Reply of the European Commission to a proposal for a solution from the European Ombudsman
- Complaint by Mr [redacted] ref. 2000/2022/PVV

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 23 November 2021, the applicant, Mr [redacted] submitted a request for access to documents to the Directorate-General for Climate Action. The request was treated under Regulation (EC) No 1049/2001[1] and registered under reference Gestdem No 2021/7326. Quoting the initial application, the applicant requested access to:

'1. Installation specific information and data with related exchanges as referred to the precited recitals 1 and 4, including notably;

> 1.1 data or other information in relation to energy consumption (plant specific net energy/electricity/thermal energy consumption per t of product and/or process, with indication of reference year;
>
> 1.2 data or other information in relation to GHG emissions (plant specific or process specific) per t of product and/or process, with indication of reference year;
>
> 1.3 data or other information in relation to GHG emissions from combustion sources such as fuel related CO2 emission, process emissions etc, with indication of reference year and other contextual information;
>
> 1.4 data or other information in relation to GHG emissions from clay emissions/calcining process;
>
> 1.5 Where available, data on techniques, process, economic costs or benefits in relation to decarbonization techniques applied at the installation.

Where data/information is available for multiple years, the applicant clarified that the request was limited to the time period 2016-November 2021.

2. Where available, the list of ceramics manufacturing installations that have been retained for setting the "best 10%" benchmark", separately for phase 3 and Phase 4.

3. Where relevant, information exchange with Member States, only where this concerns data and information in relation to the best 10% reference plants for deriving the relevant benchmark;

4. Where relevant, documents (i.e., emails, position papers, briefings, performance data...) received in the context of information exchange with industry stakeholders, where this concerns data and information in relation to the ETS benchmark update process. More

[1] *OJ L145, 31.05.2001, p. 43-48*

specifically, any information received by the Commission in the context of bilateral discussions regarding their specific benchmarks and the installations participating in the benchmark curve, as mentioned in the Meeting Minutes of the Expert group on climate change policy (CCEG) meeting on free allocation rules and carbon leakage list (dated 22 September 2020, under point4, CLIMA.B2)'.

The applicant further specified the following '[t]his request is limited to installations and activities which, in view of the European Commission services, would fall under the scope of the revised CER BREF. This would in his opinion concern the following activities:

a) Commission implementing Regulation 2021/447 Annex, section 1 'benchmarks': facing bricks, roof tiles,

b) Manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tonnes per day, pursuant to Annex I of Directive 2003/87/EC,

c) Manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain with a production capacity exceeding 75 tonnes per day and/or with a kiln capacity exceeding 4 m3 and with a setting density per kiln exceeding 300 kg/m3; pursuant to Annex 1, section 3.5 of Directive 2010/75/EU'.

In its reply of 16 February 2022, the Directorate-General for Climate Action identified 24 documents under the scope of the request. These corresponded to 23 National Implementing Measures (NIMs) from Member States related to four product benchmarks concerning the ceramic sector (facing bricks, pavers, roof tiles and spray dried powder) and one position paper on the benchmarks update from a private stakeholder. The Commission provided full access to the position paper and refused access to the rest of documents in question, based on the exception of the first indent of Article 4(2) (protection of commercial interests) of Regulation (EC) No 1049/2001.

The applicant submitted a confirmatory application on 9 March 2022, and requested a review of the position of the Directorate-General for Climate Action. In response, by its decision of 10 August 2022, the Commission confirmed the position of the Directorate-General for Climate Action to refuse access to the 23 documents on the basis of the first indent of Article 4(2) of Regulation (EC) No 1049/2001. The Commission also identified one additional document under the scope of the request, namely an Excel spread sheet containing a list of the 10% most efficient installations related to four product benchmarks. Access to this document was refused based on the same exception. Moreover, the Commission explained that it does not consider that an overriding public interest in the disclosure of the documents exists as it does not consider that the information rejected relates to emissions into the environment.

Finally, the Commission informed the applicant that it does not hold more documents.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

The applicant launched a complaint to the Ombudsman in accordance with Article 228 of the Treaty on the Functioning of the European Union.

The Ombudsman opened an inquiry and requested additional clarifications from the Commission as well as access to the refused documents in a letter dated 15 November 2022. The Commission provided the Ombudsman with a copy of the documents requested and additional comments as regards the handling of a previous requests for public access to documents that resulted in a court ruling *Rogesa Roheisengesellschaft Saar mbH* v *Commission*, T-643/13[2].

III. EUROPEAN OMBUDSMAN'S PROPOSAL FOR A SOLUTION

The Ombudsman opened an inquiry into the Commission's refusal to give public access to the 24 documents at issue and into its alleged failure to identify all documents that fell within the scope of the complainant's access request.

