

Decision of the European Ombudsman closing the inquiry into complaint 253/2013/JN against the European Commission

Decision

Case 253/2013/JN - Opened on 11/03/2013 - Decision on 14/07/2014 - Institution concerned European Commission (Settled by the institution) |

The case concerned the alleged failure of the European Commission to give reasons for rejecting the complainant's projects in the area of trans-European energy infrastructures. The Ombudsman inquired into the issue and found the explanation provided by the Commission in the course of the inquiry to be convincing and satisfactory.

The background to the complaint

1. In view of the adoption of the Regulation on guidelines for trans-European energy infrastructure (the 'Regulation') [1] , the European Commission organised a call for Projects of Common Interest ('PCI'). The aim was to identify potential PCIs [2] . The initial project information was to be submitted between 23 May and 7 June 2012.
2. The complainant's company submitted two projects: one project, entitled "*A technology of saving energy resources and reducing CO2 emissions for a large-scale gas supply systems* ", in the category of gas infrastructures; and the other project, entitled "*A technology of saving energy resources and reducing CO2 emission for a large-scale energy systems* ", in the category of electricity infrastructures (the 'gas project' and the 'electricity project', jointly the 'projects').
3. As regards the gas project , on 20 September 2012, the Commission informed the complainant that "*given the nature of his project - which is not a piece of infrastructure - it doesn't seem to be in the scope* " of the Regulation. It drew his attention to two other EU programmes that might be more suitable for the project.
4. On 21 September 2012, the complainant attended a meeting of the North-South East regional gas working group, which was in charge of assessing the project. During that meeting, the working group rejected the gas project.
5. On 3 October 2012, the complainant wrote to the Commission and insisted that his gas



project be included in the PCI list. He suggested that the Commission add energy efficiency as a project evaluation criterion. Moreover, the Commission should suggest to the project promoters whose projects were included in the PCI list that they modernise those projects by using the complainant's project and cooperate with the complainant.

6. On 19 April 2013, the Commission replied to the complainant's website enquiry of 15 March 2013 relating to the rejection of his gas project. The Commission informed him that the Regulation is aimed at energy infrastructures. His gas project was a technology solution, which fell outside the scope of the Regulation. This information had been presented to the relevant regional gas working group, which excluded the project from further evaluation.

7. As regards the electricity project, several documents transmitted by the complainant to the Ombudsman indicate that his electricity project was considered non-eligible on the ground that it was " *not a project but an invention of an efficiency technique* " and not " *essential equipment* " or " *two-way communication equipment* ".

8. On 3 October 2012, 12 November 2012, 17 December 2012 and 25 January 2013, the complainant wrote to the Commission and challenged this assessment. It seems that no substantive answer had been given to the complainant before he contacted the Ombudsman.

The inquiry

9. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

1) Allegation: The Commission (DG Energy) failed to explain why it rejected the complainant's projects.

2) Claim: The Commission should provide an explanation for its assessment of the complainant's projects.

10. The Ombudsman asked the Commission for an opinion by 31 May 2013. On 24 July 2013, the Commission sent its opinion and, subsequently, the complainant made comments in response to the Commission's opinion. On 13 November 2013, the Ombudsman made further inquiries and received, in reply, a further opinion from the Commission on 19 March 2014 and subsequently the complainant's comments on it. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Alleged failure to explain why the complainant's project was rejected

Arguments presented to the Ombudsman



11. In his complaint, the complainant submitted that the Commission had failed to reply to his requests to correct obvious errors in its assessment without providing any reasons for not correcting those errors. It further failed to explain why it had refused to apply energy resources savings as a criterion for the selection of projects in accordance with Directive 2012/27/EU on energy efficiency [3] .

