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On behalf of (if applicable): Friends of the Earth Europe

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Against which European Union (EU) institution or body do you wish to complain?

European Commission

What is the decision or matter about which you complain? When did you become aware of it?

This complaint by Friends of the Earth Europe (FoEE) is made in response to the European Commission's failure to:

- provide a satisfactory justification for not dealing with a complaint about entries in the Register for Interest Representatives (Lobby Register)¹ adequately, despite an appeal and a related request for access to documents by the complainant;
- subsequently provide access to the documents requested by the complainant (FoEE) in order to understand the Commission's treatment of their complaint.

In July 2010, FoEE sent two complaints to the European Commission about the entries of ROYAL DUTCH SHELL (Shell) and BRITISH PETROLEUM (BP) in the Commission's lobby register. In February 2011, the Secretariat General of the Commission rejected these complaints, but failed to provide a satisfactory explanation or argumentation for its decision. As a result, FoEE lodged an appeal to the European Commission and filed a request for access to the documents relating to the exchanges between the Commission and the companies' representatives on the calculation of their lobbying budgets (May 2011). FoEE was trying to understand how this complaint had been investigated and why the Commission had decided to reject it. However, the European Commission refused to provide access to the documents in their entirety, instead blackening out parts of the information

¹ In the meantime, the Commission Register for Interest Representatives has become the joint Commission-Parliament Transparency Register.

related to Shell's and BP's lobbying budget calculations. They did not give satisfactory reasoning for this partial disclosure, other than that "putting these figures and information in the public domain would be prejudicial to the commercial interests of Shell and BP"(July 2011). Despite a confirmatory application by FoEE, the Commission kept on refusing the full disclosure of the requested documents (October 2011), therefore preventing the complainant from fully understanding how its complaints had been investigated or how the Commission's decision had been made.

Friends of the Earth Europe believes this constitutes an instance of maladministration.

Annexes submitted with this complaint:

- Annex 1: FoEE's complaints to the Commission on the lobby registration of Shell and BP (submitted via the Commission complaint form on 27th July 2010);
- Annex 2: Commission's answer to FoEE's complaints (4th February 2011);
- Annex 3: FoEE's appeal to the European Commission and related access to documents request (12th May 2011);
- Annex 4: Commission's answer to FoEE's access to document request (6th July 2011);
- Annex 5: FoEE's confirmatory application to the European Commission (27th July 2011);
- Annex 6: European Commission answer to FoEE's confirmatory application (24th October 2011);
- Annex 7: Frequently Asked Question (Guidance document for the former Register of Interest Representatives).

What do you consider that the EU institution or body has done wrong?

The nature of FoEE's complaint is twofold. On the one hand the European Commission services failed to provide sufficient or satisfactory explanation for its treatment of our complaints. On the other hand, the Commission refused to provide full access to the documents that were requested by FoEE in order to understand the reasoning behind its treatment of the complaints.

Following FoEE's complaints, the Commission informed us that "based on the available evidence, a violation [by Shell and BP] of the Code of conduct for interest representatives has not taken place [...] The European Commission's Register requires registrants to provide an estimate of their costs related to interest representation vis-à-vis the EU institutions. This declaration must be made in good faith and be based on a clear methodology. It is however clear that the method of calculation by individual registrants is not necessarily identical between registrants."

FoEE was not satisfied by such argumentation, which neither answered our concerns nor explained how the decision had been made. The European Commission Code of Good administrative behaviour clearly states that: "A Commission decision should clearly state the reasons on which it is based and should be communicated to the persons and parties concerned [...] As a general rule full justification for decisions should be given. [...] Furthermore, an interested party who expressly requests a detailed justification shall be provided with it²." That is why we wrote an appeal letter to the Commission, in which we requested access to the evidence on the basis of which the Commission

