July 2025

Complaint to the European Ombudsman

Failure to reply to a Confirmatory Application and to grant access to documents on the environmental and social sustainability of critical raw material projects applying for the status of strategic projects under the CRMA.

ClientEarth

Contents

This Complaint deals with the European Commission's failure to respond to the confirmatory application filed by the Complainant on 7 February 2025 submitted in response of the decision of DG GROW of 24 January 2025 refusing access to on the environmental and social sustainability of critical raw material projects applying for the status of a strategic project under the CRMA. In particular the Complaint will address the failure to respond to the Complainants confirmatory application (Chapter 5.1.), failure to take into account that the requested documents contain environmental information (Chapter 5.2.), misapplication of the exception under Article 4(2) of Regulation 1049/2001 (Chapter 5.3.), misapplication of the exception under Article 4(3) of Regulation 1049/2001 (Chapter 5.4) and failure to identify and apply an overriding public interest (Chapter 5.5.).

1. Context

The Critical Raw Materials Act ("**CRMA**"), adopted in March 2024, was the European Union's ("**EU**") response to the worldwide critical minerals race. It, among other things, established a process of recognising certain mining and recycling projects as strategic for the European Union in its efforts to gain more critical materials independence.

In deciding whether a project has the status of being "strategic", the European Commission ("**Commission**") makes a decision that can potentially affect the rights and ways of living of local communities across the EU. Despite this, the process has been marred by a lack of transparency and a lack of acknowledgement of the voice and the rights of the local communities. This Complaint is only one example of a larger pattern of the inability of local NGOs, community groups, individuals and environmental NGOs such as the Complainant to access any information about the applications submitted by project promoters to the Commission, as well as the assessment process. On 25 March 2025, this process culminated in the publication of the Commission Decision recognising certain critical raw material projects as Strategic Projects under Regulation (EU) 2024/1252 of the European Parliament and of the Council (the "Decision**"**). The Decision failed to include any evidence or assessments made by the Commission to conclude that the projects that are recognised as strategic are environmentally and socially sustainable.

2. Background

2.1. The strategic project designation process under the CRMA

Mining and recycling projects that fulfil certain criteria (Art. 6 CRMA) can be recognised as strategic by the Commission. This decision is taken in consultation with the Critical Raw Materials Board ("**CRM Board**"), which consists of the Commission and experts from the Member States. In practice, the Commission, with the assistance of external experts, assesses whether a particular project fulfils the criteria and forwards that assessment to the Member States.[1] Member States (or third countries) whose territory is concerned by the project can veto further assessment.

It is worth noting that, according to Article 7 CRMA, the Commission takes its decision based on an application and supporting evidence submitted by the project promoter. Although the decision concerns, among others, an evaluation of environmental impacts and public engagement (Art. 6(1)(c) CRMA), there is no formal process for the public to engage and present its views or evidence. Moreover, there is no

[1] Commission Decision of 25.3.2025 recognising certain critical raw material projects as Strategic Projects under Regulation (EU) 2024/1252 of the European Parliament and of the Council, Preamble, para. 6.

information either on the projects that have applied for the status of a strategic project, or a summary of their applications, or the assessment process itself, proactively published by the Commission.

2.2. The lack of transparency

In the process of assessing the applications for the status of a strategic project, the Commission has opted for a process completely shielded by the lack of transparency. This means that the public has no access to any information about the applications under consideration, even if the members of local communities are going to be directly affected by a given mining project or are the very targets of the "meaningful engagement" plan. It is important to note that meaningful engagement with local communities is one of the criteria for a strategic project (Article 6(1)(c) CRMA) and that the project promoters must show how meaningful engagement with local communities will be ensured. In any event, meaningful engagement is impossible if stakeholders do not have access to relevant information.

The lack of transparency is broader than the access to documents request at issue in this Complaint. Even though decisions granting the status of a strategic project directly concern local communities across the EU and despite the obligation to conduct the proceedings before the CRM Board in "*a fair and transparent process*",[2] the local communities continue to be unable to obtain basic information regarding the project applications throughout the assessment process. To date, multiple access to information requests have been filed by non-governmental organisations to access parts of information about the project applications held by the Commission.[3] They have all been either left long overdue without a response[4] or rejected with varying grounds, including protection of the EU's defence and military strategy on lithium used for those purposes, and economic policy objectives.[5] For the sake of clarity, the Complainant is using these examples to highlight the background to this Complaint. They do not form the subject of the present Complaint, which relates only to the documents requested by ClientEarth.

Contributing to the lack of transparency, the full reasoned decisions concerning individual projects have not been published and remain inaccessible to the public despite the Commission's obligation to reason its decision (Article 7(9) CRMA). Recitals (7) and (8) to the Decision merely state that: "*The Commission assessed those applications in accordance with the criteria specified in Article 6(1) of Regulation (EU) 2024/1252, with the support of external experts with professional expertise in the technical, financial, environmental, social and governance (ESG) dimensions of a project, […] and listed in the Annex to this Decision the projects that fulfil all the criteria provided for in Article 6(1) of Regulation (EU) 2024/1252, and which should therefore be recognised as Strategic Projects under that Regulation."* The Complainant notes that the Commission has published a so-called fact sheet on each of the strategic projects,[6] however they all follow the same one A4 page format, with roughly two-thirds of the page being covered by pictures and basic information such as the title, type of project, location, project promoter, with no information on how the project fulfils the environmental or social sustainability criteria under the CRMA.

