

Recommendation of the European Ombudsman in case 1708/2015/ANA on the European Commission's refusal to grant public access to documents related to the use of GMOs as food or feed

Recommendation

Case 1708/2015/MH - **Opened on** 18/12/2015 - **Recommendation on** 03/09/2018 - **Decision on** 06/05/2019 - **Institution concerned** European Commission (Maladministration found) |

This case, brought by Greenpeace, concerns the Commission's refusal to grant public access to documents taken into account by the Commission when preparing its proposal to amend EU legislation on the use of GMOs as food or feed.

The Ombudsman inquired into the issue and found that the Commission's refusal to give full public access to the requested documents is not in line with Regulation 1049/2001.

This constitutes maladministration. The Ombudsman recommends that the Commission give full access to the documents in question.

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

Background to the complaint

1. The case concerns a refusal by the Commission to give public access to documents relating to the process by which the European Commission proposed a modification to EU legislation relating to Genetically Modified Organisms (GMOs). Regulation 1829/2003 deals with the authorisation procedure for the use of GMOs in food and feed [2] . On 22 April 2015, the Commission made a proposal [3] to amend that Regulation by inserting into the Regulation Article 34a. Article 34a establishes a process that allows Member States to restrict the use of GMOs as food or feed on their territory. The purpose of the proposed amendment was to align Regulation 1829/2003 with a similar procedure under Directive 2015/412, the Directive which governs the deliberate release of GMOs into the environment [4] .

2. On 28 May 2015, Greenpeace, a non-governmental organisation, asked the Commission to give it public access to a) documents setting out the different options considered by the



Commission before presenting its proposal, and b) documents about the way in which the option presented in that proposal was selected.

3. In its reply of 8 July 2015, the Commission identified 21 documents that fell within the scope of the request. It gave Greenpeace access to 16 documents and denied access to the remaining 5 documents.

4. On 31 July 2015, Greenpeace made a request for review of the Commission's decision in respect of 4 of those documents to which access was denied (a so-called "confirmatory application").

5. On 26 August 2015, the Commission confirmed its denial of access to the 4 documents arguing that they contained preliminary reflections and opinions for internal use and that there was no overriding public interest to disclose these documents [5] .

6. On 27 October 2015, Greenpeace lodged a complaint with the European Ombudsman. The object of the complaint was the Commission's refusal to give no access at all to three different versions of the so-called "**Options paper**" and the only partial access given to the document "**Elements for a Roadmap**" .

7. On 28 October 2015, the day after the complaint was lodged with the Ombudsman, the European Parliament rejected the Commission's legislative proposal.

8. Following Parliament's rejection, the Commission announced that it would not withdraw its legislative proposal. In fact, the proposal was included in the Commission's 2016 Work Programme, among the pending proposals that were a priority for that year.

The Ombudsman's inquiry

9. On 18 December 2015, the Ombudsman opened an inquiry into the complaint to examine the assertion by Greenpeace that:

The Commission wrongly refused to give public access to three different versions of the so-called "Options paper" and wrongly gave only partial access to the document "Elements for a Roadmap".

Greenpeace argued that the Commission's refusal cannot be justified under Article 4(3) of Regulation 1049/2001, read in light of the principles of sincere co-operation and of institutional balance.

10. On 12 February 2016, the Ombudsman's inquiry team carried out an inspection of the withheld documents. They discuss the "pros and cons" of different scenarios and the Commission's possible "margin of manoeuvre". During the inspection, the Commission informed the Ombudsman's inquiry team that it considered that the Options Paper was still confidential.



This is because, in spite of the rejection of the Commission's proposal, it did not intend to withdraw its proposal. Rather, it intended to enter into further negotiations with the Council and Parliament.

11. On 21 December 2016, the Ombudsman's inquiry team spoke to officials in Directorate-General (DG SANTE) which has responsibility for the Commission's proposal. The Commission confirmed that the proposal was with the Council, that the procedure was still ongoing, and that the latest exchanges on the proposal between the Commission's services and the Council took place in December 2016. Although the proposal did not appear in the Commission's work programme as a priority proposal for 2017, it was still in the working programme of DG SANTE.

12. In light of this information, on 18 April 2017, the Ombudsman asked the Commission to reply to the complaint and to explain, in particular, how access to those documents could *specifically* and *actually* undermine the interest protected by the exceptions relied on, set out in Article 4(3), first and second subparagraphs of Regulation 1049/2001, and why it considered that the disclosure of the documents in question would pose a foreseeable, and not purely hypothetical, risk to its decision-making process.

13. In its reply of 10 July 2017, the Commission stated that it had explained everything in detail in the confirmatory decision of 26 August 2015, which had in the meantime become final [6] . The Commission did not consider it necessary to elaborate on its reasoning for refusing access to the requested documents. Instead, it merely confirmed the validity of its decision in light of the factual and legal circumstances which prevailed at the time. The Commission maintained the view that, at the relevant time, it correctly invoked and applied the exception laid down in Article 4(3), first and second subparagraphs of Regulation 1049/2001 in relation to the above-mentioned four documents and that there was no manifest error in the Commission's assessment.

14. On 20 March 2018, the Ombudsman's inquiry team again contacted DG SANTE. DG SANTE confirmed that the proposal is with the Council, that the legislative procedure is still ongoing and that it has no intention of withdrawing it.

Arguments presented to the Ombudsman

15. The **complainant** argued that, in order to protect and strengthen its negotiating position vis-à-vis the EU co-legislators, the Commission decided to sacrifice the right of the public to be informed about the rationale of its policy choices.

16. The complainant argued that the Commission cannot rely on the exception set out in the first subparagraph of Article 4(3) of Regulation (EC) 1049/2001, which is intended to protect the Commission's ongoing decision-making process. The reason is that the Commission has adopted its proposal and has presented it to the Parliament and to the Council. Thus, the Commission's decision-making powers in the context of the ordinary legislative procedure have



been exhausted.

17. In the event the Commission's decision-making process had to be considered as "ongoing", the complainant argued that Article 4(3), first subparagraph cannot prevent the disclosure of the information and documents the Commission used to prepare the proposal.

18. In support of this view, the complainant argued that, in the context of the ordinary legislative procedure under Article 294 of the Treaty on the Function of the European Union (TFEU), the Commission's role and prerogatives must aim at putting the Parliament and the Council in the position of fully exercising their role of co-legislators, in fulfilment of their democratic mandate. For this purpose, the Commission must provide them with full and clear information on the proposal submitted to them. The complete knowledge of the preparatory works, including the various options considered by the Commission in the definition of its proposal, is an essential requirement for the institutions to make an informed assessment of the Commission's text and take a position during the legislative procedure.

19. More importantly, a full public account of the preparatory works is an essential element of the democratic process. It allows citizens to understand why the Commission submitted a certain proposal to Parliament and to the Council. Withholding information (particularly on other policy options available to the Commission during the preparation of the proposal) for the purpose of protecting the Commission's 'negotiating position' during the legislative procedure is incompatible with the transparent and democratic nature of the legislative process. Keeping alternatives options "in the pocket" might be a valid strategy for negotiators, but is an inappropriate conduct for the institution that is entrusted with the protection of the Union's interest and with the monopoly of legislative initiative; in any event such a conduct would be in breach of the principle of sincere cooperation.

20. For these reasons, the complainant considered that the refusal to disclose the documents concerned is not justified under the first subparagraph of Article 4(3) of Regulation 1049/2001.

21. Furthermore, the complainant argued that it is even less clear why the exception relating to the protection of the Commission's decision-making set out in the second subparagraph of Article 4(3) of Regulation 1049/2001 (that is, after the Commission's decision has been taken) should apply.

22. The **Commission** argued that there are two stages in its decision-making process. The first stage is concluded with the adoption of the proposal. The second stage is the inter-institutional decision-making process. The Commission's involvement in the second stage includes (a) explaining and defending the proposal at working level at the Council and in the relevant Committees of the Parliament; (b) formally issuing an opinion in first reading and second reading on the amendments of the co-legislators (Article 294(6) and (7)(c) TFEU) [7] , and (c) as long as the Council has not acted, altering its proposal at any time during the legislative procedure (Article 293(2) TFEU).

23. Thus, the Commission argued that its decision-making process has not yet been finalised



and the premature disclosure of the internal views and policy actions set out in the documents withheld would seriously undermine its margin of manoeuvre and capacity to propose and promote compromises between the co-legislators under the **first subparagraph** of Article 4(3) of Regulation 1049/2001.

24. In the alternative, if the decision-making process were considered closed following the adoption of the Commission's proposal, the documents concerned would then be covered by the exception provided for in the **second subparagraph** of Article 4(3), on the ground that disclosing those documents, reflecting opinions for internal use as part of preliminary deliberations, would seriously harm the subsequent, inter-institutional decision-making processes as regards the review of the legislation on GMOs.

25. The Commission argued that there was no overriding public interest in disclosure and that no meaningful (further) partial access could be granted.

The Ombudsman's assessment leading to a recommendation

26. The argument that the Commission's decision-making processes will be seriously undermined by disclosure must be based on the specific nature of the decision-making process(es) concerned, the specific contents of the documents at issue, and the specific context that existed at the time the request for access was refused.

27. As regards the specific nature of the decision-making process at issue, the Commission argued, when refusing access to the documents, that disclosure would seriously undermine its "margin of manoeuvre and capacity to propose and promote compromises between the co-legislators" and would seriously harm the "inter-institutional decision-making processes" as regards the review of the legislation on GMOs. Taking into account the fact that the decision-making process(es) covered by Article 4(3) of Regulation 1049/2001 can only be those that occur *within* the institution refusing access, these two statements are not distinguishable from each other. They both should be understood as relating to the efforts by the Commission to ensure that its proposal for legislation would get through the legislative process. The statements should thus be considered together.

