

Comments of the Commission on a proposal for a friendly solution from the European Ombudsman
- Complaint by Mr Joseph CAULFIELD, ref. 181/2013/(JF)(RT)AN

1. MAIN PRELIMINARY FINDINGS OF THE OMBUDSMAN

In her preliminary assessment, the Ombudsman noted that:

- *The Commission has failed to show how business secrets of the undertakings concerned were endangered by the disclosure of each piece of the redacted information¹.*
- *It was not entirely clear whether the redacted paragraphs should or should not be disclosed².*
- *The Commission cannot blindly follow the view of the providers of the information as to whether a particular exception is applicable, but it needs to make its own assessment³.*
- *It was not possible to establish whether the Commission carried out the public interest test⁴.*
- *The estimated costs of the projects might, if approved, have an impact on the environment and thus could constitute 'environmental information' in the sense of the Aarhus Convention⁵.*

2. THE OMBUDSMAN'S PROPOSAL FOR A FRIENDLY SOLUTION

In view of the above, the Ombudsman suggested that the Commission could grant full access to the questionnaires by disclosing the redacted paragraphs.

3. POSITION OF THE COMMISSION

- 3.1. The Commission recalls that the complainant's request for access to the questionnaires completed by the project promoters was handled by the Directorate-General for Energy (DG ENER) at the initial stage.

¹ Paragraph 32 of the friendly solution proposal

² Paragraph 35 of the friendly solution proposal

³ Paragraph 36 of the friendly solution proposal

⁴ Paragraph 38 of the friendly solution proposal

⁵ Idem.

- 3.2. On 22 April 2013, the complainant received partial access to the said questionnaires. DG ENER explained that it had redacted (i) personal data and (ii) certain commercially sensitive information from the questionnaires. The complainant did not submit a confirmatory application but instead decided to directly pursue this issue in the context of the present complaint before the Ombudsman.
- 3.3. In light of the above-mentioned proposal for a friendly solution from the Ombudsman, the Commission has reassessed the content of the requested questionnaires with a view to considering the possibility of granting either full access, as requested by the Ombudsman, or wider access to the parts which had been redacted. The results of its assessment are set out below.

Concerning the personal data redacted:

Article 2(a) of Data Protection Regulation 45/2001⁶ provides that '*personal data*' shall mean any information relating to an identified or identifiable person [...]. The Commission maintains its view that personal names, e-mail addresses and telephone numbers redacted from the questionnaires constitute personal data in the sense of Article 2(a) of Regulation 45/2001.

The Commission notes that the applicant has not established the need to obtain these personal data, and that it cannot be excluded that the release thereof would prejudice the privacy and integrity of the individuals concerned. In accordance with the exception laid down in Article 4(1)(b) of Regulation 1049/2001 as interpreted by the Courts⁷, access to these elements can therefore not be provided.

The Commission understands that the Ombudsman agrees with the above assessment, as she did not question it in her proposal for a friendly solution.

Considering that only personal data had been redacted from the following questionnaires (E150, E152, E153, E154, E155, E156 and E291), the Commission consequently understands that these questionnaires are not covered by the Ombudsman's friendly solution proposal.

Concerning the commercially sensitive information:

Based on an assessment of the input received from the project promoters who had provided the replies to the project questionnaires, DG ENER had redacted additional information (other than personal data) from the following three completed project questionnaires:

- (i) Questionnaire E149a Natural Hydro Energy Ireland 'Project Highway';
- (ii) Questionnaire E149b Natural Hydro Energy Ireland 'Project Store';

⁶ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, Official Journal L 8 of 12.1.2001, p. 1.

⁷ Judgment of 29.6.2010 in Case C-28/08 P, *Bavarian Lager*.

(iii) Questionnaire E151 (an update to the original submission).

According to Regulation 1049/2001 and its implementing rules⁸, it is the Commission who takes the final decision whether to disclose the documents in its possession.

Nevertheless, following the Ombudsman's friendly solution proposal the Commission decided to re-consult the project promoters that had submitted the above-mentioned questionnaires in order to discuss the possibility of granting either full or wider partial access to the latter.

Taking into account this further dialogue with the project promoters and in light of its own assessment of the documents concerned, the Commission is pleased to inform the Ombudsman that it has decided to grant wider public access to the requested questionnaires (see enclosures 1 and 2) by maintaining only very limited redactions, as the remaining parts are not covered by any of the exceptions of Article 4 of Regulation 1049/2001.

Questionnaires 149a and 149 b:

The only information that is still redacted from questionnaire 149a are the following two figures: the level (amount) of access to funding (on page 3) and the estimated project costs (on page 4).

The only information that is still withheld from questionnaire 149b is the level (amount) of access to funding (on page 3), the estimated project costs (on page 4), the cost per unit power and the energy storage cost, with a related brief explanation (on page 13) .

The remaining sections of the said questionnaires that had been previously redacted are now disclosed.

Questionnaire 151:

As for questionnaire 151, the Commission recalls that DG ENER provided partial public access to the updated and additional information sent by the project promoter on 8 February 2013. The reason for this was that the project promoter's original submission was no longer up-to-date. The Commission re-consulted the project promoter in the context of the present friendly solution proposal and for the sake of completeness it considered also the possibility of granting access to the original submission, which the promoter had previously sent to DG ENER.

The Commission concludes that the following redactions from the original submission and from the additional and updated information sent on 8 February 2013 should be maintained:

⁸ OJ L 345/94 of 29.12.2001.

- information on the possible subsequent phases of the project containing reference to certain follow-up actions and the type of resources to be invested, as provided under letters b, f, g, h, i and k, was redacted from both the original submission and the update;
- a summary of the ownership of shares of the holding concerned (presented as a chart) (letter d).

