CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON ACCESS TO ENVIRONMENTAL INFORMATION

Legal Analysis

Justice and Environment 2024

CONTENTS

Introduction

By questioning the values of liberal democracy, openly or covertly, environmental democracy, including the legal conditions of access to public information started to erode in several EU Member States. Expedited permitting procedures, amongst others, represent a serious constraint on public participation, because civil society participants usually form communities and parts of different networks where communication and formation of jointly agreed strategies and actions take considerable time. As concerns access to information, proliferation of secrets of all kinds is a major barrier, too[1]. Apart from the most obvious legislative attacks on environmental democracy, the everyday practice of authorities also follows a negative trend. This is reflected partly in the domestic judicial decisions, too. The problems in access to environmental information seem to create more and more a bottleneck for effective public participation in decision-making procedures of authorities and municipalities for local communities and environmental NGOs.

Taking all these, the need for progressive decisions by the Court of Justice of the European Union is fast growing. The Court responds to this need as the sustainer of the system of democratic, human rights and environmental values of Europe. The CJEU cases are indeed bolstered by the values of the EU enshrined in the Treaty and in the Charter of Fundamental Rights of the European Union. Behind this background, fortunately, we have found so far mostly cases in which the Court was supportive of environmental democracy.

Environmental law is one of the youngest branches of law within the Union and the Member States, while the laws on public participation, as a system - created by the 1998 (2001) Aarhus Convention - is barely two decades old. Contrary to this short history, there are several hundreds of environmental cases in the jurisprudence of the CJEU and we have found[2] several dozens of important cases in respect of access to environmental information, as well. Naturally, the case law of a court is partly led by the applicants, therefore we cannot expect that within such a short timespan all controversial issues in this field will be addressed by the Court. Even if so, the public interest environmental lawyers of Justice and Environment found the available

[1] In Hungary, for instance, after the introduction of CD-based law books and more developed web based search engines, in 1997 the search for the word “secret” resulted in 470 laws as hits that contained the aforementioned word. In the mid-2000s this number was around 7.800. In the summer of 2024 the same exercise resulted in 14.655 finds.

[2] As a general caveat, we have to add that wherever in this study we say „we have not found”, it is a cautious proxy for „non-existent”, taking into consideration that we have performed a thorough research in general and for environmental issues specifically, among the official and semi-official CJEU case collections, as well as in the relevant legal literature.

information sufficient for putting together a systematic survey of the relevant cases, together with opinions from the legal literature and, naturally, attaching thereto our opinions and suggestions, too.

One of the goals of the following survey by the lawyers of J&E is to map out the strong and the missing spots in the practice of the European Court in the field of access to environmental information and encourage the European environmental civil society organisations and local communities who have the proper background to either harness the existing achievements or to build up legal strategies in order to enforce rights of their respective community.

Before entering into the analysis of the legal background and the relevant CJEU case law, we shortly observe some important theoretical matters that highlight important background issues of access to environmental information.

Theoretical background

TRANSPARENCY, DEMOCRACY, RULE OF LAW AND GOOD GOVERNANCE

In the course of normal administrative operation, local communities and the general public regularly get access to information on plans, projects, actions from the Government or from business entrepreneurs. However, the members of the public do not always trust that the information is full and reliable, therefore they wish to trace it back to the raw data and to independent expert analyses. Considering this, transparency is a key issue of democracy and the public evaluation and control of the quality of work of the political and economic leaders, in other words, transparency, is the primary guarantee of good governance[3].

