European Ombudsman

Report on the meeting of the European Ombudsman inquiry team with representatives of the European Food Safety Authority

Correspondence - 09/03/2022
Case 2124/2021/MIG - **Opened on** 17/12/2021 - **Recommendation on** 02/05/2022 - **Decision on** 14/11/2022 - **Institution concerned** European Food Safety Authority (Recommendation agreed by the institution) |

COMPLAINT : 2124/2021/MIG

Case title : The European Food Safety Authority's (EFSA) failure to reply in a timely manner to a request for public access to documents concerning lead in ammunition that have informed a proposal for restrictions

Date : Thursday, 10 February 2022

Remote meeting via MS Teams

Present

European Food Safety Authority

Head of Legal Affairs Services Unit

Senior Legal Officer (Team Leader)

Legal Officer

European Ombudsman

Jennifer KING, Legal Expert

Tanja EHNERT, Inquiries Coordinator

Michaela GEHRING, Inquiries Officer

Viola PENDL, Inquiries Trainee

Purpose of the meeting

The purpose of the meeting was for the Ombudsman inquiry team to obtain further information on how EFSA dealt with the complainant's access request, as well as about EFSA's general approach towards processing requests for public access to documents. Prior to the meeting, the inquiry team reviewed the documents at issue in the complainant's access request as well as parts of EFSA's file.

Introduction and procedural information

The participants introduced themselves and the Ombudsman inquiry team thanked EFSA for agreeing to the meeting and set out the purpose of the meeting. The inquiry team outlined the legal framework that applies to meetings held by the Ombudsman and, in particular, that the Ombudsman would not disclose any information identified by EFSA as confidential, neither to the complainant nor to any other person outside the Ombudsman Office, without EFSA's prior consent. [1]

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

Information exchanged

On the complainant's access request

On EFSA's approach regarding the complainant's access request

The Ombudsman inquiry team asked whether EFSA had considered that the processing of the complainant's access request would entail an excessive administrative burden and, if so, what the exceptional circumstances had been.

The EFSA representatives said they had immediately considered the request to be rather complex. This was due to the number of documents involved, the number of third parties that had to be consulted, and the nature of the documents (two were data sheets, of which one required a consultation with 25 Member States [MS]).

The inquiry team noted that it had taken EFSA several weeks before it had informed the complainant that it would not be able to reply to its access request within the prescribed time limit.

The EFSA representatives said that the documents had been identified quickly (despite a wrong date indicated by the complainant in its access request) and that EFSA had realised shortly after the request was received that it would not be able to reply to the complainant within the prescribed time limit. However, rather than asking the complainant to narrow down the scope of its request, EFSA intended to be as transparent as possible, and thus to assess and − to the extent possible − disclose *all* requested documents. EFSA therefore decided to split the request into several batches and to process these batches consecutively, as a 'fair solution' under Article 6(3) of Regulation 1049/2001. While doing so, EFSA kept the complainant frequently informed, at an interval of about 15 working days.

Concerning the time taken, the EFSA representatives explained that certain parts of the documents at issue originated from several MS and the United Kingdom (UK). EFSA had to consult these third-party authors. Before EFSA could launch the consultation procedure, it had to identify the relevant responsible contact points to be consulted, as these can be different from those contact points that provided the data. This required internal consultations. In addition, while EFSA's consultation procedure with external entities has been streamlined due to a 'prior agreement' [2] that EFSA has concluded with the Scientific Network on Chemical Monitoring Data Collection (whose members comprise the MS), the fact that the UK is no longer part of the network meant that this country had to be consulted separately on one of the data sheets (document 5). The UK had been consulted later than the members of the scientific network, as, prior to launching the consultation with the UK, EFSA had considered whether it could redact the data stemming from the UK. However, this was not feasible given that this data was presented in aggregate form. The consultation of the UK may have been further delayed due to the summer holiday period. The duration of this consultation contributed to the overall time taken for the third party consultation.

Another delaying factor was that, due to the many public access requests EFSA received at that time, it had decided to group several access requests and to consult the relevant members of the scientific network on all of those requests at the same time.

When consulting the scientific network in this case, EFSA indicated the parts of the documents that it considered could not be disclosed under Article 4 of Regulation 1049/2001, in line with the 'prior agreement' concluded with the network. As concerns the remaining parts of the documents at issue, none of the members put forward any objections to disclosure. While one MS put forward an additional claim for protection of one data element, EFSA could verify that this data element was not contained in the relevant document.

