Observations by the European Commission, on behalf of the European Union, to the Communication to the Aarhus Convention Compliance Committee concerning compliance by the European Union in connection with access to environmental information regarding the New Exploration Technologies project

(ACCC/C/2024/207)

I. Introduction

1. These observations refer to the letter by the Aarhus Convention Compliance Committee (ACCC) of 5 March 2024, asking the European Union to submit to the ACCC any written explanations or statements clarifying the matter referred to in the above-mentioned Communication.

2. Pursuant to Article 17.1 of the Treaty on European Union (TEU), the European Commission replies to this letter on behalf of the European Union (EU).

II. Background

1. Communication to the ACCC

3. On 20 February 2024, the non-governmental environmental organisation "Fundación Montescola", ("the Communicant") represented by its director Mr Xoan Evans Pin, introduced a communication to the ACCC.

4. Under the terms of paragraph 18 of the Annex to Decision I/7 on Review of Compliance, a communication is the means for the public to address the *"Party's compliance with the Convention"*.

5. In its communication, Fundación Montescola alleges that the EU, by not granting full access to requested documents concerning an EU funded research project in the field of mineral exploration, in particular the San Finx mine in Spain, has violated Article 4 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "Aarhus Convention").

2. Legal context

6. To recall, Article 4 of the Aarhus Convention provides that public authorities give access to environmental information upon request, subject to certain exemptions which are enumerated in paragraph 4. Pursuant to Article 4(4)(d) of the Aarhus Convention, a request for environmental information may be refused if the disclosure would adversely affect *"The confidentiality of commercial and industrial information, where such confidentiality is prohibited by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed." (emphasis added).*

7. Pursuant to Article 4(4)(g) of the Aarhus Convention, a request for environmental information may further be refused if the disclosure would adversely affect *"[t]he interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material".*

8. Article 4(4)(h), second subparagraph of the Aarhus Convention reads: *"The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment."*

9. The individual allegations by the Communicant will be commented under section III.

3. Procedure at EU level

a) Request to the European Commission for public access to documents

10. On 10 September 2021, the Communicant submitted a request for access to documents to the European Commission. The Communicant requested access to documents concerning the Horizon 2020 research project "New Exploration Technologies" (NEXT) in the field of mineral exploration, and in particular its implementation at the Spanish San Finx mine.

11. In its initial reply of 20 October 2021, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) refused access to these documents based on the first indent of Article 4(2) of the "Transparency Regulation"[1], to protect commercially sensitive information, upon consultation of the coordinator of the research project, the pan-European consortium "Geological Survey of Finland (GTK)", from which the requested documents originated and which had objected to their disclosure.

12. On 7 November 2021, Fundación Montescola lodged a confirmatory application, in which it asked the Commission's Secretariat-General (SG) to conduct an independent administrative review of the reply given by DG GROW at the initial stage of the public access to documents procedure. The Communicant argued that the refused documents relate to "emissions into the environment", so that, pursuant to Article 6 (1) of the "Aarhus Regulation"[2], which implements the relevant provisions of the Aarhus Convention for the EU institutions, an overriding public interest in disclosure shall be deemed to exist concerning these documents.

13. In its confirmatory reply of 3 June 2022, the European Commission identified 5 documents as falling under the scope of the Communicant's request. It carried out a renewed third-party consultation, but GTK maintained its objection to disclosure. Based on its analysis of the documents concerned and the arguments provided by the third party, the European Commission considered that the objections of the third party were justified as regards parts of the documents concerned. However, the European Commission considered that other parts of the documents were not protected under the Transparency Regulation and thus granted partial access to these parts despite the objections of the third party.

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1 Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents; OJ L 145, 31.5.2001, p. 43.

2 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. This Regulation was amended by Regulation (EU) 2021/1767 of 6 October 2021, but not in relation to the Articles here at stake.

14. In particular, the European Commission granted access to one document, subject only to the redaction of personal data. It equally granted partial access to three documents, and refused access to one document, to protect, besides personal data, also commercial interests, under the first indent of Article 4(2) of the Transparency Regulation. The European Commission did not consider, though, that the redacted parts of these documents contained information related to emissions, but rather information about workforce and costs, commercial relations and operational details.

