

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

Decision

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 complaint, made by Greenpeace, concerns the European Commission's refusal to grant full public access to four documents, which the Commission took into account when preparing its proposal to amend EU legislation on the use of GMOs as food or feed.

The Commission refused access to three documents in their entirety and withheld parts of a fourth document, relying on the exceptions protecting the decision-making process. The Ombudsman found that the Commission had failed to justify properly its refusal. She therefore recommended that the Commission disclose all the documents in full.

The Commission did not follow the Ombudsman's recommendation, on the basis that its original decision was legally correct at the time. The Ombudsman regrets that the Commission did not follow her recommendation. She confirms her view that the Commission's continued refusal to give full access to the documents constitutes maladministration.

Background to the complaint

1. The complaint concerns the Commission's refusal to give public access to documents [1] relating to the process behind the Commission's proposed amendments to EU legislation on Genetically Modified Organisms (GMOs). Regulation 1829/2003 deals with the authorisation procedure for the use of GMOs in food and feed [2] . In April 2015, the Commission proposed [3] to amend that Regulation by inserting a new provision [4] to allow Member States to restrict the use of GMOs as food or feed.

2. In May 2015, Greenpeace, a non-governmental organisation, asked the Commission for public access to (a) documents describing the various options the Commission had considered before presenting its proposal, and (b) documents about the way in which the option presented in its proposal was selected.



3. The Commission identified 21 documents within the scope of that request. It disclosed 16 of these documents to the complainant (but with some of the content withheld) and refused access to the remaining five. Greenpeace asked the Commission to review that decision (the so-called 'confirmatory application'). In reply, the Commission confirmed that it would not grant access, since the documents contained preliminary reflections and opinions for internal use, and there was no overriding public interest in their disclosure [5] .

4. In October 2015, Greenpeace complained to the European Ombudsman about the Commission's decision not to grant access to four specific documents. On the following day, the European Parliament rejected the Commission's proposed amendments. The Commission did not withdraw its proposal. The Council of the EU has discussed the proposal, but has yet to take a position on it. [6]

5. In the course of the inquiry, the Ombudsman inspected the relevant documents. The Ombudsman then asked the Commission to explain further why it was reasonably foreseeable and not purely hypothetical that full disclosure of the documents could specifically and actually undermine the decision-making process. In response, the Commission merely stated that it was not necessary to reiterate its reasoning in its reply to the complainant's request for review.

6. The Ombudsman was not convinced by the Commission's arguments. She therefore made a recommendation [7] to the Commission that it should disclose the documents in full. This decision takes into account the Commission's opinion on the Ombudsman's recommendation, as well as the complainant's comments on both.

The Ombudsman's recommendation

7. The Ombudsman was not convinced by the Commission's reasons for not granting access to three versions of the "Options paper" and for withholding parts of the document "Elements for a Roadmap". She considered that these documents did not contain sensitive or controversial information, but options and possible ways forward considered by the Commission when drafting its proposed amendments. Any reasonably well-informed observer, when considering amendments to the GMO authorisation procedure, could have come up with the options in the documents. It was thus not reasonable for the Commission to conclude that the disclosure of the documents could actually and specifically seriously undermine the decision-making process. The Commission had not demonstrated that such a risk was reasonably foreseeable, as opposed to purely hypothetical.

8. The Ombudsman therefore found that the Commission had failed to justify its decision not to grant full access to the documents and that this constituted maladministration. She made 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".

9. In reply, the Commission stated that its analysis was legally correct. Since the decision-making process on this legislative file is still ongoing, it remains important for it to be



able to defend its proposal, without having to disclose its sensitive, internal preliminary views and opinions [8] .

10. The Commission disagreed with the Ombudsman's position that it had failed to demonstrate a reasonably foreseeable, and not purely hypothetical, risk that the disclosure of the documents would seriously undermine the decision-making process.

11. The Commission noted that an ongoing decision-making process is seriously undermined where disclosure has a “ *substantial impact*” on it [9] . In that regard, it is sufficient that the contested decision contains “ *tangible elements from which it can be inferred*” that the decision-making process would be undermined if the documents requested were disclosed [10] . The Commission pointed to the risk that its proposal would be rejected, to uncertain political circumstances and to the controversial nature of the discussions on the legislative file. Therefore, the possibility that it would amend its proposal was real (as opposed to hypothetical). According to the Commission, these factors made it even more important for it to be able to explain and defend its proposal, without disclosing its preliminary views and opinions.

12. The Commission also stated that the four documents in question concerned a “ *highly sensitive field*” (politically and publicly), namely, legislative proposals on the use of GMO food and feed. The Commission pointed to the Ombudsman's own comments [11] that GMO authorisations and approvals “ *may invoke strong public concerns*”, and involve “ *significant public debate*” as well as complex, important and sensitive decisions.

13. In conclusion, the Commission said that its confirmatory decision had become final in the absence of any challenge before the EU Court. It added that it was “ *fully in line with the applicable legislation and the relevant case-law on access to documents at the point in time it was taken and, therefore, could not have amounted to an instance of maladministration*” .