The Commission considers that the redacted parts relating to project questionnaires 149a, 149b and 151 (original submission and an update) referred to above fall within the exception laid down in Article 4(2), 1st indent of Regulation 1049/2001 concerning the protection of commercial interests of the legal entities concerned, including their intellectual property.

Indeed, the redacted estimated costs of the project, available construction funding and the cost per unit power and the energy storage cost are individual to each project promoter and reflect its business model, genuine use of resources and possible competitive advantage. Disclosure of this information would reveal details about its way of operating to its competitors, which could use this information to the project promoter's disadvantage. Therefore, if the corresponding parts of the questionnaires 149a and 149b were to be released, there is a real and non-hypothetical risk that the commercial interests of the project promoter concerned would be negatively affected.

The Commission notes in this regard that it attempted to provide as wide a public access to the requested questionnaires as possible. When the project promoters did not specifically object to the estimated project costs to be made public, the Commission did grant public access to these data. However, in cases, such as the one concerning project questionnaires 149a and 149b, where the project promoter specifically objected to the disclosure of this financial information, the Commission considers that it has sufficient elements to conclude that access to it is protected under the commercial interest exception of Regulation 1049/2001.

The redactions maintained in the project questionnaire 151 concern the exact ownership of the shares of the holding in question. In the present case, the project promoter has asked the Commission not to reveal the specific ownership structure of the holding concerned. On the basis of this feedback, the Commission takes the view that there is a real and non-hypothetical risk that public knowledge of this information would undermine the commercial interest of the holding on the market and in particular its market value.

The other element redacted from 151 concerns information on the possible subsequent phases of the project. Given that these data reveal the future commercial and research strategy of the promoter, references to works to be considered and the resources to be envisaged, the Commission considers that there is a real and non-hypothetical risk that disclosure of this information would undermine the commercial interests of the promoter and its intellectual property, for similar reasons as those set out above for the other undisclosed elements of the documents requested.

Further to the above-mentioned exception of Regulation 1049/2001, the Commission would like to draw the Ombudsman's attention to the following specific provisions, which were also considered in the context of the complainant's request for access and the Ombudsman's friendly solution proposal.

Article 339 of the Treaty on the Functioning of the European Union requires members of the staff of the EU institutions to refrain from disclosing "*information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components*".

Furthermore, a special confidentiality requirement was laid down in Regulation 347/2013 on guidelines for trans-European energy infrastructure. More specifically, Annex III, point 2(2) of Regulation 347/2013 provides that "[a]ll recipients shall preserve the confidentiality of commercially sensitive information".

The application of Regulation 1049/2001 cannot have the effect of rendering these provisions ineffective. It follows that the exceptions of Article 4 of Regulation 1049/2001 have to be read in light with the confidentiality requirements defined in the TFEU and in Regulation 347/2013. The project promoters that have submitted information to the Commission on the basis of privileged access rules have the legitimate expectation that the institution will not divulge that information to the public and that it will protect commercially sensitive data contained in their submissions. The Commission is of the view that if commercially sensitive information were to be disclosed, this would be also contrary to the confidentiality requirements defined in Regulation 347/2013, which aims to protect commercially sensitive information dealt with under that Regulation. It is evident that this would also negatively impact the stakeholders' confidence in the Commission's services and, consequently, the Commission's decision-making process protected under Article 4(3) of Regulation 1049/2001, as its stakeholders would be less likely in the future to submit commercially sensitive information to the Commission, which is necessary for the institution in order to decide on the related project proposals.

Overriding public interest in disclosure and the issue of an 'environmental information' in the sense of the Aarhus Convention:

The Commission recognises that it has not specifically informed the complainant of whether it had carried out a public interest test.

The complainant referred in this regard to the Convention on access to information, public participation in decision-making and access to justice in environmental matters ('the Aarhus Convention'). This convention has been

transposed into Union law by Regulation 1367/2006⁹ (The 'Aarhus Regulation').

As illustrated by the content itself of the disclosed documents at stake, the exception provided under Article 6 of Regulation 1367/2006 which obliges the divulgence of information only when it is information on emissions, is not relevant at all given that the content of the requested documents concerns information on proposals from project promoters for European Projects of Common Interest (PCIs) (key infrastructure projects in the energy sector, i.e. electricity transmission lines and electricity storages) and they do not contain any information on emissions into the environment. Therefore, an overriding public interest is not deemed to exist in this case.

The Commission recalls that the Court of Justice in its *TGI* and *Bavarian Lager* judgments¹⁰ confirmed that administrative activities are to be clearly distinguished from legislative procedures, for which the Court has acknowledged the existence of wider openness.

In the Commission's view, the limited redactions maintained are justified in order to safeguard the commercial interests and the intellectual property of the legal entities concerned, as well as the Commission's decision-making process, and they prevail over the public interest in transparency in this case. The fact that the documents concern an administrative procedure, and not a legislative procedure for which wider openness is presumed to exist, only reinforces this conclusion.

4. PROPOSAL TO SETTLE THE CASE

In replying to the Ombudsman's friendly solution proposal, the Commission has now provided the complainant with the widest possible access to the requested questionnaires. For the reasons explained above the Commission is not in a position to grant full public access.

Encl.: (2)

(1) Questionnaire E149a Natural Hydro Energy Ireland 'Project Highway' and Questionnaire E149b Natural Hydro Energy Ireland 'Project Store' (partial access)

⁹ Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies, OJ 2006 L 264, p.13.

¹⁰ Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-139/07 P, *European Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 53-55 and 60; Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 56-57 and 63.

(2) Questionnaire E151 Project Caes Larné NI (electricity, storage) – original submission and the updated information (partial access)