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[2] Article 7(6) CRMA.

[3] See MiningWatch Portugal access to documents request entitled "FOI request under 1049/2001: CRMA application Savannah Resources", 10 September 2024, attached as Annex 1a; and the decision of DG GROW of 14 October 2024, case No. EASE 2024/4763, attached as Annex 1b. See also, e.g., https://www.asktheeu.org/request/request_for_information_on_appli#incoming-55869; https://www.asktheeu.org/request/list_of_applicants_for_strategic#incoming-57689; https://www.asktheeu.org/request/strategic_status_decisions#incoming-58515.

[4] See e.g., https://www.asktheeu.org/request/request_for_all_documents_regard https://www.asktheeu.org/request/crma_strategic_projects_mining_p, and https://www.asktheeu.org/request/crma_strategic_projects_mining_i. https://www.asktheeu.org/request/crm_strategic_projects_wolfsberg

[5]

[6] See e.g., the Fact sheet on Romano mining project https://op.europa.eu/en/publication-detail/-/publication/6bf8a3f3-263e-11f0-8a44-01aa75ed71a1/language-en

The lack of transparency has also been a subject of concern for Members of the European Parliament. For example, on 10 April 2025, MEP Rackete raised the issue in a letter addressed to the Director General of the Directorate for Internal Market, Industry, Entrepreneurship and SMEs ("**DG GROW**")[7]. In her letter, she requested the Commission to provide information regarding the Commission's assessment and reasoning in granting the status of a strategic project to the 47 projects announced on 25 March 2025. On 13 May 2025, Director General Jorna replied,[8] refusing to provide the requested information, alleging harm to public security and commercial interests. She also noted that "*EU citizens have the right to request access to public documents in accordance with Regulation (EC) No 1049/2001. My services diligently analyse and reply to each of the received requests*." As the Complainant has explained above, this is not the case.

Finally, the Commission also appears to prevent Member States from disclosing any information to the public. For example, in January 2025, the Finnish government informed the public about its decision to refrain from using its right to object in relation to 16 Finland-based projects. The Finnish government expressly referred to the Commission-mandated confidentiality as the reason for providing no more details.[9]

3. Facts

The Complainant submitted a request for access to documents on 20 November 2024 via the Commission's access to documents online EASE platform ("**Request"**).[10] In it, the Complainant requested access to the following documents ("**Requested documents**"):

> *"1. A list of the tiles and locations of any of the projects that have applied for the status of a Strategic Project in accordance with Article 7 of the Critical Raw Materials Act (CRMA). In case such a list is not compiled by the Commission, we request any other documents (or excerpts of documents) containing the title and location of the projects that have applied for the status of a Strategic Project.*
>
> *2. Any document (assessment guidelines, rules of procedure or other documents) outlining the criteria for the assessment of the projects, in particular, the assessment of compliance with the criteria of "monitoring, prevention and minimisation of environmental impacts and meaningful engagement with local communities (Article 6(1)(b) CRMA).*[11]

Concerning mining projects located within the European Union that have applied for the status of a Strategic Project, we request:

> *3. Environmental assessments or any other documents submitted as evidence by the Applicants (project promoters) to support their project's compliance with the criteria of "monitoring, prevention and minimisation of environmental impacts ((Article 6(1)(b) CRMA).*

[7] See Annex 3a.
[8] See Annex 3b.
[9] See https://valtioneuvosto.fi/en/-/1410877/16-finland-based-projects-apply-for-strategic-project-status-under-eu-critical-raw-materials-act-finland-refrains-from-its-right-to-object.
[10] Attached as Annex 4a.
[11] We would like to note that the correct reference in this item, as well as in items 3 and 4, should have been Article 6(1)(c) CRMA.

4. Any documents submitted as evidence by the Applicants (project promoters) to support their project's compliance with the criterion of meaningful engagement with local communities (Article 6(1)(b) CRMA).”

On 20 December 2024, the Complainant was notified that the Request had been received and registered under case number EASE 2024/6124. On 11 December 2024, the Complainant received a notification of extension of the deadline for providing an initial response for another 15 working days, stating that the *“extended time limit is needed as in order to retrieve the documents requested, large files have to be examined*.” The extended deadline was set for 4 January 2025.

The Initial Decision

On 24 January 2025 – long after the statutory deadline – the Complainant received an initial decision No. ARES(2025)559012 (**“Initial Decision”**)[12], per which DG GROW granted partial access to the documents requested by the Complainant.

In relation to points 1, 3 and 4 of the Request, DG GROW informed that the Request “*cannot be granted, as disclosure is prevented by exceptions to the right of access laid down in Article 4 of this Regulation*.” DG GROW noted that the information sought relates to a decision which has not yet been taken by the Commission.

