurship and SMEs on 16 November 2022 with CATAPA and Friends of the Earth Europe and by a Member of the Cabinet of the Commissioner for Agriculture on

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<sup>16</sup> It is worth noting that the 48 applications submitted by the complainant accounted for approximately 4.5% of all initial applications registered by the Commission in that nearly-two-month period and constituted less than a quarter of all initial applications made by him in the whole of 2023 (which totalled 204 and corresponded to almost 3% of all initial applications registered by the Commission in that year). The Commission would like to draw the Ombudsman's attention to the fact that processing such a high number of applications submitted in such a close temporal proximity entails a very large administrative burden on the institution, which in consequence impairs its capacity to handle these applications, as well as those submitted by other applicants, promptly, as prescribed by Articles 7(1) and 8(1) of Regulation (EC) No 1049/2001.

15 November 2022 with Norge Mineral AS existed at the time of the processing of the complainant's corresponding applications and the Commission effectively granted public access to them by virtue of its reply to those applications;

- minutes of the meetings held by the Director-General for Internal Market, Industry, Entrepreneurship and SMEs on 13 July 2022 and 20 March 2023 with Volkswagen and by the Commissioner for Internal Market and a member of his Cabinet on 21 March 2023 with Association des Constructeurs Européens d'Automobiles exist and were identified in the course of drawing up this reply<sup>17</sup>.

As for the remaining seven meetings – which indeed took place and information about which was duly published – no documents containing minutes were drawn up ex-post by the Commission and placed in its archives. This is justified by the following:

- in some cases, detailed information about the intended content of the meetings had been already included in preparatory documents, whereby that information subsequently turned out to be sufficient to ensure that records of what was ultimately discussed be kept;
- some meetings did not entail an active exchange of views but were merely a platform of in-person presentation by the interest representatives of their positions to the representatives of the Commission, whereby the relevant information conveyed would have been already contained in other documents related to the meetings.

In light of these explanations, the Commission would like to draw the Ombudsman's attention to the fact that failure by an institution to produce ex-post a document containing minutes of a meeting is not tantamount to the failure by that institution to draw up and retain records of that meeting's content and possible other relevant information.

In this context, the Commission considers that the reasons for which it did not produce such documents in the rare instances concerned by the complaint demonstrate that the Commission did not act in an arbitrary or unpredictable manner, within the meaning of the above-cited case-law.

### **On whether and, if so, how the Commission monitors compliance with its internal transparency rules and with the recommendation to draw up minutes of meetings with interest representatives**

As detailed in the preceding section of this reply, the Commission Secretary-General's note of 27 January 2021 recalls the legally binding horizontal transparency-related obligations applicable to Members of the Commission and members of their Cabinets, which concern:

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<sup>17</sup> Following the identification of further documents corresponding to the complainant's applications, the Commission has undertaken to rectify its previous omission by adopting a superseding confirmatory decision. At the time of the adoption of this reply, that decision is pending adoption.

- the processing of applications for access to documents;
- publication of information on meetings with interest representatives;
- publication of overviews of mission expenses.

As concerns the Commission's concrete efforts to ensure internal compliance with relevant legal provisions establishing the said transparency-related obligations, the Commission would like to refer the Ombudsman to its previous explanations provided in the framework of the latter's Strategic Initiative on how the European Commission makes available information about meetings between commissioners and organisations or self-employed individuals (SI/8/2021/AMF)<sup>18</sup>.

In that context, the Commission would like to inform the Ombudsman that, since the closure of the Strategic Initiative, the network of the designated ethics and transparency contact points in Cabinets of Members of the Commission has continued its regular meetings, having been convened twice in 2022 and 2023 and already once in 2024. That network has consistently served as an efficient platform to systematically reiterate the importance of compliance with the applicable transparency and ethics rules, as well as to raise awareness in the Cabinets of good administrative practice in both of these areas.

Lastly, with regard to, specifically, the good administrative practice of drawing up meaningful minutes of meetings with interest representatives, it must be kept in mind that this practice refers to a recommendation introduced by the Secretary-General's note of 27 January 2021. As such, due to its implications for the Commission's policy on access to documents, it has also been subsequently communicated by the Secretariat-General to the network of access to documents coordinators in Directorates-General and departments.

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<sup>18</sup> The Commission's explanations are summarised in the Ombudsman Closing note on the Strategic Initiative on how the European Commission makes available information about meetings between commissioners and organisations or self-employed individuals (SI/8/2021/AMF), available at: [https://www.ombudsman.europa.eu/en/doc/correspondence/en/153542#\\_ftn3](https://www.ombudsman.europa.eu/en/doc/correspondence/en/153542#_ftn3).

#### **IV. CONCLUSION**

The Commission welcomes the Ombudsman's interest in its continuous efforts aimed to develop good administrative practices in the area of transparency for the sake of facilitating public scrutiny of its activities. The Commission trusts that the above information will be of use to the Ombudsman in possible subsequent phases of the inquiry. The Commission remains open to further substantive engagement with the Ombudsman on the matter at hand and welcomes any constructive observations the latter may have as a result thereof.

*For the Commission*  
*Věra JOUROVÁ*  
*Vice-President*

