

Decision on the European Commission's refusal to give full public access to documents concerning statistical data on pesticide active substances reported by Spain (case 1170/2021/OAM)

Decision

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

The complainant sought public access from the European Commission to documents containing statistical data, reported by the Spanish authorities, on active substances in pesticides. The Commission granted access to only parts of the four documents it identified as falling under the request. It refused access to the rest, invoking exceptions under the EU's rules on public access to documents, and arguing that disclosing the redacted parts would undermine the commercial interests of companies from which the data was collected. The Commission also argued that the data was covered by the principle of confidentiality set out in the EU rules on statistic gathering.

Based on an inspection of the documents in question, the Ombudsman considered that the redacted information related to substances intended to be released into the environment. According to the EU rules on access to environmental information (the Aarhus Regulation) and related case-law, there is an overriding public interest in disclosing such information.

The Ombudsman questioned the Commission's position that the principle of statistical confidentiality prevails over the transparency of information relating to emissions into the environment. She was not convinced the Commission had given full effect to the rules set out in the Aarhus Regulation. However, the Ombudsman took the view that these issues would be best addressed by the EU legislators which are currently revising the applicable legislation and therefore closed the inquiry, committing to bring the matter to their attention.

Background to the complaint

1. The 'Pesticides Statistics Regulation' sets out a common framework for the systematic production of EU statistics on sales of pesticides. [1] According to this framework, Member States collect data on pesticides at national level and transmit the statistical results to the



European Commission. The Commission (Eurostat) then publishes aggregated data on quantities of pesticides sold in the EU. The published data is organised by major groups of substances, such as fungicides, herbicides and insecticides, [2] and not by individual active substances. [3] This is done in accordance with rules on European statistics [4] to avoid the release of any confidential data, namely data that would allow statistical units to be identified. [5]

2. In June 2020, the complainant, a Spanish environmental organisation, Ecologistas en Acción, requested public access to documents containing statistical information transmitted by Spain to the Commission concerning pesticides active substances [6] for the years 2011, 2012, 2013 and 2018. The request was made in accordance with the EU rules on public access to documents (Regulation 1049/2001) [7] and access to environmental information (Aarhus Regulation). [8]

3. In July 2020, the Commission replied. It identified four documents as falling within the scope of the request, one for each year, all originating from Spanish authorities. Taking into account that the Spanish authorities opposed disclosure, the Commission refused access to the documents in their entirety. It invoked an exception provided for under the EU rules on public access to documents, namely the need to protect commercial interests of a natural or legal person. [9]

4. The complainant asked the Commission to review its decision (by making what is known as a 'confirmatory application').

5. In February 2021, the Commission adopted its confirmatory decision and granted access to parts of the four documents. The documents released show quantities of individual active substances under the major groups of substances. However, for specific active substances, the quantities were redacted. The Commission justified withholding those parts of the documents taking into account the position of the Spanish authorities, which again opposed disclosure of confidential statistical data, and based on the protection of commercial interests.

6. Dissatisfied with the partial access, the complainant turned to the Ombudsman in June 2021.

The inquiry

7. The Ombudsman opened an inquiry into the Commission's refusal to provide full public access to the requested documents.

8. In the course of the inquiry, the Ombudsman inquiry team inspected non-redacted versions of the documents and the consultations between the Commission and the Spanish authorities following the confirmatory application. The inquiry team also held a meeting with the Commission's representatives. [10] The complainant provided comments on the meeting report.



Arguments presented to the Ombudsman

9. The Ombudsman reviewed all the material provided and considered the arguments raised by the Commission and by the complainant.

By the Commission

10. The Commission said that its decision to partially refuse access took into account the EU rules on public access to documents - Regulation 1049/2001 and the Aarhus Regulation - as well as the rules on European statistics.

11. Since the documents came from a Member State, the national authorities concerned were consulted, in accordance with Regulation 1049/2001. The Spanish authorities opposed the disclosure of some statistics (quantities of certain active substances) that originated from a single or a limited number of suppliers, as disclosure would allow for their identification and thus would breach the principle of statistical confidentiality.

12. The Commission did not find grounds to question the assessment of the Spanish authorities. It therefore disclosed the documents but redacted the values indicated as confidential by the Spanish authorities.

13. The Commission said disclosing the redacted parts would *"reveal details about the volume of active pesticide put on the market by an economic operator (the statistical unit), thereby harming its commercial interests"*. Since there were only *"one or very few suppliers on the national market of each active substance"*, anyone could easily identify the statistics provider by linking the quantities of a specific active substance with *"data on authorisation holders"* (for putting on the market a specific substance).

14. The Commission agreed with the complainant that there was a certain interest in transparency of statistics on pesticides. However, such public interest was satisfied with the partial access provided, and there was no *"pressing need for the public to obtain the undisclosed parts of the requested documents, specifically"*. The Commission considered the public interest was better served by protecting the principle of statistical confidentiality and the commercial interests of the statistical units concerned.

15. The Commission emphasised the importance of the principle of statistical confidentiality in the meeting held with the Ombudsman inquiry team. It explained that this principle was 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.

16. Finally, the Commission noted that it was working on improving the legislation concerning statistics on pesticides. It had tabled a proposal for a regulation on statistics concerning agricultural input and output [11] which was currently being negotiated by the



European Parliament and the Council. [12]

By the complainant

17. The complainant said that the documents requested contain information relating to emissions into the environment. Under the Aarhus Regulation and according to EU case-law, any grounds for refusing full access should be interpreted in a restrictive way and a public interest in disclosure is always deemed to exist. [13] Therefore, the right to access such information should prevail over any confidentiality rules.

18. The complainant emphasised that there was an overriding public interest in disclosing the redacted parts of the requested documents. Knowing the quantities of pesticides placed on the market can lead to understanding the possible effect of their emission into the environment. It clarified that it was not seeking access to the identities of the individual economic operators.

19. In the complainant's view, the Commission incorrectly balanced the competing public interests in this case. It did not agree with the Commission's view that the public interest is better served by protecting statistical confidentiality, rather than by disclosing environmental information. In its comments on the meeting report, the complainant claims that the Commission's interpretation was based only on the fact that releasing the confidential statistical data, against the will of the Spanish authorities, would negatively affect the working relations with the respective Member State.

20. In addition, the complainant considers that the Commission did not properly justify how disclosing the withheld information would affect the commercial interests of the statistical units. It relied on a 'general presumption' that harm existed. The complainant also points out that some of the information requested concerned historical data, from the years 2011-2013.

21. In its comments to the meeting report, the complainant said that the Commission was not aware how statistics are gathered at national level or how confidentiality rules were applied. It cannot therefore ensure that what the Member States mark as confidential is in reality confidential according to the rules.

The Ombudsman's assessment

22. The Ombudsman shares the complainant's view that the documents in question contain 'environmental information' within the meaning of the Aarhus Regulation.

23. The Aarhus Regulation defines environmental information as including any information in written, visual, aural, electronic or any other material form on factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions,



discharges and other releases into the environment, affecting or likely to affect the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites. [14]

24. EU case-law has established that pesticides, and the active substances contained in pesticides, *“which, in the course of normal use, are intended to be released into the environment by virtue of their very function”*, are covered by the concept of ‘emissions into the environment’ under the Aarhus Regulation. [15] This means that an overriding public interest in disclosure is deemed to exist regarding the exceptions set out in Article 4(2) of Regulation 1049/2001, first and third indents, including the protection of commercial interests.

25. The Ombudsman further notes that the Aarhus Regulation aims to ensure that environmental information is progressively made available and is disseminated to the public in the widest possible manner. The purpose of such wide access is to promote more effective public participation in the decision-making process, thereby increasing the accountability of decision making and contributing to public awareness and support for the decisions taken. [16]

26. In a similar vein, the purpose underpinning the rules on pesticides statistics is to inform the public, to assess EU policies on sustainable development and to calculate relevant indicators on the risks for health and the environment related to pesticide use. [17]

27. The Commission currently publishes information on pesticides placed on the market in aggregated form. While the public is thus informed about the quantities of different major groups of pesticides sold yearly in the Member States, this publication does not extend to each individual active substance used in those pesticides.

