



European Ombudsman
1 avenue du Président Robert Schuman
CS 30403, F - 67001, Strasbourg Cedex
France
via email - EOPublicConsult@ombudsman.europa.eu

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Contribution to the Public Consultation SI/5/2022/KR, “Transparency and Participation in EU decision making related to the environment”

The Montescola Foundation welcomes the Public consultation on transparency and participation in EU decision making related to the environment of the European Ombudsman and would like to submit the contribution below.

With kind regards.

Joám Evans Pim, Director

In terms of point 4, transparency concerning public access to information relating to the environment:

Example 1: NEMO (funding ID 776846), applied research project on recycling of sulphidic mining waste, with pilot case studies in Finland (Sotkamo mine), Spain (Las Cruces mine), and Belgium (Vito premises in Mol).

On 4.12.2020, the grant agreement’s “Description of the Action” of the Horizon2020 funded project NEMO, which usually includes a part on implementation risks and mitigation actions, as well as information on the projects anticipated emissions into the environment, was requested from the Executive Agency for Small and Medium-sized Enterprises (EASME).¹ Subsequently, and adopting the opinion of the consortium consulted, EASME only disclosed 6 of 168 identified pages (3.6%) containing parts which were already in the public domain and which did not contain relevant information on risks and anticipated emissions into the environment during the project implementation, claiming commercially sensitive information and personal data to be affected.²

¹ Application for access to documents, 4.12.2020, record Ares(2020)7488977

² EASME response, 11.1.2021, record Ares(2020)210370

In the 29.1.2021 confirmatory application, which referenced CJEU Case T 545/11 and also the Las Cruces open-pit land slide on 23.1.2019, which occurred during the NEMO implementation and led to the exclusion of the project beneficiary Cobre Las Cruces S.A., it was argued that EASME, in negating the existence of an overriding public interest in disclosure, did not sufficiently balance the interests of the involved parties (fundamental rights of citizens under the provisions of the Aarhus Convention versus protection of commercial interests), also disregarding earlier Court decision on a broad interpretation of information relating to emissions into the environment.³ In their response, EASME upheld its earlier interpretation on a predominant non-disclosure, only giving access to a hardly legible and non-contextualised table on emission limits extracted from the requested documents, continuing the non-disclosure of relevant parts on the projects possible risks and foreseen emissions into the environment.⁴

Example 2: NEXT (funding ID 776804), applied research project on mineral exploration with reduced environmental impact, including pilot case studies in Finland (Raja prospect) and Spain (Aguas Teñidas and San Finx mines).

On 4.12.2020, the grant agreement's "Description of the Action" of the Horizon2020 funded project NEXT, which usually includes a part on implementation risks and mitigation actions, as well as information on the projects anticipated emissions into the environment, was requested from the EASME.⁵ Subsequently, and adopting the opinion of the consortium consulted, EASME only disclosed 5 of 128 identified pages (3,9%) containing mostly parts which were already in the public domain and which did not contain relevant information on risks and anticipated emissions into the environment during the project implementation, claiming commercially sensitive information and personal data to be affected.⁶

In the 29.1.2021 confirmatory application referencing CJEU Case T 545/11, it was highlighted that the project's test site of the San Finx mines in Northern Spain has a track record of non-compliant emissions into the environment, which are suspected to continue or to worsen directly related to the field work and activities of the NEXT project and its consortium partner Valoriza Minería SL.⁷ In the application, it was also highlighted that 11 written question by an MEP between 2016 and 2019, an open letter, submitted to Vice-President Maros Sefcovic and Commissioners Thierry Breton in 2020 in the name of 230 European NGOs, and also two petitions presented before the European Parliament's Committee on Petitions, furthermore confirmed the public interest in the San Finx pilot site and related activities of the NEXT project, asking EASME to rightfully balance a possible overriding public interest in disclosure against the interest of the consortium partners to protect intellectual property or commercial secrets. In their response, EASME upheld its earlier interpretation on a predominant non-disclosure due to a prevailing interest in the protection of third party commercial interests and intellectual property, only giving access to one more and heavily redacted page, containing solely generic information on ore deposits within the EU but no details on

