

Recommendation on the European Commission's refusal to grant public access to documents concerning compliance with biofuels sustainability criteria under the Renewable Energy Directive (case 1527/2020/DL)

Recommendation

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) |

The complainant, who works in the biofuels sector, stated that he wished to obtain this information to monitor possible widespread fraud in the UCO sector, which may have negative consequences on tropical forests, biodiversity, climate and the EU's domestic used oil collection and recycling sector.

The complainant sought public access to a list of all countries of origin of used cooking oil (UCO) for the years 2016 to 2019, together with the volumes of UCO feedstock collected for each country for each year, as reported by the voluntary certification schemes for biofuels sustainability to the European Commission under the Renewable Energy Directive.

The Commission said that it did not hold any document corresponding to the complainant's request.

The Ombudsman found that the Commission held detailed information on the countries of origin and the volumes of UCO collected. That information was not contained in a single document, but rather was spread over a number of documents. Since the complainant was interested in receiving the information requested even if it was not compiled into a single document, the Ombudsman proposed that the Commission should review the documents it does hold containing this information with a view to disclosing them.

The Commission did not accept this solution proposal.

The Ombudsman is both concerned and disappointed with the Commission's reply. Rather than taking the opportunity to ensure the complainant's fundamental right of access to documents, the Commission reiterated that it does not hold any documents corresponding to the request and refused to review the documents requested. The Ombudsman cannot but consider that the Commission's reply demonstrates a deliberate and inexplicable refusal to settle this case. This is particularly worrying in light of the concerns raised over the last years about the



environmental impact of the EU's import of UCO.

Consequently, the Ombudsman concluded that the Commission's refusal to review the documents amounted to maladministration. She made a corresponding recommendation.

Made in accordance with Article 4(1) of the Statute of the European Ombudsman [1]

Background to the complaint

1. The Renewable Energy Directive (RED) [2] of 2009 sets out targets for Member States as regards the production of energy from renewable sources. To achieve these targets, the RED favours the use of certain waste-based types of feedstock, such as used cooking oils (UCO), for the production of biofuels [3]. It does this by allowing these types of feedstock to be counted twice towards the relevant targets. [4]

2. The RED provides for the creation of 'voluntary certification schemes' in order to verify compliance with the sustainability criteria set out in the directive. [5] Voluntary schemes are private entities that are recognised by the European Commission or EU Member States. [6] They submit yearly reports to the Commission on the production and import of feedstock and biofuels that they certify. The reports include 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. UCO is one of the types of feedstock mentioned. [7]

3. The complainant asked the Commission for public access [8] to *"documents which contain the following information: 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, while it did collect such data, it did not hold a document that would correspond to the complainant's request. Specifically, it stated that it did not produce any documents that would "extract" the information requested by the complainant from the reports in the Commission's possession.

5. The complainant then asked the Commission to review its decision. [9] He stated that the information he requested is in the possession of the Commission in an easy to access format such as text file, simple database or excel sheet, and it would require no more than a few moments to copy it and make it available to him. He said that all the requested information is collected for the Commission by a single organisation called 'International Sustainability & Carbon Certification' (ISCC), which used a simple online system for collecting the data. He provided a link to the ISCC website [10] where it is stated that according to the Renewable Energy Directive each recognised voluntary certification scheme is obliged to send a report to the Commission every year. This report has to include the amounts of sustainable material (raw



materials and final biofuels) certified by the scheme in the previous calendar year. To fulfil this legal requirement, ISCC is obliged to collect the data from the ISCC System Users that were certified at any point in 2020.

6. In the absence of a reply, the complainant turned to the Ombudsman. The Ombudsman opened an inquiry into how the Commission dealt with the complainant's request. The inquiry team held a meeting with the Commission and inspected a sample of the reports submitted to it by the voluntary schemes. The Commission then also adopted a confirmatory decision, in which it confirmed its initial position.

The Ombudsman's proposal for a solution

7. Following the inspection of documents, the Ombudsman confirmed that the Commission holds detailed information on the countries of origin and the volumes of UCO collected for the years for which the complainant requested access. She noted that the Commission does not hold a single document that contains all the information requested, but that the information is spread over a number of documents.

8. Since the complainant indicated that he was interested in receiving the information concerned even if it was not compiled into a single document, the Ombudsman made the following proposal for a solution [11] :

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.

9. The Ombudsman considered that it was for the Commission to assess whether the information contained in these documents is protected under the EU rules on public access and should thus be redacted. Having said that, the Ombudsman found that the grounds for refusing access should be interpreted restrictively since the data on the volumes of UCO feedstock should be considered information relating to emissions into the environment. [12]

10. The Commission did not accept the Ombudsman's proposal for a solution.

11. In its reply, the Commission reiterated that it does not hold any document that corresponds to the complainant's request. The Commission did not disclose the documents containing the countries of origin, volumes of production and import of UCO since they were not covered by the original request. Moreover, it had understood that the complainant was not seeking access to a number of documents, each of which contained only some information.

