



18 March 2019

Dear Ms O'Reilly,

Thank you for the opportunity to comment on the arguments raised by the European Commission (DG Growth) in response to our complaint on the lack of transparency regarding the air pollutants emissions limits to be placed on vehicles across the EU, and more specifically, about the way in which this decision was taken within the Technical Committee on Motor Vehicles.

Before outlining our main points below, it is worth highlighting once more that decisions that 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 handled with the highest standards of transparency, in line with the EU Treaties and relevant case-law of the European Court of Justice.

### **1. The nature of the decision-making process**

To justify its refusal to provide access to the information requested, the Commission argues that this particular decision-making processes does not require the same high degree of transparency as is required when working on a legislative process, in which, for example, the European Parliament would be required to meet in public. However, given the limited role played by the European Parliament in the decision-making processes of the Technical Committee on Motor Vehicles, this comparison is irrelevant.

More importantly, however, it is clear that the role of the Technical Committee on Motor Vehicles was specifically to implement the legislation adopted by the co-legislators which sought to reduce the level of pollution that vehicles can emit into the environment. This makes it an integral part of the legislative process, since, in the absence of any technical implementation of the legislation, the legislation is de facto not being properly applied.

The legislative role of the Technical Committee on Motor Vehicles is confirmed by the fact that the European Parliament set up a specific Committee of Inquiry into Emission Measurements in the Automotive Sector (EMIS Committee), “to investigate alleged contraventions and maladministration **in the application of Union law** in relation to emission measurements in the automotive sector” (emphasis added).

Indeed, [the EMIS Committee found](#) that the TCMV’s “introduction and application of conformity factors at the agreed levels could be considered a **de facto blanket derogation** from the applicable emissions limits for a considerable amount of time and thus **run counter to the aims and objectives of the basic Regulation** (EC) No 715/2007”. To put it in simpler terms: if the decision-making process in this case was capable of undermining the legislation agreed, then its effects are clearly legislative in nature.

### **2. The failure to establish that transparency would seriously undermine the institution's decision-making process**

I would like to highlight that the Commission has still failed to convincingly establish a specific, foreseeable and not purely hypothetical risk that the decision-making process would be severely

undermined if citizens were to know what positions Member States are defending in important procedures of this kind.

In fact, the EMIS Committee, in its report, has already chastised the negative role played by different Member States in this decision-making process. Therefore, it is already public knowledge that “many Member States (Italy, Spain, France, the Slovak Republic, Romania, Hungary, the Czech Republic, Bulgaria, Poland, the United Kingdom and Austria) strongly opposed the more ambitious Commission proposal for conformity factors for NOx limits and instead settled for higher conformity factor values corresponding to weaker environmental objectives.” Yet no serious harm has been caused to the decision-making process.

If anything, it is the lack of transparency in the way the TCMV takes decisions that has seriously undermined the legislative decision-making processes of the EU, by allowing for loopholes (so-called “conformity factors”) to be introduced to the legislation behind closed doors. The EMIS committee found that “Some Member States presented a different position to the public from that they presented to the participants of the TCMV”, which could severely undermine the legitimacy of European Union decision-making. Transparency is therefore a solution that would help to avoid similar situations from occurring in the future.

### **3. This information relates directly to emissions into the environment**

The Commission has attempted to argue that the information requested does not constitute ‘environmental information’ because it is actually about the voting behaviour of the relevant Member States or about procedural or administrative aspects of the decision-making process. However, the Commission overlooks the fact that the decision being taken is precisely about emissions from vehicles into the environment, and the permissible levels of those emissions in order to protect the environment and public health.

The European Court of Justice has determined in Case T-329/17, that substances which, “in the course of normal use, [are] intended to be discharged into the environment by virtue of [their] function” are foreseeable emissions in the sense of the rules on access to environmental information. Car emissions are, by their very function or nature, therefore, emissions into the environment.

Furthermore, car emissions are a reality, and decisions about how to limit them have a specific and real impact on the final levels of emissions that people are currently breathing. Following the controversy around the real driving emissions tests, it is also clear that the real levels of emissions from vehicles currently on the road are much higher than the legislation intended.

### **4. Conflict between regulations on transparency and rules on secrecy**

In its reply, the European Commission criticises the Ombudsman’s office for failing to take into account the confidentiality provisions of Article 10(2) and 13(2) of the Standard Rules of Procedure for Committees (2011/C 206/06), which the European Commission referred to in its confirmatory decision of 29 April 2017. The Commission adds that the Standard Rules were adopted on the basis of Article 9 of Regulation No 182/2011.

However, Article 9 of Regulation 182/2011 simply gives each committee the power to establish its own rules of procedure, and clearly states that “The principles and conditions on public access to documents and the rules on data protection applicable to the Commission shall apply to the committees.” In other words, the Regulation on access to documents (1049/2001) still applies, and it is on this basis that a decision about public access to documents must be taken.

The Commission also argues that “Article 10 of Regulation No 182/2011 provides for the information on committee proceedings that can be made public and information such as the one included in the requested documents is not part thereof.” However, article 10 is simply a list of information which needs to be recorded and then proactively published in a register. This has no bearing on the right to request and to access EU documents under regulation 1049/2001.

Finally, the Standard Rules clearly state in Article 13(1) that “Requests for access to committee documents shall be handled in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council”.

## **5. The overriding public interest**

In summary, and in order to avoid repeating arguments previously made, under the access to documents regulation, transparency should be ensured where there is an overriding public interest, even if the decision-making process could be seriously undermined.

Apart from the [study published](#) on the 15th May 2017 estimated that the excessive emissions from cars exceeding the pollution limit helped to cause the premature deaths of 6,800 Europeans in 2015 alone, and the fact that the whole emissions scandal prompted a specific inquiry committee, the European Court of Justice also ruled in December 2018, against the European Commission.

The General Court reversed its decision to allow car manufacturers to exceed emission limits during on-road tests through the so-called conformity factors, and although the Commission has appealed this decision, the mere fact that several European cities worked together to take a case before to the European court of Justice shows that there is clearly a high - and overriding - public interest in the information I’ve requested.

I look forward to receiving the final decision from the European Ombudsman’s office in this case.

Yours sincerely,

Bas Eickhout

A handwritten signature in black ink, appearing to be 'BE', with a large, sweeping horizontal stroke underneath.