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**Commission reply to the European Ombudsman**

**Complaint ref. 1053/2023**

**Reply of the European Commission to the recommendation from the European Ombudsman regarding the Commission’s refusal to grant full public access to the Impact Assessment and RSB opinion on the revision of the REACH Regulation  
Complaint by ██████████, ref. 1053/2023/MIK**

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**I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY**

On 25 November 2022, the applicant submitted an application<sup>1</sup> for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation (EC) No 1049/2001’)<sup>2</sup>.

In her application, handled by the Regulatory Scrutiny Board in the European Commission’s Secretariat-General (hereafter ‘RSB’), the applicant requested access to any impact assessments on the revision of the Regulation on the registration, evaluation, authorisation and restriction of chemicals (REACH) submitted to the RSB and all RSB opinions on these impact assessments.

In its initial reply of 12 January 2023, the RSB granted partial access to three documents, namely a draft Impact Assessment, its annexes, and a draft RSB opinion, with redactions based on the exceptions of the first subparagraph (protection of the decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

On 4 July 2023, the European Commission confirmed the initial decision taken by the RSB to refuse full access to the documents requested based on the exceptions of the first subparagraph (protection of the decision-making process) of Article 4(3) and of the first indent (protection of commercial interests) of Article 4(2) of Regulation (EC) No 1049/2001<sup>3</sup>.

The European Commission considered that the disclosure of the passages redacted in the Impact Assessment would severely undermine the European Commission’s ongoing decision-making process concerning the revision of the REACH Regulation. The redactions in the Impact Assessment contain information about all policy options, their possible impacts, a comparison of the options, and the methodology for evaluating impacts. The redactions in the annexes concern potential options, the practical implications of proposed options of the initiative and the methodology for screening and assessing impacts. They reflect the overall opinion of the Board, the summary of the findings, which mirror the information in the Impact Assessment, the conclusion, as well as detailed comments on the Impact Assessment.

Furthermore, the European Commission provided a concrete example as to how external pressure from lobbyists could severely undermine the decision-making process by referencing a newspaper article documenting the pressure exerted by lobbyists in the framework of the Chemicals Strategy for Sustainability, which comprises REACH.

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<sup>1</sup> Registered with reference EASE 2022/6860.

<sup>2</sup> OJ L 145 of 31.5.2001, p. 43.

<sup>3</sup> C(2023)4664 final.

Moreover, both the draft Impact Assessment and its Annexes are based on various studies conducted by contractors, who retain copyright on their original production until the conclusion of the contracts between the European Commission with consultants. The European Commission acquires ownership of these studies as from the moment the contractor has finalised the studies. However, the European Commission had not acquired all intellectual property rights at the time of the adoption of the confirmatory decision.

## **II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN**

On 12 June 2023, the applicant turned to the European Ombudsman in the absence of a final reply within the statutory deadlines.

## **III. THE EUROPEAN OMBUDSMAN'S INQUIRY AND RECOMMENDATION**

The Ombudsman initially opened an inquiry on the lack of reply within the statutory deadlines and examined the documents at issue. After the applicant received the confirmatory decision, the European Ombudsman inquired as to the reasons for refusal of certain parts of the documents.

The European Ombudsman takes the view that the documents at issue in this inquiry are legislative documents, to which the highest standards of transparency must apply. The Court of Justice held that impact assessment reports and the accompanying RSB opinions constitute important elements of the EU legislative process<sup>4</sup>. In the European Ombudsman's view, the documents at stake contain environmental information in the meaning of Regulation (EC) No 1367/2006 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 (hereafter 'the Aarhus Regulation')<sup>5</sup>. The European Ombudsman notes that any exception must therefore be interpreted restrictively.

As regards the application of the exception relating to the protection of the ongoing decision-making process, the European Ombudsman considers that the redacted parts are not particularly sensitive. Among other points, the European Ombudsman argues that refusing public access to legislative documents cannot be used as a safeguard by EU institutions when faced with external pressures.

As regards the example provided by the European Commission of external pressure related to the new chemicals policy, the European Ombudsman took the view that disclosure of the documents requested would put industry and civil society on an 'equal footing'. The

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<sup>4</sup> Judgment of the Court of Justice, *Client Earth v Commission*, Case C-57/16 P, EU:C:2018:660, paragraphs 90-91.

<sup>5</sup> 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, OJ L 264, 25.9.2006, p. 13–19.

European Ombudsman argued that the article does not elaborate on why the risk of external pressure in this case would be more serious than in cases of other legislative initiatives and why this risk would substantially affect the European Commission's ability to complete its work. Moreover, the European Commission did not explain why it considers that external pressure would further increase due to disclosure of these documents.

Finally, the European Ombudsman considered that the European Commission did not explain in what way the decision-making process would be exceptional as to justify the application of the exception under the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

As regards the application of the exception related to the protection of commercial interests and the protection of copyright, the European Ombudsman considers that the European Commission failed to demonstrate how the commercial interests of its contractors would be undermined, irrespective of whether the European Commission had already acquired intellectual property rights or not.

In light of the above, the European Ombudsman considers that the European Commission's refusal to grant full access to the requested impact assessment and RSB opinion related to the revision of the REACH Regulation constituted maladministration.

As regards the delays by the Commission services in replying to confirmatory applications, the European Ombudsman has addressed this issue separately in the context of an own initiative inquiry and this, therefore, will not also be addressed in this reply.

Last, with regard to the documents related to the Mercury Regulation, as access was granted to those documents, they will not be in the scope of the current reply.