According to the Initial Decision, “[*d]isclosure of the information requested would undermine the protection of the decision-making process of the Commission in relation to the call for Strategic Projects based on Article 7 of Regulation 2024/1252, as it would reveal preliminary policy options which are currently under consideration. The Commission's services must be free to explore all possible options in preparation for a decision, free from external pressure. Therefore, the exception laid down in Article 4(3) first subparagraph of Regulation (EC) No 1049/2001 applies to this case. Moreover, we can neither confirm nor deny whether projects applied to the call for Strategic Projects under Regulation 2024/1252, since this could undermine the commercial interests of a natural or legal person in case of a rejection. Therefore, the exception laid down in Article 4(2) of Regulation (EC) No 1049/2001 also applies to this request.*” DG GROW also did not identify an overriding public interest justifying disclosure of the information.

Documents requested under point 2 of the Request were granted access to and attached to the Initial Decision.

Confirmatory Application

On 7 February 2025, the Complainant submitted a Confirmatory Application[13] seeking a re-examination of its findings concerning three aspects:

1. The Initial Decision fails to reason specifically and concretely how documents requested under points 1, 3 and 4 of the Request undermine the interests protected under Article 4(3) of Regulation 1049/2001;

2. The Initial Decision fails to substantiate how the documents requested under points 1, 3 and 4 undermine the commercial interests of companies;

3. The Initial Decision fails to take into account the overriding public interest in the disclosure of environmental information.

[12] Attached as Annex 4b.
[13] See Annex 4c.

The extended deadline for the Confirmatory Decision expired on 21 March 2025. On 9 April 2025, the Complainant sent a reminder to the Commission regarding the confirmatory decision.[14] In an email of 11 April 2024, the Commission replied: "*We sincerely apologise for the failure to reply within the statutory time limit. We would like to confirm that the internal consultations in relation to your application are fully ongoing. Therefore, we cannot commit to a specific timeframe within which the decision will be adopted. However, we would like to assure you that we are doing our utmost to provide you with a reply as soon as possible. Please accept our apologies for the inconvenience this delay may cause to you and thank you for your understanding.*"[15] At the date of submission of this Complaint, the Complainant has not received a response from the Secretariat General of the European Commission.

4. Legal Context

The TEU enshrines the democratic principles which underlie the right of access to documents. These underlying principles are the concept of openness and proximity of decision-making to the citizen, key to the European Union project, as stated in Article 1 (paragraph 2), and reiterated in Article 10(3) – under the title of "Provisions on Democratic Principles" – which states that "[*d]ecisions shall be taken as openly and as closely as possible to the citizen*."

The TFEU establishes the general right of access to documents by providing in its Article 15(3) that *"[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions.*"

In addition, the Charter of Fundamental Rights of the European Union ("**CFR**"),[16] which is legally binding on the European Union, its institutions, and the Member States under Article 6(1) of the TEU, reiterates the general right of access to documents and thus characterises this right as a fundamental right. Article 42 of the CFR reads "*[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State has a right of access to documents of the institutions*".

Similar to all fundamental rights, limitations on the exercise of the right must respect the essence of that right, and may only be applied if they are necessary and genuinely meet the objectives of general interest recognised by the Union, as provided by Article 52(1) of the CFR.

The CRMA does not contain provisions relating to the publication of information on applicant projects. Consequently, the general EU transparency legal framework (Regulation 1049/2001 and the Aarhus Regulation) apply.

Regulation 1049/2001 provides the principles, conditions, and limits governing the right of access to all documents held by European institutions. Firstly, its Recital 11 recognises that "*[i]n principle, all documents of the institutions should be accessible to the public*". It also ensures that the right of access to documents is broad in scope: according to Article 1, the Regulation aims to provide access to documents "*in such a way as to ensure the widest possible access to documents*". Given these objectives and principles, the exceptions to the right of access to documents provided by Regulation 1049/2001 must be interpreted and applied strictly.[17]

[14] See Annex 4d.
[15] See Annex 4e.
[16] Charter of Fundamental Rights of the European Union (CFR), OJ C 326, 26.10.2012, p. 391–407.
[17] Grand Chamber, Case C-64/05 P, Sweden v Commission and Others, ECLI:EU:C:2007:802, para. 66; and Grand Chamber, Joined Cases C-39/05 P and C-52/05 P, Sweden and Turco v Council, ECLI:EU:C:2008:374, para 36.

The obligations of transparency and openness placed on the EU institutions by Regulation 1049/2001 have, as one of their goals, the development of a culture of good administration in the EU. Article 15(1) of Regulation 1049/2001 requires that such a culture should extend to the treatment of applications for access: *"[t]he institutions shall develop good administrative practices to facilitate the exercise of the right of access guaranteed by this Regulation*". The principle of good administration is furthermore enshrined as a fundamental right in the CFR. Article 41(1) of the CFR provides that *"[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, offices, bodies, and agencies of the Union*". Article 41(2), third indent, of the CFR makes clear that the right to good administration includes the obligation of the administration to give reasons for its decisions.

Article 8(1) of Regulation 1049/2001 states that *"[a] confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal*."

Regulation No 1367/2006 ('**Aarhus Regulation**') aims, as provided for in Article 1 thereof, to ensure the widest possible systematic availability and dissemination of environmental information. It follows, in essence, from recital 2 of that regulation that the purpose of access to that information is to promote more effective public participation in the decision-making process, thereby increasing, on the part of the competent bodies, the accountability of decision-making and contributing to public awareness and support for the decisions taken.[18]

Article 6(1) of Aarhus Regulation states "*[a]s regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Union law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment*."

