European Court of Justice rules in favour of greater transparency in accessing EFSA data

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I. Introduction

This commentary looks at an interesting judgment by the European Court of Justice (ECJ) on 16 July. The judgment relates to plant protection products, but as it seeks to achieve levels of transparency capable of overcoming the lack of trust towards the European Food Safety Authority (EFSA) - often accused of being biased for using experts with vested interests because of their industry associations - it may also be relevant to the food sector, given that the EFSA deals with many authorization procedures, opinions, etc. related to food products.

The judgment in question is “PAN Europe”, case C-615/13 P which dealt with the appeal lodged by ClientEarth and Pesticide Action Network Europe (PAN Europe) asking for the judgment of the General Court of the European Union in ClientEarth and PAN Europe v EFSA (T-214/11, EU:T:2013:483; ‘the judgment under appeal’) to be set aside.

In the judgment under appeal’, the Court dismissed the first action brought by ClientEarth and Pesticide Action Network Europe (PAN Europe) which initially sought the annulment of the decision EFSA) of 10 February 2011, refusing an application for access to certain working documents relating to a guidance document prepared by EFSA, for the benefit of applicants for authorisation to place plant protection products on the market ('the guidance document') and, subsequently, for annulment of EFSA’s decision of 12 December 2011 withdrawing the earlier decision and granting the appellants access to all the information requested, except for the names of the external experts who made certain comments on the draft of that guidance document ('the draft guidance document').

II. Background to the dispute

It should firstly be noted that Article 8(5) of Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market provides that '[s]cientific peer-reviewed open literature, as determined by the [EFSA], on the active substance and its relevant metabolites dealing with side-effects on health, the environment and non-target species ..., shall be added by the applicant [for authorisation to place a plant protection product on the market] to the dossier'.

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1 ECLI identifier: ECLI:EU:C:2015:489.

Brevitatis causae, a summary follows of the case’s chequered bureaucratic and judicial history:

- On 25 September 2009 EFSA requested that its Assessment Methodology Unit develop guidance as to how to implement article 8.5 of Regulation No. 1107/2009.

- An *ad hoc* working group submitted a draft guidance document to two EFSA bodies, some of whose members were *external scientific experts* who were invited to submit comments on the draft guidance document.

- As a result of those comments, the working group incorporated changes into the draft guidance document.

- The document was subject to public consultation between 23 July and 15 October 2010 and several persons and associations, including *ClientEarth* and *Pesticide Action Network Europe (PAN Europe)*, submitted comments on the draft.

- By letter of 1 December 2010 EFSA granted *ClientEarth* and *Pesticide Action Network Europe (PAN Europe)* partial access to the documents requested (some of which referred to the drafting of the guidance document, including the comments made by the aforementioned experts).

- However, it refused, pursuant to the exception to the right of access to documents provided for in Article 4(3)2 of Regulation No 1049/2001\(^3\), concerning the protection of the decision-making process of institutions, to disclose two sets of documents, namely (i) various working versions of the draft guidance document; and (ii) comments by the experts on that draft.

- On 23 December 2010 *ClientEarth* and *PAN Europe* submitted an application asking EFSA to reconsider its position as stated in its letter of 1 December 2010.

- By decision of 10 February 2011, EFSA confirmed that it was correct to deny access to the undisclosed documents.

- The guidance document was adopted on 28 February 2011 and it was published on the same day in the *EFSA Journal*.

On 12 December 2011 EFSA adopted and informed ClientEarth and PAN Europe of a further decision on the application which they had submitted on 23 December 2010. EFSA stated that it had decided to ‘withdraw’, ‘annul’ and ‘replace’ its decision of 10 February 2011. Pursuant to this new decision, it specifically authorized ClientEarth and PAN Europe to have access to individual comments by the external experts, whilst nevertheless confirming that it had hidden “the

names of those experts ...”⁴, arguing “...that the disclosure of the names of those experts was a transfer of personal data, within the meaning of Article 8 of Regulation No 45/2001⁵, and that the conditions for such a personal data transfer laid down in that article were not fulfilled in this case”⁶.

On 11 April 2011 *ClientEarth* and *PAN Europe* brought an action for the annulment of the EFSA decision of 10 February 2011, but the General Court held that the three pleas in law were unfounded and consequently dismissed the action.

