

Opinion of the European Commission on a recommendation from the European Ombudsman on a request for granting public access to documents concerning compliance with biofuels sustainability criteria under the Renewable Energy Directive.

- Complaint by Mr [REDACTED] ref. 1527/2020/DL

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

Mr [REDACTED] requested on 21 April 2020 access to “a list of all Countries of Origin of Used Cooking Oil (UCO) for the years 2016, 2017, 2018 and 2019, together with the volumes of UCO feedstock collected for each Country of Origin for each year as reported to the European Commission by all voluntary certification schemes for biofuels sustainability under the Renewable Energy Directive” (GESTDEM 2020/2287).

By letter of 25 May 2020, the Directorate-General for Energy (DG ENER) informed Mr [REDACTED] that it was not able to identify any document as falling within the scope of his request. The Directorate General for Energy explained that ‘while the Commission receives reports from the voluntary schemes recognised by the Commission according to Article 18(4) of Directive 2009/28/EC, the Commission does not produce any documents that would extract the information you are seeking from those reports’.

Mr [REDACTED] lodged on 29 May 2020 a confirmatory application taking the view that the requested information is in the possession of DG ENER in an easy to access format such as text file, simple database or excel sheet, and it would require no more than a few moments to copy it and make it available. He also claimed that all the requested information is collected for DG ENER by a single organisation called ISCC and they use a simple online system for collecting the data and provide the relevant internet link.

In the meantime, Mr [REDACTED] lodged a complaint to the European Ombudsman in September 2020 (1527/2020/MAS) criticising that the Commission had not disclosed any data.

Based on his confirmatory application, the Secretary General of the Commission by Decision of 21 October 2020 confirmed that the Commission does not hold any documents that would correspond to the description given in the application. She clarified that while the European Commission is in possession of the reports submitted by the voluntary schemes in accordance with the Renewable Energy Directive, the provided data do not cover all certified material as they only include information as to the amount of feedstocks certified under each certified scheme or specifically circumscribe used cooking oil as they extend to all feedstock. It was also stressed that whereas ISCC certifies the bulk of used cooking oil used for the production of biofuels, it is not the sole voluntary scheme in that respect.

Taking the above into consideration, the decision further clarified that Article 2(3) of Regulation (EC) No 1049/2001 provides that the right of access as defined in that regulation applies only to existing documents in the possession of the institution. In this respect, Article 10(3) of the above-mentioned regulation further provides that ‘documents shall be supplied in an existing version and format [...]’. As per settled case law, ‘neither Article 11 of Regulation No (EC) 1049/2001 nor the obligation of assistance in Article 6(2) thereof, can oblige an institution to create a document for which it has been asked to grant access but which does not exist’. The Court of Justice further held that ‘an application for access that

would require the Commission to create a new document, even if that document were based on information already appearing in existing documents held by it, falls outside the framework of Regulation (EC) No 1049/2001’.

The Ombudsman opened an inquiry into how the Commission dealt with the complainant’s request. The inquiry team held a meeting with the Commission and inspected a sample of the reports submitted to it by the voluntary schemes.

Following the inspection of documents, the Ombudsman confirmed that the Commission does not hold a single document that contains all the information requested, but that the information is spread over a number of documents.

Since the complainant indicated that he was interested in receiving the information concerned, even if it was not compiled into a single document, the Ombudsman made the following proposal for a solution: The Commission should review the documents it does hold containing the countries of origin and relevant volumes of production and import of used cooking oil for the period indicated by the complainant with a view to disclosing them.

The Commission did not accept the Ombudsman’s proposal for a solution. In its reply, the Commission reiterated that it does not hold any document that corresponds to the complainant’s request. The Commission did not disclose the documents containing the countries of origin, volumes of production and import of UCO since they were not covered by the original request. Moreover, it had understood that the complainant was not seeking access to a number of documents, each of which contained only some information.

The Commission also stressed that it published a new report on the operation of the voluntary schemes, which includes data on the origin of used cooking oil that is used for the production of biofuels as well as an assessment of the data. The Commission also stressed that if the complainant would consider that the data published in this report are not sufficient, he could submit a new request for access to the reports submitted to the Commission by the voluntary schemes in accordance with the Renewable Energy Directive. In its reply to the Ombudsman’s proposals, the Commission explicitly invited the complainant to do so if he considered the information in the above-referenced reports to be insufficient. The complainant did not react to this towards the Ombudsman.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

Following the solution proposed by the Ombudsman and the unchanged position of the Commission, the complainant expressed some comments to the final recommendation of the Ombudsman.

III. EUROPEAN OMBUDSMAN’S INQUIRY

The Ombudsman's assessment after the proposal for a solution

Following the Ombudsman, the Commission does hold the data requested by the complainant, albeit not in a single document. The Ombudsman further stressed that the EU rules on public access to documents provide that if an application is not sufficiently precise, the institution

shall ask the applicant to clarify the application and shall assist the applicant in doing so. In the present case, according to the Ombudsman, the complainant clarified what documents in the possession of the Commission he needed.