15. The Communicant did not challenge this decision before the General Court of the EU, which, according to Article 263 of the Treaty on the Functioning of the European Union (TFEU), reviews the legality of acts of the European Commission. The confirmatory decision of 3 June 2022 became definitive in the absence of any legal challenge before the Union courts.

b) Complaint to the European Ombudsman

16. The Communicant, however, addressed a complaint to the European Ombudsman on 10 June 2022, pursuant to Article 228 TFEU. According to this provision, the European Ombudsman is empowered to receive complaints concerning instances of maladministration in the activities of the European institutions. The Communicant argued that access should have been granted to all information, except personal data.

17. In her proposal for a solution of 10 October 2022[3], the European Ombudsman, Ms Emily O'Reilly, considered that certain limited parts of one document contained information that could be understood as environmental information and that parts of that information related to emissions into the environment. The European Ombudsman invited the European Commission to review its position, with the view to giving the widest possible access to the requested documents.

18. In its reply to the European Ombudsman of 11 January 2023, the European Commission confirmed its assessment laid down in its confirmatory decision, which it considered legally and factually correct.

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[3] The European Ombudsman decided not to publish her proposal for a solution in this case, as certain elements in it remained confidential.

19. In her closing decision of 17 April 2023, the European Ombudsman, *"[w]hile [she] regretted the Commission's decision not to disclose more parts of the documents at stake, she acknowledged that the Commission has already made information publicly available about the research project and, in particular, about the activities of the San Finx mine. In view of this, the Ombudsman considered that further inquiries into this matter are not justified."* (quote from the decision).

20. It follows that the European Ombudsman did not find an instance of maladministration in how the European Commission dealt with the Communicants access to documents request.

21. Furthermore, as already mentioned, the Communicant did not challenge the legality of the European Commission's confirmatory reply before the General Court of the EU, despite having been informed of such possibility in the confirmatory reply of 3 June 2022.

III. Legal observations

1. Admissibility of the Communication

22. In its Preliminary Determination of Admissibility of the Communication, dated 23 February 2024, the ACCC declared Fundación Montescola's Communication as admissible, *"subject to review following any comments from the Party concerned*" (page 2, paragraph 9).

23. Under paragraph 21 of the Annex to Decision I/7 on Review of Compliance, the ACCC *"should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress"*.

a) Exhaustion of domestic remedies

24. The European Commission notes that the Communicant did not exhaust the **judicial** means of redress available at the level of the European Union.

25. As far as requests for public access to documents are concerned, the available means for redress are, first, to address a confirmatory application to the SG.

26. Against a negative reply by the Commission (SG) to a confirmatory request for access to documents, the means of redress are then to bring proceedings before the General Court of the European Union, under the conditions of Article 263 TFEU, or to file a complaint with the European Ombudsman, under the terms of Article 228 TFEU. These means of redress are always indicated in the reply, so that the applicant is fully informed about the judicial and non-judicial remedies available.

27. In the case at hand, making a complaint to the European Ombudsman cannot be regarded as exhausting the available domestic remedies, as the Communicant implies.

28. Firstly, the decisions by the European Ombudsman are not legally binding, so that it is highly questionable whether bringing a case before the European Ombudsman qualifies as a "remedy" in the sense of paragraph 21 of the Annex to Decision I/7 on Review of Compliance.

29. Furthermore, the European Ombudsman is an alternative **non-judicial** remedy that does not necessarily have the same objective as judicial proceedings. Unlike the General Court, the European Ombudsman cannot annul the Institution's decision, should she find maladministration or otherwise disagree with the substance of the reply to the confirmatory request for access to documents.

30. It is clear from the Communicant's allegations that it addresses issues on which the Ombudsman cannot make a legally binding decision, namely on an alleged breach of the Aarhus Convention and the respective legislation at the level of the EU that falls under the competence of the EU Courts, which have not been seized in the case at hand.

b) Adequacy of domestic remedies

31. In the Preliminary Determination of Admissibility of this Communication, the ACCC underlines that the *"Committee's view is that this provision does not imply any strict requirement that all domestic remedies must be exhausted"* (page 1, paragraph 5).