12. In its opinions, the Commission explained its reasons for rejecting the complainant's projects. In brief, both projects concerned a technology to increase energy efficiency, which was not covered by the Regulation. The Regulation targeted infrastructure projects for geographically specified locations but the complainant's projects did not fall under any of the infrastructure categories. Admittedly, his projects could be considered as "equipment" but not as "essential equipment", as required by the Regulation, and did not meet other eligibility criteria.

13. The **electricity project** was non-eligible as it did not fall under any of the infrastructure categories set out in Annex II.1 (a) to (d) of the Regulation [4] . In addition, it did not fulfil the criteria set out in Article 4 [5] and Annex IV.1 [6] for any of the infrastructure categories, including infrastructure category (e).

14. According to the detailed information provided to the Commission, the complainant's project made it possible to calculate when to turn on or off certain equipment in the energy system in order to minimise the use of energy and reduce CO2 emissions. It explicitly addressed not only transmission/storage infrastructure, but the entire energy system, including production facilities. Thus, it was not a transmission line, an electricity highway or equipment needed for such, or a storage facility (categories (a)-(c)).

15. The Commission stated that the project could also not be considered "essential equipment" (category (d)). The Commission provided examples of essential equipment which is usually required for the relevant systems to operate safely, securely and efficiently. Such equipment is essential because, without it, either no energy could flow or the system could stop operating (blackout). The complainant's project was non-essential because the system could operate without it and its safety, security and efficiency would not be jeopardised. In addition, the project did not fulfil other criteria. In particular, it did not demonstrate that it was located in a Member State and increased cross-border capacity by at least 500MW between two Member States.

16. Finally, the project was also not eligible under category (e) since it did not fulfil the criteria listed in Annex IV. In particular, the project was not physically located in any Member State and did not involve transmission and distribution system operators from at least two Member States. Nor did it meet some further conditions specified in Annex IV.

17. For similar reasons, the Commission rejected the **gas project** , which clearly concerned the same technology as that in the gas project. The Commission considered that it did not constitute infrastructure and was not essential for the system to operate safely, securely and efficiently or to enable bi-directional capacity [7] . It explained that such projects are typically



compressor stations needed to create pressure in order to transport gas over long distances or reverse flow installations allowing gas to be transported in two directions. Without them, gas could not flow at all or only in one direction. While the project promoted by the complainant might contribute to the optimisation of flows, it was not essential for the system to operate. In addition, the project did not fulfil any of the criteria in Article 4 of Annex IV to the Regulation. In particular, it did not demonstrate that it was located in a Member State or that it increased cross-border or reverse flow capacity by 10%.

18. The Commission further observed that the complainant was informed on 20 September 2012 that the gas project was potentially not eligible. On 21 September 2012, he attended a meeting of the Regional Group, during which the project was rejected. The complainant did not comment on this decision during the meeting. The minutes of that meeting were not sent to the complainant because his e-mail address was unintentionally not included in the list of addresses. However, before the meeting, he had been sent preparatory documents with information on the reasons why his project seemed to be non-eligible.

19. The complainant, in his e-mail of 3 October 2012, made requests for corrections in the regional working group's assessment which were clearly outside the scope of what the regional working groups or the Commission could do and which had no impact on the eligibility of the project [8] . His email was indirectly answered through a reply to his website enquiry of 15 March 2013.

20. The Commission further pointed out that the evaluation criteria are applied only to eligible projects. Projects deemed non-eligible by the regional working group are not further assessed. Therefore, the complainant's gas project was not assessed on the basis of any of the further evaluation criteria set out in Article 4 of the Regulation. In the Commission's view, Directive 2012/27/EU on energy efficiency was not relevant for the assessment of the projects.

21. In his observations, the complainant maintained his earlier views. He argued that the technology proposed by his company could be used in all types of infrastructures, including the electricity and gas infrastructures listed in the Regulation. It could also be regarded as "essential equipment" for such infrastructures which could be located or used in all Member States and neighbouring countries.

