

Recommendation of the European Ombudsman in case 2142/2018/TE on the European Commission's refusal to grant access to Member State positions on a guidance document concerning the risk assessment of pesticides on bees

Recommendation

Case 2142/2018/EWM - Opened on 18/12/2018 - Recommendation on 10/05/2019 - Decision on 03/12/2019 - Institution concerned European Commission (Maladministration found) |

Pesticides are considered to be a contributing factor in the decline of bees in Europe. Following concerns, widely raised, the European Food Safety Authority (EFSA) developed, in 2013, guidance on the assessment of risk of pesticides on bees.

The complaint, submitted by a French civil society group, concerned a request for public access to documents containing the positions of EU Member States on the 2013 EFSA guidance. The European Commission refused access on the basis that the disclosure of Member State positions would jeopardise an ongoing decision-making process.

The Ombudsman found that the documents at issue should, in view of the context in which they were drawn-up and in view of their purpose, benefit from the wider access granted to "legislative documents" under the EU law on public access to documents. Wider access to such documents is crucial to ensure that EU citizens can exercise their treaty-based right to participate in the democratic life of the Union. The Ombudsman also considers that the documents in question contain environmental information, as defined in the Aarhus Regulation. The exception invoked by the Commission to refuse public access to the requested documents must therefore be applied all the more restrictively.

The Ombudsman also found that the Commission has not demonstrated that disclosure of the documents in question would seriously affect, prolong or complicate the proper conduct of the decision-making.

The Ombudsman therefore considers that the Commission's refusal to grant public access to the positions of Member States constituted maladministration. She recommends that the Commission should grant public access to the requested documents.



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

Background to the complaint

1. The complaint concerns the transparency of the positions of Member States in the process of adopting a guidance document on the risk assessment of pesticides on bees [2] (hereafter the 'bee guidance'). The bee guidance is intended to provide industry and authorities with guidance on how to implement EU law on the placing on the market of pesticides [3] .

2. Following a request from the European Commission, the European Food Safety Authority (EFSA) issued a first version of the bee guidance in 2013, and revised it in 2014.

3. In accordance with the applicable EU law [4] , guidance documents prepared by EFSA are adopted by the Commission, taking into account the advice of Member States [5] . Representatives of Member States meet and deliver their opinion on guidance documents within the scope of the Standing Committee on Plants, Animals, Food and Feed , a so-called "*comitology*" [6] committee that is chaired by the Commission.

4. Due to the absence of agreement among Member States in the Standing Committee, the adoption of the bee guidance has been delayed since 2013 .

5. The complainant, the French non-profit organisation POLLINIS, asked the Commission, in March 2018, for public access to "*all correspondence (including emails), agendas, minutes of meetings and any other reports of such meetings between officials / representatives / Commissioner / cabinet member of DG SANTE and the members of the Standing Committee on Plants, Animals, Food and Feed, regarding EFSA Guidance Document on the risk assessment of plant protection products on bees (Apis mellifera, Bombus spp. and solitary bees*". Upon request, the complainant clarified the request to cover the period between July 2013 and April 2018.

6. In May 2018, the Commission responded to the complainant and identified 29 documents as falling within the scope of the request. It granted partial access to two documents and fully refused access to the remaining 27 documents on the ground that these documents contain positions of individual Member States on the draft bee guidance. The Commission argued that the public disclosure of Member State positions would undermine an ongoing decision-making process [7] .

7. Wishing to receive full access to all the requested documents, the complainant turned to the Ombudsman on 21 September 2018. However, since the complainant had not asked the Commission to review its decision (by making a so-called "*confirmatory application*"), the Ombudsman had to declare the complaint inadmissible at that stage.

8. In September 2018, the complainant made a new application for access to documents to the Commission, in which it repeated verbatim its request of March 2018.



9. On 13 November 2018, the Commission replied.

10. As regards the scope of the request, the Commission found that, since the complainant's previous request of March 2018 partially referred to the same documents, the new request would only cover the additional documents relating to the period between May 2018 and September 2018.

