

Decision of the European Ombudsman closing the inquiry into complaint 240/2014/FOR against the European Commission

Decision

Case 240/2014/FOR - Opened on 27/02/2014 - Decision on 28/04/2015 - Institutions concerned European Commission (No maladministration found) | European Commission (Critical remark) |

The case concerned the alleged lack of public consultation by the Commission regarding a list of energy infrastructure projects that, if eventually approved by the Commission, would be given priority for funding by the Commission. The complainant (an Irish citizen) questioned the extent of the information provided in relation to individual projects on the proposed list and the fact that the Commission had carried out no consultation at local level in relation to individual projects.

The Ombudsman noted that the applicable rules required extensive public consultation on the impact of individual projects, to be carried out by national authorities, when a particular project was at the stage of planning. That public consultation involved the provision of detailed information to the public on individual projects and the organisation of public meetings at local level on individual projects. The Ombudsman does not consider that the Commission's public consultation, on the drawing up of a list of energy infrastructure projects to be given priority for funding by the Commission, should replicate that process. Rather, the Commission correctly chose to ensure that the consultation it carried out had a pan-European focus.

The Ombudsman made a critical remark as regards the failure of the Commission to make a relevant document (the list of projects) available to the public during the consultation period in languages other than English. She also made a further remark that the Commission should seek to use more dynamic means of making its public consultations known to the public.

The background to the complaint

1. The complainant, an Irish citizen who campaigns against the construction of windmills in his locality in Ireland, complained in May 2014 to the Ombudsman about how the Commission conducted a public consultation during the process of drawing up of a list of energy infrastructure projects that would be given priority for funding by the Commission.



The inquiry

2. The Ombudsman opened an inquiry into the complaint and identified the following allegations and claims:

Allegations:

- 1) The Commission failed to comply with its own Communication on public consultation [1] in respect of energy infrastructure projects.
- 2) By restricting the language of its website on the public consultation to English only, the Commission disenfranchised many citizens in countries where the energy infrastructure projects may be built.

Claims:

- 1) The Commission should ensure that all relevant environmental information is available to the communities affected by the projects in question;
- 2) The Commission should consider publishing its websites on public consultations in all the official languages of the European Union, or, at least, in the official languages of those Member States which would be affected by the schemes contemplated by the public consultations.
3. In the course of the inquiry, the Ombudsman received the opinion of the European Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Alleged failures relating to the manner in which public consultations were carried out

Arguments presented to the Ombudsman

4. The complainant argued that the Commission failed to ensure that the public could give their views on the Commission's proposal to prioritise the funding of various windmill projects in Ireland. He argued, specifically, that the Commission failed to use all possible means to publish information on the windmill projects and failed to take the steps necessary to ensure that interested parties in Ireland could take part in the Commission's public consultation. As regards these arguments, he noted that the Commission had given him no examples of how the people of the Midlands of Ireland (where he lives) were informed of the Commission's public consultation on the windmill projects.



5. The complainant stated that the failure to contact people affected by the various windmill projects, namely the people living in the areas where the windmills were to be built, infringed the Aarhus Convention [2] .

6. In its opinion, the Commission stated it conducts extensive public consultations before including a project on the list of projects to be prioritised for funding by the Commission [3] . Separate from the issue of the funding of projects by the Commission, the Commission noted that national authorities are required to carry out project-specific consultation at local, regional and national levels before the individual projects are authorised to go ahead.

7. The Commission stated that it had launched a public consultation on the list of projects that might be funded by the Commission on the 'Your Voice in Europe' website, which is a single access point for all public consultations launched by the Commission.

8. The Commission noted that further consultation events were communicated to the public through different webpages of DG Energy, including 'Public consultations' webpage, the 'Events' webpage and the 'News; What's new in Energy Policy' webpage.

9. In addition, the Commission noted, the website of the Irish Department of Communications, Energy and Natural Resources contained information about the consultation process and contained a link to the relevant DG Energy website.

10. The Commission also noted that it also used " *more traditional alternatives to the internet* ", such as press releases and memos with frequently asked questions.

11. The Commission also informed the Ombudsman that its consultation process included seven events for stakeholders [4] .

12. The Commission then underlined that access to the consultation process was not subject to any limitations on the basis of location or the specific characteristics of stakeholders. It noted that the participation in the Information Day was free of charge.

13. The Commission added that the consultation started at the earliest possible stage, namely 17 months prior to its decision on which projects to prioritise as regards funding. The consultation then lasted for 15 weeks (from 20 June - 4 October 2012).