³ Confirmatory application, 29.1.2021, record Ares(2021)982808

⁴ EASME response, 18.3.2021, record Ares(2021)1953026

⁵ Application for access to documents, 4.12.2020, record Ares(2020)7489438

⁶ EASME response, 11.1.2021, record Ares(2021)210819

⁷ Confirmatory application, 29.1.2021, record Ares(2021)982494

implementation risks and their mitigation, as well as no information on NEXT projects' anticipated direct or indirect emissions into the environment.⁸

Example 3: GREENPEG (funding ID 869274), applied research project on mineral exploration with reduced environmental impact and estimated environmental releases, including industry-led trials and field testing in Austria (Wolfsberg mine), Ireland (South Leinster test site), Norway (Tysfjord pegmatite field), Finland, Portugal, and Spain.

On 4.12.2020, the grant agreement's "Description of the Action" of the Horizon2020 funded project GREENPEG, which usually includes a part on implementation risks and mitigation actions, as well as information on the projects anticipated emissions into the environment, was requested from the Executive Agency for Small and Medium-sized Enterprises (EASME).⁹ Subsequently, adopting the opinion of the consortium consulted and despite the GREENPEG project website stating that the project's activities are covered by a manifold of 12 EC and EU Directives considering the protection of the environment against the impacts created by extractive activities¹⁰, EASME only disclosed 11 of 139 identified pages (7.9%) containing mostly parts which were already in the public domain and which did not contain relevant information on risks and anticipated emissions into the environment during the project implementation, claiming commercially sensitive information and personal data to be affected.¹¹

In the 29.1.2021 confirmatory application referencing CJEU Case T 545/11, it was highlighted that the project's implementation, per public domain information on its website¹⁰, is covered by many legal environmental, social and safety regulations, such as the Environmental Liability Directive 2004/35/EC, the Industrial Emissions Directive 2010/75/EU, the Mining Waste Directive 2006/21/EC, the Birds Directive 2009/147/EC, the Drones EASA regulation 2018/1139/EU, the Habitats Directive 92/43/EEC, the Water Framework Directive 2000/60/EC, the Council Directive 2013/59/Euratom on ionising radiation, or the EIA Directive 2011/92/EU.¹² In the application, it was also highlighted that the project deliverable 6.4's objectives are, in public domain information, described as "comparison of environmental and social issues for each main exploration method deployed by GREENPEG", thus suggesting that the information requested de facto contains information relating to emissions into the environment beyond the information so far disclosed by EASME. The confirmatory application also asked EASME to rightfully balance a possible overriding public interest in disclosure resultant from the above mentioned details against the interest of the consortium partners to protect intellectual property or commercial secrets. In their response, EASME upheld its earlier interpretation on a predominant non-disclosure due to a prevailing interest in the protection of third party commercial interests and intellectual property, only giving access to two more and heavily redacted pages, containing solely generic information on World/EU raw materials production but no details on implementation risks and their mitigation, as

⁸ EASME response, 18.3.2021, record Ares(2021)1952938

⁹ Application for access to documents, 4.12.2020, record Ares(2020)7489113

¹⁰ „Many legal environmental, social and safety regulations apply to GREENPEG exploration activities, at European level (shown in the diagram), as well as nationally and regionally.“, online source, consulted 10th of December 2022, <https://www.greenpeg.eu/aim-and-objectives.html>

¹¹ EASME response, 11.1.2021, record Ares(2020)214922

¹² Confirmatory application, 29.1.2021, record Ares(2021)983128

well as no information on GREENPEG projects' anticipated direct or indirect emissions into the environment.¹³

Example 4: BLUE MINING (funding ID 604500), applied research project on exploration and exploitation of minerals from the deep sea, including field work on the ocean floor of the Mid-Atlantic Ridge.

