Европейски омбудсман

Преводът на страницата е генериран чрез машинен превод [Връзка]. *Машинните преводи могат да съдържат грешки, които да водят до нарушаване на яснотата и точността. Омбудсманът не поема отговорност за евентуални несъответствия. За най-надеждна и правно издържана информация направете справка с: изходната версия в английски препратката по-горе. За повече информация вижте нашата* езикова политика и политика за превода [Връзка].

Препоръка относно начинът, по който Европейският орган за безопасност на храните (ЕОБХ) е разгледал искане за публичен достъп до документи, свързани с предложение за ограничаване на оловото в боеприпаси (случай 2124/2021/MIG)

Препоръка
Случай 2124/2021/MIG - **Открит на** 17/12/2021 - **Препоръка за** 02/05/2022 - **Решение от** 14/11/2022 - **Засегната институция** Европейски орган за безопасност на храните (Препоръка, одобрена от институцията) |

Случаят се отнася до заявление за публичен достъп до документи, съхранявани от Европейския орган за безопасност на храните (ЕОБХ) относно олово в боеприпаси. На ЕОБХ са необходими повече от седем месеца, за да разгледа искането, като удължава срока по различни поводи. Жалбоподателят е неудовлетворен от времето, необходимо на ЕОБХ за разглеждане на искането, като твърди, че ЕОБХ не е дал задоволителни обяснения за забавянето и че забавянето означава, че той не е могъл да участва пълноценно в съответната обществена консултация.

Омбудсманът установи лошо управление в начина, по който ЕОБХ е разгледал заявлението за достъп на жалбоподателя, и по-специално неспазване на сроковете, определени в законодателството на ЕС относно публичния достъп до документи. Омбудсманът отправя две препоръки, насочени към подобряване на начина, по който ЕОБХ разглежда искания за публичен достъп до документи.

Made in accordance with Article 4(1) of the Statute of the European Ombudsman [1]

Background to the complaint

1. In July 2019, the European Commission asked the European Chemicals Agency (ECHA) to assess the risk [2] of lead in ammunition and fishing, and to propose possible restrictions to address any risk that it might identify. [3]

2. In June 2020, in preparation of ECHA's human health risk assessment, the European Food Safety Authority (EFSA) provided ECHA with information on game meat consumption and lead in game meat.

3. In January 2021, ECHA finalised its assessment, proposing that the use of lead in ammunition and fishing should be restricted. ECHA then invited the public to comment on the proposed restrictions. The public consultation was open from 24 March 2021 until 24 September 2021.

4. The complainant, a civil society organisation representing the interests of hunters, intended to participate in the public consultation. To this end, it sought public access [4] from EFSA to the documents that it had provided *"to ECHA on 10.06.2020 with respect to the concentration of lead in game meat and the consumption frequency of game meat in the EU"* . The request was made on 23 February 2021.

5. On the same day, EFSA acknowledged receipt of the complainant's request [5] and informed the complainant that it would reply *"by 16 March 2021 at the latest"* .

6. On 17 March 2021, EFSA extended the deadline for its reply until 9 April 2021 saying that *"it is still gathering all elements"* .

7. On 9 April 2021, EFSA extended the deadline again on the grounds that it was receiving many access requests and, thus, that it had to assess a large number of documents at the time. EFSA proposed as a "fair solution" [6] to reply within a timeframe that would enable it to finalise its assessment of the documents requested by the complainant and indicated that it would do so by 30 April 2021.

8. On 3 May 2021, EFSA informed the complainant that it had identified five documents falling under the request: an email to ECHA (dated 9 June 2020) and four attachments to the email. EFSA gave the complainant access to parts of the email and of one attachment, a table containing information on game meat consumption of hunters and their families in 21 EU Member States and the United Kingdom (UK). Concerning the three remaining documents, EFSA said that it was *"still gathering the elements necessary"* and that it would send another reply to the complainant by 26 May 2021. EFSA also informed the complainant that it could request a review of the decision on the first two documents (by making a 'confirmatory application') , either immediately or after receiving EFSA's decision as regards the three remaining documents.