Access to political, economic and administrative information opens the opportunities for the public to interfere with decisions that seriously influence their health, property and the environment they enjoy and wish their offsprings to enjoy, too. This way, access to environmental information is a part of the three pillar system of public participation, yet in many

[3] Governance is the manner in which power is exercised in the management of a country's economic and social resources for development, while good governance is a predictable, open and enlightened policy, together with a bureaucracy imbued with a professional ethos and accountable for its actions (World Bank, 1992)

cases it stands alone with no continuation of expression of any meaningful opinion (suggestions, objections, protests, etc.) and in the form of the use of legal remedies. However, an inherent feature of this public participation system is that access to information can stand alone, too. Mostly it is enough that the administrative decision-making is transparent, people and their experts might not wish to have a say in the governmental business, they leave it to their elected political experts. This is the parsimonious way of the interplay of the Government and the public. Naturally, people can elect new administrators if they are notoriously disappointed with their performance, but this is already a political issue, rather than a legal-administrative one.

TRANSPARENCY IS A COMPLEX AND DYNAMIC CONCEPT

The right of access to information has many aspects. It embraces both the right of the media to have access to information and the general right of the public to have access to public interest information from several sources, in addition to the right of individuals to request and receive information that may affect their individual rights. As quoted from the Human Rights Committee and the UN Special Rapporteurs, by virtue of its complex nature, the right of access to information has also emerged as a component of other rights, including the right to privacy, the right to a fair trial, the rights of minorities and the right to the truth. (Rossi 2021, p. 189)

How much State owned data and information shall and can be scrutinized by the members and associations of the public? This question constantly evolves, following political, social and technological changes and arguments that try to follow them. The balance between openness and the competing social, political and economic interests can be reflected in a variety of rules, procedures and institutions. (Rossi 2021, p. 181) Indeed more elitist, economically single-focussed governments might shift transparency rules towards the secrecy axis, while growing social awareness and openness culture can counteract these strives. Last but not least, development of information technology can influence the outcome of the fight between openness and secrecy from both ends: it is difficult to hide away any content once existing in electronic format (and everything does so), while it might be even more difficult to distil the true content from the noise of superfluous mass of information and from conscious manipulation.

SHIELD AND SWORD

In harmony with the above said things, environmental law in general and public participation laws, too, try to hit the balance between environmental and democracy viewpoints on one side and the interests of the economic forces on the other. Indeed, environmental laws might be used by the parties opposite to the local communities anxious about the fate of their environment[4]. This might be called the 'shield' function of the environmental law and, considering a wider scope of the CJEU environmental cases. Many authors are of the opinion that this shield function still dominates the case law, in accordance with the survey of literature made by Krommendijk. (Krommendijk 2023, p. 619) The first 'iron layer' of the shield – for both the administrative bodies who wish to get rid of the public scrutiny and for business players who prefer a quick and 'conflict free' procedure – is information. If they succeed to hide the whole case/project from the public, the procedure might reach stealthily such an advanced level where any substantial changes are hopeless already. Even if they can just hide certain parts of the procedure from the curious eyes of the public, they might seriously undermine public position in the cases.

Naturally, environmental law can be used to protect the environment, too. This might be called the 'sword' function. In the recent J&E publication as in our publications usually, we are focussing, naturally, on this second aspect of the EU environmental law and the procedural legal aspects within that.

THE POWER OF ENVIRONMENTAL INFORMATION

Information gaps and uncertainties lie at the heart of many persistent pollution and natural resource management problems. In the early, still optimistic phase of the information technology revolution, Daniel Esty, the famous American legal scholar, together with other

[4] For instance, in the famous *Križan* case a reference was made to the infringement of the right to property in connection with Article 17 of the Charter, by the operator of a landfill site in an IPPC procedure. The Grand Chamber of the CJEU ruled, however that such restrictions do not constitute an unjustified interference with property rights compared to the legitimate interests of environmental protection. In *Standley*, too, UK farmers challenged the Nitrates Directive also because of an alleged infringement of their right to property, also unsuccessfully. The CJEU decided that the right to property of the private corporations concerned must not take precedence over the general interest in environmental protection.

leading social scientists were quite enthusiastic about this development. They meant that the emerging technologies of the Information Age (a key term, forged by Manuel Castells[5]) would create new gap-filling functions and thus expand the range of environmental protection strategies. Remote sensing technologies, modern telecommunications systems, the Internet, and computers all promised to make it much easier to identify harms, track pollution flows and resource consumption, and measure the resulting impacts. They hoped that these developments would make possible a new structure of institutional responses to environmental problems, including a more robust market in environmental property rights (a controversial American origin legal technique in itself), expanded use of economic incentives and market-based regulatory strategies (greens have reservations here, too), improved command-and-control regulation (although everyone acknowledge that it is not sufficient in itself), and redefined social norms of environmental stewardship. They thought that while some potential downsides of the Information Age in environmental protection would remain, the promise of a more refined, individually tailored, and precise approach to pollution control and natural resource management looks to be significant. (Esty 2004, p. 115)

Two decades later we might be more pessimistic about the interface of communication technology and environmental democracy. The abundance of data and expert processed information benefits more those businesses who can pay for it, but less the governments and much less the general public. Close scrutiny of emissions, waste generation and other environmentally harmful actions is possible in principle, but environmental authorities are vastly disabled and discouraged from harnessing the available means of the Information Age. As a matter of fact, we do not see anywhere in the world serious systematic (let alone: systemic) efforts from the governments to clarify the actions of economic role-players and the ecological and social consequences thereof, neither on short term, nor in respect to the coming generations.

THE INFLUENCE OF THE AARHUS CONVENTION ON THE EUROPEAN LAWS

The European Union laws, similarly to the typical national legal developments, contained access to information provisions way before the Aarhus Convention. They ranged from

[5] Castells, M., 2010. The Information Age: Economy, Society and Culture Volume 1: The Rise of the Network Society. 2nd ed. Oxford: Wiley Blackwell.

constitutional and human rights laws in close connection with freedom of expression, through sectoral environmental law provisions, representing an important part of environmental impact assessment (e.g. notification, public hearing), the oldest and most influential legal complex of this new branch of administrative law, or appearing alone, such as the 1990 Directive[6]. Aarhus brought a new element that made public participation much more effective: the system approach. Systems are always more than a mere sum of their elements, because these elements form new structures in a system, develop new procedures and bring about new achievements. (Fulop, 2024)

In the European legal literature there are many articles that analyse the systemic effect of the Aarhus Convention on the European laws, which is broader than the field of environmental law only. When the Regulation on general access to information, the so called Documents Regulation of 2001[7] was issued, the final text of the Convention was known by the European legislator, but that was not yet mandatory for the EU, at that time only a signatory to Aarhus[8]. We shall note here that there is a terminology confusion concerning the name of this regulation. The majority of the specific literature calls it "Transparency Regulation", while the newly introduced 2019 Regulation on food safety information[9] is also called this way, so we insist on the (changed) official names. While the food safety regulation contains plenty of relevant provisions, there is no court practice attached to it and the true practical relevance will turn out only in the coming years.

There is a much more visible effect of the Aarhus Convention on the Aarhus Regulation in 2006[10] that, naturally, provides a more complete scheme of access to information in respect to environmental information, specifically. The Aarhus Regulation obliges not only the European Parliament, the Council and the Commission to provide access to environmental information, but all the Community's institutions and bodies, too. In addition to that, European citizenship or

---

[6] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment

[7] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

[8] The Convention entered into force in 2002 October.

[9] Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain and amending Regulations (EC) No. 178/2002, (EC) No. 1829/2003, (EC) No. 1831/2003, (EC) No. 2065/2003, (EC) No. 1935/2004, (EC) No. 1331/2008, (EC) No. 1107/2009, (EU) 2015/2283 and Directive 2001/18/EC

[10] 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

residency is not a prerequisite for the application of the new access to environmental information rules. Furthermore, the right of access to information is wider than the right of access to documents, because it contains the collection and dissemination of environmental information, too. Article 6(1) of the Aarhus Regulation explicitly states that exceptions to the mandatory disclosure of environmental information should be interpreted in a strict manner, while Regulation 1049/2001 EC does not include such a provision. Also important is the innovation introduced by the Aarhus Regulation stipulating that the requested information related to emissions into the environment be not exempted from the mandatory disclosure, because public interest is deemed to prevail.