12. The Commission also said that it recently published a new report [13] on the operation of the voluntary schemes, which includes data on the origin of used cooking oil that is used for the production of biofuels as well as an assessment of the data. If the complainant considers that the data published in this report are not sufficient, he could submit a new request for access to



the reports submitted to the Commission by the voluntary schemes in accordance with the Renewable Energy Directive.

13. The complainant considered it clear that the Commission does hold the documents corresponding to his request. He contended that the Commission had failed to assist him at any time during the process. [14] Instead, it unjustifiably delayed the process several times, which resulted in him waiting for the documents for over one year and four months. The complainant considered the Commission's proposal that he submit a new request for access unnecessary and time-consuming.

The Ombudsman's assessment after the proposal for a solution

14. The Ombudsman is disappointed that the Commission rejected her proposal.

15. The Commission does hold the data requested by the complainant, albeit not in a single document.

16. In its initial reply to the complainant, the Commission limited itself to stating what it did not have, namely a single document containing all of the information that the complainant wanted. It did not confirm what documents it did have. It also did not confirm that it had raw data in a database.

17. The complainant then responded explaining what he wanted and where it could be found (see paragraph 5 above). It is not in dispute that the Commission has the reports referred to by the complainant in his response to the initial application.

18. The EU rules on public access to documents provide that if an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so. [15]

19. The wording of this provision implies that an applicant has a right to clarify an application. It is also implicit in that provision that an institution is required to take due account of any clarifications made by the applicant in the course of the procedure.

20. In the present case, the complainant clarified what documents in the possession of the Commission he needed. Even though the Commission did not ask the complainant for clarifications, he provided the Commission with information to help it identify and locate these documents. These clarifications indicated clearly the documents the complainant wished to obtain access to.

21. The Commission did not take account of these clarifications in its confirmatory reply. This is at variance with the principles of citizen-friendliness and service-mindedness that govern the EU administration.



22. The Ombudsman made a proposal for a solution to give the Commission another opportunity to settle this case by reviewing the documents it held containing the information requested. Rather than taking the opportunity to ensure the complainant's fundamental right of access to documents, the Commission simply reiterated that it does not hold any document corresponding to the request. The Ombudsman cannot but consider that the Commission's reply demonstrates unwillingness to settle this case.

23. Concerning the Commission's statement in its reply to the Ombudsman's proposal for solution that the complainant could submit a new request for access to the reports submitted by the voluntary schemes, the Ombudsman recalls that the complainant submitted his initial request in April 2020. It would have been more helpful for the Commission to engage with the proposal for a solution rather than inviting the complainant to make a new request.

24. The complainant's stated reason for seeking access to the information requested was to monitor possible fraud in the UCO sector. The Ombudsman considers that disclosure of these documents would thus serve a public interest and could support the Commission's monitoring role. This is especially important given the public concerns raised over the last years concerning the import of UCO by the EU and its environmental impact.

25. Therefore, the Ombudsman finds that the Commission's failure to cooperate with the complainant and to take into account his clarifications concerning the documents to which he wished to obtain access constituted maladministration .

26. The Ombudsman calls on the Commission, one more time and in the interest of showing its commitment to give full effect to the right of public access to documents and the principles of citizen-friendliness and service-mindedness, to review the documents at stake with a view to disclosing them.

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the European Commission:

The European Commission should cooperate with the complainant, taking into account his clarifications and review the documents it holds 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 and the complainant will be informed of this recommendation. In accordance with Article 4(2) of the Statute of the European Ombudsman, the European Commission shall send a detailed opinion by **4 February 2022** .



Emily O'Reilly European Ombudsman

Strasbourg, 08/11/2021

[1] Available at:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.253.01.0001.01.ENG&toc=OJ%3AL%3
[Link].

[2] Directive 2009/28/EC on the promotion of the use of energy from renewable sources,
available at:

<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/renewableenergy/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
[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] He made a 'confirmatory application' pursuant to Article 7(2) of Regulation 1049/2001.

[10] <https://www.iscc-system.org/> [Link].

[11] For further information on the background to the complaint, the parties' arguments and the
Ombudsman's inquiry, please see the full text of the Ombudsman's proposal for a solution,
available at: <https://www.ombudsman.europa.eu/en/doc/correspondence/en/145658> [Link].

[12] Article 6 of Regulation 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,



<http://data.europa.eu/eli/reg/2006/1367/oj> [Link].

[13]

<https://op.europa.eu/en/publication-detail/-/publication/86eb1ce8-11b5-11eb-9a54-01aa75ed71a1>
[Link].

[14] In line with Article 6(2) of Regulation 1049/2001.

[15] Article 6(2) of Regulation 1049/2001.