² http://ec.europa.eu/civil_society/code/rights_en.htm

had made this decision. In our appeal, we referred to an earlier ruling³ by the European Ombudsman, on another complaint about the lobby register by FoEE, in which the Ombudsman states that **“data may be objectively misleading, even if this is not the intention of the person supplying the data.** The Ombudsman considered that, as the institution which maintains the Register, the Commission must act with sufficient diligence to ensure that the data contained in the Register is not objectively misleading. It is for the Commission and not the Ombudsman to judge whether the method of calculation used by a lobbying group wishing to register its related budget is appropriate in this regard. **However the amount of an estimated lobbying budget, even if calculated on the basis of a clear methodology, may still be misleading if the data on which the calculation is based are not accurate. In other words, the use of an acceptable methodology does not necessarily ensure that the total lobbying budget declared is accurate. The final amount essentially depends on two factors, first, what costs are taken into account and, second, what percentage of them is considered as directly relating to the lobbying activities”.**

In this earlier ruling, the Ombudsman also reminded the Commission that failing to comply with its duty to provide an accurate statement of reasons could also be an instance of maladministration, and that “the lack of guidance on how and what kind of lobbying costs should be calculated for the purposes of the Register may indeed jeopardise the very objectives of the Register, namely, to maintain public trust and confidence in the Commission’s activities and to reinforce the transparency and coherence of its decision-making process. The Ombudsman did not consider that the voluntary character of the Register justified the lack of guidance in question.”

The need for transparency by the European institutions, including the Commission, is enshrined in Article 15 of the Treaty of the Functioning of the European Union (TFEU), which states that "In order to promote good governance and ensure the participation of civil society, the Union institutions [...] shall conduct their work as openly as possible." In particular, paragraph 3 of that provision states that "Each institution [...] shall ensure that its proceedings are transparent." Regulation 1049/2001 on public access to documents in the EU⁴ also states that the new Treaty should aim at creating an Union where “decisions are taken as openly as possible and as closely as possible to the citizens” and that “Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system”.

However, in responding to FoEE’s appeal and request for documents, the Commission granted partial access only, arguing that “putting these figures and information in the public domain would be prejudicial to the commercial interests of Shell and BP.” Besides this, in dealing with our request for documents, the Commission failed to respect the time limits imparted by Regulation 1049/2001.

1) The partial information disclosed by the Commission raised concerns and suspicions about how our complaints had been investigated.

³ European Ombudsman, Complaint 3072/2009/MHZ, Decision on 5 April 2011,

<http://www.ombudsman.europa.eu/cases/decision.faces/en/10251/html.bookmark>

⁴ http://www.europarl.europa.eu/RegData/PDF/r1049_en.pdf

The Frequently Asked Questions (Annex 7)⁵ of the former Register for Interest Representatives clearly states that the activities falling in the scope of the register include: “contacting members or officials of the EU institutions, preparing, circulating and communicating letters, information material or argumentation and position papers, organising events, meetings or promotional activities (in the offices or in other venues) in support of an objective of interest representation.”

However, what the partially disclosed documents revealed raised concerns and caused further confusion about the Commission’s method in dealing with our original complaints. For instance:

- It was revealed that “BP developed a percentage for the time and costs related to “direct lobbying of the EU institutions” (e.g. meeting with EU officials) by tagging all the relevant activities.” If correct, this would be in contradiction with the Commission’s own guidelines that lobbying activities should also include the preparation of lobby meetings and letters. In addition, it was mentioned that “BP excluded payments to third parties such as trade associations, think tanks or consultancies which, in their understanding, will be accounted for the organisations concerned”. However, the entries of these third parties in the Register did not seem to account for such payments.
- In the case of Shell, it was stated that “According to Shell’s understanding of the Commission guidance in the “frequently Asked Questions” in order to avoid double-counting Shell deducted from total EUL budget the fees paid to industry associations and think tanks [...] and consultancy fees paid to consultancies for policy monitoring services”. The Commission FAQ rather states that “To avoid such double-counting, registrants are encouraged to agree with their partners and clients who reports what”. Such agreement does not seem to be accounted for either in Shell’s registration, or in the registration of any of the partners that the company works with relating to lobbying activities.

2) The refusal by the Commission to disclose the entirety of the requested information made it impossible to verify their reasoning in the treatment of the complaint.

In addition to blackening out all the figures and percentages declared and used by both Shell and BP in the calculation of their lobby budget, the Commission also blackened out other types of information, the lack of which made it very difficult, if not impossible, to verify and understand the Commission’s reasoning when dealing with our complaints and appeal. The information blackened out by the Commission in its answer to our original access to document request included: the names of organisations of which BP and Shell are members, as well as names of organisations they partner with to organise public events, or names of events they sponsor; the number of companies’ staff and people involved in lobbying; the conclusions of the Commission’s exchange and minutes of the meetings with the companies; and parts of the remarks about the complaint submitted by FoEE.

