

Decision in case 311/2021/TE on the Innovation and Networks Executive Agency's refusal to grant public access to a cost-benefit analysis concerning the Brenner tunnel project

Decision

Case 311/2021/TE - Opened on 19/02/2021 - Decision on 02/06/2021 - Institution concerned European Climate, Infrastructure and Environment Executive Agency |

The case concerned the Innovation and Networks Executive Agency's (INEA) refusal to grant public access to a cost-benefit analysis of the Brenner tunnel project. INEA took the view that the document's disclosure would harm the commercial interests of the company implementing the project.

The Ombudsman's inquiry team inspected the requested document and found that, while it is reasonable to consider that the disclosure of some information contained in the cost-benefit analysis could undermine the commercial interests of the company, the document also contains information that cannot reasonably be understood to be commercially sensitive. The Ombudsman therefore proposed to INEA to review its position on the complainant's request, with a view to granting the widest possible public access.

In its reply, the European Climate, Infrastructure and Environment Executive Agency (CINEA), which succeeded and replaced INEA on 1 April 2021, agreed to grant partial public access to the cost-benefit analysis in question. The Ombudsman considered the redactions reasonable and closed the case on the grounds that her solution proposal had been accepted.

Background to the complaint

1. On 30 November 2020, the complainant requested public access to a cost-benefit analysis of the Brenner tunnel project. The Brenner Base Tunnel is a railway tunnel connecting Austria and Italy, and is financed by Austria and Italy, with a contribution from the EU. The Innovation and Networks Executive Agency (INEA) received the cost-benefit analysis in question as part of the grant application submitted by the two Member States.

2. On 3 December 2020, INEA refused public access.



3. On 10 December 2020, a Member of the European Parliament, on the complainant's behalf, asked INEA to review its decision to refuse access, by making what is referred to as a 'confirmatory application'. She argued that:

- the document in question contains 'environmental information' within the meaning of the EU Aarhus Regulation. [1]
- INEA's argument that the disclosure of the document would harm the commercial interests of the company implementing the project, that is, BBT SE, is wrong, as the company in question has no competitors.
- INEA's argument that there is no overriding public interest in disclosure is wrong. This is evidenced by the establishment of almost 20 local citizen initiatives and a petition [2] that gathered more than 30,000 signatures. Citizens have the right to know whether the benefits of the project, which is financed by taxpayers, outweigh its costs.

4. On 1 February 2021, INEA confirmed its initial decision to refuse access, arguing that:

- The requested document does not contain 'environmental information' within the meaning of the EU Aarhus Regulation.
- The cost-benefit analysis mainly includes financial and economic analyses of various infrastructure scenarios related to the implementation of the project. In addition, the document contains sensitive business information such as the starting date of operations, the level of investments and the level of tolls and fees of the national infrastructure managers. Elements that affect a company's cost structure are trade secrets, the disclosure of which could affect its commercial interests. Therefore, there is a reasonably foreseeable and not purely hypothetical risk that the disclosure of the document would harm the commercial interests of the company.
- The applicant has not indicated any specific circumstances that would provide evidence of an overriding public interest, but put forward general considerations only.
- The document contains the name of its author, which constitutes personal data as protected by the EU rules on public access to documents. [3]
- Meaningful partial access to the requested document is not possible without harming commercial interests.
- In line with Article 4(5) of the EU rules on public access to documents, INEA consulted the concerned Member States, which objected to the document's disclosure.

5. Dissatisfied with INEA's reply, the complainant turned to the Ombudsman on 12 February 2021.

The Ombudsman's proposal for a solution

6. On 19 February, the Ombudsman asked INEA that her inquiry team inspect the cost-benefit analysis in question, as well as documentation on the consultation of Member States in line with Article 4(5) of the EU rules on public access to documents.

7. Based on an analysis of the inspected documents, the Ombudsman proposed a solution to INEA on 26 March 2021. In her solution proposal, the Ombudsman considered that:

- The cost-benefit analysis contains, in parts, information on the starting dates of operations, the



investment level, and the amount of tolls and fees to be received from the national railway infrastructure managers. It is reasonable to consider that the disclosure of this information could undermine the commercial interests of the company implementing the project (BBT SE).

- At the same time, the cost-benefit analysis contains information that cannot reasonably be understood to be commercially sensitive, such as those sections on 'change in environmental externalities' (5.6.4) and 'change in climate impacts' (5.6.5), which also mention CO₂ emissions. These parts of the document contain 'environmental information' within the meaning of the EU Aarhus Regulation and should be released.

- For those parts of the cost-benefit analysis that are not 'environmental information' and that could be considered confidential commercial information, it must still be examined whether an overriding public interest in disclosure exists. [4]

- Concerns that disclosing the cost-benefit analysis could stir public debate, or that it could be used in a public debate, including by those opposed to the construction of the new railway line, cannot constitute a legitimate reason for rejecting access.

- While Italy objected to the disclosure of the document under Article 4(5) of the EU rules on public access to documents, it is INEA's obligation to conduct a careful examination of whether the explanations given by the Member State appear to be well founded. [5] The Ombudsman considered that they were not well founded.

8. In view of these considerations, the Ombudsman proposed to INEA to review its position on the complainant's public access request, with a view to granting the widest possible public access to the cost-benefit analysis .

9. In its reply to the Ombudsman's solution proposal, the European Climate, Infrastructure and Environment Executive Agency (CINEA), which succeeded and replaced INEA on 1 April 2021, agreed to grant partial public access to the cost-benefit analysis in question .

