

## Report on the meeting of the European Ombudsman's inquiry team with the European Commission's representatives

Correspondence - 15/10/2021

**Case** 1170/2021/OAM - **Opened on** 05/07/2021 - **Decision on** 01/03/2022 - **Institution concerned** European Commission ( No maladministration found ) |

**COMPLAINT** : 1170/2021/OAM

**Case title** : The European Commission's refusal to give full public access to documents concerning statistical data on pesticide active substances reported by Spain

**Date** : Friday, 15 October 2021

**Location** : Videoconference

### Present

*European Commission Eurostat*

Director (Sectoral and regional statistics)

Head of Unit (Agriculture and Fisheries)

Deputy Head of Unit (Agriculture and Fisheries)

Head of Unit (Legal affairs; Document management)

Deputy Head of Unit (Legal affairs; Document management)

Legal Officer (Legal affairs; Document management)

*European Commission Secretariat-General*

Deputy Head of Unit (Transparency, Document Management & Access to Documents)



Legal and Policy Officer (Transparency, Document Management & Access to Documents)

Senior Expert - Coordinator for inter-institutional relations (Ethics, Good Administration & Relations with the European Ombudsman)

*European Ombudsman Directorate of Inquiries*

Fergal O'REGAN, Chief Legal Expert

Jennifer KING, Legal Expert

Oana MARIN, Inquiries Officer

Michaela GEHRING, Inquiries Officer

Viola PENDL, Inquiries Trainee

## **Purpose of the meeting**

The meeting was held in the context of an inquiry into a complaint that the Commission did not provide full public access to documents relating to statistical results on pesticides active substances transmitted by Spain to the Commission for the years 2011, 2012, 2013 and 2018. The purpose was to obtain further information on the Commission's decision not to fully disclose the documents.

## **Introduction and procedural information**

The participants introduced themselves and the European Ombudsman's inquiry team thanked the Commission for agreeing to the meeting. The inquiry team outlined the legal framework that applies to inspection meetings held by the Ombudsman, in particular, that the Ombudsman would not disclose any information identified by the Commission as confidential without the Commission's prior consent.

The inquiry team explained that a report on the meeting would be drawn up and that the draft would be sent to the Commission for review to ensure it was factually accurate and complete. The meeting report would then be finalised and provided to the complainant for any possible comments.

## **Information exchanged**



## General information

The Commission representatives explained that the confirmatory decision, which led to partial disclosure of the requested documents, was adopted taking into account different sets of rules, including Regulation 1049/2001 [1], the Aarhus Regulation [2], and the rules on the protection of statistical confidentiality. [3]

The Commission representatives emphasised the importance of the principle of statistical confidentiality, which is the foundation for producing statistics at EU level. Member States communicate statistics to the Commission under this principle, allowing in turn for data to be published, including on pesticides and other environmental information. The disclosure of data flagged by the Member State as confidential, against the explicit agreement of the data originator, would negatively affect the working relations with the national authorities. This would require overruling the explicit position of the Member State concerned based on solid legal arguments.

In this case, the Commission outlined the need to interpret the principle of transparency in conformity with the principle of statistical confidentiality. As regards the redacted parts of the documents, the Commission considered that the public interest is best served by protecting the principle of statistical confidentiality. The Commission did not find grounds to overrule the objections of the Spanish authorities from which the documents originate.

## On the application of the Aarhus Regulation

The inquiry team asked in what way the Commission took into account the application of the Aarhus Regulation given that the Regulation creates a presumption of overriding public interest in the context of information relating to emissions into the environment. In particular, recital 28 of Regulation 223/2009 and recital 12 of Regulation 1185/2009 [4] mention specifically that the rules on statistical confidentiality should apply “*without prejudice*” to the Aarhus Regulation.

The Commission representatives stressed that partial access to the requested documents had been granted following consultation with the Member State that had provided the information. Further, the Commission stated that there was no guidance or case law that could help determine how to apply the Aarhus Regulation in conjunction with the rules on statistical confidentiality. The Commission representatives explained that they had taken these recitals into account, but emphasised that at the same time Regulation 223/2009 prohibits the use of confidential data for purposes other than statistical purposes which is paramount to maintaining the trust of the parties providing the data [5].

The Commission had tried to strike the correct balance between the different interests at stake. The outcome of this process was that the widest possible access was granted, including for instance information concerning the active substance ‘glyphosate’.

The Commission has also consulted the Spanish authorities which had provided the statistical



data at issue. At the initial stage, the Spanish authorities opposed disclosure of the requested documents. At the confirmatory stage, the Commission conveyed the arguments of the applicant and asked the national authorities to consider all aspects, including the EU's rules on public access to documents, Article 6(1) of the Aarhus Regulation, relevant case law, and the passage of time. The Spanish authorities agreed that some data could be disclosed, but opposed the disclosure of data on the basis of statistical confidentiality - namely, the respective data originated from only one or a few companies, and its disclosure would allow for their identification. The Commission considered whether the Member State had provided properly reasoned objections and found no grounds to question its assessment.