Following a confirmatory application by FoEE, greater partial access was granted to the requested documents. Nonetheless, key information, particularly regarding the percentages and figures relating to lobbying activities, were kept secret. The Commission argued that “the disclosure of some parts of the requested documents would undermine the commercial interests of these companies.

⁵ http://ec.europa.eu/transparency/docs/reg/FAQ_en.pdf

Indeed, some parts of the documents contain amounts and percentage values of money spent in interest representation and other activities in Brussels and the number of staff including the breakdown into different functions as well as membership in industry associations and fees paid to associations as well as to consultancies.” In addition, the Commission stated that “Your request aims at publication of additional information provided by BP and Shell in the course of this investigation, which is not part of the information that has to be provided by virtue of the rules of the Register [...] It is obvious that by doing so, the Commission would not favour further voluntary registration, but rather discourage organisations from registering. **Therefore I consider that disclosure would compromise the interest of transparency rather than pursuing it.**”

While we understand that the register and the related complaints about the entries in the register should not be used as a tool to obtain information that would put registrants in a less favourable position vis-à-vis groups that choose not to register, the Commission’s argument appears very contradictory. Supposedly, the purpose of the lobby register is to bring light on the lobbying budgets, number of staff involved in lobbying, as well as the various channels used by organisations to lobby (i.e. memberships). In his speech at the launch of the European Transparency Initiative in Nottingham in 2005, Commissioner Kallas himself commented that: “Lobbyists can have considerable influence on legislation, in particular on proposals of a technical nature... But their transparency is too deficient in comparison to the impact of their activities.” The Commission’s 2006 Green Paper on the European Transparency Initiative⁶ makes a clear reference to external scrutiny as a potential “deterrent against improper forms of lobbying”.

However, the Commission’s treatment of the complaints filed by third parties, and the concerns raised about the reliability of the data in the voluntary register, reveal a very ambiguous approach. On the one hand, the Commission states that the purpose of the Register is to increase transparency about lobbying activities in the EU, thereby providing comprehensive information on the matter to citizens. On the other hand, it seems to be reluctant to upset commercial interests of corporate groups, whenever concerns are raised about the credibility of the budgets they disclose for lobbying. While we understand the Commission is not an anti-fraud agency, it is puzzling that it is not making more efforts to verify the reliability of the information in the register. The voluntary nature of the Register should not be used as an excuse to avoid a transparent justification of how such verifications are being implemented. Ultimately, if the register fails to provide credible information and figures, it is the Commission’s very credibility that risks being damaged. There is a great risk that the European public will conclude that the Commission is not serious about transparency.

The treatment of FoEE’s complaints and related request for access to documents reveals the extent of the contradictions in the lobby register. On the one hand, it is supposed to bring transparency in terms of information and budgets around lobbying activities in Europe. On the other hand, any attempt to understand how the system is monitored, and how registrations are being investigated, is met with an obvious lack of willingness to disclose all the elements required to secure full transparency, based on the argument that the register is not mandatory. The Commission should be responsible for the quality of the information that is published in its own register. At the moment, outside complaints are the main way to check the quality and reliability of the data. The

⁶ http://ec.europa.eu/transparency/eti/docs/gp_en.pdf

Commission's approach to complaints however raises serious concerns about the credibility of the register, but also about the Commission's willingness to further enhance transparency in the lobbying of EU decision-makers.

What, in your view, should the institution or body do to put things right?

In order to put things right, we think that the Commission should do the following:

- handle complaints in a meaningful manner rather than the current approach that virtually almost always leads to the Commission siding with the objects of the complaints rather than with the complainant;
- respond to complaints in a serious manner, including a proper explanation of how and why the Commission reached its decision;
- make full transparency around the handling process 1049/2001 requests for access to documents (under Regulation 1049/2001).

Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes

If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

Yes (please specify)

Has the object of your complaint already been settled by a court or is it pending before a court?

No

Please select one of the following two options after having read the information in the box below:

Please treat my complaint publicly

Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?

Yes

Date and signature: