

Proposal of the European Ombudsman for a solution in case 709/2015/MDC on the European Commission's refusal to grant access to drafts of the final Impact Assessment Report accompanying its proposal for a Directive amending the Fuel Quality and Renewable Energy Directives

Solution - 16/06/2015

Case 709/2015/MDC - Opened on 15/06/2015 - Decision on 04/10/2017 - Institution concerned European Commission (No further inquiries justified) |

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

The complaint, submitted by a group of organisations, concerns the Commission's refusal to grant public access to draft versions of an Impact Assessment Report (IAR) on indirect land-use change related to biofuels (ILUC). The IAR accompanied a legislative proposal to amend the Fuel Quality Directive and the Renewable Energy Directive. ILUC may be explained as follows: Biofuel production typically takes place on cropland which was previously used for other agricultural purposes such as growing food or feed. Since this agricultural production is still necessary, it may be partly displaced to previously non-cropland such as grasslands and forests. Thus, land-use change occurs indirectly.

The disclosure of the documents was refused on the ground that disclosure would undermine the Commission's decision-making process. The complainant considered that it should be granted access to the documents it requested.

The Ombudsman notes that in September 2015, Parliament and Council adopted Directive 2015/1513. That Directive was based on the Commission's legislative proposal to which the impact assessment report, the draft versions of which are at issue in this case, was attached. The Ombudsman therefore proposes that, in light of these new circumstances, the Commission grant public access to the requested documents.

The background to the complaint

1. This case concerns a request for public access to documents which the complainant, a group of organisations, submitted to the European Commission. The complainant requested access to, among other documents, drafts of the final impact assessment report on indirect land-use change related to biofuels (ILUC) [2], its annexes and associated correspondence and summaries. These documents were drawn up in the context of the Commission's proposal for



amendments to the existing Fuel Quality Directive [3] and the Renewable Energy Directive [4] [5] .

2. The Commission granted access to some of the requested documents and denied access to the following documents:

1. Draft Impact Assessment on indirect land-use change related to biofuels and bioliquids (ILUC);
2. Commission Staff Working Document - Draft IA (draft version of 4 April 2011) - Annex I;
3. Commission Staff Working Document - Impact Assessment Executive Summary (draft version of 4 April 2011) - Annex 2;
4. Extract of IA draft in an internal e-mail exchange between DG ENER and DG TRADE [6] ;
5. Commission Staff Working Document - Draft IA (draft version of 26 July 2011) -Annex I;
6. Commission Staff Working Document Impact Assessment Executive Summary (draft version of 26 July 2011) - Annex 2;
7. Overview of the changes made to the draft Impact Assessment following the submission to the Impact Assessment Board of 16 May 2011 - Annex 4;
8. A 'compare version' of the current version of the Impact Assessment (draft version of 26 July 2011) with the previously submitted one.

3. The Commission denied access to these documents on the basis of Article 4(3) of Regulation 1049/2001 [7] . The complainant later lodged two further requests for access to the same documents which were both rejected by the Commission.

The inquiry

4. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

- 1) The Commission wrongly denied access to the eight [8] requested documents.
- 2) The Commission should grant the complainant access to the requested documents.

5. In the course of the inquiry, the Ombudsman received the reply of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's reply. Her services also carried out an inspection of the Commission's file concerning this case. The Ombudsman's solution proposal takes into account the arguments and views put forward by the parties.

Alleged wrong denial of access to the eight requested documents and the related claim



Arguments presented to the Ombudsman

6. The Ombudsman will not set out in detail the arguments of the parties. She notes that in the comments which the Commission submitted to her, the institution took the view that the confirmatory decisions were legally and factually correct **at the point in time when they were taken**.

7. In its observations on the Commission's comments, the complainant drew the Ombudsman's attention to Case T-520/13 *Philip Morris Benelux v European Commission* [9], which, according to the complainant, is very similar to the case under consideration. Case T-520/13 concerned the Commission's refusal to grant access to draft versions of the Impact Assessment Report prepared in the context of the Commission's proposal for a revision of the Tobacco Products Directive. The Commission eventually decided to disclose the requested documents. Thus, the Court decided that it no longer needed to adjudicate on the action. The complainant took the view that the Commission's decision to disclose the requested documents "*is not fortuitous; it illustrates the strength of the legal arguments supporting the disclosure of such type of documents ... once the Commission has adopted a legislative proposal*".

8. The complainant noted that now that the directive at issue, the ILUC Directive [10], has been formally adopted and published, the Commission's objections based on the argument that disclosure would undermine the decision-making process "*which were already void at the time of the requests ... are even less meaningful today*".

The Ombudsman's preliminary assessment leading to the solution proposal

9. The Ombudsman considers that it is not necessary to dwell on the issue whether the Commission's confirmatory decisions were legally and factually correct at the point in time when they were taken. This is because she considers it appropriate to invite the Commission to change its position by taking into account events that have occurred since it refused access to the requested documents.

10. As the complainant has noted, on 9 September 2015, Parliament and Council adopted the ILUC Directive. That Directive is based on the Commission legislative proposal to which the impact assessment report whose draft versions are at issue in this case was attached.

11. The Ombudsman notes that in the case of the Tobacco Products Directive, once the revised Directive was adopted, the Commission decided to grant access to the draft versions of the Impact Assessment Report prepared in the context of the Commission's proposal for a revision of that Directive. The Ombudsman considers that the Commission could adopt the same approach in this case. She therefore makes a proposal for a solution to this effect below, in accordance with Article 3(5) of the Statute of the European Ombudsman.

The proposal for a solution

The Ombudsman proposes that, in light of the fact that Directive 2015/1513 has now been



adopted, the Commission grant public access to the seven remaining requested documents.

Emily O'Reilly

European Ombudsman

Strasbourg, 07/12/2017

[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] Biofuel production typically takes place on cropland which was previously used for other agricultural purposes such as growing food or feed. Since this agricultural production is still necessary, it may be partly displaced to previously non-cropland such as grasslands and forests. This process is known as indirect land use change (ILUC). Indirect land use change risks negating the greenhouse gas savings that result from increased biofuels because grasslands and forests typically absorb high levels of CO₂. By converting these land types to cropland, atmospheric CO₂ levels may increase.

[3] Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC, OJ 1998 L 350, p. 58.

[4] 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, OJ 2009 L140, p. 16.

[5] The complainant stated that these documents are based on different scientific studies commissioned by the Commission in the context of the overhaul of the Fuel Quality Directive and the Renewable Energy Directive. The Commission explained that on 22 December 2010, it published a report on indirect land use change related to biofuels and bioliquids. The report announced that the Commission would conduct an Impact Assessment on the four options identified in the report as a basis for a legislative proposal to amend, if appropriate, the Renewable Energy and Fuel Quality Directives, thereby taking into consideration potential changes to the existing legislation. Both Directives included clauses requiring the Commission to review the greenhouse gas impacts from indirect land use change and if appropriate, propose ways for addressing them by 31 December 2010.

[6] The Commission informed the complainant that this e-mail exchange does not exist



anymore since it was not archived. The Commission apologised to the complainant for its error.

[7] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L145, p. 43. Article 4(3) of the Regulation provides: "*Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. "

[8] One of the documents no longer exists. See footnote 6 above.

[9] Order of 3 September 2015, *Philip Morris Benelux v Commission* , T-520/13, ECLI:EU:T:2015:702.

[10] 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, OJ 2015 L 239, p. 1.