

Decision in case 1560/2019/SRS on the European Commission's decision to ban the sale of food containing residues of buprofezin

Decision

Case 1560/2019/SRS - **Opened on** 13/02/2020 - **Decision on** 13/02/2020 - **Institution concerned** European Commission (No maladministration found) |

The case concerned the timing of the entry into force of a ban on the sale of food containing residues of a pesticide. The complainant, who represents importers of basmati rice, wanted to delay the entry into force of the ban to allow enough time to dispose of stocks of rice produced using the pesticide.

The Commission has wide discretion when deciding upon the measures necessary to protect public health. It explained why it was necessary to introduce the ban. It also gave stakeholders adequate advance notice of the entry into force of the ban. Thus, the Ombudsman found no maladministration.

Background to the complaint

1. The complainant, an organisation that represents rice millers, submitted a complaint about the date of the entry into force of an EU-ban on the sale of basmati rice [1] containing residues of buprofezin. Buprofezin is a chemical contained in some pesticides.
2. The Commission approved buprofezin as an active substance in pesticides in 2011. [2] However, in February 2017, after safety concerns were raised, the Commission adopted a Regulation banning the use of pesticides containing buprofezin on food and feed crops. [3] The ban came into full effect on 21 June 2018. [4]
3. The Commission then adopted a Regulation banning the sale of food containing any significant residues of buprofezin. [5] The ban applied from 13 August 2019. The complainant considers that the Commission should have allowed a longer period so as to allow for the disposal of stocks of basmati rice produced using pesticides containing buprofezin.

The inquiry



4. The Ombudsman opened an inquiry into whether the Commission should have allowed for a transitional period when it banned the sale of food containing residues of buprofezin.

5. In the course of the inquiry, the Ombudsman met with the Commission to clarify aspects of the complaint. The Ombudsman sent the complainant a report of this meeting and received the comments of the complainant regarding the Commission's views.

Arguments presented to the Ombudsman

Arguments presented by the complainant

6. The complainant claims that, in light of the Commission's past practices, it had a legitimate and reasonable expectation that the Commission would allow for a grace period during which stocks of basmati rice containing residues of buprofezin could be sold.

7. The complainant also argued that the Commission treated comparable situations differently. Whereas farmers were allowed to use buprofezin-based pesticides for a period after the Regulation banning the use of such pesticides was adopted, importers of basmati rice were granted no such grace period.

8. The complainant also stated that a grace period was granted for the sale of food containing residues of similar chemicals. [6]

Arguments presented by the Commission

9. The Commission explained that farmers had enough time to sell products that had been sprayed with pesticides containing buprofezin. The Commission noted that pesticides containing buprofezin could no longer be used on crops from June 2018. The sale of food containing residues of buprofezin was banned more than one year later (from August 2019) .

10. Moreover, the ban on the sale of food containing buprofezin only became applicable six months and twenty days after the publication of the ban on the sale of food containing buprofezin.

11. In that context, the Commission did not consider it necessary to grant even more time for the disposal of food stocks containing buprofezin.

12. The Commission added that it had notified the World Trade Organisation (WTO) of its intention to restrict the use of pesticides containing buprofezin in 2016, and of its intention to lower the MRL in July 2018. Therefore, economic operators worldwide could, and should, have foreseen that limits would be set on the sale of food containing buprofezin.



13. The Commission added that since it took the view that a high level of consumer protection should apply in relation to food containing buprofezin, no transitional period was set for food containing residues of buprofezin. [7]

14. The Commission added that, in its view, the complainant is simply unhappy with the fact that the Commission currently applies a higher level of protection than it did a few years ago. The Commission noted that it has recently adopted a stricter approach regarding the use of pesticides. This stricter approach reflects demands for a higher level of protection for human and animal health, and for the environment.

The Ombudsman's assessment

15. The Commission has explained that in the past few years it has taken a stricter approach regarding measures aimed at protecting human and animal health, and protecting the environment.

16. The Commission is entitled to take such a policy decision. It also has a broad margin of discretion when deciding on the measures necessary to protect these important interests.

