

Decision in case 2142/2018/EWM 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

Decision

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) |

The complainant, an environmental NGO, made a request for public access to documents containing the positions taken by Member States in a committee dealing with the risk assessment of how pesticides affect bees. The Commission refused access to the documents. It argued that its rules of procedure require that the positions of individual Member States not be disclosed and that public disclosure of Member States' positions would prevent Member States from frankly expressing their views.

The Ombudsman inquired into the issue and found that the Commission was wrong to refuse access to the documents. She considered that the documents, should benefit from the wider public access granted to 'legislative documents'. Moreover, she considered that wider public access was needed as the documents contain environmental information. She thus recommended that the Commission disclose the documents.

The Commission has chosen not to follow the Ombudsman's recommendation. This is disappointing. Transparent decision-making regarding procedures which are of general interest and application is a cornerstone of democracy. This is all the more important when the decision-making relates to the protection of the environment.

The Ombudsman confirms that the Commission's continued refusal to grant the complainant access to the requested documents constitutes maladministration.

Background to the complaint

1. There has been widespread public concern about the possible effects of pesticides on bee populations. The complaint, from an environmental NGO, concerns the transparency of the positions taken by Member States in the process of adopting a guidance document on the risk



assessment on how pesticides affect bees [1] (hereafter the 'bee guidance') [2] .

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 EFSA revised the draft guidance in 2014.

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

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

5. In September 2018, the complainant, the French non-profit organisation POLLINIS, asked the Commission 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*" in the period between July 2013 and September 2018.

6. The Commission replied to the complainant's request on 13 November 2018. It identified 16 documents as falling within the scope of the request. All 16 documents are email exchanges between the Commission and Member States regarding their positions on the draft bee guidance.

7. The Commission refused to grant access to the documents arguing that their disclosure would undermine the decision-making process [6] within the Standing Committee.

8. In support of its refusal, the Commission noted that the Standard Rules of Procedure for Standing Committees ("Standard Rules of Procedure for Committees") explicitly exclude that positions of individual Member States be disclosed [7] . The Commission further argued 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".

9. 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 has, repeatedly, not been endorsed in the Standing Committee. It argued that this was damaging to the survival of bees.

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



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

The Ombudsman's recommendation

11. In her recommendation [8], the Ombudsman considered 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 considered that the documents in question contain environmental information, as defined in the Aarhus Regulation. For this reason also, broader access should be given.

12. The Ombudsman concluded that the exception invoked by the Commission for refusing to grant public access to the emails containing the positions of Member States' representatives must be applied all the more restrictively.

13. The Ombudsman did not consider the Commission's argument that the disclosure of the emails containing Member State positions is contrary to the Standard Rules of Procedure for Committees [9] to be decisive. She accepts that these rules state that the positions of individual Member States should not be disclosed. However, the Rules of Procedure simply reflect a choice made by the Commission as to how to organise the work of the Committees. It can choose to change these rules of procedure at any time. The Commission could only make a convincing argument that it is ‘rule-bound’ not to release the positions of Member States if the rule was contained in EU legislation. In this regard, the Ombudsman noted that the disclosure of Member State positions is not prohibited by the applicable EU legislation, namely the Comitology Regulation.

14. Essentially, the position of the Commission is that it cannot disclose the documents because it chose to put in place, through the Rules of Procedure, a system of non-disclosure. This is a self-fulfilling, circular argument. By contrast, rules on public access to documents are contained in specific legislation, namely Regulation 1049/2001 and, for environmental information, Regulation 1367/2006.

15. The Ombudsman also found that the Commission has not demonstrated how Member State representatives would be subject to external pressure in the event of disclosure of the documents. Nor has it shown how, if any pressure were imposed, the capacity of Member States to act fully independently would be affected. The Ombudsman notes that we are referring here not to individuals, but to Member States, whose elected governments are well used to handling issues which are subject to serious and vibrant public debate.