32. As already mentioned in its observations to a previous compliance case[4], the European Commission does not share this interpretation. The terms of paragraph 21 of the Annex to Decision I/7 on Review of Compliance leave no doubt that domestic remedies are to be taken into account, unless they are unsatisfactory.

33. As outlined above, the remedy of proceedings before the General Court of the EU is available against a Commission decision giving a negative reply to a confirmatory request for access to documents.

34. These Court proceedings do not unreasonably prolong the remedy, and they do without any doubt provide an effective and sufficient means of redress. As a matter of fact, the Court of Justice is the only EU institution that can make legally binding interpretations of Regulation (EC) No 1049/2001 and conclude on its incorrect application.

35. The Communicant argued, in its written statement regarding the determination of preliminary admissibility of 20 February 2024, that the *"[l]egal costs at the Court can be exorbitant."*

36. In order to inform the ACCC about costs before the two EU courts relevant for the purpose of these proceedings[5], the EU would like to recall a number of principles and elements which can be of assistance.

37. To begin with, access to the EU Courts is in principle free of charge, as stated in Article 143 of the CJEU's Rules of Procedure[6] (hereafter RP) and Article 139 of the General Court's RP[7].

38. However, parties have to be represented by an agent or a lawyer (see Article 119 of the RP of the CJEU and Article 51 of the RP of the General Court). The choice of the lawyer is within the discretion of the parties. The fees related to the

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4 Case ACCC/C/2013/96

5 These are the General Court and the Court of Justice of the European Union (CJEU). No references will thus be made to the rules of procedure of the Civil Service Tribunal. In case the ACCC wishes to consult such rules, they can be found under www.curia.europa.eu.

6 Consolidated version of 25 September 2012, OJ L 265 of 29.9.2012, as amended on 18 June 2013, OJ L 173 of 26.6.2013.

7 OJ L 105 of 23.4.2015. The General Court may set specific fees for obtaining copies of documents, pursuant to Article 37 of the RP of the General Court.

contractual relation between party and lawyer are not regulated and are not a matter of Union law.

39. In this context, it should be noted that the Rules of Procedures of both the CJEU and the General Court provide, for a party to the main proceedings who is wholly or in part unable to meet the costs of the proceedings before the Court, for the possibility to apply at any time for legal aid, including before lodging the application (see Article 115 *et sequitur* of the RP of the CJEU and Article 146 *et sequitur* of the RP of the General Court).

40. Moreover, pursuant to Article 138(1) of the RP of the CJEU (Article 184 for appeals for which Articles 137 to 146 apply *mutatis mutandis*) concerning general rules as to allocation of costs, *"[t]he unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings".* A similar provision is contained in Article 134 of the RP of the GC. With regard to EU institutions, this implies that, when the applicant succeeds, the institutions have to bear his/her costs.

41. Article 144 of the RP of the CJEU and Article 140 of the RP of the General Court provide that *"recoverable costs"* are the expenses necessarily incurred by the parties for the purpose of the proceedings[8], in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers, and sums payable to experts. Such recoverable costs are in principle subject to an agreement between parties. Only where there is a dispute concerning the costs to be recovered, on application by the party concerned and after hearing the opposite party and the advocate general, the CJEU makes an order concerning the costs (see Article 145 of the RP of the CJEU; an equivalent procedure is provided by Article 170 *et sequitur* of the RP of the GC).

42. It follows from these provisions that recoverable costs are limited, firstly, to those incurred for the purpose of the proceedings before the General Court or the CJEU and, secondly, to those which were necessary for that purpose (see orders of 24

[8] This excludes the costs incurred in the administrative proceedings (see, for instance, Case C-326/05P, paragraph 53). In cases before EU courts on access to documents, regulated under the Aarhus and the Transparency Regulations, the arguments developed before EU courts largely recoup those advanced in administrative proceedings. This element is therefore to be taken into account when assessing the "necessary costs".

January 2002 in Case T-38/95 DEP, *Groupe Origny v. Commission* [2002] ECR 11-217, paragraph 28, and of 6 March 2003 in Joined Cases T-226/00 DEP and T-227/00 DEP, *Nan Ya Plastics and Far Eastern Textiles* v *Council* [2003] ECR 11-685, paragraph 33).