A continuous legal development can be observed in relation to the direct implementation of the Aarhus Convention for the Member States by Directive 2003/4/EC[11], too. 'Environmental information' and 'public authority' are described in the Directive in a broader way, while the grounds of refusal of information shall be limited. Moreover, 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. (Papadaki 2012)

Peeters observes that the EU legislature has implemented the right of access to environmental information more ambitiously than required under the Aarhus Convention, particularly with regard to legislative information. Moreover, the CJEU has steered EU institutions, including the European Commission, towards even greater transparency. The judicial reasoning by the CJEU is principled and refers to the general values regarding openness and transparency codified in primary EU law and in the EU Charter of Fundamental Rights. (Peeters 2020, p. 13)

The influence of the Aarhus Convention on the European law is not ensuing only from the text of the Convention. The Convention itself is a living, ever developing legal material, owing to a line of Task Forces and Working Groups, the outstanding activity of the Parties on the MOPs and outside and, the most of all, to the Compliance Committee, with its amazingly widespread case practice.

Article 216(2) TFEU specifies that agreements concluded by the EU with third countries or international organisations are binding on the EU institutions and on the Member States. But what is the situation with the legal interpretations the bodies, commissions etc. attach to the text of international conventions? Findings of the Aarhus Convention Compliance Committee have achieved significant changes in administrative procedural laws in a series of Pan-

[11] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

European countries. Can we expect that the CJEU will take these decisions and their reasoning into consideration regularly? As Hadjiyianni establishes, attitude of the CJEU is ambivalent in this respect. It considers ACCC findings and other international quasi-judicial bodies selectively and implicitly, demonstrating a qualified openness to international law and a reluctance to engage in a meaningful dialogue with international quasi-judicial bodies. No wonder that the CJEU has been reluctant to recognise their direct legal effects within the EU legal order, this ensues from the task of the European Court to ensure the integrity and uniformity of the EU legal order. However, too much autonomy and isolation from international law, particularly when the CJEU does not openly take external decisions into account, can harm the EU's credibility and go against the rule of law. As a balance, therefore, while in many respects, the CJEU's gatekeeping approach can be characterised as restrictive, the interpretation of international public participation law by the relevant compliance review bodies indirectly influence the CJEU beyond any doubt. (Hadjiyianni 2021, p. 895, 897 and 898)

As Jan Jans puts it in a synthesizing spirit: '[i]n a globalised legal order there is not one master. It is about jurisdictional pluralism, communication, dialogue, strength of arguments, competition and acceptance, based on a set of common values and common standards', as developed in the relevant international agreement.[12] A further interesting feature of the interaction between CJEU and ACCC is the sporadic references made by the European Court to the Aarhus Convention Implementation Guide. The Guide is a soft-law instrument, prepared at the request of the Meeting of the Parties by independent experts, some of whom have also served as members of the ACCC, therefore the Guide is fully attentive to the practice of that non-judicial body of high professional prestige and effective practice. By referring to the Guide and with the mediating role of Attorney General opinions, which themselves increasingly refer to ACCC findings, the CJEU is indirectly influenced by ACCC findings, demonstrating that the Court is more open to external influences than might initially be apparent. (Hadjiyianni 2021, p. 908)

[12] JH Jans, 'Judicial Dialogue, Judicial Competition and Global Environmental Law. A Case Study on The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' in JH Jans, R Macrory and A-MM Molina (eds), National Courts and EU Environmental Law (Europa Law 2013) 166. (quoted by Hadjiyianni 2021, p. 908)

PUBLIC PARTICIPATION IN INTERNATIONAL DECISION-MAKING

Our civilisation is faced with more and more global ecological problems, while there are no effective organising agents on the Earth's horizon. Besides the global business networks that control the great part of the global information flow, too, public participation, through the network of environmental experts and NGOs could be one of the first governance elements in this respect.

