

SI/5/2022/KR

POLLINIS Contribution to the public consultation on transparency and participation in EU decision making related to the environment

- December 2022 -

Transparency

1. Please describe any difficulties you have faced in searching for and obtaining information or documents related to (decision making on) the environment held by EU institutions.

Based on our experience of applications for access to documents and information, we find, in general, that it is very difficult and time-consuming to obtain clear and exhaustive information about environment-related decision making and/or to obtain access to relevant documents. In particular:

- the time-limit (15 working days) provided for in Article 7 of Regulation 2001/1049 for handling applications for access to documents is almost systematically and repeatedly extended for weeks and, often, months;
- often, once received, the responses are not exhaustive or evade the questions, or are drafted in a way that does not enable the applicant to understand whether or not the institution has provided all relevant documents requested;
- when access is not simply refused, documents are provided sparingly, over extended periods of time, often with significant parts redacted.

Please find below one specific example of difficulties faced in obtaining access information or documents related to (decision making on) the environment held by EU institutions.

Commission's refusal to grant access to Scopaff documents on the EFSA Bee Guidance 2013

As of March 2018, POLLINIS made several requests for access to documents held by the European Commission (DG Santé) so as to obtain relevant documents relating to the discussions, since September 2013, within the Standing Committee on Plants, Animals, Food and Feed (hereinafter "SCoPAFF") on the EFSA 2013 Guidance document on the risk assessment of plant protection products on bees (*Apis mellifera*, *Bombus* spp. And solitary bees) (hereinafter "EFSA Bee Guidance 2013").

In response to a fair solution proposal by the Commission , POLLINIS agreed to reduce the scope of its request to documents and/or information recording the positions of Member States and/or members of the SCoPAFF and the Commission in relation to the EFSA Bee Guidance 2013. The Commission identified 84 documents, but refused to grant POLLINIS access to 78 of them, on the ground that such disclosure would undermine its decision-making process.

Following a complaint by POLLINIS, the Ombudsman asked the Commission to make available the requested documents, considering that granting wider access to such documents is necessary to ensure that EU citizens can exercise their right to participate in the EU's democratic process (Ombudsman, case 2142/2018/EWM, recommendation of 10 May 2019 and decision of 3 December 2019).

As the Commission persisted in refusing access to the documents in question, POLLINIS brought two actions for annulment before the General Court on, respectively, 12 August and 6 November 2020. On 14 September 2022, by a joint judgement, the General Court annulled the Commission's refusals to grant access to all documents requested by POLLINIS.

Following that judgement, POLLINIS wrote to the European Commission on 26 September 2022 so as to obtain the documents in question, in execution of the judgement of the General Court. To this day, the European Commission has not replied, and POLLINIS has been informed that the Commission filed an appeal against the judgement of 14 September 2022. Although an appeal does not have suspensory effect and the European Commission remains bound to disclose the documents to POLLINIS, the fierce opposition of the Commission against disclosure make us fear that the Commission will use the appeal process to delay access, thus postponing for many more months or even years the disclosure of these documents, for which POLLINIS is seeking access since 2018. Such a situation is clearly unsatisfactory.

The EFSA Bee Guidance 2013 set out new, updated requirements for the risk assessment of pesticides on bees, in line with the criteria set out in Regulation (EC) 1107/2009. As such, this document was crucial to pollinators' protection. It was discussed for years within the SCoPAFF but was never adopted due to the opposition of a few Member States within that committee. The goal of POLLINIS's request was precisely to understand the reasons for that opposition. In order to overcome the disagreements among SCoPAFF members, the European Commission finally asked EFSA, in 2019, to revise its guidance document. The revised document, published in July 2022, is less protective than the 2013 version. Yet even this new, weakened version, which should be submitted to the SCoPAFF in the course of 2023, is deemed to be too protective by the agrochemical industry and might not be agreed upon by a qualified majority of the SCoPAFF, thus postponing for even longer the improvement of the current environmental risk assessment.

As recalled in POLLINIS' letter to the European Commission of 26 September 2022, access to the requested documents would enable civil society and EU citizens not only to understand why some Member States opposed the adoption of the EFSA Bee Guidance 2013 but also to ascertain that the SCoPAFF acts in a fully independent manner and exclusively in the general interest and in line with applicable law (in particular, with the requirements under Regulation (EC) 1107/2009). It would help ensuring that future guidance documents, which could improve the environmental risk assessment of pesticides, are reviewed and adopted in a fully transparent, independent and democratic manner.

To this day, almost five years after having asked for documents related to decision making on the EFSA Bee Guidance 2013, and despite the General Court having ruled in favour of disclosure, POLLINIS is still being denied access to these documents.

4. In some inquiries concerning public access to documents, the Ombudsman found that the EU institution concerned did not recognise that 'environmental information' was at stake and, thus, did not apply the higher transparency standards required by the EU Aarhus Regulation.[2] Have you come across this issue? If so, please provide relevant examples.

With regard to the EFSA Bee Guidance 2013, and despite the importance of that guidance for pollinators protection, the Commission's position is that discussions and positions of Member States within the SCoPAFF regarding the adoption of that document do not qualify as environmental information.

5. The European Commission has implementing powers (under the so-called 'comitology' procedure) that it also uses to adopt decisions that relate to the environment, such as approving active substances in pesticides.[3] The Commission submitted a proposal to amend the 'comitology' regulation in 2017, including by making public EU Member States representatives' votes in the Appeal Committee. However, the legislative process on this proposal has since stalled.[4] Meanwhile, the Commission said it is reflecting on how to ensure further transparency in comitology procedures.[5] How do you think the Commission can improve the transparency of comitology procedures, specifically concerning environmental decision-making?

