

**Reply by the European Commission to the European Ombudsman’s proposal for a solution on a complaint concerning the European Commission’s refusal to give public access to the opinion of the Regulatory Scrutiny Board on the draft impact assessment on the revision of the Food Information to Consumers Regulation**  
**Complaint by ██████████, reference 2347/2023/MIK**

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**I. BACKGROUND**

The complainant submitted a request for public access to ‘documents and minutes from meetings (in 2022) concerning the legislation package on Food Information to Consumers. This includes but is not limited to the conclusions of the assessment by the Regulatory Scrutiny Board in 2022’<sup>1</sup>.

In its initial reply of 22 August 2023, the Directorate-General for Health and Food Safety (‘DG SANTE’) identified 29 documents falling under the scope of the request. DG SANTE granted full access to documents 14 and 26-28 (concerning meetings with stakeholders and presentations prepared by the Commission) and granted partial access to documents 1-13 (meetings between Commission representatives and stakeholders) and 15-25 (meetings between Commission representatives and stakeholders) subject only to redactions based on the exception of Article 4(1)(b) (protection of the privacy and integrity of the individual) of Regulation (EC) No 1049/2001. DG SANTE refused public access to document 29 (opinion of the Regulatory Scrutiny Board, hereafter ‘RSB’) based on the first subparagraph (protection of the decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001<sup>2</sup>.

On 7 September 2023, the complainant lodged a confirmatory application regarding that reply, specifically against the non-disclosure of document 29. She subsequently lodged a complaint to the European Ombudsman due to the lack of a final decision.

**II. EUROPEAN OMBUDSMAN’S INQUIRY AND PROPOSAL FOR A SOLUTION**

The Ombudsman opened an inquiry into the Commission’s implicit refusal to give public access to the opinion of the RSB (document 29). Upon request of the Ombudsman, the Commission provided a copy of the document concerned to the Ombudsman.

Following the inspection of the document, on 19 February 2024, the Ombudsman proposed that the Commission disclose document 29.

In its proposal for a solution, the Ombudsman took the view that the Commission’s decision not to disclose the document is not in line with the case-law, in particular with the judgment

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<sup>1</sup> The complainant’s request was registered with reference EASE 2023/3645.

<sup>2</sup> OJ L 145, 31.5.2001, p. 43.

of the Court of Justice in case C-57/16 P<sup>3</sup>. The Ombudsman stressed that the opinion of the RSB on an impact assessment of a draft legislative proposal is a ‘legislative document’, to which the highest standards of transparency must apply. In the Ombudsman’s opinion, the document contains standard preparatory work that can be expected in any legislative file. The Ombudsman questioned the applicability of the exception laid down in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 to the document in question and argued that the Commission’s initial reply to the complainant’s request was based on ‘limited and general considerations’ which cannot justify the protection of the document in question.

The arguments provided by the Ombudsman in its proposal will be addressed in the section below.

### **III. THE REPLY OF THE EUROPEAN COMMISSION TO THE PROPOSAL FOR A SOLUTION OF THE EUROPEAN OMBUDSMAN**

At the outset, the Commission notes that the Ombudsman’s inquiry concerns one document (document 29) from a set of 29 documents covered by the initial request of the complainant. Neither the confirmatory request submitted by the complainant nor the Ombudsman’s inquiry concern the remaining 28 documents, which confirms the transparent approach adopted by the Commission in this case. As regards document 29 in particular, the Commission’s confirmatory decision 22 of February 2024<sup>4</sup>, of which the Ombudsman has received a copy, confirms the initial decision of DG SANTE to refuse public access to this document based on the first subparagraph (protection of the decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

The Commission notes that the principle of openness, although of fundamental importance to the EU legal order, is not absolute and, consequently, it remains open to the EU institutions to refuse, on the basis of the first subparagraph of Article 4(3) of Regulation No 1049/2001, to grant access to certain documents of a legislative nature in duly justified cases<sup>5</sup>. The Court of Justice in its judgment in case C-57/16 P noted that while legislative documents should be made directly accessible, this is however ‘subject to Articles 4 and 9’ of Regulation (EC) No 1049/2001<sup>6</sup>.