28. The specific "decision-making processes" which the Commission argues would have been seriously undermined by disclosure (namely, its decision-making related to getting the proposal through the legislative process) were indeed on-going at the time the request for access was refused.

29. As regards whether those decision-making processes would have been seriously undermined by the disclosure of the documents at issue, the Ombudsman notes that the decision-making processes at issue are clearly "legislative" in nature, as they relate directly to the Commission's to ensure that its proposal will be adopted into law.



30. As a general rule, transparency is an essential aspect of good democratic governance as it makes it possible for citizens to scrutinise the activities of public authorities, evaluate their performance and call them to account. Transparency thus forms an essential part of the institutional checks and balances that mediate the exercise of public power and promote accountability [8] . Transparency is of particular importance as regards the legislative process, where the EU Courts have set particularly high standards as regards transparency. They have stated that, if citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and must have access to all relevant information. Furthermore, Article 10(3) TEU states that every citizen is to have the right to participate in the democratic life of the Union and that decisions are to be taken as openly and as closely as possible to the citizen. Thus, the expression of public opinion in relation to a particular provisional legislative proposal forms an integral part of the exercise of EU citizens' democratic rights [9] .

31. As regards the specific content of the documents in question, the versions of the "Options" paper and the "Elements for a Roadmap" contain the options and possible ways forward that the Commission assessed in drafting its proposal for the amendment of Regulation 1829/2003. The documents do not appear to contain any sensitive or controversial information. As regards the "options paper", none of the options discussed go beyond what might easily be envisaged. Any reasonably well-informed observer would have expected that the Commission would have come up with these options when it was tasked with considering how the decision-making procedure for the authorisation of GMOs in food and feed could be amended. The Elements for a Roadmap simply summarises these options, sets them in their context and makes an initial assessment of their impact. It is not reasonable to conclude, given the content of those documents, that their disclosure could seriously undermine a decision-making process.

32. As regards the specific timing of the refusal to grant access, the Ombudsman notes that transparency is of particular importance **precisely when** a legislative proposal is being debated by the co-legislators. At the time of the refusal to grant Greenpeace access to the documents, Parliament was deliberating on the proposal. (Just over 2 months after the Commission refused to grant public access to the documents relating to the adoption of the Commission's proposal, Parliament voted not to approve the Commission's proposal.) While there may be many and diverse reasons why Parliament rejected the Commission's proposal, limiting transparency of the process by which the proposal was adopted would not have contributed, at that time, to building the necessary public trust in the proposal. In taking this view the Ombudsman takes into account Article 10(3) of the Treaty on European Union, which states that every citizen is to have the right to participate in the democratic life of the Union and that decisions are to be taken as openly and as closely as possible to the citizen. She considers that the opportunity for public opinion in relation to a particular legislative proposal is an integral part of the exercise of EU citizens' democratic rights [10] .

33. The Ombudsman therefore finds that the Commission has not demonstrated that it was reasonably foreseeable and not purely hypothetical that full access to the documents at issue would undermine, specifically and actually, the decision-making process at issue within the meaning of the first subparagraph of Article 4(3) of Regulation 1049/2001.



34. Therefore, the Ombudsman considers that the Commission failed to justify its decision not to disclose fully the requested documents. The failure to disclose the documents in full is maladministration and the Ombudsman makes the appropriate recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the Commission:

The Commission should give full access to the three different versions of the so-called “Options paper” and to the document “Elements for a Roadmap”.

The Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send an opinion by 30 November 2018.

Emily O'Reilly

European Ombudsman

Strasbourg, 03/09/2018

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (Text with EEA relevance), OJ L 268, 18.10.2003, p. 1–23.

[3] COM(2015) 177 final.

[5] Article 4(3) of Regulation 1049/2001 relating to the protection of the institution's decision-making process. For a detailed explanation of the Commission's key arguments, see below paragraphs 22 to 27.

[6] This statement of the Commission means that, as the time-limit to bring an action in the Court of Justice of the European Union to review the legality of the Commission's decision



(“action for annulment”) had expired, the Commission’s decision refusing access to documents became immune from challenge before the EU courts.

[7] Where the Commission delivers a negative opinion on the Council’s amendments, the latter has to adopt its amendments unanimously (Article 294(9) TFEU).

[8] See, for instance, Decision of the European Ombudsman closing her inquiry into complaint 1454/2012/ANA against the European Commission, paragraphs 41-43, available at <https://www.ombudsman.europa.eu/cases/decision.faces/en/52892/html.bookmark> [Link]

[9] See Case T-540/15 *Emilio De Capitani v Parliament* , Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, ECLI:EU:T:2018:167, paragraph 98, and the case-law cited therein.

[10] See also in this connection *De Capitani* , paragraph 98 and Case T-233/09 *Access Info v Council* , EU:T:2011:105, paragraph 69.