The Ombudsman confirmed the Commission's assessment as regards the scope of the request and the impossibility for the applicant to validly commit to not further disseminating documents that would receive following a public access request. As regards the application of the exception on the protection of commercial interests under the first indent of Article 4(2) of Regulation (EC) No 1049/2001, the Ombudsman considered that the Commission was justified in relying on the exception for the documents concerned in this case.

When analysing the application of Regulation (EC) No 1367/2006 ('the Aarhus Regulation')[3] and the possible existence of an overriding public interest in the disclosure of the documents requested. The Ombudsman argued that the Commission did not sufficiently clarify whether it considered that part of the information contained in the documents relate to "emissions into the environment" within the meaning of Article 6(1) of the Aarhus Regulation.

In addition, the Ombudsman also considered that the Commission should reassess whether there is an overriding public interest in disclosing the 'environmental information' contained in the documents and disagreed with the Commission on the fact that the applicant pursues a private interest when seeking access to the documents.

The Ombudsman decided to propose that the Commission:

1) *reconsider its assessment of the information contained in the documents at issue, to the extent that they "contain[...] the total amount of CO2 emitted by a given*

[2] Judgement of the General Court of 11 July 2018, *Rogesa Roheisengesellschaft Saar mbH* v *Commission*, T-643/13, EU:T:2018:423.
[3] OJ L 264, 25.9.2006, p. 13–19.

installation". If the Commission agrees that information 'related to emissions into the environment' is concerned, it should provide access to the relevant parts of the documents, in line with Article 6(1) of the Aarhus Regulation. In the alternative, the Commission should explain, in more detail, why this information does not 'relate to emissions into the environment'.

2) *reassess whether there is an overriding public interest in disclosure of the 'environmental information' contained in the documents, based on the specific public interest arguments put forward by the complainant, and provide detailed and coherent reasoning for its assessment.*

3) *reassess whether there are any additional documents falling within the scope of the complainant's access request, to the extent that they still exist.*

IV. THE REPLY OF THE EUROPEAN COMMISSION

The Commission hereby submits the following comments regarding the Ombudsman's proposal for a solution.

First proposal: On the reassessment of the information contained in the documents to the extent that they "contain […] the total amount of CO2 emitted by a given installation" as relating to "emissions into the environment" under Article 6(1) of the Aarhus Regulation.

As explained in the contested confirmatory decision the documents concerned by this access to documents request entail in a large part, commercially sensitive business information such as data on production activity, energy consumption, heat balances, attribution of emissions at sub-installation level, and type and quantity of products produced over the five years preceding the submission.

As confirmed by the Ombudsman herself, the public interest in accessing 'environmental information' does not automatically override the interest to be protected by non-disclosure but must be assessed based on an individual examination of the documents and the context.

As explained by the Commission, to the extent that in its confirmatory decision, the information contained in the documents concerns emissions from installations, such information is already in the public domain. In her Proposal[4], the Ombudsman has misrepresented the Commission's statements in the confirmatory decision by implying that by finding that the "*the documents contain the total amount of CO2 emitted by a given installation*", the Commission has itself implied that the information related to '*emissions into the environment*'. To the contrary, the Commission has specified that such information is already in the public domain, as accepted by the Ombudsman herself, and that *"<u>besides this</u>*

[4] Paragraph 34 of the fair solution proposal.

public information, the documents also contain detailed business information such as data on heat balances, carbon efficiency or allocation data'. It is this specific information which the Commission does not consider as qualifying under Article 6(1) of the Aarhus Regulation as 'information relating to emissions into the environment'.

Per contra, the information which the Ombudsman invites the Commission to reconsider is exactly that which, having regard to its *sui generis* nature as relating to emissions into the environment, the Commission proactively publishes into the public domain, accounting for the public interest in its disclosure as intended under the Aarhus Regulation. The actual emissions from 2005 onwards, and the compliance of the obliged entities, that is, the number of allowances surrendered, are public in the European Union Transaction Log ('EUTL')[5]. Contrary to the Ombudsman's interpretation, an installation means a stationary technical unit, i.e. a single production site where one or more activities covered by the EU ETS are carried out. Therefore, the verified emissions publicly available in EUTL per installation refer to one single geographical location, and not to a "*global number for companies that manage several installations"* as suggested by the Ombudsman.

Furthermore, the conclusion of the Commission that the specific information mentioned does not qualify as such as 'information relating to emissions into the environment' is however based on a detailed analysis *in concreto* of the documents concerned, which, in the Commission's opinion does not reflect either actual or foreseeable emissions within the meeting of the case-law of the European Courts on Article 6(1) of the Aarhus Regulation. It should be noted that the NIMs contain information on emissions at sub-installation level. The split of installations into "sub-installations" corresponds to the technical separation necessary to determine the benchmarks and free allocation as required by Commission Delegated Regulation (EU) 2019/331[6]. When applying for free allocation, the installation's inputs, outputs and emissions are assigned to one or more sub-installations represented by a benchmark and the result is submitted in an aggregated form in the NIMs. The NIMs (apart from verified emissions at the installation level, already available in EUTL) contains the data that is a result of applying the allocation methodology and formulas to allow for comparable data from all the EU ETS installations. The actual data on emissions is provided by the installation operators in the emission reports and they are reflected in the Union Registry (and available to the public in EUTL).

