

## Besluit in zaak 1856/2017/EIS betreffende de behandeling door de Europese Commissie van een verzoek om toegang van het publiek tot documenten met betrekking tot door de fabrikanten en importeurs van tabaksproducten geregistreerde productinformatie in een door de Commissie beheerd systeem

Besluiten

**Zaak 1856/2017/EIS - Geopend op 26/10/2017 - Besluit over 23/07/2018 - Betrokken instelling** Europese Commissie ( Geen wanbeheer vastgesteld ) |

De zaak betrof de behandeling door de Europese Commissie van een verzoek om toegang van het publiek tot documenten met betrekking tot door de fabrikanten en importeurs van tabaksproducten geregistreerde productinformatie in een door de Commissie beheerd systeem. De klager wenste documenten te verkrijgen met gegevens over de in het systeem geregistreerde ingrediënten, emissies en toxiciteit van de afzonderlijke tabaksproducten. De klager stelde dat de Commissie ten onrechte weigerde hem toegang tot de gevraagde documenten te verlenen. De Commissie legde uit dat zij de gevraagde gegevensbestanden niet bezat, aangezien zij enkel het proces van verzamelen vergemakkelijkt door via het platform gegevensarchiveringsdiensten te verstrekken. De Ombudsman onderzocht de kwestie en constateerde, na een inspectie, dat het standpunt van de Commissie correct was. De Ombudsman heeft de zaak derhalve afgesloten met de constatering dat er geen sprake was van wanbestuur.

## Background to the complaint

1. The complainant is an Italian citizen. On 2 August 2017, he asked the Commission to give him public access to documents relating to tobacco, namely “ *all documents that were submitted to the EU Common Entry Gate (EU-CEG) in accordance with Articles 5 and 6 of Directive 2014/40/EU [1]* ” (hereinafter referred to as the ‘Directive’). In particular, the complainant was interested in obtaining documents containing data transmitted by manufacturers and importers of tobacco products and stored in the EU-CEG under the said Directive, to the extent that the data concerns the **ingredients, emissions and toxicity** of the individual tobacco products [2] .

2. On 17 August 2017, the Commission replied to the complainant. It explained that the



information the complainant had requested has been recorded by the manufacturers and importers of tobacco products. The recipients of this information are, it stated, **the individual Member States** and not **the Commission**. The latter only provides the Member States with a technical service (an ICT reporting and notification platform) that enables manufacturers and importers to deliver documents containing the required information in an electronic format to the competent national authorities. Therefore, any such documents are not held by the Commission, but by the Member States to whom they have been submitted. In this respect, the Commission also referred to Article 5(7) [3] of Directive 2014/40/EU, which clarifies that the Commission shall only **access** the documents submitted under Articles 5 and 6 for the purposes of applying the Directive.

3. In view of the above, the Commission concluded that Article 4(4) [4] of Regulation 1049/2001 [5], read in conjunction with Article 5(7) of Directive 2014/40/EU, makes it clear that such documents are not to be disclosed by the Commission, but solely by the Member States. Therefore, the complainant's request was rejected.

4. The complainant subsequently sought a review of the Commission's decision (by means of the 'confirmatory application' procedure provided for in Regulation 1049/2001). Among other issues, he argued that the Commission's role in the given context was not limited to merely providing the ICT platform. He further contended that the data transmitted by the manufacturers and importers of tobacco products should have been, in his view, made public as of 20 November 2016.

5. On 18 October 2017, the Commission replied to the complainant's request for review. It explained that, contrary to the complainant's belief, it does **not** administer the collection process of the data, but merely **facilitates** it by providing data archiving services through the EU-CEG platform. As a result, it reiterated its view that it does not possess the requested documents. It added that the date of 20 November 2016 mentioned in Article 5(1) of the Directive refers to the deadline imposed on manufacturers and importers to provide information to national authorities on products already placed on the market at the time the Directive was transposed and **not** to the date of disclosure of such information to the public.

6. Dissatisfied with the Commission's position, on 19 October 2017, the complainant turned to the European Ombudsman.

## The inquiry

7. The Ombudsman opened an inquiry into the following aspect of the complaint:

The Commission wrongly failed to grant access to the requested documents.