14. The Commission finally noted that the contact details of the Commission services in charge of drawing up the list of energy infrastructure projects to be prioritised as regards funding by the Commission, and the names of project promoters in charge of these projects, , were published on the Commission's website in June 2012. Therefore, members of the public interested in any given project had the possibility of requesting additional information from project promoters or from the Commission. The Commission noted, in this respect, that it received and dealt with a number of requests for information related to projects on the list of energy infrastructure projects.



15. In his observations, the complainant asked " *how many ordinary people can be bothered to read the Commission's "Your Voice in Europe" website page, if they can even find it?* " In this respect, the complainant disagreed with the Commission's view that notices on a website are 'public notices'. The complainant went on to ask whether the Commission's press release was published in the Irish newspapers.

The Ombudsman's assessment

16. The Ombudsman notes that Article 1 of the Treaty on European Union states that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

17. Compliance with Article 1 of the Treaty on European Union requires that EU institutions make adequate information available to the public, in good time, relating to the policies and decisions they intend to adopt, and creates the appropriate opportunities for the public to make their views known in relation to these proposed policies and decisions.

18. Compliance with Article 1 of the Treaty on European Union is particularly important in relation to policies and decisions that may impact on the environment. First, the protection and improvement of the environment is a central pillar of the EU [5] . Second, the effective protection and improvement of the environment requires the input of citizens throughout the EU, who are often the best placed to identify threats to the environment.

19. The above principles are reflected in the Aarhus Convention, to which the EU is a signatory and by which it is bound. The Convention establishes a number of rights of the public with regard to the environment. The Convention provides for the right of everyone to receive environmental information that is held by public authorities, which includes information on the state of the environment, but also on policies or measures taken in relation thereto. In addition, public authorities are obliged, under the Convention, to disseminate actively environmental information in their possession. The Convention also creates a right to participate in environmental decision-making. Arrangements should thus be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment. Such comments should be taken into due account in decision-making.

20. The above principles are reflected in the Aarhus Regulation [6] . Article 9 of the Aarhus Regulation gives specific effect to the right of the public to participate in decision-making by EU institutions and bodies relating to projects that impact on the environment. It states that (emphasis added by the Ombudsman):

" 1. *Community institutions and bodies shall provide, through appropriate practical and/or other provisions , early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when*



all options are still open. In particular, where the Commission prepares a proposal for such a plan or programme which is submitted to other Community institutions or bodies for decision, it shall provide for public participation at that preparatory stage .

2. Community institutions and bodies shall identify the public affected or likely to be affected by, or having an interest in, a plan or programme of the type referred to in paragraph 1, taking into account the objectives of this Regulation .

3. Community institutions and bodies shall ensure that the public referred to in paragraph 2 is informed , whether by public notices or other appropriate means , such as electronic media where available , of:

(a) the draft proposal, where available;

(b) the environmental information or assessment relevant to the plan or programme under preparation, where available; and

(c) practical arrangements for participation, including:

(i) the administrative entity from which the relevant information may be obtained,

(ii) the administrative entity to which comments, opinions or questions may be submitted, and

(iii) reasonable time-frames allowing sufficient time for the public to be informed and to prepare and participate effectively in the environmental decision-making process.

(...)."

21. The complainant argues that the Commission failed to take adequate steps to inform persons located in the area of Ireland in which he lives (the Midlands), which is an area where there was then a windmill project on the list of projects that would be prioritised for funding by the Commission. He states that the Commission should have held meetings with persons living in the Midlands of Ireland and should have put notices in local newspapers there.

22. The Ombudsman notes that Article 9 of the Aarhus Regulation is outcome focused. Rather than establishing a rigid formal legal regime which requires **specific forms** of public participation to be organised, Article 9 of the Aarhus Regulation focuses on ensuring that effective outcomes, in terms of public participation in decision-making, are achieved. In that respect, the Ombudsman notes, Article 9(1) of the Aarhus Regulation refers to the need for "*appropriate*" practical and/or other provisions, to ensure that there are early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when all options are still open [7] . In this respect, the Ombudsman disagrees with the view, implicit in the complainant's allegation, that the Commission should have used all *possible* means of ensuring access to publications/information on the list of energy infrastructure projects. The Commission does not



have to use all *possible* means to ensure access to publications/information on the list of energy infrastructure projects. Rather, it has to use all *appropriate* means ensuring access to publications/information on the list of energy infrastructure projects. Whether a measure is or is not " *appropriate* " will depend on the nature of the environmental issue that is subject to that decision-making and the nature of the decision-making. It also depends upon whether other bodies are better placed to carry out such measures.