5. Maladministration in relation to a failure to provide a response to a Confirmatory Application and misapplication of the exceptions under Articles 4(2) and 4(3) of Regulation 1049/2001.

5.1. Failure to respond to the Confirmatory Application

As noted in the statement of facts above (Chapter 3), in its Confirmatory Application, the Complainant contested the Commission's refusal to disclose the Requested documents, providing arguments to support its claim. However, ClientEarth received no response within the extended deadline, which expired on 21 March 2025. No response has been received as of the filing date of this complaint.

[18] C-57/16 P - ClientEarth v Commission, ECLI:EU:C:2018:660, paragraph 98.

The Commission's failure to reply to the Complainant within the timeframe set out for the processing of a confirmatory application constitutes an implied and unmotivated decision to refuse access within the meaning of Article 8(3) of Regulation No 1049/2001 and Article 4 of the Annes of the Code of Good Administrative Behaviour for Staff of the European Commission in their relations with the public.[19] It is therefore an instance of maladministration. In addition, even after the decision designating 27 EU-located projects as strategic was adopted on 25 March 2025,[20] the Requested documents were still not disclosed. The Commission has neither disclosed the documents nor otherwise communicated to ClientEarth when it could expect to receive a confirmatory decision.

5.2. The Requested documents contain environmental information

At the outset, the Complainant notes that in its initial assessment, the Commission failed to take into account that the Requested documents, especially documents requested under point 3 of the Request, contain environmental information. In *Saint Gobain v Commission,* Advocate General Szpunar argued in favour of an interpretation whereby the exception of Article 4(3) of Regulation 1049/2001, read in conjunction with Article 6(1) of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (the "**Aarhus Regulation**"), must be interpreted directly in the light of Article 4(4) of the Aarhus Convention: "*The Aarhus Convention, which was approved by Decision 2005/370 forms an integral part of the EU legal order. By becoming a party to the Aarhus Convention, the European Union undertook, inter alia, to ensure, within the scope of EU law, access to environmental information in accordance with the provisions of that Convention. In response to that undertaking, the EU legislature has adopted two acts, Directive 2003/4/EC, which is addressed to the Member States, and Regulation No 1367/2006, which applies to EU institutions and other bodies. Because the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention in adopting those two acts, account is to be taken of the wording and aim of that Convention for the purposes of their interpretation*."[21] In that case, the CJEU agreed with the Advocate-General and held that the General Court had erred in law when it failed to interpret Article 4(3) of Regulation 1049/2001 in light of Article 6(1) of the Aarhus Regulation, as interpreted in light of the Aarhus Convention itself.[22]

Article 2(3) of the Aarhus Convention defines environmental information as any information in written, visual, aural, electronic or any other material form on, among others, factors, including substances, affecting or likely affecting the elements of the environment such as air, atmosphere, soil, water, land and other stated elements.[23] In addition, Article 2(1)(d)(iv) of the Aarhus Regulation explicitly lists "*reports on the implementation of environmental legislation*" as environmental information. It also covers information on "*the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment.*"[24]

[19] Commission Decision 2024/3083 of 4 December 2024 establishing the Code of Good Administrative Behaviour for Staff of the European Commission in their relations with the public.
[20] Commission Decision of 25.3.2025 recognising certain critical raw material projects as Strategic Projects under Regulation (EU) 2024/1252 of the European Parliament and of the Council.
[21] Opinion of Advocate General Szpunar in Case C-60/15 P, *Saint Gobain Glass Deutschland v Commission*, ECLI:EU:C:2016:778, paras. 37-39.
[22] Case C-60/15 P, *Saint Gobain Glass Deutschland v Commission*, ECLI:EU:C:2017:540, paras. 79-81 and 86.
[23] Article 2(3)(a) and (b) of the Aarhus Convention.
[24] Article 2(1)(d)(vi) of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

The Complainant notes that the Requested Documents contain environmental information, namely, the evidence submitted by the project promoters on the project's compliance with the environmental criteria under Article 6(1)(c) CRMA. According to the assessment methodology disclosed by DG GROW under point 2 of the Request, Section 8 of the Individual Assessment Report entitled "Project sustainability" contains criteria for environmental compliance, including:

- "b) Does the project adequately monitor, prevent and minimise the environmental impacts:
  - on air, including air pollution such as greenhouse gas emissions? [..]
  - on water, including seabed and marine environment, and water pollution, water use, water quantities (flooding or droughts) and access to water? [..]
  - on soil, including soil pollution, soil erosion, land use and land degradation? [..]
  - on biodiversity, including damage to habitats, wildlife, flora and ecosystems, including ecosystem services? [..]
  - regarding hazardous substances? [..]
  - regarding noise and vibration? [..]
  - on plant safety? [..]
  - regarding energy use? [..]
  - regarding waste and residues? [..]
- c) If provided, do the EIA, SEIA or similar environmental impact assessment reports give assurance for this? [..]"

It is clear that promoters must submit environmental information to the Commission in support of their application. Therefore, the Commission is under the obligation to interpret the exceptions to disclosure set by Regulation 1049/2001 even more strictly, in light of the Aarhus Regulation and of the Aarhus Convention.