17. The Commission has explained that granting a grace period was not appropriate given the risk to human health. In doing so, the Commission has explained how it balanced the different interests at stake.

18. The Ombudsman considers that the Commission did not exceed its margin of discretion.

19. The Commission also informed all stakeholders of its intentions in good time. Sellers of food containing residues of buprofezin were aware of the ban on the use of pesticides in 2017, and the ban on the sale of food containing traces of buprofezin in 2018. They had until August 2019 to dispose of stocks of food containing residues of buprofezin. The fact that a longer period to dispose of stocks was not granted does not constitute maladministration.

20. The Ombudsman takes note of the fact that the complainant argues that products treated with other pesticides were treated less strictly. The complainant has not, however, provided evidence to support this statement. In any event, the Ombudsman considers that the Commission is entitled and is in fact required to take a decision based on the risk assessment that has been carried out for each pesticide. The fact that the Commission may consider that different products pose different risks, and that they thus merit different treatment, does not constitute maladministration.

Conclusion

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



There was no maladministration in this case.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 13/02/2020

Annex:

Regulatory framework for Maximum Residue Limits (MRLs) and pesticides

Active substances in plant protection products (pesticides or PPPs) are regulated under a two-stage procedure set out in **Regulation (EC) 1107/2009 ('the pesticides' regulation')** [8] . First, the approval of the active substance takes place at EU level under a procedure involving the European Commission. After some years, these substances are subject to a re-approval procedure. Second, a pesticide containing the approved active substance may be placed on the market or used only after **it has been authorised in the given Member State** .

The approval criteria for active substances provide that residues of the pesticides shall not have any harmful effects on human health or the environment. Where residues can be harmful to health, the environment or drinking water, there must be ways of measuring them. Thus, the approval file must include, where relevant, a copy of an application for a **Maximum Residue Level (MRL)** . [9] In practice, **the Commission sets MRLs after having approved an active substance** . [10]

When it is decided that a substance should no longer be approved, the pesticides' regulation allows for "**grace periods**" . During grace periods, it is possible to sell and distribute the product for up to six months, while existing stocks of pesticides can be disposed of, stored and used for up to a year . [11] Grace periods must take into account the normal period of use. In this case, Regulation 2017/360 established a transitional period ending on 21 June 2017 and allowed Member States to establish grace periods until 21 June 2018 at the latest.

MRLs are regulated in Regulation (EC) No 396/2005 (**'the MRL regulation'**). [12] This regulation establishes a mechanism for changes to MRLs when the authorisation of a given pesticide is revoked, which can include **transitional measure periods** . [13] The regulation also lays down the possibility for an urgency procedure. [14]



According to technical guidelines adopted by the responsible Commission department, setting MRLs must be notified to the WTO under the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).

[1] Basmati rice is produced in India and Pakistan.

[2] Under Regulation (EU) No 540/2011:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011R0540> [Link]

[3] Commission implementing Regulation (EU) 2017/360:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R0360> [Link]

[4] For more information on how pesticides are approved and maximum residue levels (MRLs) set in the EU, see annex.

[5] Deleting an MRL implies that its maximum value is set at 0.01 mg/kg.

[6] It referred to pencycuron, which is another substance used in pesticides.

[7] A transitional period was applied to other active substances under the same regulation, because they were deemed to pose a lower risk.

[8] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009R1107>

[9] See Article 8(1)(g) of Regulation (EC) No 1107/2009 and Article 7 of Regulation (EC) No 396/2005 on Maximum Residue Limits.

[10] This was the subject of complaint 2000/2015/ANA to the Ombudsman.

[11] Article 46 of Regulation (EC) 1107/2009.

[12] This regulation defines MRLs as “the upper legal level of a concentration for a pesticide residue in or on food or feed set in accordance with this Regulation, based on good agricultural practice and the lowest consumer exposure necessary to protect vulnerable consumers”.

[13] See Article 49(1) and (2) of Regulation (EC) No 396/2005.

[14] Article 45(5) of Regulation (EC) No 396/2005.