

## **Proposal of the European Ombudsman for a solution in case 1527/2020/MAS on the European Commission's refusal to grant public access to documents regarding the origin and amount of used cooking oil reported to the Commission by voluntary certification schemes under the Renewable Energy Directive**

Solution - 04/03/2021

**Case 1527/2020/DL - Opened on 24/09/2020 - Recommendation on 08/11/2021 - Decision on 14/03/2022 - Institution concerned** European Commission ( Maladministration found ) |

Made in accordance with Article 3(5) of the Statute of the European Ombudsman [1]

### **Background to the complaint**

1. The 2009 Renewable Energy Directive (RED) [2] sets out targets for Member States for the production of energy from renewable sources. In order to achieve these targets, the RED privileges, among other things, certain waste-based types of feedstock such as used cooking oils (UCO) for the production of biofuels [3] by allowing them to be counted twice towards the relevant targets. [4]

2. In order to verify compliance with the sustainability criteria set out in the RED, the directive provides for the creation of so-called voluntary certification schemes. [5] Voluntary schemes are private entities that are recognised by the European Commission or EU Member States. [6] These voluntary schemes submit yearly reports to the Commission on the production and import of feedstock and biofuels that they certify. The reporting template that the Commission asks the voluntary schemes to use foresees the submission of the following information: the type of product, the country of origin, the feedstock, the calendar year, and the value in tonnes of biofuels and feedstock. One of the types of feedstock that is included in the reports is UCO. [7]

3. The complainant is an Irish citizen. He is concerned about possible fraud in the UCO sector, which he says could be verified if the reported volumes of UCO were greater than production capacities. This would indicate a mislabelling of other oils as UCO. To verify this, he asked the Commission for public access [8] to a *'list of all Countries of Origin of Used Cooking Oil (UCO) for the years 2016, 2017, 2018 and 2019, together with the volumes of UCO feedstock collected for each Country of Origin for each year as reported to the European Commission by all*



*voluntary certification schemes for biofuels sustainability under the Renewable Energy Directive.'*

4. The Commission replied that it does not hold a document that would correspond to the complainant's request. It stated that, while the data requested is collected by the Commission, it does not produce documents extracting the information requested by the applicant. The Commission provided the complainant with a link to a report prepared by a contractor, in which information provided by voluntary schemes is analysed, but which does not contain the details that the complainant requested access to. [9]

5. The complainant asked the Commission to review its refusal. [10] He argued that, even if the Commission does not hold documents that are specific to his request, it should be able to access the information in a format that can be easily turned into a document.

6. In the absence of a reply to his confirmatory application, the complainant turned to the Ombudsman in September 2020.

## The inquiry

7. The Ombudsman opened an inquiry to determine whether the Commission holds any documents that would correspond to the complainant's request.

8. In October 2020, the Ombudsman's inquiry team held a meeting with the Commission and inspected a sample of the reports submitted to it by the voluntary schemes.

9. Shortly after the meeting, the Commission sent a confirmatory decision to the complainant in which it confirmed its initial position. The Commission clarified that, while it is in possession of reports submitted by the voluntary schemes, these reports do not: '*cover all certified materials, but only the amount of feedstock certified under each certified scheme and contain specific information on UCO, or - specifically circumscribe used cooking oil [...] as they extend to all feedstock.*'

## Arguments presented to the Ombudsman

10. The complainant argued that the Commission appears to hold *the information* which he had requested access to. To support this statement, he referred to several documents published by the Commission [11], by contractors working for the Commission [12], and by Member States [13], which contain certain information on origin and volumes of UCO. He gathers from these documents that the Commission should hold comprehensive data regarding his request. He further argued that if the Commission would - in fact - not hold the data that he requested, that would amount to a very serious breach of the Commission's duty under the RED.

11. In addition, he claimed that almost all UCO feedstock is reported by a single voluntary



scheme, namely the International Sustainability and Carbon Certification (ISCC), which would mean that almost all relevant data should be held by the Commission in the same electronic document. The complainant asserted that even if the Commission found the information it holds to be incomplete, access to the documents containing incomplete information would nevertheless be helpful for him.

**12.** During the meeting with the Ombudsman's inquiry team, the Commission confirmed that, while it does hold the data requested by the complainant, it does not hold this data in a single document.

**13.** The Commission noted that the right of public access to documents extends only to existing documents. The Commission said that it is not required to create new documents, [14] even by compiling information from a number of existing documents. [15] The Commission explained that data would have to be manually extracted from the reports held by the Commission in order to create a single document as requested by the complainant. This is not required under the EU rules on public access to documents.

**14.** In addition, the Commission pointed out that the documents concerned might contain information which could undermine the protection of commercial interests [16] They should therefore be protected under the EU rules on public access to documents.

## The Ombudsman's assessment

**15.** Having inspected the sample of documents provided by the Commission, the Ombudsman's inquiry team can confirm that the Commission is in possession of detailed information on the countries of origin and the volumes of UCO collected for each of the years for which the complainant requested access. The Commission is right that, for the most part, this data is spread over a number of documents. For some of the years for which the complainant requested access, it has been compiled into one document. It is therefore true that the Commission does not hold a single document that includes all the information requested by the complainant.