The inquiry team asked whether EFSA had given the complainant the opportunity to prioritise certain documents. In reply, the EFSA representatives said that they consider EFSA's communication with applicants as a dialogue, which allows applicants to express any preferences or feedback on the approach. In this case, the complainant had not expressed any preferences. At the same time, EFSA did not explicitly ask the complainant for its preferences. EFSA's goal at all times was to provide access to *all* documents (to the extent possible), which it assessed in the order they had been attached to the email sent to ECHA (document **1).**

On the generally high workload of EFSA

The Ombudsman inquiry team noted that EFSA had told the complainant that it was experiencing a high workload while dealing with its access request. The inquiry team wanted to know how many access requests EFSA had been dealing with at the time.

The EFSA representatives explained that the complainant's access request had been the 24 th request received that year (compared to nine requests in the same period in 2020 and five requests in the same period in 2019). Overall, EFSA processed 232 access requests in 2021, 176 access requests in 2020 and 141 access requests in 2019. Thus, EFSA experienced a significant increase in public access requests during the last years with 2021 being particularly demanding. In addition, the complexity of the access requests and thus the legal analysis that is required to assess them has increased. EFSA explained that the majority of the documents sought comprise lengthy scientific studies and reports, and thus are complex, voluminous and generally require third-party consultation, often with a multitude of actors.

On the third-party consultation

When asked why the scientific network was not consulted on the contents of the first table at issue (document 2, batch 1), the EFSA representatives said that this document included only information that had been previously published. This was not the case for the second table concerned (document 5, last batch).

The Ombudsman inquiry team also noted that, according to the prior agreement with the members of the network, EFSA may disclose documents based solely on its own assessment, if it does not receive a reply from the members it consults within ten working days.

The EFSA representatives stated in reply that EFSA intends to make sure that the members concerned are aware of the access request, so as to ensure that no sensitive data is disclosed. This is in line with EFSA's cooperation practice that ensures an optimal dialogue and relationship with MS, which are crucial for EFSA's activities in view of the importance of data collection for EFSA's scientific work. Therefore, EFSA, notwithstanding the terms of the prior agreement, provides more time to members that do not reply within the agreed deadline. This can cause delays, as it happened in this case, specifically because the consultations took place over the summer period.

Concerning consultations of the network on several access requests at a time, the EFSA representatives explained that EFSA introduced this approach about two years ago. Instead of consulting the network separately on every access request, bundling several access requests renders the consultation process less resource-intensive for EFSA and the MS. EFSA's staff holds weekly meetings during which they discuss all pending public access requests and decide on necessary consultations. In this case, it was noticed during one of these meetings that there were eight access requests that concerned similar information. It was therefore decided to group those requests and to consult the network on them simultaneously.

On EFSA's practice in general

The EFSA representatives explained that EFSA employs five full time equivalents (FTE) dealing with requests for public access to documents (= "team processes"). This team consists of about 2.4 FTEs legal officers, two trainees, one interim and one part-time support staff, and it deals exclusively with initial public access requests.

Requests for review ('confirmatory applications'), amongst other things, are dealt with by the "team review", which consists of 2.5 FTE in charge of pre-litigation and litigation. On average, EFSA receives between six and seven confirmatory applications per year. EFSA considers that this low number – when compared to the overall annual number of access requests – indicates that applicants are satisfied with its approach of dealing with requests in their entirety, and not narrowing the scope.

In 2021, it received only three such requests (this figure does not include the complainant's confirmatory application, given that it had been sent shortly before the last batch was disclosed and the complainant had not upheld it afterwards).

Concerning EFSA's general approach to propose as a "fair solution" under Article 6(3) of Regulation 1049/2001 that the documents requested by an applicant are split into batches and the time limit is extended, the EFSA representatives explained that EFSA takes this approach in cases where it considers that the assessment of an access request will take more than 15 working days. This can be the case if the documents concerned are complex, if extensive external consultations are required, or if the public access request concerns a large number of documents.

Overall, the EFSA representatives estimated that about 80% of the access requests that EFSA receives are considered as complex due to the scientific nature of the documents, which often means that the documents are very long, originate from several third party-authors and/or contain commercially sensitive information.

When deciding on its approach towards a specific public access request, EFSA takes into account the scope of the request as well as the size and the nature of the requested documents, always with the view to providing the greatest transparency possible. If a public access request does not seem manageable within a reasonable period, EFSA proposes, as a fair solution under Article 6(3) of Regulation 1049/2001, that the request is split into batches that are then processed consecutively. If this approach is adopted, EFSA does not normally inform the applicant about the number of batches or the documents they will include, as this becomes clear only during the assessment of the request. The individual batches are processed as if they were separate access requests. Usually, the assessment of the next batch is started while the current batch is issued to the applicant. Once the last batch is issued, EFSA communicates this to the applicant.