## On the need to protect commercial interests

[6]

The inquiry team asked how the Commission had verified the application of the exception under Regulation 1049/2001. In particular, whether the passage of time had been taken into account when the Commission assessed if data from 2011-2013 was still commercially sensitive today.

The Commission representatives replied that the Commission had asked the national authorities to consider all aspects since it is the Member State that gathers the data and transmits it to the Commission. In this case, the Spanish authorities' assessment was that the respective data should remain confidential.

The representatives of the Commission added that the classification of data as being confidential statistical information is not limited in time according to the applicable rules.

In addition, the Commission confirmed that it had made no contact with the statistical units (the Commission does not know the identity of the statistical units) nor did the Commission request the Member State to contact the statistical units for their view as to whether the redacted data remained commercially sensitive or for their consent to disclose that data. The Commission could not request the agreement of each of the companies concerned, as this role belongs to the national statistical authority from which the information originates.

## On the information contained in the documents

The inquiry team asked about the confidentiality marking in the disclosed documents. The Commission representatives followed-up on this question after the meeting as follows:

*"Data flags are an important part of the data delivery in addition to numerical values. The flags have standard meanings defined in the SDMX (Statistical Data and Metadata eXchange) rules. More information can be found here ( [https://sdmx.org/?page\\_id=3215](https://sdmx.org/?page_id=3215) ).*

*The flags are classified in two categories: observation status and confidentiality status (two different columns in the data transmission file).*



## Confidentiality status

*For pesticide statistics three different flags are used to mark data confidentiality for incoming data files:*

- A: Primary confidentiality due to small counts. A cell is flagged as confidential if less than  $m$  units ("too few units") contribute to the total of that cell. The limits of what constitutes "small counts" can vary across statistical domains, countries, etc. For Spain this is 1-3 units.*
- G: Primary confidentiality due to dominance by one or two units. This is used when one or two units account(s) for more than  $x$  % of the total of a cell. The value of  $x$  can vary across statistical domains or countries, be influenced by legislation, etc. For Spain it is 85%-90% depending on a year.*
- D: Secondary confidentiality set and managed by the data sender: Used by the sender of the data to flag (beyond the confidential statistical information) additional observations in the dataset so that the receiver knows that he/she should suppress these observations in subsequent stages of processing (especially dissemination) in order to prevent third parties to indirectly deduct the observations that are genuinely flagged with "C".*

*These flags help Eurostat to understand what is the reason for the data confidentiality and how/if the data can be aggregated and published. After the data treatment these three flags are converted into C-flags, which means 'Confidential statistical information': Confidential statistical information (primary confidentiality) due to identifiable respondents. Measures also should be taken to prevent not only direct access, but also indirect deduction or calculation by other users and parties, probably by considering and treating additional observations as "confidential" (secondary confidentiality management). After the data treatment A, G and D flags are not visible in the publically disseminated data on Eurostat's website.*

*These flags were introduced after the consultation of the Agro-environmental statistics Working Group in December 2017. Eurostat proposed to introduce the new flags starting from 2016 data transmission All Member States that answered to the consultation agreed to introduce new confidentiality flags in 2016 pesticides sales data transmission.*

## Observation status

- M: Missing value; data cannot exist: Used to denote empty cells resulting from the impossibility to collect a statistical value (e.g. a particular active substance not in use in the country) "*

In general, the Commission representatives noted that based on the reporting done by the Member States, the Commission already publishes aggregated data on the quantities of sold pesticides and active substances. It is in the public interest to keep receiving this data from the national authorities and continue making it public in an aggregated way. This is why preserving statistical confidentiality is so important. There are also ongoing discussions with the co-legislators on improving the statistics on pesticides. [7]



## Conclusion of the meeting

The Ombudsman's inquiry team thanked the Commission representatives for their time and for the explanations provided, and the meeting ended.

Brussels, 15 October 2021

Fergal O'Regan Oana Marin

Chief Legal Expert Inquiries Officer

[1] 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]

[2] 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:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R1367> [Link]

[3] In accordance with Chapter V of Regulation 223/2009 on European Statistics:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009R0223> [Link]

[4] Regulation 1185/2009 concerning statistics on pesticide:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009R1185> [Link].

[5] Recital 23 of Regulation 223/2009 provides that “[t]he confidential information which the national and Community statistical authorities collect for the production of European statistics should be protected, in order to gain and maintain the confidence of the parties responsible for providing that information”. Recital 27 of the same Regulation provides that “[t]he use of confidential data for purposes that are not exclusively statistical, such as administrative, legal or tax purposes, or for the verification against the statistical units should be strictly prohibited”.

[6] In accordance with Article 4(2), first indent of Regulation 1049/2001.

[7] See <https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-saio> [Link] and [https://eur-lex.europa.eu/legal-content/SV/ALL/?uri=PI\\_COM:Ares\(2021\)2206803](https://eur-lex.europa.eu/legal-content/SV/ALL/?uri=PI_COM:Ares(2021)2206803) [Link]