At present, minutes of the SCoPAFF meetings are extremely summarized. Citizens do not have access to important aspects and details of the discussions within the SCoPAFF. Providing access to more extensive and detailed minutes, as well as to the positions and argumentations of Member States, would significantly increase transparency and citizens' oversight of the decision making-process. It would also ensure that there are no discrepancies between the spirit of the law and its actual interpretation/application within the committees. Indeed, this discrepancy between the initial act and the texts that come under it, as is illustrated by several examples

in issues concerning the environment, raises the question of committees' compliance with the law and the legislator's intentions.

In particular, and at least on issues concerning the environment, the vote of each Member State should be public and Member States' representatives should give reasons for their vote, their abstention or for any absence from the vote, and/or where particularly sensitive areas are concerned (pesticides, GMOs etc.).

In this regard, the Commission's proposal to reform comitology (COM/2017/085 final - 2017/035 (COD)) (in particular its proposal to require a public vote of the representatives of each Member State) could and should be extended to comitology as a whole, and not only to the appeal committees.

Furthermore, as comitology 'technical choices' are a key factor on the effective implementation of the original legislation, it would be important to ensure better accessibility to the comitology register so as to increase transparency for citizens.

7. Please raise any further issues you have observed in the transparency of decision making relating to the environment.

As part of a [public consultation held in January 2019 on the active substance boscalid](#), EFSA published the renewal assessment report drafted by the Rapporteur Member State (Slovakia). The file comprises 19 documents, most of which containing hundreds of pages filled with scientific data that are not comprehensible by the lay citizen. While the report itself (volume 1) is meant to summarize the results of the risk assessment and provide the proposed decision of the Rapporteur Member State on BASF's application, section 3.2 of that report, entitled "proposed decision", on page 178, is entirely redacted.

Participation

11. Please raise any further issues you have observed in the way the EU institutions facilitate public participation in decision making relating to the environment.

- Participation in public consultations on the environment requires expertise and human resources to which NGOs and citizens may not have access (as opposed to big corporations in particular).

- Furthermore, regarding in particular public consultations launched by the Commission, the questions or surveys used for public participation are sometimes biased and/or inadequate, and do not enable proper and true public participation.

The [public consultation launched by the Commission on the legislation for plants produced by certain new genomic techniques](#) is one such example.

A number of questions of that public consultation were closed questions strongly oriented in favour of the new genomic techniques (NGT), and appeared to be formulated so as to weaken the existing GMO legislation. We were also concerned about the absence of policy options in the public consultation material and subsequent lack of transparency on this topic.

More worryingly, in parallel with the public consultation, the Commission launched a study to support the impact assessment for a legislation for plants produced by certain new genomic techniques. This study was conducted by a consortium comprising private firms, namely Ecorys, Technopolis Group, and Arcadia International, and one public research institute. As part of this study, Technopolis Group designed and carried out a survey on NGT, open to targeted stakeholder groups and public authorities, to which POLLINIS was invited to participate. The targeted survey appeared even more biased in favour of far-reaching deregulation of GMOs in agriculture and food. The survey was alarmingly one-sided and several elements made it inadequate for a serious evaluation of the regulation. The questions and answer options, the presented scenarios and accompanying texts again reveal the seemingly already fixed aim of deregulation of NGTs. It even appears that some defining conclusions were integrated into the survey's design. For more details, please see the [open letter addressed to the European Commission by POLLINIS and other environmental NGOS](#) in October 2022. We consider, therefore, that the targeted survey was fundamentally flawed and cannot provide a sound basis to feed into decisions about safety regulations for GMOs, nor can it justifiably be used as a basis for the assessment of a legal framework.

- Finally, public consultations only serve public participation if citizens' comments are somehow taken into account. In this regard, criteria for taking into consideration citizens' comments are unclear.

For instance, the Commission held, in 2019, a public consultation on the draft Commission Regulation amending Regulation (EU) No 546/2011 as regards the assessment of the impact of plant protection products on honeybees. According to the Commission, 4 735 comments were received on that occasion (which is a record for this kind of public consultation). POLLINIS took the time to scrutinize these comments: the vast majority of the 4 735 public comments (86.5%) on this Commission communication were asking one single thing: the immediate adoption of the EFSA Bee Guidance 2013 in its entirety or, at least, the adoption of its first part (laboratory tests), in particular the chronic/larval toxicity tests. Citizens thus massively participated in this public consultation in order to demand that the Commission also include chronic and larval toxicity tests in its proposal of amendment.

Yet, these tests were not included the Commission's final proposal of amendment to Regulation (EU) No 546/2011. Its proposal resulted in the inclusion of only one test out of the whole EFSA Bee Guidance 2013: the acute toxicity test, which is already conducted and has proven insufficient to properly determine the toxicity of substances on bees. The Commission thus ignored the results of the public consultation.

Citizens did not have any explanation on the reasons why their comments were ignored, despite the large majority of the overall comments asking a clear and feasible modification of the proposed amendment, in line with the position of the European Parliament. This kind of situation undermines civil society and citizens' trust on the usefulness of their participation in public consultation, which are (as in the above-mentioned example) felt as a "token tool" just to declare that citizens have been consulted, while their comments are actually ignored.