

# Access to environmental information in CJEU

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# Aarhus Convention, article 4.4

-A request for environmental information may be refused if the disclosure would adversely affect:

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(d) The confidentiality of commercial and industrial information, where such confidentiality is protected 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

The 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*.

# The Environmental Information Directive (directive 2003/4/EC), article 4.2

- Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

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(d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest [---];

The grounds for refusal shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused *where the request relates to information on emissions into the environment.*

# Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents

## Article 4.2

The institutions shall refuse access to a document where disclosure would undermine the protection of

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

## Article 4.3

Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, *unless there is an overriding public interest in disclosure.*

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, *unless there is an overriding public interest in disclosure.*

# The "Aarhus Regulation" (regulation No 1367/2006), article 6.1

As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001 [---] 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*.

# The Aarhus Convention Implementation Guide

## Article 4.4 (d)

The Convention holds that information concerning pollutant emissions which is relevant for the protection of the environment may not be claimed as confidential commercial information. This provision is broadly consistent with the principle that information about emissions would lose its proprietary character once the emissions enter the public domain. In principle, the exception seems to

allow that information on emissions that is not relevant for the protection of the environment could still be exempted from disclosure. In practice, it is not completely clear in what circumstances information on emissions might be deemed not relevant to the protection of the environment. In view of the Convention's principles and objectives, it would seem that any information on emissions that may affect the quality of the environment should be considered relevant for environmental protection, irrespective of the quantities of the emissions involved. Indeed, a case can be made that all information on emissions is relevant to the protection of the environment.

## Defining “emissions”

The term “emission” has been defined in the Industrial Emissions Directive (directive 2010/75/EU on industrial emissions as a “direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land” (article 3, para. 4).

## CJEU and access to information

Regulation No 1049/2001 seeks to give the public a right of access to documents of the institutions which is as wide as possible, *the principle of the widest possible public access to documents* (C-39/05 P and C-52/05 P)

The exceptions to the right of public access to documents of the institutions set out in article 4 of Regulation No 1049/2001 must be interpreted and applied strictly (C-64/05 P)

The institutions are bound to assess in each individual case whether the documents whose disclosure is sought actually fall within the exceptions set out in Regulation No 1049/2001. The institutions may however base their decisions on general presumptions which apply to certain categories of documents, as considerations of a generally similar nature are likely to apply to requests for disclosure relating to documents of the same nature (C-39/05 P and C-52/05)

The Aarhus Convention Implementation Guide is not binding (C-204/09)

## **C-266/09 - Stichting Natuur en Milieu and Others** (request for a preliminary ruling from NL)

### **Opinion of Advocate General Kokott delivered on 23 September 2010**

- the question whether emissions originate from installations is immaterial to whether they are relevant for the protection of the environment. One need only think of transport emissions (para 90)
- the definition of emissions under the IPPC directive can be adopted without the reference to installations for the application of the Environmental Information Directive. The fourth sentence of Article 4(2) of the directive therefore concerns information on the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources into the air, water or land (para 91)
- the concept of emissions also corresponds to the definition in Article 2(8) of Directive 2004/35 on environmental liability - emissions are to be understood as the release in the environment, as a result of human activities, of substances, preparations, organisms or micro-organisms (para 92)
- both information on the release of substances as such and information on the consequences of such a release are to be regarded as information on emissions into the environment. The consequences of emissions are the precise reason why information on emissions into the environment is generally disclosed. The public has an increased interest in finding out how they may be affected by an emission (para 93-95)

### **Judgment of the Court of 16 December 2010**

The Court took no position on the definition of “emissions into the environment”

# C-673/13 P - Commission v Stichting Greenpeace Nederland and

**PAN Europe** (Appeal proceedings. SE was joined to the proceedings as an intervener in support of Stichting Greenpeace Nederland and PAN Europe at the hearing on 4 February 2016 and presented oral argument at the hearing )

## T-545/11, Judgment of the General Court of 8 October 2013

- the notion of emission into the environment should not be interpreted restrictively. Accordingly, in order for the disclosure to be lawful, *it suffices that the information requested relate in a sufficiently direct manner to emissions into the environment* (para 53)
- the definition of emission into the environment which emerges from the Implementation Guide cannot be used to interpret Regulation No 1367/2006 (para 56)
- it must be determined whether the document at issue contains information which relates, sufficiently directly, to emissions into the environment (para 57)