Therefore, the Commission considers that the emissions at "sub-installation" level do not reflect actual emissions released into the environment within the meaning of Article 6(1) of the Aarhus Regulation but a theoretical split of those emissions for the purpose of setting the administrative process of setting the benchmarks to determine free allocation.

Information as regards the actual emissions into the environment is already made proactively public by the Commission.

[5] https://ec.europa.eu/clima/ets/.
[6] OJ L 59, 27.2.2019, p. 8–69.

This reasoning is consistent with the Court interpretation of "emissions into the environment". According to the Court, the concept covers a broad range of information which includes, inter alia, data enabling the public to know what is actually or will be released into the environment in a foreseeable manner. However, that concept cannot include all information which has any connection, even direct, with emissions into the environment. If that concept were interpreted as covering such information, it would largely exhaust the concept of 'environmental information' within the meaning of Article 2(1)(d) of Regulation (EC) No 1367/2006. Such an interpretation would thus deprive of all practical effect the possibility, provided for in the first indent of Article 4(2) of Regulation (EC) No 1049/2001, for the institutions to refuse to disclose environmental information on the ground, inter alia, that such disclosure would undermine the protection of the commercial interests of a particular natural or legal person and jeopardise the balance which the EU legislature sought to ensure between the objective of transparency and the protection of those interests.[7]

The Commission concludes, therefore, that it has sufficiently explained why the information contained in the documents does not relate to emissions into the environment within the meaning of Article 6(1) of the Aarhus Regulation. The fact that the documents contain also the publicly available data on the total amount of CO2 emitted by a given installation, does not change this conclusion. In fact, the Commission proactively publishes this information and the applicant was informed accordingly.

The European Ombudsman in fact agrees with the Commission that information on the quantity of CO_2 that is emitted during the production of one tonne of product and other information, such as "data on production activity, energy consumption, heat balances, attribution of emissions at sub-installation level, and type and quantity of products produced over the five years preceding the submission", does not allow the public to inform itself about the actual or foreseeable emissions of the installations concerned[8]. Therefore, the European Ombudsman agrees that this information does not constitute information 'related to emissions into the environment' under the Aarhus Regulation and an overriding public interest in its disclosure cannot be presumed to exist.

The Commission considers therefore that it has complied with the case-law and the applicable legal settled standard.

Second proposal: On the reassessment of existence of an overriding public interest based on the specific public interest arguments put forward by the complainant.

[7] Judgment of 23 November 2016, *Commission v Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraphs 79 to 81.
[8] Paragraph 37 of the fair solution proposal.

The exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

The Commission maintains the arguments presented in its confirmatory decision, that the considerations brought by the complainant in order to demonstrate the existence of an overriding public interest, were of a general nature, and could not be equated to the specific circumstances required by the case law to demonstrate such interest.[9]. While the Commission acknowledges that there is a certain interest regarding the topic of allocations of free allowances, this need for transparency does not outweigh in this case the need to protect the documents concerned, pursuant to the exception relating the protection of the commercial interests.

In accordance with settled case-law, the overriding public interest capable of justifying the disclosure of a document must, as a rule, be distinct from the principles of transparency, openness, and democracy or of participation in the decision-making process[10]. In order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance, but that an applicant has to show why in the specific situation at hand, the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure[11].

In particular, applicants are required to, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal[12].

In the confirmatory application, the applicant argues that 'the information requested is necessary to verify whether the allowance of allocations free of charge has been based on correct data and also necessary to derive a fact-based decision-making process within the EU Best Available Techniques (BAT) Reference Document for Ceramics Manufacturing (CER BREF) review, notably in relation to setting BAT Conclusions on energy efficiency and decarbonisation techniques. Without the documents 1 – 23 the public and NGOs are not able

[9] Judgment of the Court of Justice of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2104:2250, paragraph 128.

[10] Judgment of the Court of First Instance of 23 November 2004, *Maurizio Turco* v *Council of the European Union*, T-84/03, EU:T:2004:339, paragraphs 81-83.

[11] Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack* v *Commission*, (EU:C:2014:2250), paragraph 129.

[12] Judgment of the General Court of 9 October 2018, *Anikó Pint* v *European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s* v *European Commission*, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC* v *European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

to verify the basis of the benchmark and even the reported actual GHG emissions per installation and not sharing that information will limit the EEB's ability to actively provide and contribute useful facts for its participation in the decision-making process relating to the CER BREF review'.