14. The complainant commented on the Commission's reply. It considered that even if the Commission's decision was valid at the time, in the light of recent EU case-law [12] , this would not be the case today. The complainant repeated its arguments about the importance of transparency in the legislative process. Concerning the “ *tangible elements*”, it pointed out that, beyond the fact that the documents concerned GMOs, the Commission had not advanced “ *specific evidence*” of their sensitive nature. The complainant also noted that the Commission could not rely on the protection of the ongoing decision-making process to keep documents secret throughout the entire legislative procedure [13] .

The Ombudsman's assessment after the recommendation

15. The Ombudsman regrets that the Commission did not follow her recommendation to give full access to three versions of the “Options paper” and the document “Elements for a Roadmap”.

16. The Ombudsman maintains her view that the Commission failed to justify adequately why it considered it reasonably foreseeable, and not purely hypothetical that full disclosure of the four



documents risked undermining the decision-making progress.

17. The Ombudsman is not convinced by the Commission's argument that its refusal was justified simply because there was a real possibility that it would amend its proposal. This is a very general consideration [14] , and not sufficient to show, tangibly, that there was a reasonably foreseeable risk that the decision-making process could actually and specifically be undermined [15] . The public is, after all, likely to be aware that proposals usually follow consideration of a range of options and might reasonably expect any Commission legislative proposal (not merely the one at issue) to be liable to change [16] .

18. Regarding the Commission's argument about sensitivity, the fact that the documents relate to a specific legislative field (on the use of GMOs) is not, in itself, sufficient to demonstrate their special sensitivity and to justify the Commission's refusal. To decide otherwise could exempt all EU proposals on GMOs from the EU's transparency rules [17] . This would seriously undermine the democratic rights of citizens to follow and access information about the EU's legislative decision-making process [18] .

19. It is precisely because of public concerns and the need for an open debate on GMOs that the Ombudsman has intervened in past complaints. The Ombudsman considers that full public disclosure of the documents at issue during the ongoing decision-making process would enable EU citizens to understand the options envisaged and the Commission's choices [19] . This would allow citizens to make known their views and facilitate public debate on the authorisation procedure for GMOs.

20. The Ombudsman therefore finds it disappointing that the Commission has failed to be transparent and open in an area of such importance to EU citizens. She is also disappointed that the Commission continues to rely on the legal correctness at the time of a decision taken nearly four years ago, despite the fact that recent court decisions would demand a different approach if the matter were considered afresh today.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion that:

The Commission's failure to grant full access to the documents constitutes maladministration.

The complainant and the Commission will be informed of this decision .

Emily O'Reilly

European Ombudsman

Strasbourg, 06/05/2019



[1] 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> [Link]

[2] Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed:

<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003R1829> [Link]

[3] See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52015PC0177> [Link]

[4] The purpose of the proposed amendment was to align Regulation 1829/2003 with a similar procedure under another Directive 2015/412 amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0412> [Link]

[5] Article 4(3) of Regulation 1049/2001.

[6] For more information, see

<http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-restriction-of-the-use-of-gmos> [Link]

[7] <https://www.ombudsman.europa.eu/en/recommendation/en/102719> [Link]

[8] Judgment of the European Court of Justice of 4 September 2018, *ClientEarth v Commission*, Case C-57/16, paragraph 109: <http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en>

[9] Judgment of the General Court of 22 March 2018, *Emilio de Capitani v Parliament*, Case T-540/15, paragraph 64: <http://curia.europa.eu/juris/liste.jsf?num=T-540/15>

[10] Above, at paragraph 65.

[11] The European Ombudsman proposal in case 176/2015/JF on the alleged failure of the European Food Safety Authority to reply adequately to questions about an authorisation application for genetically modified maize:

<https://www.ombudsman.europa.eu/en/solution/en/87264> [Link]; Recommendation of the European Ombudsman in case 428/2016/JAS on the European Commission's response to a request for internal review of its decision to grant market authorisation for a genetically modified oilseed rape: <https://www.ombudsman.europa.eu/en/recommendation/en/87311> [Link]; and Decision of the European Ombudsman closing the inquiry into complaint 1582/2014/PHP on the European Commission's handling of authorisation applications for genetically modified food and feed: <https://www.ombudsman.europa.eu/en/decision/en/63025> [Link]



[12] *Emilio de Capitani v Parliament* and *ClientEarth v Commission*.

[13] *ClientEarth v Commission*, paragraph 109.

[14] *Emilio de Capitani v Parliament* , paragraphs 88 and 92.

[15] *Emilio de Capitani v Parliament* , paragraphs 65 and 99.

[16] *Emilio de Capitani v Parliament* , paragraphs 99 and 102.

[17] *Emilio de Capitani v Parliament*, paragraphs 89 and 97.

[18] Paragraphs 30 and 32 of the Ombudsman's recommendation in this case.

[19] *ClientEarth v Commission*, paragraph 92 and *Emilio de Capitani v Parliament*, at paragraph 78.