10. CINEA noted, however, that, regarding the disclosure of the sections on 'change in environmental externalities' (5.6.4) and on 'change in climate impacts' (5.6.5) of the requested document, it maintains the position that the EU Aarhus Regulation is not applicable. CINEA considers that the requested document is not a cost-benefit analysis produced for the EU's policy purposes. Furthermore, according to the case law, [6] the Aarhus Regulation does not apply to purely hypothetical emissions, which CINEA considers to be referred to in the cost-benefit analysis. [7]

The Ombudsman's assessment after the proposal for a solution

11. The Ombudsman welcomes CINEA's positive response to her solution proposal.

12. She notes that CINEA agreed to disclose substantial parts of the cost-benefit analysis, including those sections identified in her solution proposal as "*information that cannot reasonably be understood to be commercially sensitive*". The inquiry team's examination showed that CINEA redacted mainly the financial analysis (section 4), which examines the cash



flows (expenses and revenues) directly generated by the project. CINEA also redacted those parts of the economic analysis (section 5), which relate to investment costs, costs for renovations and line operating costs.

13. The Ombudsman agrees that, if disclosed, the redacted information could undermine the protection of the commercial interests of the company BBT SE and other stakeholders involved. The Ombudsman does not identify an overriding public interest in disclosing such information. The redactions seem therefore justified.

14. By agreeing to grant adequate partial public access to the cost-benefit analysis, CINEA thus resolved the complaint.

15. Having said that, the Ombudsman notes that, while CINEA agreed to release the relevant sections, it maintains INEA's original position that the cost-benefit analysis does not contain 'environmental information' within the meaning of the EU Aarhus Regulation.

16. The Ombudsman strongly disagrees with this position.

17. Article 2(1)(d)(v) of the Aarhus Regulation defines 'environmental information' as any information in written, visual, aural, electronic or any other material form on "*cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii) .*" Point (iii) refers to "*measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements*". Point (i) concerns "*the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements*". Point (ii) concerns "*factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i)*".

18. The Brenner Tunnel project clearly is an activity likely to affect the state of the elements of the environment. The requested document concerns a cost-benefit analysis used within the framework of that activity. The Ombudsman therefore reiterates her view that the cost-benefit analysis clearly contains 'environmental information' within the meaning of the EU Aarhus Regulation.

19. CINEA further argues that the EU Aarhus Regulation does not apply to purely hypothetical emissions, as reflected in the table on "*Budget for the change in undiscounted external climate costs*" on page 62 of the requested document.

20. The Ombudsman notes that the objective of the EU Aarhus Regulation is to ensure access to information concerning factors, such as emissions affecting or likely to affect elements of the environment, in particular air, water and soil. [8] While the Court of Justice of the EU found, in



the case referenced by CINEA, that this is not the case as regards “ *purely hypothetical emissions* ”, it found in the same judgment that the concept of ‘ *information [which] relates to emissions into the environment* ’ in the EU Aarhus Regulation cannot be limited to information concerning emissions actually released into the environment. [9] Rather, the concept covers “ *information on foreseeable emissions into the environment* ”. [10]

21. The Ombudsman understands that information on emissions will be deemed to be *foreseeable* if that information is based on a concrete assessment of objective data. In contrast, information on emissions will be deemed to be *purely hypothetical* if that information is not based on a concrete assessment of objective data, but rather is based on conjecture.

22. The relevant section of the cost-benefit analysis “ *estimates the change of the external costs [CO₂ emissions] due to the construction of the works envisaged by the project and by the management of transport in the various infrastructural scenarios* ”. The Ombudsman considers that these estimated emissions are based on a concrete assessment of objective data. Specifically, they are likely to occur based on the nature of the envisaged works and transport flows in various infrastructural scenarios.

23. The Ombudsman therefore takes the view that the information on CO₂ emissions in the cost-benefit analysis is covered by the concept of “ *information [which] relates to emissions into the environment* ” in the EU Aarhus Regulation.

24. The Ombudsman therefore welcomes the fact that CINEA did not redact this information.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

The Ombudsman welcomes CINEA’s positive reply to her solution proposal. By agreeing to grant adequate partial public access to the requested cost-benefit analysis, CINEA has resolved the complaint.

The complainant and the European Climate, Infrastructure and Environment Executive Agency will be informed of this decision .

Emily O'Reilly European Ombudsman

Strasbourg, 02/06/2021

[1] Regulation 1367/2006 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, available here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006R1367> [Link]

[2] <https://brennerdialog.de/blog/2020/01/21/petition-brennerdialog-mit-30-435-unterschriften/>

[3] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1049>

[4] Judgment of the Court of Justice of 1 July 2008 in case C-39/05 P and C-52/05 P, Sweden & Turco v Council, para. 44: <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-39/05> [Link]

[5] Judgment of the General Court of 6 February 2020, *Compañía de Tranvías de la Coruña, SA v European Commission*, T-485/18, para. 70:

<https://curia.europa.eu/juris/liste.jsf?num=T-485/18&language=EN> [Link]

[6] CINEA refers to the Judgment of the Court (Fifth Chamber) of 23 November 2016, *European Commission v Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe)*, Case C-673/13 P:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0673>

[7] CINEA refers to the table on “ *Budget for the change in undiscounted external climate costs* ” on page 62 of the cost-benefit analysis.

[8] Judgment of the Court (Fifth Chamber) of 23 November 2016, *European Commission v Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe)*, Case C-673/13 P, para. 72:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0673> [Link].

[9] para. 73

[10] para. 74.