Article 3(7) of the Aarhus Convention obliges its parties to promote the application of its principles in international environmental decision-making processes. The Escazú Agreement has a similar provision in Article 7(12) which specifically requires the promotion of public participation in international forums, although it does not refer to the Agreement's principles as a whole. The Escazú Agreement's obligations also contain extra qualifications compared to the Aarhus Convention, stating that it only applies 'where appropriate' and 'in accordance with the procedural rules on participation in each forum', which all could weaken its legal effect. Nonetheless, together these duties provide a convincing legal endorsement, covering a geographical scope of around one quarter of the world's population, that the principle of public participation in environmental matters should be exported to international levels. In practice, the parties to the Aarhus Convention have reported having been using various approaches to date, such as involving domestic stakeholders in the preparation of contributions to international dialogues, promoting public participation within negotiation processes themselves, or supporting international outputs that uphold the Aarhus principles. In the case of the Escazú Agreement, the regime has yet to develop further guidelines or practices to engage the public in their activities, based on the content of the Escazú Agreement, Article 7(12) duty.

Despite the need for multilevel governance approaches to many environmental issues, international environmental law and policy on public participation have predominantly focused on domestic contexts, while international decision-making might still have a certain level of legitimacy concerns. Indeed, public participation in environmental decision-making is inherently local. National, regional and even the global efforts in this respect are mostly targeting local issues, too. There are, however, a line of genuinely global issues that would need close public scrutiny, such as climate change and biodiversity loss. This aspect, according to the literature, has remained normatively less clear and practically more challenging. (Sharman 2023, p. 334, 235)

Most of the earliest international Multilateral Environmental Agreements (MEAs) were silent on the matter of public participation or granted very limited access to NGOs only. Over time, individual legal regimes have come to incorporate explicit provisions for some form and degree of public participation, primarily through observer accreditation for NGOs. This observer position can start even during the drafting phase of some MEAs, and UNGA has already institutionalised the information exchange with certain social groups, including the environmental NGOs. The consistent trend of doing so across multiple MEAs points to a broader legal phenomenon.

One of the most significant milestones in this regard was the 1987 Montreal Protocol. The Montreal Protocol permits organisations 'qualified in fields relating to the protection of the ozone layer' to be admitted to a meeting of the parties as an observer according to the rules of procedure adopted by the parties, unless at least one-third of the parties object it. This phrasing became essentially a template for subsequent MEAs, for instance the later stages of work of the 1972 Convention on International Trade in Endangered Species (CITES) and naturally the Aarhus and Escazú rules of operation, which have adopted broadly similar provisions and often with a further softening of the substantive access test so that any organisation qualified in matters relating to the treaty in question could be accredited. (Sharman 2023, p. 353-255) Under some regimes the chairperson leading the discussions have a special role in determining the circle of civil observers. The chairs generally have a key role in regulating the level of influence the expert groups and NGOs can exert on the content of the draft decisions.

General legal background of access to information

ACCESS TO INFORMATION AS A GLOBAL HUMAN RIGHT

The right to access to information represents an essential element of the right to freedom of expression, as it is established by the Universal Declaration of Human Rights[13] (Article 19) and

[13] Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948

the International Covenant on Civil and Political Rights[14] (ICCPR). According to Article 19(2) of the ICCPR, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds […]". The right to freedom of expression is also enshrined in Art. 13 of the American Convention on Human Rights[15] (ACHR), in Art. 10 of the European Convention on Human Rights[16] (ECHR), and in Art. 11 of the Charter of Fundamental Rights of the European Union[17] (CFR).

According to Rossi, a turning point in this process was the judgment of the Inter-American Court of Human Rights (IACtHR), in 2006, in the case Claude Reyes v. Chile[18]. The case was brought by members of a Chilean environmental NGO, who had been denied access to information on environmental impacts of a proposed logging project, without appropriate justification, both from the competent national authority and from the Court of Appeal of Santiago de Chile. The American Human Rights Court analysed the claimant's allegations under Articles 13 and 25 of the ACHR. In its judgment, it referred to the "individual and social dimensions" of the right to freedom of expression embodied in Article 13 of the ACHR and affirmed, for the first time, that this provision "protects the right of all individuals to request access to State-held information", unless there is a specific justification for refusal. In theoretical terms, the Court developed the first generation, freedom type of human rights into a second generation right, which demands active behaviour from the State, not only in respect to preparing and serving the requested information but also in performing the complicated weighing between the interests at stake.