Concerning the Commission's statement in its reply to the Ombudsman's proposal for solution that in the meantime a new report had been published on the operation of the voluntary schemes, which includes data on the origin of used cooking oil that is used for the production of biofuels¹ as well as an assessment of the data, and the Commission's statement that if the complainant deemed the information in this report to be insufficient, he could submit a new request for access to the reports submitted by the voluntary schemes, the Ombudsman recalled that the complainant submitted his initial request in April 2020. Therefore, the Ombudsman stated that it would have been more helpful for the Commission to engage with the proposal for a solution rather than inviting the complainant to make a new request.

The complainant's stated reason for seeking access to the information requested was to monitor possible fraud in the UCO sector. The Ombudsman considers that disclosure of this information would thus serve a public interest and could support the Commission's monitoring role.

Therefore, the Ombudsman finds that the Commission's failure to cooperate with the complainant and to take into account his clarifications concerning the documents to which he wished to obtain access constituted maladministration.

Based on this argument, the Ombudsman proposed that the Commission should review the documents it holds containing the countries of origin and relevant volumes of production and import of used cooking oil for the period indicated by the complainant with a view to disclosing them.

On 8 November 2021, the Ombudsman issued a recommendation that the European Commission should cooperate with the complainant, taking into account his clarifications and review the documents it holds containing the countries of origin and relevant volumes of production and import of used cooking oil for the period indicated by the complainant with a view to disclosing them.

IV. THE REPLY OF THE EUROPEAN COMMISSION / THE COMMISSION'S COMMENTS TO THE COMPLAINANT'S ARGUMENTS

The Commission does not hold any document that would correspond to the description given in the initial application. However, in its reply to the Ombudsman's proposal for solution, the Commission invited the applicant, after having examined the information already published by the Commission, to make a new request for those documents that he still wanted to have access to so that he can distil the information himself. The applicant did not react to this suggestion by the Commission. For this reason, the Commission, in spite of its best intentions to provide the applicant with the information he was seeking in the best possible way, even beyond the strict legal requirements of Regulation (EC) No 1049/2001, was not able to

¹ <https://op.europa.eu/en/publication-detail/-/publication/86eb1ce8-11b5-11eb-9a54-01aa75ed71a1>

engage further with the Ombudsman's proposal for solution.

In his initial request, the complainant did not request access to the several documents containing the countries of origin and relevant volumes of production and import of used cooking oil referred to by the Ombudsman and therefore, as these documents were not covered by the initial request, they could not be disclosed based on that request even at the confirmatory stage.

It is to be noted that in its modified request in its confirmatory application, Mr [REDACTED] referred to the same type of information but referred to only one voluntary scheme, namely ISCC, which – as also clarified in the Commission's decision – does not contain the whole data related to used cooking oil as defined in the initial request and does not specifically circumscribe used cooking oil

This is the reason why the Commission clarified in its Decision to the complainant that it is in possession of the reports submitted by the voluntary schemes in accordance with the Renewable Energy Directive. The Commission also informed that it had published a new report on the operation of the voluntary schemes, which includes data on the origin of used cooking oil that is used for the production of biofuels² as well as an assessment of the data.

The Commission explicitly invited again the complainant to consider whether the published report on the operation of the voluntary schemes already satisfied in whole or in part his interest. If, following the consultation of the new report on the operation of the voluntary schemes, the complainant had still an interest getting access to the report mentioned in his confirmatory request, he could have lodged a new request for access with the Commission. However, the Commission notes that, unfortunately, the complainant has failed to provide the requested specification in his reply to the Ombudsman.

The Commission is attached to the principle of good administration and cooperation with complainants that request access to documents. In the circumstances of this case, the Commission would like to point out that, in order for it to engage with the proposal for a solution as proposed by the Ombudsman – i.e. assessing which of the existing documents could be disclosed to the complainant or should be refused based on the exceptions to the right of access laid down in Article 4 of Regulation (EC) No 1049/2001 – the complainant is again invited and should first specify which of those documents he still wished to have access to.

V. CONCLUSION

The assessment of the Commission as regards the request for access to documents remains unchanged. The Commission does not possess the requested document, and hence it cannot be disclosed based on the initial request. The confirmatory application lodged by Mr [REDACTED] on 29 May 2020 did not clarify the request, as it indicated a different scope than the initial request. The complainant also did not react to the Commission's invitation, following the publication of the above-referenced report on the operation of the voluntary schemes, to specify whether he considers the information therein to be insufficient and to request access to documents that are in the Commission's possession.

² <https://op.europa.eu/en/publication-detail/-/publication/86eb1ce8-11b5-11eb-9a54-01aa75ed71a1>

Under those circumstances, the Commission is not in a position to accept the Ombudsman's proposal and again invites the applicant to make a new request for access to documents that are in possession of the Commission.

For the Commission

████████████████████

Member of the Commission