16. The Ombudsman does not agree that disclosure of the documents would seriously affect, prolong or complicate the proper conduct of the decision-making. [10]

17. In light of the above, the Ombudsman found that the Commission's refusal to grant public access to the positions of Member States on the draft bee guidance constituted maladministration. She therefore made the following recommendation (in accordance with



Article 3(6) of the Statute of the European Ombudsman):

“ 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 .”

18. In its reply to the Ombudsman’s recommendation, referring both to Article 13 of the Standard Rules of Procedure for Committees and to the Comitology Regulation, the Commission repeated its argument that the rules applicable to comitology procedures preserve the confidentiality of the individual positions of Member States. The Commission concluded that it is therefore not in a position to disclose the Member States’ positions on the draft bee guidance.

19. The Commission explained that it has made proposals to amend the Comitology Regulation to further increase transparency and accountability, in particular by making public the votes of Member States representatives at Appeal Committee. It also noted that it will continue to reflect on how to ensure further transparency in comitology procedures, bearing in mind the differences between the legislative decision-making process and the decision-making process pertaining to the adoption of non-legislative acts.

20. The complainant commented on the Commission’s reply, saying it “ *deplores that the Commission decided to ignore the Ombudsman’s recommendation .*”

21. The complainant stressed the fact that the confidentiality rules in the Standard Rules of Procedure are not mentioned in the Comitology Regulation. It said that, if the Commission considers the confidentiality provisions in the Rules of Procedure to be in compliance with the Comitology Regulation, this would “ *constitute a clear undermining of citizens’ right to access documents* ” under Regulation 1049/2001. The complainant said that it regrets that the Commission did not address this crucial issue in its reply to the Ombudsman’s recommendation.

22. The complainant also stressed that the adoption of the bee guidance is of utmost importance for the protection of bees in the EU. It said that, in a context where pollinators are undergoing a dramatic decline, transparency regarding Member State positions would allow citizens to understand why the EFSA draft bee guidance has been discussed at least 26 times in the Standing Committee since 2013 without any agreements being reached. The preservation of biodiversity should never be compromised by confidentiality provisions. It said that the Commission’s position creates a situation where Member States are not accountable to their citizens and this constitutes a threat to the democratic process.

The Ombudsman’s assessment after the recommendation

23. The Ombudsman is disappointed with the Commission’s reply to her recommendation. The Commission has not addressed the arguments set out in the recommendation, in particular concerning the Ombudsman’s view that the disclosure of Member State positions on the draft bee guidance is not contrary to the Comitology Regulation.

24. The Ombudsman maintains her view that the Commission was wrong to refuse public disclosure to the requested documents containing Member State positions on the draft bee



guidance.

25. Under the EU Treaties, every citizen has “ *the right to participate in the democratic life of the Union* ” [11] . Therefore, EU decisions must be taken “ *as openly and as closely as possible to the citizen* ” [12] .

26. Ensuring that citizens are able to follow the progress of how rules are adopted is a cornerstone of EU democracy. The possibility for citizens to scrutinise and be made aware of all the information forming the basis for “EU legislative action”, understood broadly, is a precondition for the effective exercise of their democratic rights. The Ombudsman understands that the decisions adopted in comitology, which impact on how legislation is understood and applied, fall within this broad definition of EU legislative action.

27. The importance of the right to participate in the democratic life of the EU goes beyond questions as to what constitutes a legislative act and whether delegated acts adopted in the framework of the Comitology Regulation can be considered to fall within this category. The democratic nature of the European Union requires that citizens are in principle able to scrutinise all action taken by the EU that have an impact on them.

28. As set out in the Ombudsman’s recommendation, the requested documents contain information on a measure likely to affect biological diversity. Therefore, the content clearly qualifies as environmental information. EU policy action that has an impact on the environment affects every EU citizen and resident. This has been recognised in the Aarhus Regulation.