11. As regards the substance of the request, the Commission identified 16 documents as falling within its scope. As all 16 documents are email exchanges between the Commission and Member States regarding their positions on the draft bee guidance, the Commission refused access to all 16 documents with reference to the protection of an ongoing decision-making process. The Commission also argued that the complainant did not put forward any evidence of an overriding public interest in disclosure.

12. On 14 November 2018, the complainant asked the Commission to review its decision. It argued that there was an overriding public interest in disclosure, as citizens need to know why the bee guidance is repeatedly not endorsed in the Standing Committee to the detriment of the bee population.

13. On 3 December 2018, the Commission confirmed the conclusions of its initial decision.

14. Dissatisfied with the Commission's reply, the complainant turned to the Ombudsman on 12 December 2018.

The inquiry

15. The Ombudsman opened an inquiry into the complaint. The complainant's position is that the Commission:

- 1.** wrongly limited the scope of its request to the period between May 2018 and September 2018; and
- 2.** wrongly refused access to the requested documents.

16. This recommendation addresses the second aspect of the complaint which concerns the refused access to the requested documents, showing Member State positions on the draft bee guidance. With regard to the first aspect of the complaint, the Ombudsman accepts that the Commission was legally justified [8] in refusing to deal with the part of the complainant's access request that relates to the same documents (dating from July 2013 to April 2018) to which it had previously been denied access. While she expresses her disappointment that the Commission has taken such a legalistic and citizen unfriendly approach in this case, she cannot take this matter further within the context of this inquiry.



17. The Ombudsman asked the Commission to provide full copies of the requested documents, covering the period between May 2018 and September 2018.

18. The Ombudsman furthermore invited the Commission to provide additional views on its confirmatory response to the complainant. The Commission chose not to provide any additional views.

Arguments presented by the parties

Complainant's arguments

19. The complainant considers that the 16 documents, which contain the positions of Member States on the draft bee guidance, should be disclosed in full.

20. In support of its argument, the complainant maintains that the documents in question relate to urgent measures aimed at protecting biological diversity and would therefore constitute “*environmental information*”, as defined in the EU Regulation concerning public access to information in environmental matters [9] (the ‘Aarhus Regulation’). The disclosure of such environmental information constitutes, according to the complainant, an overriding public interest.

21. The complainant further argues that the Commission failed to correctly balance the interests at stake. Although the Commission recognises the importance of protecting bees, it nevertheless considers that the overriding public interest lies in the protection of the decision-making process - without, however, explaining how the disclosure of the documents in question would concretely and effectively endanger that process.

Commission's arguments

22. The Commission argues that the disclosure of the 16 documents would undermine the decision-making process within the Standing Committee [10] .

23. In support of its argument, the Commission notes that the decision-making process on the bee guidance is still ongoing and that Member States submitted comments in the framework of discussions within the Standing Committee on Plants, Animals, Food and Feed. The Standard Rules of Procedure for Standing Committees explicitly exclude that positions of individual Member States be disclosed [11] . The Commission further argues that, within the scope of Standing Committees, the Commission and Member States must be “*free from external pressure*” and that “[p] ublic disclosure of the references to individual Member States would prevent Member States from frankly expressing their views ”.

24. As regards the overriding public interest, the Commission acknowledges that the protection



of bees is an important matter related to public health. However, it concludes that, in this particular case, “ *the public interest is better served by protecting the ongoing decision-making process* ”. Therefore, the Commission believes there is no overriding public interest in disclosure.

The Ombudsman's assessment leading to a recommendation

25. The 16 documents in question are all emails (some of them with annexes), in which Member States respond to the Commission's invitation, expressed at the meeting of the relevant Standing Committee of 19/20 July 2018 [12] , to inform the Commission regarding their views on the draft bee guidance.

26. The documents contain the positions of Member State representatives on Member States' level of support and the nature of any concerns they may have regarding the content or implementation of the draft guidance.

27. The Ombudsman wishes to highlight that the 16 documents in question contain Member State positions on a draft measure whose aim it is to provide guidance to industry and Member States on the implementation of the EU legislation on plant protection products (pesticides). This measure is adopted via a comitology procedure, that is, the advisory procedure set out in Regulation 182/2011 [13] (hereafter 'Comitology Regulation').