The Ombudsman's assessment

22. This inquiry concerns the Commission's alleged failure to give reasons for rejecting the complainant's two projects. The Ombudsman is pleased to note that the Commission has, in the course of the Ombudsman's inquiry, further explained why it rejected these projects (see points 12-17 above). In the Ombudsman's view, this explanation is convincing and satisfactory.

23. In particular, it is clear that, given their specific nature, the complainant's projects do not constitute infrastructure within the meaning of the Regulation. The Ombudsman finds convincing the Commission's explanation that, while the complainant's projects could be regarded as



equipment, they are not "essential equipment" within the meaning of the Regulation. The Ombudsman sees no reason not to accept the rest of the Commission's arguments.

24. As regards the complainant's (procedural) argument that the Commission failed to reply to his requests to correct errors in its assessment, the Ombudsman does not find it necessary to examine its merits because, in any event, the Commission has now given a satisfactory explanation.

25. As regards the complainant's argument that the Commission failed to explain why it refused to apply the saving of energy resources as a criterion for the selection of projects, the Ombudsman is of the view that this argument has now also received a convincing and satisfactory reply (see point 20 above).

26. For these reasons, the Ombudsman concludes that the Commission has taken steps which satisfy the complainant's claim in that it provided an explanation which is convincing and satisfactory.

Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

The Commission has taken steps which satisfy the complainant's claim in that it provided an explanation which is convincing and satisfactory.

The complainant and the European Commission will be informed of this decision.

Emily O'Reilly

Done in Strasbourg on 14 July 2014

[1] Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJ 2013 L 115, p. 39.

[2]

http://ec.europa.eu/energy/infrastructure/consultations/20120607_non_tyndp_projects_en.htm
[Link]

[3] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ 2012 L 315, p. 1.



[4] Annex II.1 sets out the electricity energy infrastructure categories to be developed as follows:

"(a) high-voltage overhead transmission lines, if they have been designed for a voltage of 220 kV or more, and underground and submarine transmission cables, if they have been designed for a voltage of 150 kV or more;

(b) concerning in particular electricity highways; any physical equipment designed to allow transport of electricity on the high and extra-high voltage level, in view of connecting large amounts of electricity generation or storage located in one or several Member States or third countries with large-scale electricity consumption in one or several other Member States;

(c) electricity storage facilities used for storing electricity on a permanent or temporary basis in above-ground or underground infrastructure or geological sites, provided they are directly connected to high-voltage transmission lines designed for a voltage of 110 kV or more;

(d) any equipment or installation essential for the systems defined in (a) to (c) to operate safely, securely and efficiently, including protection, monitoring and control systems at all voltage levels and substations;

(e) any equipment or installation, both at transmission and medium voltage distribution level, aiming at two-way digital communication, real-time or close to real-time, interactive and intelligent monitoring and management of electricity generation, transmission, distribution and consumption within an electricity network in view of developing a network efficiently integrating the behaviour and actions of all users connected to it — generators, consumers and those that do both — in order to ensure an economically efficient, sustainable electricity system with low losses and high quality and security of supply and safety".

[5] The relevant part of Article 4 reads as follows:

"1. Projects of common interest shall meet the following general criteria:

(a) the project is necessary for at least one of the energy infrastructure priority corridors and areas;

(b) the potential overall benefits of the project, assessed according to the respective specific criteria in paragraph 2, outweigh its costs, including in the longer term; and

(c) the project meets any of the following criteria:

(i) involves at least two Member States by directly crossing the border of two or more Member States;

(ii) is located on the territory of one Member State and has a significant cross-border impact as set out in Annex IV.1;



(iii) crosses the border of at least one Member State and a European Economic Area country.