On 28.9.2021, the grant agreement's "Description of the Action" of the FP7-NMP funded project BLUE MINING, which usually includes a part on implementation risks and mitigation actions, as well as information on the projects anticipated emissions into the environment, was requested from the European Health and Digital Executive Agency (HaDEA).¹⁴ The request was reattributed from HaDEA to the Directorate-General Research & Innovation (DG R&I) on 13.10.2021¹⁵, which postponed a timely response to the request on 21.10.2021¹⁶ and 15.11.2021.¹⁷ In the initial request, the Commission services were informed that the project and documents thereon certainly involves information relating to emissions into the environment, as "as the projects objectives include field work on the ocean floor (performed by the research vessel 'Meteor (III)' and 'James Cook' in 2016 and 2017) that have proven track-record of emissions into the environment (e.g. 'seismic work ... with airgun shots ... on 230 nautical miles'¹⁸, 'six OBEM were intentionally left behind'¹⁹, 'drill has reached over 10 metres below seafloor and is still going strong'²⁰, 'missing one drill pipe. It seems it fell off when recovering the drill.'²¹, 'released an Ocean Bottom Electromagnetic Instrument (OBEM) from the seafloor 3600m below us, and then promptly lost it.'²², 'drill coring deep in to the mineral deposits'²³).

Subsequently, adopting the opinion of the consortium consulted, DG R&I did not disclose the requested information (0 of 181 pages identified), claiming commercial interests of a natural or legal person, including intellectual property.²⁴ In their evaluation, and despite the facts on emissions into the environment presented in the initial request, DG R&I did not consider an overriding public interest in disclosure.

Example 5: BLUE NODULES (funding ID 688975), applied research project on the harvesting of metals from the deep sea, including field tests with a mining vehicle on the ocean floor of the Atlantic Ocean (Vigo) and the Mediterranean Sea (Bay of Málaga).

¹³ EASME response, 18.3.2021, record Ares(2021)1953006

¹⁴ Application for access to documents, 28.9.2021, record Ares(2021)6217134

¹⁵ HaDEA response, 13.10.2021, with record GESTDEM 2021/6059 attributed by DG R&I on 30.09.2021

¹⁶ DG R&I response, 21.10.2021, record Ares(2021)6477561

¹⁷ DG R&I response, 15.11.2021, record Ares(2021)7016168

¹⁸ 2016 Cruise report I, online source, consulted 10.12.2022, <https://oceanrep.geomar.de/id/eprint/34777/>

¹⁹ 2016 Cruise report I, online source, consulted 10.12.2022, <https://oceanrep.geomar.de/id/eprint/34777/>

²⁰ 2016 Cruise report II, online source, consulted 10.12.2022, <https://bluemining.eu/2016-08-04/>

²¹ 2016 Cruise report II, online source, consulted 10.12.2022, <https://bluemining.eu/2016-08-04/>

²² 2016 Cruise report III, online source, consulted 10.12.2022, <https://bluemining.eu/2016-08-10-loss-of-the-obem-at-the-mid-atlantic-ridge/>

²³ 2016 Cruise report III, online source, consulted 10.12.2022, <https://bluemining.eu/2016-08-10-loss-of-the-obem-at-the-mid-atlantic-ridge/>

²⁴ DG R&I response, 25.11.2021, record Ares(2021)7271325

On 28.9.2021, the grant agreement's "Description of the Action" of the Horizon 2020 funded project BLUE NODULES, which usually includes a part on implementation risks and mitigation actions, as well as information on the projects anticipated emissions into the environment, was requested from the European Health and Digital Executive Agency (HaDEA).²⁵

Subsequently and adopting the opinion of the consortium consulted, HaDEA did not disclose the requested information (0 of 146 pages identified), claiming commercially sensitive information while not being able to identify elements "which could indicate the existence of [...] an overriding public interest in the sense of the Regulation (EC) No 1049/2001 that would outweigh the need to protect the commercial interests of the contracting parties."²⁶ Such evaluation stays in contrast with the project documentation on field work on the ocean floor, documenting the disturbance of the seabed and loss of equipment - creation of sediment plumes, "sediment compaction to at least 0.5 m depth", „broken off piece of equipment"²⁷ - the collection of samples, and the collection of sensor data during environmental tests, suggesting that also the requested documents on the project's design and environmental target performance hold information relating to emissions into the environment.