9. On 28 May 2021, EFSA gave the complainant access to parts of a second batch of documents (two brief email exchanges between EFSA and the authorities of two Member States concerning information on food consumption of hunters and their families). Concerning the

remaining document, a table containing data on lead in game meat in 26 EU Member States and three non-EU countries, EFSA said that it was *"still gathering the elements necessary"* and extended the deadline until 18 June 2021.

10. On 21 June 2021, EFSA provided the complainant *"with a status update on the fair solution proposed"* . It wrote: " *Please rest assured that we are committed to finalising the processing of our [access request] as swiftly as possible. However, we would like to inform you that additional time is needed in order to finalise the assessment (...). We will revert to you by 9 July at the latest."*

11. EFSA extended the deadline on three subsequent occasions: 9 July, 10 August and 31 August 2021.

12. On 21 September 2021, the complainant requested a review of EFSA's implied refusal to give access to the remaining document (by making a 'confirmatory application'). The complainant mentioned that it doubted the validity of the data that EFSA had provided to ECHA in the context of its risk assessment.

13. On 28 September 2021, EFSA acknowledged receipt of the complainant's confirmatory application and indicated that it would reply by 12 October 2021.

14. On 13 October 2021, EFSA granted the complainant access to large parts of the last document. Concerning the delay incurred, EFSA apologised and said that it *"had to liaise internally with several EFSA [departments] and launch consultations with numerous data providers in order to finalise the assessment (...) which unfortunately was time-consuming"* .

15. Dissatisfied, the complainant turned to the Ombudsman in December 2021.

The inquiry

16. The Ombudsman opened an inquiry into the time taken by EFSA in dealing with the complainant's request for public access to documents.

17. In the course of the inquiry, the Ombudsman inquiry team inspected the documents at issue in the complainant's access request as well as parts of EFSA's file on this case. The inquiry team also met with representatives of EFSA. It then drew up a meeting report [7] that was shared with the complainant who subsequently provided its comments.

Arguments presented to the Ombudsman

18. The **complainant** argued that the delay by EFSA violates the EU legislation on public access to documents (Regulation 1049/2001 [8]) and the principles of good administration.

19. Specifically, the complainant considered that the arguments put forward by EFSA did not justify the delay and that EFSA must have been aware of the importance and relevance of the requested documents, in light of the then ongoing public consultation conducted by ECHA.

20. The complainant was particularly concerned that the last document was disclosed only after the public consultation had concluded. The fact that it could not access the document while the public consultation was still ongoing meant it could not properly assess ECHA's findings and undermined its ability to contribute more substantially to the public consultation.

21. The complainant also considered that EFSA could not legitimately propose a 'fair solution', given that the access request did not concern a very long document or a very large number of documents. It added that EFSA did not ask it to narrow down the scope of its access request.

22. EFSA argued that the complainant's access request had been clear but rather complex, due to the number of documents concerned and the number of third parties that had to be consulted. While it had quickly noticed that it would not be able to reply to the complainant within the prescribed time limit, EFSA had strived to assess (and, where possible, to disclose) all documents at issue, rather than asking the complainant to narrow down the scope of its access request. To this end, it had offered the complainant a 'fair solution', namely to divide the access request into batches of documents and to deal with them consecutively.

23. Concerning the time taken, EFSA explained that the information contained in the documents (and particularly in the two tables at issue) originated from several Member States and the United Kingdom (UK). These 'third party authors' had to be consulted, and this contributed to the delay. In addition, EFSA stated that is has been experiencing a significant increase in requests for public access to documents in recent years, both in terms of quantity and in terms of complexity.