8. The Ombudsman's inquiry team had an inspection meeting with the Commission staff. During the meeting, the Commission staff gave an overview of the database in which Member States store relevant information collected in line with the Directive. The Ombudsman staff also asked



for and obtained screenshots of the EU-CEG platform.

## Arguments presented to the Ombudsman

9. The complainant argued that it followed from the Directive itself that the data should have been made public and that the notification and the publication of the data, as provided for in the Directive, are interrelated. Furthermore, the complainant invoked Articles 5 and 6 of the Directive, stating that control and transparency are duties of both the Commission and of the Member States.

10. According to the complainant, the Commission's argument that it was not in possession of the data was unfounded. In his view, the Commission role was not limited to being an intermediary. It appeared to the complainant that the delays that the competent national authorities incurred in making relevant information available to the public were due to the Commission's role in dealing with the platform.

11. Moreover, the complainant argued that the Commission should grant access to all the data in its possession regardless of their quantity. In his view, the purpose of the platform was to filter the information submitted by the private sector, especially information covered by confidentiality because of eventual trade secrets. The complainant said that it was not difficult to select which data to publish or which data to grant access to. He argued that the Commission itself had also established a list of types of information to be classified as "trade secrets" in its Implementing Decision EU/2015/2186 [6] .

## The Ombudsman's assessment

12. In its decision on the complainant's request for review, the Commission rejected the complainant's argument that it does possess the requested documents. It stated that it only provides the Member States with a technical service (an ICT reporting and notification platform) that enables manufacturers and importers to deliver documents containing the required information in an electronic format **to the competent national authorities** . Therefore, any such documents are not **held** by the Commission, but by the Member States to whom they have been submitted. In this respect, the Commission also referred to Article 5(7) [7] of Directive 2014/40/EU, which clarifies that the Commission shall only **access** the documents submitted under Articles 5 and 6 for the purposes of applying the Directive.

13. The Ombudsman notes that Regulation 1049/2001 applies only when the requested documents are *in the possession* of the EU institution concerned. In this context, the Ombudsman carried out an inspection and meeting to ascertain whether the Commission's position, that it did not possess the documents in the database, was accurate. In the inspection, the Commission staff gave an overview of the database in which Member States store relevant information collected in line with the Tobacco Product Directive, which requires manufacturers and importers to submit specific product information to the **Member States** . The Commission



staff explained that, in order to facilitate compliance with the above mentioned obligation and to ensure the coherence of the data provided, the Commission established the technical tool, to which the Member States have access. The tool is still in its initial phase, but already now it contains an important number of datasets. The tool enables sight of the content of the datasets. Both the Commission and Member States have access to the same tool, but in line with the Directive, it is the Member States who are the **owners of the datasets** .

**14.** The Ombudsman thus agrees that the datasets are not *in the possession* of the Commission.

**15.** In view of the above, it is not necessary to examine the Commission's subsidiary argument that the search function of the ICT tool shows limited information only and not the level of detail the complainant sought.

## Conclusion

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

**There was no maladministration.**

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

Emily O'Reilly

European Ombudsman

Strasbourg, 23/07/2018

[1] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, OJ 2014 L 127, p. 1.

[2] The EU-CEG sends this data to the Member States in which such products are intended to be placed on the market.

[3] “ All data and information to be provided to and by Member States under this Article and under Article 6 shall be provided in electronic form. Member States shall store the information electronically and shall ensure that the Commission and other Member States have **access** to that information for the purposes of applying this Directive. Member States and the Commission



*shall ensure that trade secrets and other confidential information are treated in a confidential manner .” (Emphasis added).*

[4] “ *As regards third-party documents, the institution shall **consult the third party** with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed ”. (Emphasis added).*

[5] 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 L 145, p. 43.

[6] Commission Implementing Decision (EU) 2015/2186 of 25 November 2015 establishing a format for the submission and making available of information on tobacco products OJ 2015 L 312, p. 5.

[7] “ *All data and information to be provided to and by Member States under this Article and under Article 6 shall be provided in electronic form. Member States shall store the information electronically and shall ensure that the Commission and other Member States have **access** to that information for the purposes of applying this Directive. Member States and the Commission shall ensure that trade secrets and other confidential information are treated in a confidential manner.” (Emphasis added).*