The Commission considered that the interest expressed by the applicant in obtaining access to the documents is of private nature, in light of the fact that he is referring to the interest of his organisation to participate fully in the review process of the BREF CER, i.e. beyond the ordinary means already at the disposal to these stakeholders to contribute to and influence the decision-making process. Indeed, NGOs are invited to participate in this process through various channels. As mentioned by the Ombudsman, Article 13 of the Industrial Emissions Directive[13] provides for a participatory process concerning the update of the EU Best Available Techniques (BAT) Reference Documents. The Commission actively promotes this process through a forum composed of representatives of Member States, the industries concerned and non-governmental organisations promoting environmental protection.

Furthermore, as the Court has recently held, the administrative activity of the Commission does not require such extensive access to documents as that required by the legislative activity of an EU institution. To that extent and by analogy, despite the applicant's claim that the requested documents would be necessary for it to participate effectively in the BREF CFR process, with the aim of increasing the protection of the environment, its explanations are not sufficient to demonstrate the existence of an overriding public interest justifying disclosure. Such an argument could be extended to any document relevant to participation in the legislative debate on environmental matters and thus make worthless the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001. It is therefore too general to be an overriding public interest justifying disclosure.[14]

The Commission has therefore found that the considerations raised in the applicant's confirmatory application were not sufficient to establish the existence of a pressing need to obtain the documents requested. The Commission has also not been able to identify any public interest capable of overriding the public and private interests protected by Article 4(2) of Regulation (EC) No 1049/2001.

Finally, it should be noted that acknowledging this need of transparency, the Commission proactively makes a substantial amount of information publicly available. As explained in the contested decision, the Commission publishes information related to emissions into the environment in the EUTL, which contains information about allocations to stationary installations and aircraft operators (per country, per installation/operator, per ETS phase, per installation name - ID - address etc), compliance data (per country, per account type, etc.) and provides the data relating to verified emissions, units surrendered, compliance codes, etc.

[13] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast), OJ L 334, 17.12.2010, p. 17–119.
[14] Judgment of the General Court of 1 February 2023 in case T-354/21, *ClientEarth v Commission*, EU:T:2023:34, paragraphs 91-96

By publishing the extensive amount of information proactively, the Commission considers that it has complied with the high standards of transparency and need to inform the public about this specific topic.

Third proposal: additional documents falling within the scope of the request.

Following the request of the Ombudsman, the Commission has reassessed whether there are any additional documents falling within the scope of the complainant's access request. The Commission can confirm that it does not possess any additional document under the scope of the request different than the ones identified in the confirmatory reply.

In its request of 15 November 2022, the Ombudsman requested access to any email exchange under the scope of point 3 of the application. In the reply to this request, the Commission confirmed its position expressed in the contested decision that no document could be identified as falling under the scope of point 3.

The General Court held in Case T-468/16 (*Verein Deutsche Sprache* v *Commission)* that there exists a presumption of lawfulness attached to the declaration by the institution asserting that documents do not exist[15]. This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence[16]. In this regard, a mere suspicion that there must be a document does not suffice to put in question the presumption of legality of the institution's statement[17]. The Court of Justice has confirmed those conclusions[18].

In order to provide a complete overview of the process and the overall management of data linked to determining the ETS free allocation, in its reply to the Ombudsman's request the Commission provided explanations on the so-called "consistency checks" pursuant to Article 14(3) of Commission Delegated Regulation 2019/331. Indeed, the consistency checks concern questions on the completeness of the NIMs submitted and the consistency of the data submitted to Member States to ensure that all rules have been applied in line with the Free Allocation Rules and that they are applied consistently across Member States.

However, the Commission wishes to clarify that any email exchanges in the context of the consistency checks were not considered as falling within the scope of the request given that they do not concern the data and information in relation to the best 10% reference plants for deriving the benchmarks relevant for the ceramic sector and, as such, were not requested by the applicant.

---

15 Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache* v *Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

16 *Ibid*.

17 *Ibid*, paragraph 37.

18 Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache* v *Commission*, C-440/18 P, ECLI:EU:C:2019:77, paragraph 14.

V. CONCLUSION

The European Commission takes note of the arguments of the Ombudsman and, after careful assessment of all the elements in the case, considers that its confirmatory decision was in line with the applicable legislation and the relevant case law on access to documents at the point in time it was taken.

As requested by the first proposal for a solution of the Ombudsman, the Commission has provided additional reasoning as regards the nature of the documents in view of the Aarhus Regulation. Moreover, the Commission has further provided detailed and coherent reasoning for its assessment of the arguments put forward by the complainant in relation to an overriding public interest, as suggested by the second proposal. Finally, the Commission, in addressing the third proposal, has confirmed that it does not possess additional documents within the scope of the request.

For the Commission
Maroš ŠEFČOVIČ
Executive Vice-President