#### **IV. THE EUROPEAN COMMISSION'S REPLY TO THE RECOMMENDATION OF THE EUROPEAN OMBUDSMAN**

The REACH Regulation was adopted in 2006 to protect human health and the environment from adverse effects of chemicals, as well as to ensure the free circulation of substances on the internal market while enhancing competitiveness and innovation. A revision was announced as part of the European Commission's Chemicals Strategy for Sustainability<sup>6</sup>. The European Commission proposal for the revision of the REACH Regulation was included in the Commission Work Programme 2023 for adoption by the fourth quarter of 2023. As Executive Vice-President Šefčovič pointed out in his reply to the European Parliament on 4 October 2023, the European Commission's preparations will continue in 2024 on the targeted amendment of the REACH Regulation to protect human health and the environment and foster competitiveness and innovation for substitution.

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<sup>6</sup> Communication from the commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 667 final, 14.10.2020.

The revision of this regulation has attracted attention from different stakeholders. The work for its development has been carried out in a transparent manner, involving all relevant stakeholders in public and targeted consultations and discussions.

The European Commission services were and are still analysing the opinion of the Board and are considering changes to the draft impact assessment, for instance, relating to the parts concerning the choice and impact analysis of key policy options, the analysis of their impacts, including on cost and benefit estimates, the competitiveness of businesses, notably SMEs, as well as the analysis, proportionality, and choice of the preferred package of options. As the European Commission has not yet taken a decision on this, the decision-making process is not completed and is fully ongoing.

Indeed, the passages redacted contain information about the policy options currently considered, their possible impacts, a comparison of the options, and the methodology for evaluating impacts. As mentioned in the contested decision, at the time of the adoption of the decision, some fundamental elements of the draft impact assessment and its annexes were still under consideration.

In the European Commission's view, it is not obvious how further disclosure of the documents requested related to "draft" working versions would address any alleged lack of access to the decision-making process for some stakeholders.

All interested stakeholders were given the possibility to contribute to the decision-making process via an extensive consultation, which included the following:

- A four-week feedback period on the publicly available inception impact assessment (from 4 May to 1 June 2021);
- A 12-week public consultation, available to all stakeholders in all the EU official languages and published on the 'Have Your Say' website<sup>7</sup>.
- A five-week SME panel questionnaire (from 31 March to 6 May 2022) to reach SMEs in a targeted way, with the help of the European Enterprise Network.
- As part of technical support studies, 10 workshops<sup>8</sup>, seven targeted surveys and 164 interviews were carried out (indicatively from end of 2021 until mid-2022) to gather the views and information from all relevant stakeholders on specific problems and options to revise REACH.

In addition, regular meetings of the Competent Authorities for REACH and CLP expert working group (CARACAL) have been used to present progress and gather input on the impact assessment and the draft legal proposal. Member State Competent Authorities and

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<sup>7</sup> [Chemicals legislation – revision of REACH Regulation to help achieve a toxic-free environment \(europa.eu\)](https://european-council.europa.eu/media/en/press-operations/infographic-117336.jpg)

<sup>8</sup> The workshops revolved around these topics: information requirements on use and exposure, registration of polymers, Derived Minimal Effect Level for non-threshold substances, introduction of Mixtures Assessment Factors, reforming the restriction and authorisation processes, extending the generic approach to risk management, the essential use concept, and integration of REACH into customs legislation and procedures.



Moreover, it should be noted that neither Regulation (EC) No 1367/2006, nor Regulation (EC) No 1049/2001 provide for an automatic disclosure of any type of environmental information. It cannot be expected that any document containing environmental information used in the decision-making process would need to be automatically fully disclosed, without balancing the impact that this disclosure could have on the ongoing decision-making process. Furthermore, as the European Ombudsman acknowledges in its recommendation, the withheld parts of the documents do not qualify as information on ‘emissions into the environment’ in the sense of Article 6 of Regulation (EC) No 1367/2006.

Consequently, as regards the application of the exception relating to the protection of the ongoing decision-making process, the European Commission considers that the assessment it conducted at that time was correct, taking into consideration the legal and factual circumstances of the case.

As regards the exception protecting the commercial interests (in this case copyright), the European Commission explained that parts of the draft impact assessment and its annexes were based on studies carried out by contractors. The results included in the draft impact assessment were taken from the draft reports of the studies as many of the supporting studies were not finalised yet. These studies result from the conclusions of contracts between the European Commission with consultants. The European Commission acquires ownership of these studies, and therefore copyright, as from the moment the contractor has finalised the studies.

As the European Commission had not acquired all intellectual property rights at the time of the confirmatory decision, the European Commission had deemed that the disclosure of the redacted passages based on the non-finalised studies would infringe the copyright of the contractor and therefore undermine their commercial interests by revealing their know-how and methodology. Before acquiring the intellectual property rights, the European Commission considered that disclosure of the relevant redacted passages would infringe the copyright of the contractors and expose the European Commission to the risk of litigation.

Consequently, the European Commission considers that its assessment was correct at the time when the confirmatory decision was adopted.

## V. CONCLUSIONS

For the reasons set out above, the European Commission considers that its confirmatory decision, which has become definitive in the absence of any legal challenge before the Union courts, was legally and factually correct in light of the circumstances and the relevant case-law on access to documents existing at the point in time it was taken. Therefore, the European Commission maintains its position as expressed in the above-mentioned decision.

*For the Commission*  
*Věra JOUROVÁ*  
*Vice-President*