5.3. Misapplication of the exception under Article 4(2), first indent

In its Initial Decision, the Commission relied on the first indent of Article 4(2) of Regulation 1049/2001, namely the protection of commercial interests of a natural or legal person, to deny access to documents requested under points 1, 3 and 4 of the Request. In line with the principle of the widest possible public access to documents, as established by the CJEU, the Complainant submits that the exception under the first indent of Article 4(2) does not apply to the Requested documents.

The first indent of Article 4(2) of Regulation 1049/2001 requires EU institutions and bodies not to disclose information "*where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property*". The CJEU has interpreted the notion of commercial interests on multiple occasions. As will be explained below, this notion should be interpreted narrowly, covering specific information that can potentially undermine the competitive position of a company. This also follows from the Aarhus Convention, which confirms that this exception must be construed narrowly.[25]

The Complainant submits that the exception of protection of commercial interests under Article 4(2) of Regulation 1049/2001 does not apply to the Requested documents because, firstly, the CRMA fully allows for such information to be disclosed and, secondly, the Requested documents do not contain information that could undermine the protected commercial interests of project promoters.

Firstly, nothing in the CRMA or Regulation 1049/2001 prevents the disclosure of the Requested documents. While the CRMA, for example, in Article 48 stresses the need to protect the confidentiality of "*trade and business secrets and other sensitive, confidential and classified information obtained and*

[25] The Aarhus Convention: An Implementation Guide, Second Edition, 2014, p.87

processed in the application of this Regulation" such protection cannot apply to the entirety of documents requested under points 1,3 and 4 of the Request.

As will be explained below, commercial interests have a specific meaning, and the Requested documents must contain certain types of information to enjoy protection from disclosure. This means that not all information submitted by project promoters is covered by the protection of commercial interest. Assessment of what documents (or parts thereof) can be legitimately withheld from disclosure must be made individually and specifically to protect only information that, according to the established practice of the CJEU, qualifies as a legitimate commercial interest.

The Requested documents under point 1 of the Request were simply the titles and locations of the applicant projects. Given that projects falling under the scope of the CRMA (i) are meant to engage with local communities and for this, need to reveal their identity; (ii) need to obtain environmental permits and other authorisations at national level in any case, and that such information shall be publicly available; and (iii) the evidence to be provided in support of applications supposes that the projects have at least an established business plan and are not merely an idea, it's unclear how their title and location alone could qualify as a business secret.

In addition, the information requested under point 3 of the Request is information that will likely need to be or in some instances,[26] has already been made public by the promoter or the competent authorities of the Member States based on EU environmental law. The Complainant has already listed some of the assessment criteria to be taken into account under Section 8 of the Individual Assessment Report disclosed under point 2 of the Request. The Complainant submits that such information largely corresponds to the information that must be included in the EIA under Article 5(1) and Annex IV of the EIA Directive[27]:

> "The information to be provided by the developer in accordance with paragraph 1 shall include at least:
> (a) a description of the project comprising information on the site, design and size of the project;
> (b) a description of the measures envisaged in order to avoid, reduce, and, if possible, remedy significant adverse effects;
> (c) the data required to identify and assess the main effects which the project is likely to have on the environment;
> (d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;
> (e) a non-technical summary of the information referred to in points (a) to (d)."[28]

This information should not only be made public but also be subject to public consultation under Article 6 of the EIA Directive.

Secondly, the Requested documents do not contain commercially sensitive information that would enjoy protection under Article 4(2) of Regulation 1049/2001. The General Court has stated that "*it is not possible to regard all information concerning a company and its business relations as requiring the protection which must be guaranteed to commercial interests under the first indent of Article 4(2) of Regulation No 1049/2001 without frustrating the application of the general principle of giving the public the widest possible access to documents held by the institution*".[29] Therefore, the Complainant submits that not all information

[26] See e.g. the environmental impact assessment of 16 March 2023 for the Barroso Lithium mine, available at: https://siaia.apambiente.pt/AIADOC/AIA3353/ei2023321164258.7z
[27] Directive 2011/92/EU
[28] See Articles 5(1) and 5(3) of the EIA Directive.
[29] General Court, Case T-718/15 *PTC Therapeutics International Ltd v European Medicines Agency,* 5 February 2018, para. 84.

concerning a company and its activities will fall under the exception of the first indent of Article 4(2) of Regulation 1049/2001.

The General Court has interpreted the notion of commercial interests under the first indent of Article 4(2) of Regulation 1049/2001 on multiple occasions. Generally, to fall within the exception of protection of commercial interests, the documents must contain information unique to the expertise, commercial strategies or business relations of the company in question that, if disclosed to competitors, could be used to harm a company's competitive position. The General Court has found that "*commercially sensitive information relating, inter alia, to the commercial strategies of the undertakings involved or to their customer relations or (..) information particular to that undertaking which reveals its expertise*" would fall under that exception.[30] The CJEU has also deemed information that would "*significantly impede effective competition (...) commercially sensitive information relating to the commercial strategies of the undertakings involved, their sales figures, market shares or customer relations*" as falling within the scope of the first indent of Article 4(2).[31] Information that is not in the public domain and gives the company an economic, strategic or organisational advantage and that could be used profitably by other undertakings[32] or could allow a competitor to enter a specific market [33] would also be covered by commercial confidentiality. Such information could include methods of assessing manufacturing and distribution costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost price structure, sales policy, and information on the internal organisation of the undertaking.[34]