28. In this case, the complainant asked specifically for documents relating to the quantities of each *individual* active substance. In its confirmatory decision, the Commission provided partial access to the documents requested, releasing more statistical data than what is already made publicly available either at national or EU level. It went beyond providing details of the major groups of pesticides and disclosed the quantities for those individual active substances where there was no risk of identifying the statistical units, either directly or indirectly. It redacted only those parts of the requested documents concerning quantities placed on the market where such a risk existed.

29. The Commission argued that the Member State from which the data originated opposed full disclosure of the requested documents and provided reasoned objections in that regard.

30. The Commission based its decision to partially refuse access on the exception under Regulation 1049/2001 for the protection of the commercial interests of the companies which provided the respective data. It argued that the companies agreed to provide the data under statistical confidentiality rules, that is, on the condition that it would be used



exclusively for statistical purposes and without any possibility they could be identified. The Commission claimed that revealing the identity of the statistical unit, and the volumes of substances they placed on the market, could harm their commercial interests.

31. The Ombudsman is not convinced by the Commission's reliance on the exception in Regulation 1049/2001 for the protection of commercial interests. The Commission has not shown how disclosing the quantities redacted would undermine the commercial interests of the statistical units. Moreover, several requested documents contain data that is more than five years old (the documents concerning the years 2011, 2012 and 2013). [18]

32. Even if harm to the commercial interests of the statistical units were to be demonstrated, an overriding public interest in disclosure is deemed to exist where the information requested relates to emissions into the environment (as explained above).

33. With regard to the Commission's emphasis on the importance of the principle of statistical confidentiality, the Ombudsman notes that the Pesticide Statistics Regulation explicitly states that it applies without prejudice to the Aarhus Regulation, [19] as do the general rules on European statistics. [20] It is regrettable that the Commission did not explicitly address this point in its confirmatory decision.

34. In light of the above, the Ombudsman finds it questionable for the Commission to conclude that the principle of statistical confidentiality prevails over the transparency of information relating to emissions into the environment. The risks and impacts of pesticides on the environment depend on their composition, including on the active substances they contain, but also on how they are used. Making available data relating to individual active substances would help the public, but also the authorities in charge of environmental policies, to better monitor and analyse the impact of these substances. The Ombudsman is therefore not convinced that the Commission has given full effect to the Aarhus Regulation.

35. That said, the Ombudsman understands that the Commission feels constrained by the existing legislation in force on statistics, notably its provisions on data confidentiality and aggregation. The Pesticides Statistics Regulation requires that the principle of statistical confidentiality is strictly observed. It sets out that confidential data may be used only for statistical purposes, and detailed statistics may not be disclosed where it would enable 'statistical units' to be identified (in this case: individual pesticides producers or sellers). [21]

36. The Commission itself, in its 2017 evaluation report on the implementation of the Pesticides Statistics Regulation, noted that the application of confidentiality rules decreases the value of the statistical information and that users' needs are not well served by the current legal basis. [22] Following a recommendation by the European Court of Auditors in 2020 - asking the Commission to improve the quality of statistics produced for environmental monitoring, *inter alia* by removing restrictive aggregation requirements to allow for more available, comparable and useful statistics to be published [23] - the Commission said it is exploring how to improve the legislation to this end.



37. The Commission thus acknowledges that there is an issue with the availability of statistics on pesticides. It has communicated these weaknesses to the European Parliament and the Council, and it has proposed a new regulation on statistics concerning the agricultural sector, including pesticides statistics.