23. The Ombudsman notes, in this context, the Commission's argument that **all the individual energy infrastructure projects on the list of energy infrastructure projects will have to undergo a complete permit-granting process at national level, before they can proceed, which will encompass a project-specific public consultation aimed at those stakeholders likely to be directly affected by each project, including persons living locally** [8] . This observation is important since, even if a project were ever approved for funding at EU level, it could not go ahead without obtaining a permit at national level.

24. The Commission's statement is supported by the relevant legislation. The Ombudsman notes that Article 9 of Regulation 347/2013 on guidelines for trans-European energy infrastructure states that, without prejudice to any requirements under the Aarhus and Espoo Conventions, and relevant Union law, all parties involved in **the permit granting process** for projects shall follow the principles for public participation set out in of Annex VI of the Regulation. The Regulation goes on to state that at least one public consultation shall be carried out by the project promoter, or, where required by national law, by the competent (national, regional or local) authority, before submission of the final and complete application file to the competent authority.

25. Annex VI of Regulation 347/2013 itself states that, to increase public participation in the permit granting process and ensure in advance information and dialogue with the public, the following principles shall be applied to the above mentioned public consultation:

"(a) The stakeholders affected by a project of common interest, including relevant national, regional and local authorities, landowners and citizens living in the vicinity of the project, the general public and their associations, organisations or groups, shall be extensively informed and consulted at an early stage, when potential concerns by the public can still be taken into account and in an open and transparent manner. Where relevant, the competent authority shall actively support the activities undertaken by the project promoter.

(b) Competent authorities shall ensure that public consultation procedures for projects of common interest are grouped together where possible. Each public consultation shall cover all subject matters relevant to the particular stage of the procedure, and one subject matter relevant to the particular stage of the procedure shall not be addressed in more than one public consultation; however, one public consultation may take place in more than one geographical location. The subject matters addressed by a public consultation shall be clearly indicated in the notification of the public consultation.

(c) Comments and objections shall be admissible from the beginning of the public consultation



until the expiry of the deadline only."

26. Annex VI adds that the concept for public participation shall at least include information about:

"(a) the stakeholders concerned and addressed;

(b) the measures envisaged, including proposed general locations and dates of dedicated meetings;

(c) the timeline;

(d) the human resources allocated to the respective tasks."

27. Annex VI goes on to add that, in the context of the public consultation to be carried out before submission of the application file, the relevant parties shall at least:

"(a) publish an information leaflet of no more than 15 pages, giving, in a clear and concise manner, an overview of the purpose and preliminary timetable of the project, the national grid development plan, alternative routes considered, expected impacts, including of cross-border nature, and possible mitigation measures, which shall be published prior to the start of the consultation; the information leaflet shall furthermore list the web addresses of the transparency platform referred to in Article 18 and of the manual of procedures referred to in point (1);

(b) inform all stakeholders affected about the project through a website and other appropriate information means. The project website shall make available as a minimum the following: the information leaflet referred; a non-technical and regularly updated summary of no more than 50 pages reflecting the current status of the project and clearly indicating, in case of updates, changes to previous versions; the project and public consultation planning, clearly indicating dates and locations for public consultations and hearings and the envisaged subject matters relevant for those hearings; contact details in view of obtaining the full set of application documents; and contact details in view of conveying comments and objections during public consultations.;

(c) invite in written form relevant affected stakeholders to dedicated meetings, during which concerns shall be discussed."

28. The Ombudsman stresses that, in light of the above, none of the projects on the list of projects that could be prioritised for funding can be implemented unless they have undergone appropriate consultation at local level, where persons who are most affected by the projects and who may be better informed as regards the impact of the projects on the environment, may put forward their views and concerns. It is thus clear that there are safeguards which ensure that citizens can participate in **the decision-making relating to individual projects** and make known their views on the impact of those projects on the environment before they are implemented.



29. It should be noted that if a project fails the approval stage at national level, any decision at EU level as regards its funding is devoid of any effect since funding can be granted only to projects that are carried out.

30. In the Ombudsman view, it would not be *appropriate* for the Commission to attempt to replicate the consultation that already must take place at national level. In that context, the Commission cannot be faulted for choosing not to hold meetings in the localities where the projects will be implemented [9] .

31. While the Commission did not attempt to replicate the type of consultation that should takes place at national level, it nonetheless took steps to carry out a broad consultation on its plans to fund certain projects, with particular emphasis on the cross-border issues falling within its specific competence and expertise.