28. The Ombudsman further understands that, while the Commission takes the view [14] that the adopted bee guidance will not be legally binding [15] , it will undoubtedly have significant practical effects on how industry will prepare, and on how Member States will examine, applications for authorisations of pesticides. This understanding is reinforced by a provision in the EU law on pesticides, which explicitly requires Member States, when examining applications for an authorisation of a pesticide, to “ *make an independent, objective and transparent assessment in the light of current scientific and technical knowledge using guidance documents available at the time of application* ” [16] (emphasis added).

29. These considerations are important, as, under the EU Treaties, every citizen has “ *the right to participate in the democratic life of the Union* ” [17] . Therefore, EU decisions must be taken “ *as openly and as closely as possible to the citizen* ” [18] . This prerogative is considered particularly important when EU institutions are acting in their “ *legislative capacity* ” [19] . Indeed, the possibility for citizens to scrutinise and be made aware of all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights [20] .

30. The EU law on public access to documents provides that not only acts adopted by the EU legislature, but also, more generally, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding, must be considered “ *legislative documents* ” and must be made, subject to valid exceptions, directly accessible to the greatest



possible extent [21] . The law specifies that “ *legislative capacity* ” includes the EU institutions’ activity under their delegated powers [22] , such as rule-making via comitology.

31. The Court of Justice has, however, in 2018, further broadened the understanding of documents that should benefit from the wider access granted to “ *legislative documents* ” [23] . The Court held that such wider access should also be granted to documents, in that case to impact assessments, which are not, strictly speaking, drafted by an institution when acting in its legislative capacity [24] . To come to that conclusion, the Court examined the **purpose** of impact assessments, which it considered to lie in informing the Commission’s legislative proposal. The Court concluded that, as impact assessments contain “ *information constituting important elements of the EU legislative process* ” [25] , their disclosure is “ *likely to increase the transparency and openness of the legislative process as a whole* ” [26] . This, the Court inferred, would “ *enhance the democratic nature of the European Union by enabling its citizens to scrutinise that information and to attempt to influence that process* ” [27] . Therefore, the reasons underlying the principle of a wider access to legislative documents are also valid for documents drawn up in the context of an impact assessment procedure [28] .

32. The Ombudsman takes the view that an analogous assessment should be conducted for the 16 documents at issue in this case: In determining whether the documents should also benefit from the wider access attributed to “ *legislative documents* ”, the purpose and context of the documents in which they are drawn-up must be considered.

33. In that regard, the Ombudsman first notes that the documents in question are documents drawn up in the context of a comitology procedure. In adopting the bee guidance, the Commission acts under the powers delegated to it under the EU legislation on pesticides. In line with the EU law on public access to documents, the Commission can thus be understood to be acting in its “ *legislative capacity* ”.

34. Furthermore, the documents in question constitute essential information as to why a guidance document, which constitutes a measure with a significant impact on how the legislation on pesticides will be implemented in the future, has not been adopted by the Commission since 2013 . In this context, the Ombudsman takes the view that the public disclosure of the 16 documents in question is likely to enhance the democratic nature of the Union by enabling its citizens, such as the complainant, to scrutinise the reasons put forward by Member States for and against the adoption of the guidance and, if wished, attempt to influence an ongoing decision-making process. The Ombudsman has consistently taken the view that understanding which positions the different representatives of Member States hold is vital in a democratic system which is accountable to its citizens.

35. In light of the above, **the Ombudsman considers that the documents in question should also benefit from the wider access granted to “ *legislative documents* ” under the EU law on public access to documents .**

36. As a separate convincing reason for granting access, the Ombudsman also considers that **the documents in question contain environmental information within the meaning of the**



Aarhus Regulation .

37. The Aarhus Regulation defines environmental information to include any information in written, visual, aural, electronic or any other material form on measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the state of the elements of the environment, such as biological diversity and its components, as well as measures or activities designed to protect those elements [29] .