## Opinion of Advocate General Kokott delivered on 7 April 2016

- information on hypothetical emissions does not fall under the emissions clause of the Aarhus regulation (para 41)
- Authorised plant protection products are generally released in accordance with the intended use. Consequently, information on their authorisation cannot be considered to concern hypothetical emissions (para 41)
- the Aarhus Regulation neither limits the notion of emission to installations nor refers to other directives where this occurs (para 43)

# C-442/14 - Bayer CropScience and Stichting De Bijenstichting (Request for a preliminary ruling from NL. SE took part in the written procedure and presented oral argument at the hearing on 4 February 2016)

## Opinion of Advocate General Kokott delivered on 7 April 2016

- no distinction should be made between emissions, discharges and other releases (paragraph 65)
- information on hypothetical emissions does not fall under the emissions clause. However, authorised plant protection products are generally released in accordance with their intended use. Consequently, information on their authorisation cannot be considered to concern hypothetical emissions (paragraph 83-84)
- the emissions clause covers not only details of emissions as such, but also information on the effects of emissions (paragraph 88)
- The expression ‘information on emissions into the environment’ in the fourth sentence of Article 4(2) of the Environmental Information Directive is to be interpreted as covering information on the release of substances, organisms, micro-organisms, vibrations, heat or noise into the environment, in particular into air, water or land, as a result of human activities and information on the effects of such emissions, but not the information referred to in Article 63(2) of the Plant Protection Regulation (paragraph 105)

## **C-57/16 P, ClientEarth v Commission** (Action for annulment. SE has intervened in support of ClientEarth and has taken part in the written procedure)

### **T-424/14 and T-425/14, Judgment of the General Court of 13 November 2015**

- for the purposes of applying the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Commission is entitled to presume, without carrying out a specific and individual examination of each of the documents drawn up in the context of preparing an impact assessment, that the disclosure of those documents would, in principle, seriously undermine its decision-making process for developing a policy proposal (para 97)
- the general presumption may apply for as long as the Commission has not made a decision regarding a potential policy proposal, that is to say, until a policy initiative has been, depending on the circumstances, either adopted or abandoned (para 99)
- the general presumption applies regardless of the nature — legislative or otherwise — of the proposal envisaged by the Commission (para 100)
- Article 6(1) of Regulation (EC) No 1367/2006 does not preclude the recognition of the general presumption (para 107)

**T-51/15, PAN Europe v Commission** (Access to documents relating to endocrine-disrupting chemicals. Action for annulment. SE intervened in support of PAN Europe, took part in the written procedure and presented oral argument at the hearing)

### **Judgment of the General Court of 20 September 2016**

The court annulled the Commission's decision in so far as it refused access to documents purely on the basis of the exception in the first subparagraph of Article 4.3 of Regulation 1049/200 (disclosure would seriously undermine the institution's decision-making process) because the Commission had incorrectly based its refusal to disclose the documents at issue on that exception.

To comply with the judgment the Commission must undertake a fresh examination of the situation and decide either that access may be granted to the documents requested, or confirm the refusal of access to those documents, putting forward matters capable of justifying to the requisite legal standard that refusal, in particular having regard to the requirements set out in the mentioned case-law, i.e.

- the exceptions to access to documents must interpreted and applied strictly,
- the examination required for the processing of a request for access to documents must be specific in nature,
- the application of the exception in Article 4.3 requires it to be established that access to the document in question drawn up by the institution for its internal use was likely, specifically and actually, to undermine protection of the institution's decision-making process, and that the risk of that interest being undermined was reasonably foreseeable and not purely hypothetical,
- the decision-making process must be seriously undermined, which is the case, in particular, where the disclosure of the document in question has a substantial impact on the decision-making process.

The fact that a subject is a sensitive one and is followed with interest cannot constitute in itself an objective reason sufficient to justify the concern that the decision-making process would be seriously undermined, without calling into question the very principle of transparency intended by the TFEU.

# Thank you for your attention