The Ombudsman's assessment leading to recommendations

24. According to Regulation 1049/2001, a request for public access must be handled promptly, that is, within 15 working days of its registration. [9] In exceptional cases, for example, if the request concerns a very long document or a very large number of documents, this time limit may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given. [10]

25. Where an institution finds itself unable to process a particular request for public access within the prescribed deadline, due to the disproportionate administrative burden that this would entail, Regulation 1049/2001 provides for the possibility to agree on a 'fair solution' with the applicant. [11] Such a solution may, for example, entail reducing the amount of documents covered by the request.

26. The Ombudsman notes that the complainant's access request concerned five documents,

namely three short emails that were disclosed with limited personal data redacted, and two tables containing data from various Member States and three non-EU countries. The information contained in the first table had already been in the public domain, so that it could be disclosed without the need to consult any third party. Concerning the second table, EFSA consulted the third parties concerned, suggesting to redact those parts that had been predetermined by an agreement between EFSA and the countries that form part of its network. None of the contacted authorities objected to disclosing the remaining parts of the table.

27. In light of the above, it cannot be said that the complainant's access request concerned a very large number of documents or a very long document, within the meaning of Regulation 1049/2001.

28. While the Ombudsman recognises the challenges that an increasing number of public access requests may pose to an institution, the requests of other applicants can normally not be taken into account when assessing whether an institution can deal with an applicant's specific request within the prescribed time limit. [12]

29. Similarly, the fact that an institution must consult third parties in Member State authorities cannot in itself justify a delay, given that the Member States, like the EU institutions, have to ensure that Regulation 1049/2001 is applied effectively. [13] This means that Member State authorities should respond swiftly when they are consulted by the EU administration concerning a request for public access, but also that the EU administration should consult them as soon as possible. This has not been the case here. Rather, the inspection of EFSA's file on this case showed that EFSA started its consultations only in June 2021, that is, long after the expiry of the maximum time limit of 30 working days to deal with a request. In addition, EFSA did not consult the Member States and the third countries concerned at the same time, but consecutively, which led to an additional delay.

30. The Ombudsman also notes that, while the complainant's request was registered on 23 February 2021, EFSA informed the complainant that it could not process it within the prescribed deadline and offered to find a fair solution only on 9 April 2021. In other words, EFSA first approached the complainant *after* the maximum time limit of 30 working days had already expired.

31. In addition, when offering a fair solution, EFSA proposed to *"reply in a timeframe which allows for the finalisation of the assessment"* and said that it would get back to the complainant within 15 working days. EFSA did not explain the full extent of the solution, for example, that it would split the request into batches or how. Rather, it informed the complainant gradually about the steps it took. The complainant was therefore not in a position to take an informed decision on the proposed fair solution and thus to agree to EFSA's approach.

32. According to EU case-law, a 'fair solution' under Article 6(3) of Regulation 1049/2001 cannot entail extending the maximum time limit of 30 working days set out in Regulation 1049/2001. [14] The reason for this is that such a solution would create a situation of legal uncertainty for the complainant, as has happened in this case.

33. In addition, EFSA did not inform the complainant about the specific documents it had identified when proposing a fair solution in April 2021. It did not list the specific documents, nor did it mention how many there were. EFSA informed the complainant only on 3 May 2021, when it disclosed the first two documents, that it had identified an email "and four attachments". However, EFSA did not specify the remaining documents then either.

34. While it is commendable that EFSA strives to process access requests in full so as to ensure greater transparency, EFSA's approach prevented the complainant from clarifying its access request (for example, by deciding itself to narrow the scope). It transpired that the complainant was interested in only two out of the five identified documents: the two tables. It took EFSA almost eight months to take a decision on the disclosure of one of these documents.

35. Finally, the Ombudsman has consistently taken the position that access delayed is access denied. This is, unfortunately, clearly illustrated by this case. The complainant wanted the information contained in the two tables at issue to substantiate its arguments in the context of a public consultation. However, the public consultation had been closed by the time access was given to one of those tables, so it was no longer of use to the complainant. While the time limits set out in Regulation 1049/2001 may at times appear ambitious, it is of utmost importance that the EU administration ensures it deals with requests for public access in a timely manner.