38. The bee guidance outlines a process by which pesticides should be assessed, by industry and Member States when authorising such products, for their potential risk in causing harm to bees. The bee guidance is a direct response to the decline in some bee species in different regions of the world [30] , which, among other factors, is caused by the release of pesticides into the environment. Against this background, the bee guidance must be understood as a measure designed to protect biological diversity.

39. In the 16 documents at issue, Member States provide their comments on that measure, including the reasons as to why Member States support its adoption or not. **The requested documents therefore contain information on a measure likely to affect biological diversity. They clearly qualify as environmental information .**

40. The Ombudsman notes that the Aarhus Regulation aims at ensuring that environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination. The purpose of access to this information is to promote more effectively public participation in the decision-making process, thereby increasing the accountability of decision-making and contributing to public awareness and support for the decisions taken [31] .

41. In this spirit, the Aarhus Regulation provides that the exception in the EU law on public access to documents, which states that access to a document shall be refused if disclosure would seriously undermine the institution's decision-making process [32] , **has to be interpreted in a restrictive way as regards environmental information** [33] . The public interest served by disclosure of the requested information should be taken into account [34] , thereby aiming for greater transparency of environmental information.

Application of the exception in the EU law on public access to documents

42. As the requested documents should benefit from the wider public access granted to “ *legislative documents* ” and, moreover, are environmental information, the Ombudsman notes that **the exception invoked by the Commission to refuse public access to the positions of Member States’ representatives must be applied all the more restrictively** [35] .

43. The Commission claims that public release of the emails containing Member State positions



on the bee guidance is contrary to their comitology rules of procedure (Standard Rules of Procedure for Standing Committees) which explicitly exclude the disclosure of positions of individual Member States. Furthermore, the Commission argues that the disclosure of Member State positions would significantly increase the risk of external pressure on the representatives of Member States in the Standing Committee.

44. The Ombudsman understands that the basis for the adoption of the comitology rules of procedure is Article 9 of the Comitology Regulation. However, there is no provision in the Comitology Regulation which says that summary records shall not contain the individual positions expressed by Member State representatives within the scope of committee proceedings. Nor is there any other provision in the Comitology Regulation, which would impose confidentiality requirements on committee proceedings. On the contrary, Recital 19 of that Regulation makes it clear that public access to information on committee proceedings should be ensured in accordance with the EU law on public access to documents.

45. This means that the confidentiality provisions in the comitology rules of procedure, most notably Article 10(2) (stating that summary records of meetings shall not mention the individual position of the members in the committee's discussion) and Article 13(2) (stating that the committee's discussions shall be confidential), are not themselves founded in the Comitology Regulation.

46. In light of the above, the Ombudsman takes the view that **the disclosure of Member State positions on the draft bee guidance is not contrary to the Comitology Regulation** .

47. The Ombudsman further notes that the expression by the public or interested parties of their views on the policy options envisaged, in particular in environmental matters, is an integral part of the exercise by EU citizens of their democratic rights [36] .

48. The Commission has not established that the external pressure to which Member State representatives might be subjected in the event of disclosure of the documents in question would be such as to risk impeding its capacity to act in a fully independent manner and exclusively in the general interest. The Commission has also not demonstrated that disclosure would seriously affect, prolong or complicate the proper conduct of the decision-making [37] .

49. The Ombudsman therefore finds that the Commission's refusal to grant public access to the positions of Member States on the draft bee guidance constituted maladministration, in line with the considerations and principles explained above. She therefore recommends as 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 grant public access to the requested documents, showing the positions of Member States on the draft bee guidance, in line with the principles explained above.

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 a detailed opinion by **10 August 2019** .

Emily O'Reilly

European Ombudsman

Strasbourg, 10/05/2019

[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] EFSA Guidance Document on the risk assessment of plant protection products on bees, EFSA Journal 2013;11(7):3295:

<https://efsa.onlinelibrary.wiley.com/doi/epdf/10.2903/j.efsa.2013.3295> [Link]

[3] Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009R1107> [Link]

[4] Article 77 of Regulation 1107/2009.