2. The following specific criteria shall apply to projects of common interest falling within specific energy infrastructure categories:

(a) for electricity transmission and storage projects falling under the energy infrastructure categories set out in Annex II.1(a) to (d), the project is to contribute significantly to at least one of the following specific criteria:

(i) market integration, inter alia through lifting the isolation of at least one Member State and reducing energy infrastructure bottlenecks; competition and system flexibility;

(ii) sustainability, inter alia through the integration of renewable energy into the grid and the transmission of renewable generation to major consumption centres and storage sites;

(iii) security of supply, inter alia through interoperability, appropriate connections and secure and reliable system operation;

(b) for gas projects falling under the energy infrastructure categories set out in Annex II.2, the project is to contribute significantly to at least one of the following specific criteria:

(i) market integration, inter alia through lifting the isolation of at least one Member State and reducing energy infrastructure bottlenecks; interoperability and system flexibility;

(ii) security of supply, inter alia through appropriate connections and diversification of supply sources, supplying counterparts and routes;

(iii) competition, inter alia through diversification of supply sources, supplying counterparts and routes;

(iv) sustainability, inter alia through reducing emissions, supporting intermittent renewable generation and enhancing deployment of renewable gas;

(c) for electricity smart grid projects falling under the energy infrastructure category set out in Annex II.1(e), the project is to contribute significantly to all of the following specific criteria:

(i) integration and involvement of network users with new technical requirements with regard to their electricity supply and demand;

(ii) efficiency and interoperability of electricity transmission and distribution in day-to-day network operation;

(iii) network security, system control and quality of supply;



(iv) optimised planning of future cost-efficient network investments;

(v) market functioning and customer services;

(vi) involvement of users in the management of their energy usage".

[6] The relevant part of Annex IV reads as follows:

"(1) A project with significant cross-border impact is a project on the territory of a Member State, which fulfils the following conditions:

(a) for electricity transmission, the project increases the grid transfer capacity, or the capacity available for commercial flows, at the border of that Member State with one or several other Member States, or at any other relevant cross-section of the same transmission corridor having the effect of increasing this cross-border grid transfer capacity, by at least 500 Megawatt compared to the situation without commissioning of the project;

(b) for electricity storage, the project provides at least 225 MW installed capacity and has a storage capacity that allows a net annual electricity generation of 250 Gigawatt-hours/year;

(c) for gas transmission, the project concerns investment in reverse flow capacities or changes the capability to transmit gas across the borders of the Member States concerned by at least 10 % compared to the situation prior to the commissioning of the project;

(d) for gas storage or liquefied/compressed natural gas, the project aims at supplying directly or indirectly at least two Member States or at fulfilling the infrastructure standard (N-1 rule) at regional level in accordance with Article 6(3) of Regulation (EU) No 994/2010 of the European Parliament and of the Council ...;

(e) for smart grids, the project is designed for equipments and installations at high-voltage and medium-voltage level designed for a voltage of 10 kV or more. It involves transmission and distribution system operators from at least two Member States, which cover at least 50 000 users that generate or consume electricity or do both in a consumption area of at least 300 Gigawatthours/year, of which at least 20 % originate from renewable resources that are variable in nature."

[7] The relevant part of Annex II sets out the gas energy infrastructure categories to be developed as follows:

"(a) transmission pipelines for the transport of natural gas and bio gas that form part of a network which mainly contains high-pressure pipelines, excluding high-pressure pipelines used for upstream or local distribution of natural gas;

(b) underground storage facilities connected to the above-mentioned high-pressure gas pipelines;



(c) reception, storage and regasification or decompression facilities for liquefied natural gas (LNG) or compressed natural gas (CNG);

(d) any equipment or installation essential for the system to operate safely, securely and efficiently or to enable bi- directional capacity, including compressor stations".

[8] Those were namely the requests: (i) to modify the draft TEN-E Regulation to include energy efficiency among the project evaluation criteria; (ii) to include the complainant's project on the list of PCIs; (iii) to suggest to the project promoters whose projects were on the list of PCIs that they modernise those projects (on the basis of the complainant's technology proposal); and (iv) to suggest to the project promoters whose projects were on the PCI list that they modernise their systems and cooperate with the complainant's company.