29. Bees and other pollinators are critically important for the environment, sustaining biodiversity by providing essential pollination for a wide range of crops and wild plants. In view of the important ecological and economic value of bees, there is a need to monitor and maintain healthy bee stocks, not just locally or nationally, but globally. Over the past 10 to 15 years, beekeepers have been reporting unusual weakening of bee numbers and colony losses. The requested documents contain Member States’ positions on a draft measure aiming to provide guidance to industry and Member States on the implementation of the EU legislation on pesticides. It concerns the risks that pesticides impose for bees. The draft bee guidance is therefore relevant for the protection of bees in the EU. This guidance document has been discussed in the Standing Committee on Plants, Animals, Food and Feed many times since it was issued by EFSA. However, due to the absence of agreement among Member States in the committee, the adoption of the bee guidance has been delayed since 2013.

30. The public disclosure of the requested documents would enable EU 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. Understanding which positions the different representatives of Member States hold is vital in a democratic system which is accountable to its citizens.

31. The Commission’s reply to the Ombudsman’s recommendation is based on the premise that the rules made under the Comitology Regulation itself preserve the confidentiality of the



individual positions of the Member States. 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.

32. This means that the confidentiality provisions in the comitology rules of procedure, including 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.

33. The Ombudsman welcomes the Commission's commitment in its reply to increase transparency and accountability of comitology procedures. In her view, compliance with her recommendation in this case would be a significant step towards the fulfilment of that commitment. It would give EU citizens greater trust and confidence in the Commission's delivery of that commitment. No amendment to the Comitology Regulation is required. Indeed, Recital 19 and Article 9(2) of that Regulation make clear that public access to information on committee proceedings should be ensured in accordance with the EU law on public access to documents.

34. The Ombudsman notes that rules of procedure cannot take legal precedence over a Regulation . Any rules of procedure therefore have to comply not only with the Comitology Regulation, but also with the EU rules on access to documents. The Ombudsman therefore considers that the Commission cannot avail itself of the rules of procedure applicable to comitology procedures to deny public access to documents if primary or secondary EU law obliges it to grant public access to those documents.

35. It follows from the above that Regulation 1049/2001 is fully applicable and the exception pertaining to the decision-making process must be interpreted narrowly. As explained in the Ombudsman's recommendation, the Commission has not established that any 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 affect the decision-making process. In any event, given the critical importance of bees for the environment, the decline in bee numbers and colony losses in recent years, the relevance of the draft bee guidance in this respect and the fact that Member States have not been able to come to an agreement for the past five years, the Ombudsman considers that there is a **clear overriding public interest in disclosing the requested documents.**

36. The Ombudsman has previously inquired into the Commission's refusal to disclose Member States' positions expressed in the context of comitology procedures. [13] She has expressed her regret that the Commission refuses access to documents containing Member States' positions in the context of comitology procedures that have an impact on EU legislation and should therefore be open to scrutiny by citizens in a democratic society. The Ombudsman calls upon the Commission to change this practice and live up to the obligations set out in the Treaty on European Union, in particular the principles set out in Article 10 TEU.



37. On the basis of the above, the Ombudsman reaffirms her conclusion that the Commission's refusal to grant public access to the Member States' positions on the draft bee guidance constituted maladministration.

Conclusion

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

The Ombudsman is not satisfied with the European Commission's reply to her recommendation. The Ombudsman reiterates her recommendation that 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 in her recommendation and in this decision.

The Ombudsman expects the Commission to live up to its commitment to increase the transparency of comitology procedures and will continue to monitor progress closely.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 03/12/2019

[1] 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]

[2] 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]

[3] Article 77 of Regulation 1107/2009.

[4] 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]

[5] “*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]

[6] Exception to the right of access according to Article 4(3) of Regulation 1049/2001.

[7] 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].

[8] The Ombudsman's recommendation is available at:
<https://www.ombudsman.europa.eu/en/recommendation/en/113624> [Link]

[9] [Standard Rules of Procedure for Committees - Rules of Procedure for the \[Name of the committee\] committee](#) [Link].

[10] See in this respect, judgment of the Court of Justice (Grand Chamber) of 4 September 2018 in Case C-57/16, ClientEarth v Commission:
<http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en> [Link], para. 101.

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

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

[13] See e.g. decision in case 1275/2018/THH, available at
<https://www.ombudsman.europa.eu/en/decision/en/113361> [Link].