It is clear from the above case law that the first indent of Article 4(2) of Regulation 1049/2001 is not designed to shield the public from accessing information on how mining projects comply with environmental legislation requested under point 3 of the Request. In fact, both the Aarhus Regulation and the Aarhus Convention establish a broad right for the public to receive such information. As the Complainant has mentioned above, information on compliance with environmental law, including potential negative effects, emissions into the environment and mitigation measures is precisely the information that will normally be included in an environmental impact assessment, which according to the EIA Directive must not only be public, but also subject to public consultations.[35] Therefore, such information cannot be considered commercially sensitive. Furthermore, similar considerations also apply to evidence demonstrating compliance with the criterion of meaningful public engagement requested under point 4 of the Request. This information is related to past or planned community engagement; therefore, it by definition will become available to the public through its implementation. This is in line with Article 6(5) of the Aarhus Convention, which prompts Member States to encourage "*prospective Applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit*." Declaring plans for community engagement commercially sensitive grossly misconstrues the objectives of Article 4(2) of Regulation 1049/2001, covering information that should, by definition, be public. The Complainant notes that, whereas information under points 3 and 4 of the Request should be public at the national level, it was relevant to request it from the Commission because the full list of projects that had applied to become a strategic project was unknown – hence point 1 of the Request. Indeed, as per Article 7(1) of the CRMA, applications are submitted by project promoters directly, not by public authorities of the country where the projects are located. In any event, projects from all over the world could apply to become a strategic project. Even if public authorities had some

[30] General Court, Case T-377/18 *Intercept Pharma Ltd,* 18 June 2019, para. 54; Case T-189/14, *Deza, a.s. v European Chemicals Agency*, 13 January 2017, para. 56; Case T-545/11 RENV *Stichting Greenpeage Nederland and PAN Europe v Commission*, 21 November 2018, para. 101.
[31] CJEU, Case C-477/10 *Commission v Agrofert Holding*, 28 June 2012, para. 56, Case C-365/12 P, *EnBW*, 27 February 2014, para. 79, see also the General Court, Case T-44/17, *Camomilla Srl v European Union Intellectual Property Office*, 13 November 2018, para. 43 and T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission*, 12 October 2007, para. 65-66.
[32] General Court, Case T-198/03, *Bank Austria Creditanstalt* v *Commission*, 30 May 2006, para. 71, and Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission*, T-474/04, 12 October 2007, para. 65.
[33] General Court, Case T-235/15 *Pari Pharma v EMA,* 5 February 2018, para. 108.
[34] General Court, Case T-441/17, *Arca Capital Bohemia v Commission,* 11 December 2018, para. 53.
[35] See Article 6 of Directive 2011/92/EU.

information, it would have been excessively burdensome, if not impossible, to request those documents from each of the 27 Member States of the EU and beyond.

Finally, some project promoters have opted to publicise the fact that they have applied for the status of a strategic project.[36] Given that some project promoters have publicly shared which projects they have submitted for the status of a strategic project, it cannot be considered that it reveals information unique to the expertise, commercial strategies or business relations of the company in question that, if disclosed to competitors, could be used to undermine a company's competitive position.

Therefore, the exception of the first indent of Article 4(2) of Regulation 1049/2001 does not apply and, consequently, full access to the Requested documents should be granted.

5.4. Misapplication of the exception under Article 4(3)

It is the settled CJEU case law that the exceptions in Article 4 of Regulation 1049/2001 "*must be interpreted and applied strictly"* because they *"depart from the principle of the widest possible public access to documents*." [37] The duty of strict interpretation of the first sentence of Article 4(3) of Regulation No 1049/2001 is all the more compelling where the documents communication of which is requested contain environmental information.[38]

Thus, "*[t]he mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify application of that exception*".[39] According to the CJEU, "*if an EU institution hearing a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception. Moreover, the risk of the interest being so undermined must be reasonably foreseeable and must not be purely hypothetical*".[40]

In *Saint Gobain Glass Deutschland,* the CJEU observed that:

> " *to the effect that the administrative procedure in question merits greater protection, it is, in fact, the obligation of strict interpretation of the exception set out in the first subparagraph of Article 4(3) of Regulation No 1049/2001 that must prevail [..]. Thus, the mere reference to a risk of negative repercussions linked to access to internal documents and the possibility that interested parties may influence the procedure does not suffice to prove that disclosure of those documents would seriously undermine the decision-making process of the institution concerned*."

The Complainant firstly notes that the Commission has failed to disclose/list what documents have been identified as falling within each point of the Request and how concretely and specifically their disclosure would significantly undermine the Commission's decision-making process. It is clear from the wording of the Initial Decision that the justifications on which the Commission relied to protect the Requested documents are not applicable and, in any event, purely hypothetical.

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[36] See, e.g., https://investors.eurobatteryminerals.com/en/press-releases/eurobattery-minerals-submits-eu-strategic-project-application-for-hautalampi/; https://leadingedgematerials.com/eu-strategic-project-application-submitted-for-norra-karr/; https://www.mn25.ca/post/euro-manganese-submits-application-for-strategic-project-status-under-eu-s-critical-raw-materials-ac; https://nextinvestors.com/quick-takes/kni-submits-eu-critical-raw-materials-application/; https://rawmaterials.net/crma-lkab-submits-three-strategic-project-applications/; https://www.listcorp.com/asx/kni/kuniko-limited/news/eu-crma-strategic-project-application-3073806.html

[37] CJEU, Case C-64/05 P Sweden v Commission, para. 66; C-506/08 P Sweden v MyTravel and Commission, para. 75 and C-60/15 P Saint-Gobain Glass v Commission, para. 63.

[38] Case C-60/15 P*, Saint-Gobain Glass Deutschland GmbH v Commission*, para. 78.

[39] Case T-51/15 *PAN Europe v Commission*, para. 22.

[40] Case C 280/11 P *Council v Access Info Europe*, paras. 30 and 31 and the case-law cited.

The Commission claims that disclosure of the Requested documents would "*reveal preliminary policy options available to the Commission*. *The Commission's services must be free to explore all possible options in preparation for a decision free from external pressure.*"

Firstly, the Commission's decision to designate projects as strategic under the CRMA is not a *policy* decision that would entail *options*. It is a decision based on the fulfilment, by applicant projects, of legal criteria set under secondary legislation. The CRMA does not leave any political discretion to the Commission, nor to the CRM Board in this respect:

- Article 7(9) of the CRMA provides that "The Commission shall, taking account of the opinion of the Board referred to in paragraph 6, adopt its decision on the recognition of the project as a Strategic Project within 90 days of acknowledging the completeness of the application in accordance with paragraph 4 […]".

- Article 7(6) of the CRMA provides that "The Board shall meet at regular intervals in accordance with Article 36(5) to discuss and issue an opinion on, on the basis of a fair and transparent process, **whether the proposed projects fulfil the criteria laid down in Article 6(1)**. The Commission shall provide the Board **with its assessment of whether the proposed projects fulfil the criteria laid down in Article 6(1)** in advance of the meetings referred to in the first subparagraph of this paragraph." (we emphasise). It is thus clear that the Board and the Commission's assessments are limited to verifying whether applicant projects meet the criteria set in Article 6(1).

- Article 6(1) CRMA contains clear criteria that shall be assessed in an objective manner, "in accordance with the elements and evidence set out in Annex III." (Art. 6(2) CRMA). Whereas there could arguably be some political considerations for determining whether a project located in third countries "would be mutually beneficial for the Union and the third country concerned by adding value in that third country" (Art. 6(1)(e)), this is not applicable to projects located in the EU.

- If all the criteria under Article 6(1) are met, the CRMA does not leave a margin of discretion to the Commission based on policy considerations.

Secondly, the CJEU has clarified that with regard to "*the alleged external pressure and interference, it must be recalled that protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process. Nevertheless, the reality of such external pressure must be established with certainty, and evidence must be adduced to show that there was a reasonably foreseeable risk that that process would be substantially affected owing to that external pressure* [..]." [41] It has also specifically recognised vague and unsubstantiated statements of hypothetical external pressure similar to those included in the Initial Decision as insufficient to justify the application of Article 4(3) of Regulation 1049/2001.[42]

Even if there were any policy considerations in the designation of strategic projects, which again does not stem from Article 6 and 7 of the CRMA, the Complainant submits that the information requested under points 1, 3 and 4 of the Request is purely factual and does not reveal any policy options (if any) that the Commission may have in deciding whether to grant the project the status of a strategic project. This is particularly true for the titles and locations of the projects requested under point 1 of the Request. Under points 3 and 4, the Complainant essentially requests access to (parts of) documents submitted by the

[41] General Court, Case T-51/15, *PAN Europe v Commission,* 20 September 2016, para.30.
[42] General Court, Case T-51/15, *PAN Europe v Commission,* 20 September 2016, paras.32-33.

project promoters that contain evidence of their compliance with the environmental and public engagement criteria under Article 6(1)(c) CRMA.

Furthermore, the CJEU has stated with regard to the disclosure of policy choices in a decision-making process that

> "*the fact that the documents concerned are intended for internal use and concern a question which is still open is irrelevant. The exception at issue in the first subparagraph of Article 4(3) of Regulation No 1049/2001 covers access to documents for internal use which relate to a matter where the institution has not yet taken a decision. However, neither by its wording nor by reason of the interest that it protects does that exception preclude the possibility of requesting access to documents for internal use containing a preliminary analysis [..] or the policy options under consideration. Thus, the preliminary nature of the documents and the fact that they were still being commented upon and analysed by the Commission do not therefore establish, in themselves, that the decision-making process might have been seriously undermined. All the Commission's arguments concerning the preliminary nature of the reflections in the documents at issue and their internal use must therefore be rejected.*"[43]

Even if, following disclosure of the Requested documents, civil society or local communities would attempt to submit additional observations to the Commission or CRM Board, the CJEU has dismissed such a possibility as being sufficient to conclude that the Commission's decision-making process may be substantially undermined.[44]

Therefore, the Commission has failed to demonstrate any concrete and foreseeable risks that disclosure of the documents requested under points 1,3 and 4 of the Request would pose to the decision-making process. In light of the above, the non-disclosure of the Requested documents cannot be based on the application of Article 4(3) of Regulation 1049/2001.