38. It is not for the Ombudsman to assess the appropriateness of the EU legislation in place. However, in light of the above, she would like to point out that within the current legal framework, there is a conflict between the principle of statistical confidentiality, on the one hand, and the transparency of information relating to emissions into the environment, on the other. **She will bring this to the attention of the EU legislators .**

Conclusion

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

The Ombudsman finds it questionable for the Commission to conclude that the principle of statistical confidentiality prevails over the transparency of information relating to emissions into the environment. She is not convinced that the Commission has given full effect to the Aarhus Regulation. However, the Ombudsman feels this case raises issues that would be best addressed by the EU legislators.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 01/03/2022

[1] In accordance with Regulation 1185/2009 of the European Parliament and of the Council concerning statistics on pesticides, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009R1185> .

[2] The major groups are: *'fungicides and bactericides', 'herbicides, haulm destructors and moss killers', 'insecticides and acaricides', 'molluscicides', 'plant growth regulators'*.

[3] See Eurostat website:

https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Agri-environmental_indicator_-_consumption



[4] Regulation 223/2009 of the European Parliament and of the Council on European statistics, available at:

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

[5] Regulation 223/2009 on European statistics defines confidential data as: "...*data which allow statistical units to be identified, either directly or indirectly thereby disclosing individual information*". More information is available at:

<https://ec.europa.eu/eurostat/web/research-methodology/statistical-confidentiality> .

[6] **Active substances** – in the form of chemicals or microorganisms – are the essential ingredients in a pesticide that enable the product to do its job. The **pesticide** is the final product placed on the market. Apart from one or more active substances, a pesticide usually contains other ingredients that help to increase its efficacy and better protect the plant on which it is applied. More information is available at:

https://ec.europa.eu/food/plants/pesticides_en .

[7] 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> .

[8] Regulation 1367/2006 of the European Parliament and of the Council 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> .

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

[10] The report of the meeting is available at:

<https://www.ombudsman.europa.eu/en/doc/inspection-report/en/151500> .

[11] Proposal for a Regulation of the European Parliament and of the Council on statistics on agricultural input and output and repealing Regulations (EC) No 1165/2008, (EC) No 543/2009, (EC) No 1185/2009 and Council Directive 96/16/EC, COM/2021/37 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0037> .

[12]

<https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-saio> .

[13] The complainant referred to Article 6(1) of the Aarhus Regulation and to the Judgment of the General Court of 7 March 2019, *Antony C. Tweedale v European Food Safety Authority*, T-716/14, available at:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=211427&pageIndex=0&doclang=EN&mode>
, Judgment of the General Court of 7 March 2019, *Heidi Hautala and Others v European Food*



Safety Authority , T-329/17, available at:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=211426&pageIndex=0&doclang=EN&mode>

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[14] Article 2(1)(d)(i) and (ii) of Regulation 1367/2006.

[15] Judgment of the General Court of 7 March 2019, T-329/17, *Heidi Hautala and Others v European Food Safety Authority* , para. 88:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=211426&pageIndex=0&doclang=EN&mode>

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[16] Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission* , C-57/16, para. 98:

<http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en> .

[17] Recital 2 of Regulation 1185/2009 says: " *the Commission recognised the need for detailed, harmonised and up-to-date statistics on sales and use of pesticides at Community level. Such statistics are necessary for assessing policies of the European Union on sustainable development and for calculating relevant indicators on the risks for health and the environment related to pesticide use* ".

[18] See, in this regard, the judgment of the General Court of 23 September 2020, *Basaglia v European Commission* , T-727/19, paras. 71, 77, 79:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=231522&pageIndex=0&doclang=FR&mode>

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[19] Recital 12 of Regulation 1185/2009.

[20] Recital 28 of Regulation 223/2009.

[21] According to Recitals 8-10 and Article 3(4) of Regulation 1185/2009.

[22] See in particular point 5.1. of the Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EC) No 1185/2009 of the European Parliament and of the Council of 25 November 2009 concerning statistics on pesticides, COM/2017/0109 final

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0109&qid=1628690251909>

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[23] See recommendation 2 of the Special Report 05/2020: Sustainable use of plant protection products: limited progress in measuring and reducing risks

https://www.eca.europa.eu/Lists/ECADocuments/SR20_05/SR_Pesticides_EN.pdf .