36. In light of the above, the Ombudsman considers that how EFSA dealt with the complainant's access request, which resulted in an excessive amount of time being taken, constituted maladministration. The Ombudsman will make two recommendations aimed at improving EFSA's practice in dealing with access to document requests.

37. EFSA's constructive approach throughout this inquiry and its endeavours towards establishing a tool that will allow for a realistic calculation of the time needed to process a specific access request upon its receipt reassure the Ombudsman that it will engage with this finding of maladministration and the corresponding recommendations to improve its handling of public access requests in the future. The Ombudsman further encourages EFSA to monitor her ongoing own-initiative inquiry into the time taken by the Commission in handling public access requests. [15]

Recommendations

On the basis of the inquiry into this complaint, the Ombudsman makes the following two recommendations to EFSA:

When proposing a 'fair solution' (under Article 6(3) of Regulation 1049/2001) for dealing with public access requests, EFSA should cease its practice, reflected in its implementing rules [16] , of extending the prescribed time limits beyond 30 working days.

If EFSA considers that a public access request is formulated in broad terms, it should provide applicants with a list of the specific documents it identifies at an early stage, to enable the applicants to clarify their request, if necessary.

EFSA and the complainant will be informed of these recommendations. In accordance with Article 4(2) of the Statute of the European Ombudsman, EFSA shall send a detailed opinion by 2 August 2022.

Emily O'Reilly European Ombudsman

Strasbourg, 02/05/2022

[1] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.253.01.0001.01.ENG&toc=OJ%3AL%3 [Връзка]

[2] ECHA evaluates the risk to public health or the environment in relation to the manufacturing, placing on the marking or use of a specific substance, and may propose how to address this risk. Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1907-20140410 [Връзка].

[3] For more info, visit: https://echa.europa.eu/hot-topics/lead-in-shot-bullets-and-fishing-weights [Връзка].

[4] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049 [Връзка] which applies to EFSA in accordance with Article 41(1) of Regulation 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02002R0178-20210526 [Връзка].

[5] The request was registered under PAD 2021/024.

[6] EFSA referred to Article 6(3) of Regulation 1049/2001.

[7] The full meeting report is available at: https://www.ombudsman.europa.eu/en/doc/inspection-report/en/155312 [Връзка].

[8] See footnote 4.

[9] Article 7(1) of Regulation 1049/2001.

[10] Article 7(3) of Regulation 1049/2001.

[11] Article 6(3) of Regulation 1049/2001.

[12] Judgment of the Court of First Instance of 13 April 2005 , *VKI v Commission* , T-2/03, paragraphs 101 f.: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=60314&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first& [Връзка].

[13] Judgment of the Court (Grand Chamber) of 18 December 2007, *Sweden v Commission* , C-64/05 P, paragraphs 85 f.: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=71934&pageIndex=0&doclang=en&mode=lst&dir=&occ=first& [Връзка].

[14] Judgment of the Court of Justice of 2 October 2014, *Strack v Commission* , C-127/13, paragraphs 26 ff.: https://curia.europa.eu/juris/document/document.jsf?text=&docid=158192&pageIndex=0&doclang=EN&mode=lst&d [Връзка].

[15] Strategic inquiry OI/2/2022/MIG on the time taken by the European Commission to deal with requests for public access to documents: https://www.ombudsman.europa.eu/en/case/en/60766 [Връзка].

[16] Article 4 of the Decision of the Management Board laying down practical arrangements for implementing Regulation (EC) No 1049/2001 and Articles 6 and 7 of Regulation (EC) No 1367/2006: https://www.efsa.europa.eu/sites/default/files/documents/wp200327-a2.pdf [Връзка] .