Consequently, the judgment in the case referred to above does not provide an unconditional right of direct access to any impact assessment documents or documents drawn up in the course of a legislative process. In its proposal, the Ombudsman acknowledges that, in fact, public access to legislative documents can be restricted if a risk to the ongoing decision-making is established by providing tangible evidence of this risk.

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<sup>3</sup> Judgment of the Court of Justice of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 84 to 93.

<sup>4</sup> C(2024) 1304 final.

<sup>5</sup> Judgment of the General Court of 25 January 2023, *De Capitani v Council*, T-163/21, EU:T:2023:15, paragraphs 56 and 57.

<sup>6</sup> Judgment of the Court of Justice in case C-57/16 P (referred to above), paragraph 85.

The Court however concluded that the Commission was not entitled to rely on a general presumption of non-disclosure as far as documents drawn up in the context of an impact assessment is concerned<sup>7</sup>. In such cases, an individual assessment of the request for access has to be made for each document.

The document in question is the opinion of the RSB on the draft impact assessment drawn up in the context of the revision of Regulation (EU) No 1169/2011<sup>8</sup> on the provision of food information to consumers in the areas of front-of-pack nutrition labelling, nutrient profiles, origin labelling, date marking and labelling of alcoholic beverages. The Commission services submitted the draft impact assessment to the RSB for its opinion on 2 September 2022. While the RSB delivered its opinion on 28 September 2022, the draft Impact Assessment is still being revised throughout following the substantial recommendations therein.

As explained in the Commission's confirmatory decision, the revision requires thorough analysis for which Commission services need the necessary room for reflection and for internal discussion as they must be free to explore all possible options in preparation of a decision. The introduction of harmonised mandatory front-of-pack nutrition labelling, the setting of nutrient profiling criteria to restrict claims made on foods, the extension of mandatory origin or provenance information for certain products, the revision of the rules on date marking and the introduction of mandatory indications of the list of ingredients and the nutrition declaration for all alcoholic beverages have been the subject of political discussions since a long time given the sensitive nature of the issues involved and the diverging views between Member States.

As the revision of Regulation (EU) No 1169/2011 is meant to contribute to the objectives set under the Green Deal and its Farm to Fork Strategy, as well as Europe's Beating Cancer Plan, it is especially important to have robust underlying evidence for the assessment that will inform the political decision. The Commission services are still working on the impact assessment, for instance relating to the parts concerning the impact analysis of key policy options, including on cost and benefit estimates, impacts on health, consumer behaviour, competitiveness and SMEs, as well as the analysis and choice of the preferred options. As the Commission has not yet taken a decision on this, the decision-making process is not completed and still ongoing. Concretely, at the present stage, a number of fundamental elements of the impact assessment are still under consideration.

Releasing the Board's opinion at this stage would reveal preliminary views and policy options, which are currently under consideration and for which no political decision has been taken yet. Disclosure of such preliminary views and policy options would prematurely preempt and thereby prejudice the decision-making process of the Commission on this file, which is particularly sensitive. The Commission refers to the detailed analysis of the confirmatory decision 22 of February 2024<sup>9</sup>.

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<sup>7</sup> Judgment of the Court of Justice in case C-57/16 P (referred to above), paragraph 112.

<sup>8</sup> OJ L 304, 22.11.2011, p. 18–63.

<sup>9</sup> C(2024) 1304 final.

The Commission would like to underline that, in line with the judgment in the ClientEarth case referred to above, it has not applied a general presumption of non-disclosure to the documents requested by the complainant, but has performed an individual and concrete assessment of these documents, which resulted in granting full or partial access to 28 out of the 29 documents that fell within the scope of the initial request. As regards document 29 in particular, the Commission considers that it has provided concrete evidence of a serious and non-hypothetical risk for the interest at stake if the document were fully or partially released.

#### **IV. CONCLUSION**

The Commission respectfully submits that it has taken into account the circumstances of the case and the applicable case-law, and has provided concrete evidence of a serious risk to its decision-making process that justifies the protection of the opinion of the RSB (document 29) based on the first subparagraph (protection of the ongoing decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

The Commission remains available to engage further with the Ombudsman should the latter deem it necessary in the context of this complaint.

*For the Commission*  
*Věra JOUROVÁ*  
*Vice-President*