43. The legal costs in front of the Court, cannot, therefore be considered ‘exorbitant’ as the applicant has stated in its allegations.

44. The European Commission is therefore of the view that these remedies available at the level of the EU should be "taken into account". This can be done by either suspending a compliance case when the domestic remedy has been taken and is still ongoing or, if the Communicant directly addresses the ACCC without having made use of the relevant domestic remedy as in the case at hand, declare it as inadmissible.

45. The ACCC should not become a means of redress for issues where remedies internal to the European Union are available and have not been used, as in the present case. The Communicant should not be given the opportunity to circumvent the relevant domestic remedy to rule on the correct application of the EU Transparency Regulation. In the interest of legal clarity and procedural economy, the Communicant should not be able to choose whether to exhaust domestically available remedies or to bring the case directly to the ACCC (no "forum shopping”).

46. The European Commission would therefore invite the ACCC to declare the Communication as inadmissible for failing exhaustion of domestic remedies.

47. However, the European Commission replies on the substance of those grievances under point 2 below, on a subsidiary basis.

4. Observations on substance

48. The Communicant alleges that the EU breached Article 4(1) of the Aarhus Convention by refusing to grant public access to the requested documents regarding the NEXT project at the San Finx mine containing, in the Communicant’s opinion “environmental information”. The Communicant refers to Article 6(1) of the Aarhus Regulation, which foresees that an overriding public

interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.

49. The following observations on substance are made only on a subsidiary basis. They reiterate the arguments that the European Commission already made in its confirmatory decision and in answer to the European Ombudsman.

50. The documents requested relate to a grant agreement funded under the Horizon 2020 programme. The project, which ran from 1 May 2018 to 30 September 2021, aims at developing 'new geomodels, novel sensitive exploration technologies and data analysis methods'. The documents requested concern a deliverable of the project ('deliverable 8.3') that was marked in the grant agreement as 'confidential, only for members of the consortium (including the Commission Services)'. The information contained in the documents originates from a third party and is more detailed than publicly available information about the project.

51. The grant agreement with the confidentiality marking was signed both by the beneficiary and the European Commission. The documents were thus provided to the European Commission in the understanding that the confidentiality requirement would be respected.

52. The European Commission analysed the documents in light of the confidentiality requirements and the applicable legal framework. In particular, when handling the confirmatory application, the European Commission was obliged to apply the Transparency Regulation in a way which is consistent with the confidentiality obligations laid down in the grant agreement, read in conjunction with Article 3 of Regulation (EU) No 1290/2013 laying down the rules for participation and dissemination in "Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020)[9]," which provides that *'[s]ubject to the conditions established in the implementing agreements, decisions or contracts, any data, knowledge and information communicated as confidential in the framework of an action shall be kept confidential, taking due account of Union law regarding the protection of and access to classified information'.*

9 *OJ L 347, 20.12.2013, p. 81.*

53. Article 36.1 of the grant agreement lays down the obligation to maintain confidentiality of documents and other material of the project identified as confidential. It provides that *'[d]uring implementation of the action and for four years after the period set out in Article 3, the parties must keep confidential any data, documents or other material (in any form) that is identified as confidential at the time it is disclosed'.* As the period of four years after the duration of the action had not expired at the time of the adoption of the confirmatory decision, the information related to this deliverable was (and still is) covered by the confidentiality requirement.

54. The legal framework laid down by the specific provisions governing the rules concerning grant agreements are relevant in the application of the rules concerning public access to documents, as it has been underlined by the relevant case-law[10]. The European Commission was obliged to apply this framework when processing the complainant's request for public access to these documents.

55. In her proposal for a solution, the European Ombudsman argues that *'the mere fact that documents are considered as "confidential" pursuant to [the Horizon 2020 Regulation] constitutes only an indication that their content is sensitive. That is not, however, sufficient to justify the application of the exception referred to in the first indent of Article 4(2) of Regulation 1049/2001, namely the need to protect commercial interests'.*

56. The European Ombudsman acknowledged that parts of the documents contain information that, if disclosed, would undermine the commercial interests of the third party concerned. In particular, the European Ombudsman considered that public access to document 2.1 (in its entirety), and parts of documents 1.1 (including all the annexes), documents 2 and 3, is not justified. However, the European Ombudsman took the view that some information in document 1.1 can be understood as 'environmental information' in the sense of the Aarhus Regulation, and information relating to emissions into the environment.