5.5. Overriding public interest

Even if the exceptions under Articles 4(2) and 4(3) would apply, which the Complainant contests, there is an overriding public interest in the disclosure of the Requested documents.

It follows from the case law of the CJEU that the overriding public interest capable of justifying the disclosure of a document must not necessarily be distinct from the principles which underlie Regulation 1049/2001.[45] The CJEU has confirmed the General Court's approach in the case *Sweden v API and Commission*, according to which the invocation of the principle of transparency "*may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question*".[46] In addition, the CJEU has also held that the specific circumstances justifying the disclosure of documents must be set out and that purely general considerations are not an appropriate basis for establishing that an overriding public interest prevails.[47]

A specific overriding public interest in disclosure in the sense of the CJEU case law exists in the present case for the following reasons.

Firstly, the Requested documents contain information on emissions. According to Article 6(1) of the Aarhus Regulation, as regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, "*an overriding*

[43] General Court, Case T-51/15, *PAN Europe v Commission,* 20 September 2016, para.41.
[44] CJEU, Case C-57/16 P, *ClientEarth v. Commission*, 4 September 2018, para. 107.
[45] CJEU, Joined cases C-514/11 and C-605/11, *LPN and Finland v Commission*, 14 November 2013, para. 92; Joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, 1 July 2018, paras. 74-75.
[46] CJEU, Joined cases C-514/07 P, *Sweden and others v API and Commission*, 21 September 2010, paras. 152-153.
[47] CJEU, Joined cases C-514/11 and C-605/11, *LPN and Finland v Commission*, 14 November 2013, paras. 93-94.

public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment." In *Commission v Greenpeace and PAN Europe,* the CJEU clarified that information on emissions should be understood as "*data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use, i.e. information on the nature, composition, quantity, date and place of the actual or foreseeable emissions*."[48]

As the Complainant has noted above, the information contained in point 3 of the Request contains a description of measures to monitor, prevent and minimise environmental effects, inter alia, "*on air, including air pollution such as greenhouse gas emissions," "water, including seabed and marine environment, and water pollution, water use, water quantities (flooding or droughts) and access to water*" and "*regarding hazardous substances*." Therefore, such information, included in the Requested documents, enjoys an overriding public interest and must be disclosed.

Secondly, the information should be disclosed as it concerns decision-making about projects that will significantly affect the environment, as well as the health and well-being of local communities. Under the CRMA, the Commission and CRM Board are assessing the applications of project promoters without any input and in secret from the local communities whose direct neighbourhoods will be affected by the mining projects. This essentially means that the decisions are made based on one-sided information provided by the project promoters without any opportunity for the local communities to verify that information, provide their input or correct any mistakes. This is severely aggravated by the practice, furthered by the Initial Decision and failure to respond to the Complainant's Confirmatory Application, to conduct these proceedings in complete secrecy. Given that the decision-making process on the status of a strategic project assesses the environmental and social impacts of the mining project, and that the final reasoned decisions are[49] on granting the status of a strategic project to the selected projects, which were also not published by the Commission, the public has a right to at least access the information submitted by the project promoters.

6. Conclusion

The Complainant submits that the Commission has breached Article 8 of Regulation 1049/2001 in failing to respond to the Complainant's Confirmatory Application. Moreover, it has failed to sufficiently justify the non-disclosure of the documents requested under points 1, 3 and 4 of the Request and misapplied the exceptions in the first indent of Article 4(2) and in Article 4(3) of Regulation 1049/2001. Therefore, we request that the European Ombudsman find maladministration in the manner of handling the Request by the Commission and recommend that the Requested documents be disclosed to the Complainant.

We would like to thank you for your consideration of our complaint and remain at your disposal in case any further information is required.

[48] CJEU, C-673/13 *Commission v GreenPeace and PAN Euro*pe, 23 November 2016, para. 79; see also C-442/14, *Bayer CropScience SA-NV, Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden,* 23 November 2016.
[49] Under Article 7(9) CRMA the Commission is obliges to issue a reasoned decision.

List of Annexes

Annex 1:

a. MiningWatch's access to the document request to DG GROW of 10 September 2024 (CASE EASE 2024/4763)

b. DG GROW's reply to MiningWatch Portugal's access to documents request of 14 October 2024 (CASE EASE 2024/4763)

Annex 2:

a. MiningWatch's access to document request to DG GROW of 2 April 2025 (CASE EASE 2025/1867)

b. DG GROW's reply to MiningWatch's access to document request of 10 June 2025 (CASE EASE 2025/1867)

Annex 3:

a. Email of MEP Rackete to Director General of DG GROW, 10 April 2025

b. Reply of Director-General of DG GROW Jorna, 13 May 2025

Annex 4:

a. ClientEarth access to document request to DG GROW of 20 November 2024 (CASE EASE 2024/6198)

b. DG GROW reply to ClientEarth's access to document request of 24 January 2025 (CASE EASE 2024/6198)

c. ClientEarth's confirmatory application of 7 February 2025 (CASE EASE 2024/6198)

d. A screenshot of ClientEarth's reminder sent via the EASE portal on 9 April 2025.

e. Email of 11 April 2025 from the Secretariat-General to ClientEarth.