32. The Ombudsman notes that the issues which were the subject matter of the Commission consultation were extremely broad and it was not limited to environmental issues. The Commission decision-making process required also an assessment of the overall impact of the projects from an economic perspective and an environmental perspective. The criteria to be used for assessing projects included market integration and interoperability; increased competition with an emphasis on diversification, including the facilitation of access to indigenous sources of supply; security of supply; the level of emissions measured by assessing the reduction of greenhouse gas emissions, and the environmental impact of electricity grid infrastructure; capacity of transmission and distribution grids to connect and bring electricity from and to users. As will be explained below, persons and interest groups throughout the EU, and not only those persons and groups located in areas where particular projects might eventually be completed, were entitled to and were empowered to put forward their views on those broad issues.

33. As regards the extent of the information provided in relation to specific projects, the Ombudsman notes that the list of project to be prioritised for funding comprises over 200 projects across the EU. The description of each project in the consultation documents was very limited. In most cases, the project is described in one line. The description sets out the type of project (for example, project E155 is described as "3GW of onshore wind in Ireland to be directly connected using c250km HVDC cables to the UK power system in Wales"), its completion date if available and the company carrying out the project (referred to as the "Promoter"). However, the Commission stated, in its opinion to the Ombudsman, that it was willing to provide all entities who requested additional information relating to specific projects with additional information on those projects. It stated that it received and responded positively to such requests.

34. The Ombudsman notes that the Commission's chosen means of communicating the environmental issues at stake to the public was essentially web-based. The Commission placed information on various of its websites, and ensured that information was placed on the website of national environmental authorities. In principle, given the need to contact persons throughout



the entire EU using web-based means of communication would indeed be appropriate (provided, as will be discussed in relation to the second allegation below, appropriate steps are taken to ensure that essential information is available in languages accessible to all citizens and groups).

35. As regards the extent and intensity of the use of the web-based methods of communication, the Ombudsman notes that the web-based 'method' used by the Commission was a website. Websites are essentially a static means of communication. The Ombudsman notes that it may be useful, for similar processes in the future, to consider also the merits of using social media networking communications, which are more dynamic and interactive. The Ombudsman will make a further remark in this respect.

36. The Commission also organised a number of events for stakeholders during the process. These events took place in Brussels, Madrid and Florence. The Ombudsman agrees that holding such meetings is also appropriate since, unlike web-based forms of communication (and print-based communications), they allow for the immediate exchange of views and debate. As noted above, the fact that the Commission did not organise meetings at local level, where specific infrastructure projects would be implemented, is not problematic, given that such local consultation on individual projects is organised by the competent authorities at national level. There was no need for the Commission to replicate such meetings.

37. In light of the above, the Ombudsman finds no instance of maladministration as regards the first allegation.

Alleged disenfranchisement of citizens by restricting the languages used in the public consultation

Arguments presented to the Ombudsman

38. The complainant argued that the Commission carried out the public consultation in English only. The complainant noted that the projects have a pan-European reach. Therefore, in the complainant's view, the majority of EU citizens were completely disenfranchised by virtue of the use of English only.

39. In its opinion, the Commission stated that it is aware of the importance of providing the public with information in their national languages. It disagreed, however, with the assertion that it restricted the language of its website to English. The Commission said that information about the public consultation was published on the "Your voice in Europe website" in all national languages. The Commission noted, however, that its translation service has limited resources and that it cannot, therefore, translate all consultation documents.

40. In his observations, the complainant stated that he accessed the "Your voice in Europe website" in German. He then went into the section entitled "*Konsultationen nach*



Politikbereichen " (consultations according to policy area). He then accessed the section entitled "*Energie*" (Energy). The links to the potential energy infrastructure projects gave rise to the following message "*Die gesuchten Informationen stehen in folgender Sprache/folgenden Sprachen zur Verfügung: English*" (the sought after information is available in the following language/languages: English).

The Ombudsman's assessment

41. The Ombudsman underlines that in order for a public consultation to be effective, especially when it relates to an issue of pan-European relevance, it must be carried out in languages which the citizens and other stakeholders understand. Indeed, the Ombudsman has already recommended [10] that the Commission should explore all available means to ensure wider language accessibility to public consultation documents, such as ensuring a more systematic provision of links to available translations for relevant documents and increasing services' awareness of available translation tools and means to facilitate their effective use. The Ombudsman also notes that in 2012, the European Parliament adopted resolution 2012/2676(RSP) on public consultations and their availability in all EU languages [11] . This resolution urged the Commission to review any restrictive language policies regarding public consultations.