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[10] See judgment of the General Court of 17 December 2021, *Patrick Breyer v Research Executive Agency*, T-158/19, EU:T:2021:902, paragraphs 67-69.

57. The European Commission agrees that, in the framework of a project, the classification of certain information as confidential is not sufficient, by itself, to justify the application of the exception protecting commercial interests[11]. However, this classification constitutes an indication that shall form the basis for the specific assessment performed by the institution when examining a request for public access to documents[12].

58. Consequently, in the case at stake, the European Commission analysed each document based on the legal framework and the opinion of the author.

59. On the one hand, the European Commission concluded that four documents could not be fully covered by the protection of commercial interests (first indent of Article 4(2) of the Transparency Regulation, read in conjunction with the above-referred confidentiality requirements), as parts of these documents do not contain business sensitive information. Therefore, despite the objections of the third-party originator of the documents that considered the documents to be fully covered by the relevant exception, the European Commission granted partial access to the documents pertaining to the confidential deliverable 8.3, thereby overruling the position of the third-party originator.

60. On the other hand, other parts of the documents requested contain information about workforce and costs linked to the project, the operational issues encountered by the third parties concerned and how they affect the technical and management aspects of the company and its business. Therefore, they concern information about permitting procedures, investments and commercial relations of the third party concerned whose disclosure could undermine the third-party's legitimate commercial interests.

61. In the context of the handling of the confirmatory application, the European Commission invited the third party to consider the partial disclosure of the documents. However, as explained above, the third party opposed such partial disclosure referring to the confidentiality requirements of the grant agreement. Taking into account the obligation of confidentiality, and the nature of the

11 Judgment in Case T-158/19, *Breyer v Research Executive Agency*, cited above, paragraph 71.

12 Ibid, paragraph 70

information at stake in the specific parts of the documents, the European Commission considered that there were enough elements to conclude that the relevant parts are covered by the exception under the first indent of Article 4(2) of the Transparency Regulation.

62. Furthermore, the European Commission took into account in its assessment the arguments raised by the Communicant concerning the application of the Aarhus Regulation. The conclusion was that the considerations put forward by the applicant were not supported by the actual assessment of the withheld parts of the documents.

63. Firstly, the documents requested do not concern information such as policies, legislation, programmes, environmental agreements or measures or activities designed to protect elements of the environment. It is unclear how the disclosure of information about the know-how and the business activity of the company concerned, such as the choice of software, materials and methods used to support research activities, or information on administrative concessions, would qualify as environmental information in the sense of the Aarhus Regulation.

64. Secondly, even if the information at stake could be considered as environmental information in the sense of that Regulation, it is to be noted that, according to Article 6(1) of the Aarhus Regulation, **an overriding public interest in disclosure is deemed to exist only with regard to information about emissions into the environment**. The European Commission takes the view that the redacted parts of the documents do not contain information related to emissions into the environment in the sense of Article 6.1 of the Aarhus Regulation.

65. Thirdly, the European Commission wishes to recall that it is for applicants who request access to documents to demonstrate the existence of an overriding public interest in the disclosure of the documents. In this case, the complainant did not put forward arguments capable of justifying the existence of any such overriding public interest. For the reasons explained above, the European Commission cannot agree with the applicant's assertion in the confirmatory request that the documents *'have as their main subject the emissions into the environment from the San Finx mine'*.

66. Consequently, the European Commission maintains its view that it interpreted Regulation (EC) No 1290/2013 and the Transparency and Aarhus Regulations in a compatible and consistent way by granting partial access to the documents concerned. Further public access to the documents at this stage, while the confidentiality period outlined above has not yet expired, would essentially deprive the confidentiality requirements of their purpose. Such disclosure is not justified in view of any alleged overriding public interest in the disclosure of the redacted parts of the documents.

IV. CONCLUSION

67. In view of the above considerations, the European Commission asks the ACCC to dismiss the Communication as inadmissible, or, on a subsidiary basis, to reject it as unfounded.