Applicants are not systematically made aware of the possibility to prioritise documents and/or

batches. However, if applicants indicate preferences, EFSA tries to accommodate these.

Concerning EFSA's compliance with self-imposed deadlines, either EFSA replies to an applicant in time, or it provides the applicant with a (new) update on the processing of their request, including a new time line.

With regard to timelines, in order to facilitate the calculation of how much time the assessment of a specific public access request will take, the EFSA representatives advised the Ombudsman inquiry team that EFSA procured a contract with a private company last year. The aim of this project is to create an algorithm (on the basis of the statistics of past years and a series of variables) that will allow for a realistic calculation of the time needed to process a specific access request upon its receipt. The variables include *inter alia* the number of documents requested, the EFSA department concerned, the number of already pending access requests, the number of third party authors to be consulted, and the available resources. To this end, the contractor will analyse EFSA's procedure as well as statistics of five past years to identify (i) aspects that influence the duration of the processing of an access request and (ii) what this then means in terms of working days.

The results of this exercise will be assessed by EFSA with a view to analysing whether this new tool could be used in future to provide applicants with a provisional time line as to when they can expect to receive EFSA's reply to their access request.

In addition, EFSA is in the process of drawing up a guidance for applicants, including on what to expect when making an access request to EFSA and on how to communicate with EFSA while their request is being processed. The guidance is expected to be finalised this year. The publication of the final version is scheduled for September 2022.

The EFSA representatives stated that EFSA's approach towards complex access requests is reflected in its 'practical arrangements' which were issued last year. [3] The EFSA representatives stated that this approach is based on Article 6(3) of Regulation 1049/2001, which allows institutions to confer with applicants with a view to finding a fair solution if their access request is very large or very complex. This approach would allow for the balancing of transparency with the proper functioning of EFSA.

EFSA's detailed procedure for dealing with requests for public access to documents under Regulation 1049/2001 is also described in its standard operating procedure 'SOP_036_A', which is published on its website. [4] The following provides a short overview:

1) EFSA receives a request for public access to documents via the dedicated functional mailbox or via the online tool. In case the request is not received via these channels, the request is forwarded to the "team processes", in charge of handling initial access requests.

2) Upon receipt of the public access request, an acknowledgement of receipt is sent to the applicant.

3) The request is then assigned to a case handler.

4) The case handler first identifies the competent EFSA department to collaborate with, in view of the fact that the scope of the access request falls in its sphere of responsibility.

5) The competent EFSA department provides the case handler with the requested documents and/or, if the request is unclear or requires further discussions, meets with the case handler.

6) Once the documents are identified, the case handler conducts a preliminary assessment of the documents, if needed, in consultation with the competent department.

7) If the documents originate from a third party, the case handler may launch the consultation process, if needed (i.e. if it is not clear that the documents can be disclosed).

8) If the third party is a MS (a member of the scientific network), it will be asked to reply within ten working days. Other third parties are granted five working days for their reply.

9) Once the reply is received, it is assessed by the case handler together with the competent department.

10) After that, the case handler might need to seek clarifications from the third party or might need to go back to the third party with further explanations relating to the consultation

11) The case handler then draws up the reply to the applicant and, if applicable, makes necessary redactions and prepares the documents for disclosure.

12) After review by the team leader of the “team processes”, the reply (if applicable, together with the requested documents) is sent to the applicant.

13) However, if the documents originate from a third party and EFSA disagrees with the third party’s objections to disclosure, EFSA will only dispatch the reply after sending a corresponding notification to the third party and the notification period of ten working days has expired.

Finally, the EFSA representatives explained that, following the adoption of Regulation 2019/1381 [5] , EFSA’s transparency obligations have increased. Since March 2021, EFSA has therefore made more documents proactively available, which can be found on its website.

Conclusion of the meeting

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

Brussels, 09/03/2022

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[1] Article 4.8 of the European Ombudsman's Implementing Provisions.

[2] The 'prior agreement' was concluded in 2017. EFSA might soon contact the members of the network with a view to revising the agreement.

[3] Article 4(8) of the Decision of the Management Board laying down practical arrangements for implementing Regulation (EC) No 1049/2001 and Articles 6 and 7 of Regulation (EC) No 1367/2006: https://www.efsa.europa.eu/sites/default/files/documents/wp200327-a2.pdf [Link].

[4] See:
https://www.efsa.europa.eu/sites/default/files/corporate_publications/files/SOP-036_A.pdf [Link]

[5] Regulation (EU) 2019/1381 on the transparency and sustainability of the EU risk assessment in the food chain:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1381 [Link].