**16.** The Commission is also right to say that it is not obliged to produce a document as requested by the complainant by manually compiling the data it holds. The documents that the Ombudsman's inquiry team inspected do not allow for easy extraction of the data using pre-programmed search tools. [17]

**17.** However, while the complainant's request was for access to a single document, the Ombudsman understands that the complainant would be interested in receiving the information on the country of origin and volumes of UCO even if it was not compiled in a single document. In his comments on the report on the meeting between Commission representatives and the Ombudsman's inquiry team, the complainant said that he would be interested in obtaining access to "*information held by the Commission, even if incomplete, enabling stakeholders and policy makers to pursue due analysis.*"



**18.** The Commission should therefore consider giving access to all the documents that it holds that contain information on origin and volumes of UCO for the years 2016 to 2019. This would allow the complainant to extract the information that he is interested in without the need for the Commission to create a new document. Such an approach would be consistent with the purpose and spirit of Article 6(2) of Regulation 1049/2001, which states that if an application is not sufficiently precise, the institution shall assist the applicant in clarifying it. The Commission has clarified that it does not hold a single document that meets the needs of the complainant. However, it does hold a number of documents which contain at least some of the information needed by the complainant. The complainant, when informed that such documents exist, considered that access to them would be of use to him.

**19.** In this context, it would be for the Commission to assess whether there is information contained in these documents that is protected under the EU rules on public access and should therefore be redacted. When making this assessment, the Commission should take into consideration that the complainant sought access to documents containing “ *the volumes of UCO feedstock collected for each Country of Origin for each year as reported to the European Commission by all voluntary certification schemes for biofuels sustainability under the Renewable Energy Directive* ”. The volumes of UCO feedstock collected can be considered to be information relating to emissions into the environment (which the complainant seeks to help monitor the reduction of greenhouse gas emissions). [18] As such, the grounds for refusing access should be interpreted restrictively and an overriding public interest in disclosure shall be deemed to exist at least as regards the information deemed to relate to emissions into the environment. [19]

**Based on the above findings, the Ombudsman proposes that the Commission should review the documents it does hold containing the countries of origin and relevant volumes of production and import of used cooking oil for the period indicated by the complainant with a view to disclosing them.**

The European Commission is invited to inform the Ombudsman by 30 April 2021 of any action it has taken in relation to the above solution proposal.

Emily O'Reilly European Ombudsman

Strasbourg, 04/03/2021

[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] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion

of the use of energy from renewable sources and amending and subsequently repealing Directives

2001/77/EC and 2003/30/EC, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Directive 2009/28/EC on the promotion of the use of energy from renewable sources

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009L0028-20151005> [Link].

[3] Article 17 of Directive 2009/28/EC.

[4] See Annex IX of Directive 2009/28/EC.

[5] Article 18 of Directive 2009/28/EC, see also

[https://ec.europa.eu/energy/topics/renewable-energy/biofuels/voluntary-schemes\\_en](https://ec.europa.eu/energy/topics/renewable-energy/biofuels/voluntary-schemes_en) [Link].

[6] Article 18 of Directive 2009/28/EC.

[7] See

[https://ec.europa.eu/energy/topics/renewable-energy/biofuels/voluntary-schemes\\_en#documents](https://ec.europa.eu/energy/topics/renewable-energy/biofuels/voluntary-schemes_en#documents) [Link].

[8] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents,

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049> [Link].

[9] Review of voluntary scheme annual report,

[https://ec.europa.eu/energy/sites/default/files/navigant\\_2019\\_review\\_of\\_voluntary\\_scheme\\_annual\\_reports.pdf](https://ec.europa.eu/energy/sites/default/files/navigant_2019_review_of_voluntary_scheme_annual_reports.pdf) [Link].

[10] He made a so-called 'confirmatory application' pursuant to Article 7(2) of Regulation 1049/2001.

[11] <https://ec.europa.eu/eurostat/web/energy/data/shares> [Link].

[12] See above under footnote 7.

[13] For Ireland see

[https://www.nora.ie/\\_fileupload/457-20X0088%20-%20BOS%20Annual%20Report%20for%202019%20for%20publ](https://www.nora.ie/_fileupload/457-20X0088%20-%20BOS%20Annual%20Report%20for%202019%20for%20publ) [Link], for the UK see

<https://www.gov.uk/government/collections/renewable-fuel-statistics#latest-renewable-fuel-statistics> [Link].



[14] Judgment of the Court of Justice of 2 October 2014 in case C-127/13, *Strack v Commission* , paragraph 46, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-127/13%20P> [Link].

[15] Judgment of the Court of 11 January 2017 in case C-491/15P, *Typke v Commission* , paragraph 31, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-491/15> [Link].

[16] Article 4(2) first indent of Regulation 1049/2001.

[17] Judgment of the Court of 11 January 2017 in case C-491/15P, *Typke v Commission* , paragraph 36, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-491/15> [Link].

[18] See recital 1 of Directive 2009/28/EC.

[19] Article 6 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 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, <http://data.europa.eu/eli/reg/2006/1367/oj> [Link].