**III. The appeal at the ECJ: action for the annulment and final decision**

*ClientEarth* and *PAN Europe* argued that the Court should set aside the judgment under appeal and order EFSA to pay the costs, and as a result a final decision was made in which the ECJ (Second Chamber):

1. Sets aside the judgment of the General Court of the European Union in *ClientEarth* and *PAN Europe* v EFSA (T-214/11, EU:T:2013:483);

2. Annuls the decision of the European Food Safety Authority (EFSA) of 12 December 2011;

3. Orders the European Food Safety Authority (EFSA) to bear its own costs and to pay the costs incurred by *ClientEarth* and Pesticide Action Network Europe (PAN Europe) in the appeal and in the proceedings at first instance;

4. Orders the European Commission to bear its own costs relating to the appeal and the proceedings at first instance;

5. Orders the European Data Protection Supervisor (EDPS) to bear its own costs relating to the appeal proceedings.»

**IV. Commentary and conclusion**

In summarizing the reasons behind the ECJ’s judgment, I would highlight the Court’s confirmation that when an application seeks to obtain access to personal data as defined by article 2(a) of Regulation No 45/2001, “the provisions of that regulation, and in particular Article 8(b) thereof, become applicable in their

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⁴ See paragraph 15 of judgment “PAN Europe”.


⁶ See also paragraph 15 of the judgment “PAN Europe”.

entirely\textsuperscript{7-8}. In that context, pursuant to said Article 2(a) of the Regulation, \textit{personal data may, as a general rule, be transferred only if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject}. Furthermore “as the General Court correctly held in paragraph 83 of the judgment under appeal, under that provision transfer of personal data is subject to two cumulative conditions being satisfied”\textsuperscript{9}. The ECJ also declared that in the first instance it is in principle up to whoever requests the transfer to demonstrate the need for it. If that need is proven, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. In the absence of any such reason, the transfer requested has to be made, otherwise the relevant institution must weigh the various competing interests in order to decide on the request for access\textsuperscript{10}.

In any case, having noted that “…the General Court was correct to begin by examining whether the arguments put forward by [ClientEarth and Pesticide Action Network Europe (PAN Europe)] established the necessity of the information at issue being transferred…”\textsuperscript{11}, the ECJ went on to uphold its own case law, according to which the objective of transfer should not be automatically given precedence over the right to protect personal data\textsuperscript{12}:

«52. Consequently the General Court was correct to hold, in paragraph 78 of the judgment under appeal, that the appellants had not established, by that first argument, the necessity of the information at issue being disclosed».

The Court also noted that the argument set forth at paragraph 79 of the judgment under appeal “…was based on the existence of a climate of suspicion of EFSA, often accused of partiality because of its use of experts with vested interests due to their links with industrial lobbies\textsuperscript{13}, and on the necessity of ensuring the transparency of EFSA’s decision-making process”\textsuperscript{14}. Hence the transparency of the process followed by a public authority in order to adopt a measure such as

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\textsuperscript{8} See paragraph 44 of judgment “PAN Europe”.

\textsuperscript{9} \textit{Ibidem}, paragraph 46.

\textsuperscript{10} \textit{Ibidem}, paragraph 47 (see also the aforementioned case law).

\textsuperscript{11} See paragraph 48 of the judgment “PAN Europe”.

\textsuperscript{12} See paragraph 85 of the judgment “Volker und Markus Schecke and Eifert”, joined cases C-92/09 and C-93/09, EU:C:2010:662.

\textsuperscript{13} Emphasis added by the author.

\textsuperscript{14} See paragraph 53 of the judgment “PAN Europe”.
that which gave rise to the claim contributes to that authority acquiring greater legitimacy in the eyes of the persons to whom that measure is addressed and increasing their confidence in that authority. Such transparency also makes the public authority more accountable to citizens in a democratic system. Furthermore, the ECJ highlighted the fact that the argument over (failure to) transfer, far from being limited to abstract and general considerations was supported by a study which identified the links between a majority of the expert members of an EFSA working group and industrial lobbies (as noted at paragraph 79 of the judgment under appeal).

Based on this reasoning, the ECJ decided to annul the judgment under appeal, noting inter alia:

- that, although it was true that, according to paragraph 80 of the judgment under appeal, ClientEarth and PAN Europe had been informed of the personal background and declarations of interests of the experts who commented on the draft guidance, it remained the case that obtaining the information at issue was necessary so that the impartiality of each of those experts in carrying out their tasks as scientists in the service of EFSA could be specifically ascertained;

- that on such a basis, the General Court was wrong to hold at said paragraph 80 that the argument of ClientEarth and PAN Europe, stated in paragraph 79 of this judgment, was not sufficient to establish that the transfer of the information at issue was necessary; and

- that “to argue, as the General Court did in paragraph 80 of the judgment under appeal, that ClientEarth and PAN Europe failed to challenge the independence of any of the experts concerned is to misapply the condition of necessity of transfer, laid down in Article 8(b) of Regulation No 45/2001\textsuperscript{15,16}.

\textsuperscript{15} Emphasis added by the author.

\textsuperscript{16} See paragraph 60 of the judgment “PAN Europe”, which states in conclusion that “…it is, to a great extent, a prerequisite of such a challenge that ClientEarth and PAN Europe should first know, with respect to each comment made, the identity of the expert who was the author of that comment”.

Resumen de la conferencia pronunciada el 10.11.2015 en San Cugat del Vallés [texto transcrito por C. Vidreras]

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