42 The Ombudsman appreciates that the Commission faces a difficult task in seeking to achieve a balance between the need to ensure that EU citizens receive, in all official EU languages, the information necessary to take part effectively in a public consultation, and the need to comply with the principle of sound financial management. However, citizens should never be deprived of essential knowledge relating to any public consultation, such as the very existence of the public consultation and the key information relating to that consultation. Moreover, resource and budgetary constraints cannot justify systematically putting the burden on citizens themselves to pay for consultation documents to be translated if they wish to participate in the democratic life of the Union through the Commission's public consultations

43. As regards the specific case, the Ombudsman notes that the Commission did publish, in all official languages, information relating to its public consultation on the projects to be potentially funded by the Commission. It is to be commended for doing so. It did not, however, translate all documents relating to the consultation (specifically, it did not translate the list of projects, which was provided in English only). The Ombudsman notes that the list contains information necessary to allow citizens to participate fully in the public consultation, including brief descriptions of the projects in question. She also notes that no argument can be put forward as regards whether the translation of the list would be a disproportionate use of scarce financial resources, since the definitive list (which does not differ greatly from the list made available in English for the public consultation) was translated into 22 other official languages when it was eventually adopted. Thus, it would have required no greater use of public resources to translate the list into those languages at an earlier stage, thereby allowing those translations to be used in the Commission's public consultation. In this context, the Ombudsman will make a critical remark.



Conclusions

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusions and further remark:

In respect of the first allegation, the Ombudsman finds no maladministration by the Commission.

As regards the second allegation, the Ombudsman finds that the Commission failed to provide citizens with the necessary translations of a document to allow them to participate fully in the public consultation and that this constituted maladministration.

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

Further remark

The Commission should, in addition to using web-sites, consider also using more dynamic internet forms of communicating with citizens in public consultations.

Emily O'Reilly

Strasbourg, 28/04/2015

[1] Communication from the Commission: Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final, Brussels, 11 December 2002.

[2] United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on 25 June 1998.

[3] It should be noted that the placing of a project on the definitive list implies that it may thereafter be funded by the Commission. Placing a project on the definitive list does not, however, imply that it will certainly receive funding.

[4] These included the (i) Information Day held in Brussels, (information about that meeting was published on the "Events" webpage of DG Energy); (ii) the European Gas Regulatory Forum (in Madrid on 18 April 2013); and (iii) the Electricity Regulatory Forum (in Florence on 16 May 2013).

[5] In this respect the Ombudsman notes that Article 37 of the Charter of Fundamental Rights



states that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. Further, Article 3 of the Treaty on European Union states that the Union shall work for the sustainable development of Europe based on, amongst other factors, the improvement of the quality of the environment. She also notes that Article 11 of the Treaty on the Functioning of the European Union states that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

[6] See Regulation (EC) N° 1367/2006 of the European Parliament and of the Council 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 L 264, 25.9.2006, p.13).

[7] This interpretation is reinforced by the wording of Article 9(3) of the Aarhus Regulation, which indicates that an EU public authority has numerous choices as regards how it ensures that the public can participate in decision-making. The EU public authority can as Article 9(3) of the Aarhus Regulation states, use public notices, aimed at the public affected by the environmental issue, or it can also choose to use other appropriate means, such as electronic media.

[8] The Ombudsman notes that the area of protection of the environment is a shared competence with Member States. Even if a project is approved for funding from the EU, Member States retain the competences to decide whether a particular project receives planning permission and goes ahead.

[9] However, the Ombudsman notes, the Commission should, if it receives well-grounded complaints that Regulation 347/2013 has not been complied with at national level, investigate such complaints.

[10] See the Draft Recommendation in case 640/2011/AN available at: <http://www.ombudsman.europa.eu/cases/draftrecommendation.faces/en/11043/html.bookmark>: The following draft recommendations were made in that case:

" 1. The Commission should, as a matter of principle, publish its consultation documents in all the official languages of the Union, or provide the citizens with a translation upon request. In doing so, the Commission should take into account that the Treaty of Lisbon has placed special emphasis on the right of civil society to participate in the democratic life of the Union.

2. Furthermore, the Commission should draft clear, objective and reasonable guidelines concerning the use of the Treaty languages in its public consultations, bearing in mind that any restriction to the principles of democratic citizen participation in the decision-making process and of broad consultation by the Commission, enshrined in Articles 10(3) and 11(3) TEU, must be justified and proportionate. These guidelines should be public and easily accessible. The Commission could include them among its excellent general principles and minimum standards



for consultation of interested parties, or, at least, on the Your Voice in Europe website. "

[11]

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0256&language=EN>

[Link]