In all responses received by the commission services, outlined in the examples above, the affirmation of a non-disclosure due to the protection of commercial secrets and intellectual property of third parties remains entirely generic, and is, in none of the presented cases, sustained by a clear and contextualised justification that would allow to negate the basic right of the public's access to information related with emissions into the environment. Considering the projects' objectives and activities accessible in the public domain and presented in the examples 1 to 5 above, and although negated by the commission services, due to a narrow and inadequate interpretation of the notion of information which 'relates to emissions into the environment' per Article 6(1) of Regulation EC 1367/2006 on the application of the provision of the Aarhus Convention on Access to Information, it can be assumed that the documents requested do indeed contain information that should have been disclosed on the grounds of Article 6(1) and the primacy of public interest manifested therein.

In terms of point 9, on effective opportunities for the public to participate during the preparation, modification, or review of plans or programmes relating to the environment, we want to highlight the following case:

Between 30 September 2022 and 25 November 2022, DG GROW launched a public consultation on the *European Critical Raw Materials Act (CRMA)*.²⁸ In terms of effective opportunities for the public to participate in the consultation, DG GROW missed to make the consultation available in all languages of the member states, restricting the publication to language versions in German, English, and French.

The EU treaties require that all EU decisions are taken as openly and as closely as possible to the citizen and also the CRMA proposal itself sets out "to collect evidence and views from a broad range

²⁵ Application for access to documents, 28.9.2021, record Ares(2020)5959511

²⁶ HaDEA response, 21.10.2021, record Ares(2021)6482694

²⁷ p.3 and p. 40 in: Blue Nodules Deliverable report D2.9: Test report second field test

²⁸ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13597-European-Critical-Raw-Materials-Act_en

of stakeholders and citizens”.²⁹ Transparency and participation are considered particularly important when it comes to EU decision-making related to the environment. And, as mentioned in the CRMA proposal, “if not properly managed, production of critical raw materials, may have significant social and environmental impacts.” Making the proposal document only available in French, German, and English language versions excludes large parts of the European civil society and also local/regional NGOs not fluent in English, German or French from the consultation and participation process.

This shortcoming, in opposition to the accessibility and transparency standards fixed in the EU treaties, was highlighted both by contributions to the public consultation³⁰, as well as in a communication to DG GROW. On 23.11.2022 the Head of Unit GROW.I.1 responded:

“There is an urgency to prepare this proposal, which is why it is exceptionally published in English, French and German. You can submit your contribution to the call for evidence in any EU language.”

Questioned on the accessibility problems of restricting responses of the consultation only to the proprietary Have Your Say platform with mandatory registration and without options to submit contributions by mail or email, the Head of Unit responded:

“Have your say is the tool used for all Commission public consultations. In order to upload a contribution, you need to register, in line with security rules. Registration is a very light process and you can also use your social media profile - it strikes a good balance between transparency and security. If you do not wish to provide feedback via Have Your Say, you can still send a contribution via email but it will not be treated as other contributions in the analysis pertaining to the impact assessment. The official timeline of the consultation cannot be extended.

It seems thus evident that the public consultation on the CRMA suffered accessibility and transparency issues in both linguistic and technical terms, obstructing especially participations from citizens and smaller CSO's/NGO's from member states that do not have German, French or English as official language, as well as from possible participants incapable of using the “Have your Say” platform which was offered as the single valid channel for feedback to be considered by DG GROW.

²⁹ Call for Evidence for an Impact Assessment, „European Critical Raw Materials Act“, 30.9.2022, record Ares(2022)6746256

³⁰ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13597-European-Critical-Raw-Materials-Act/F3359249_en