[5] In accordance with the advisory procedure, as laid down in Article 4 of Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers:

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32011R0182> [Link]

[6] “ *Comitology* ” refers to a set of procedures through which EU Member States control how the European Commission implements EU law. Before it can adopt measures which implement EU legislation, the Commission must consult, for the detailed implementing measures it proposes, a specialised committee where every EU Member State is represented. The committee in question then provides an opinion on the Commission's proposed measures. These opinions can be more or less binding on the Commission, depending on the particular procedure specified in the legal act being implemented. For a brief overview of “ *comitology* ”, see <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home> [Link]



[7] Article 4(3) of 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]

[8] The Court of Justice held in its judgment of 26 January 2010, *Internationaler Hilfsfonds v Commission*, C-362/08, para. 57, that “ a person may make a new demand for access relating to documents to which he has previously been denied access. Such an application requires the institution concerned to examine whether the earlier refusal of access remains justified in the light of a change in the legal or factual situation which has taken place in the meantime ”. In the present case, it is arguable that the legal or factual situation has not changed since the Commission’s first initial decision of May 2018, which became final in the absence of a confirmatory application.

[9] Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006R1367> [Link]

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

[11] Articles 10(2) and 13(2) of the [Standard Rules of Procedure for Committees - Rules of Procedure for the \[Name of the committee\] committee](#) [Link].

[12] The [summary record](#) [Link] of this meeting indicates that the bee guidance was discussed at the meeting:

“ The Commission presented revision 5 of the Commission Notice regarding the implementation plan for the Bee Guidance Document. The wording of the Notice will be aligned with other Commission Notices.

One Member State indicated that the EFSA Bee guidance document needs to be revised to take into account recent scientific developments. EFSA indicated that it does not consider it currently the right time to revise the Bee Guidance Document but that this can be discussed with the Commission as soon as new models become available.

On request of a Member State, the Commission repeated its earlier explanation that a Commission Notice is not legally binding. One Member State indicated that Article 36(1) of Regulation (EC) No 1107/2009 obliges Member States to use guidance documents available at the moment of application.

Member States were invited to inform the Commission regarding their support of the Commission Notice by 3 September 2018 ”.

[13] Regulation (EU) No 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing



powers: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32011R0182> [Link].

According to the advisory procedure, the Commission takes account of the opinion of the Standing Committee on Plants, Animals, Food and Feed when deciding on the adoption of a draft measure.

[14] [Summary record](#) [Link] of the meeting of the Standing Committee on Plants, Animals, Food and Feed of 19/20 July 2018.

[15] Although Article 77 of Regulation 1107/2009 provides that guidance documents are to be adopted in form of “*implementing acts*”, which are legally binding.

[16] Article 36(1) of Regulation 1107/2009.

[17] Article 10 of the Treaty on European Union (TEU).

[18] Articles 1 and 10(3) TEU.

[19] Recital 6 of Regulation 1049/2001.

[20] See, to that effect, judgments of the Court of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, para. 46: <http://curia.europa.eu/juris/liste.jsf?num=C-39/05&language=en> [Link], and of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, para. 33: <http://curia.europa.eu/juris/liste.jsf?num=C-280/11&language=EN> [Link].

[21] Article 12(2) and Recital 6 of Regulation 1049/2001.

[22] Recital 6 of Regulation 1049/2001.

[23] Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/16: <http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en> [Link].

[24] Ibid, para. 86.

[25] Ibid, para. 91.

[26] Ibid, para. 92.

[27] Ibid, para. 92.

[28] Ibid, para. 95.

[29] Article 2(1)(d)(i) and (iii) of Regulation 1367/2006.

[30] [EFSA bee guidance](#) [Link], p. 8.



[31] Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission* , C-57/16, para. 98: <http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en> [Link].

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

[33] Article 6(1) second sentence of Regulation 1367/2006; see also Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission* , C-57/16, para. 100: <http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en> [Link].

[34] Article 6(1) second sentence of Regulation 1367/2006; see also Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission* , C-57/16, para. 100: <http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en> [Link].

[35] Ibid, para. 101.

[36] Ibid, para. 101.

[37] Ibid, para. 108.