The Court based its conclusions on "regional consensus" among the States members of the OAS on the role that access to government-held information plays as "an essential requisite for the exercise of democracy". In this perspective, it outlined the right of access to information as an instrument against discretional exercise of government power, which is recognised to all individuals in the public interest. To support its conclusions, the Court also referred to relevant international practice in other contexts and made reference to the UN Convention against Corruption, a number of recommendations adopted within the Council of Europe, Principle 10

[14] International Covenant on Civil and Political Rights, 16 December 1966, entered into force 23 March 1976

[15] American Convention on Human Rights (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969)

[16] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950, entered into force on 3 September 1953

[17] Charter of Fundamental Rights of the European Union (CFR) proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission. It has full legal effect with the entry into force of the Treaty of Lisbon on 1 December 2009

[18] IACtHR, Claude-Reyes et al. v. Chile, Judgment of 19 September 2006

of the Rio Declaration on Environment and Development and the Aarhus Convention, as well. (Rossi 2021, p. 187) This single procedure underlines again the fact that even if their practice is anchored in their respective regional or district legal culture, the courts pay more and more attention to the legal bases and arguments in the cases of other courts globally.

System approach is embedded in the operation of human rights. Access to State owned information, including environmental information shall be approached within a larger system of general human rights. These rights then, unavoidably, collide, but, inter alia, the first term of the Hungarian Constitutional Court could forge the legal techniques to solve such problems, with the help of the necessity and proportionality test.[19] According to Rossi, effective operationalisation of these standards requires a series of coordinated supportive actions: independent monitoring of the implementation of access-to-information law, improvement of the management and technical capacity (Information and Communications Technologies – ICTs), training of public officials, and awareness-raising of the public are identified as best practices. (Rossi 2021, p. 190)

While the human rights support, because of deep roots in our history and legal culture is indispensable, we need to highlight that these concepts of access to information are elaborated in much more detail in the field of environmental protection. Some important elements of capacity building mentioned by Rossi, for instance, appear in the law of public participation in environmental decision-making in a much more systemic manner. The Aarhus Convention contains provisions on providing environmental specific information to the general public, in order to raise their awareness in environmental matters, as well as to educate them about how they can actually fulfil their access rights in the labyrinth of State bureaucracy. Administrative bodies shall exert institutional support to the public, too, in order to enhance the capacity of the members and organisations to take actively and effectively part in the environmental administrative (legislative, planning etc.) matters, including direct or indirect financial support. Finally, the system of capacity building is made full by a clearcut prohibition of harassing, prosecuting, blackmailing or revenging those who use their participation rights (we might call this last group “prohibition of capacity destroying”)[20].

It is a generally expressed view in the human rights field that the European Court of Human Rights (ECtHR), has taken a conservative stance, while the Court of Justice of the EU (CJEU) has progressively recognised the right of the public to access government held information.

[19] Decision of the Hungarian Constitutional Court No. 28/1994. (V. 20.) AB.
[20] Capacity building provisions are primarily collected in Article 3 of the Convention (originally, during the drafting procedure, this Article was titled „Capacity Building”, while later it developed more general focus) and elements of capacity building appear elsewhere in the system of the Convention, such as Article 5(7) and Article 9(5).

The ECtHR has shown resistance to a broad interpretation of the right to freedom of expression embraced in Article 10 of the ECHR. The Court takes a conservative stance, arguing that this provision clearly contains only the first generation human right of "freedom to receive information" that prohibits a government from restricting a person from receiving information that others are willing to impart to him, but it does not embody an obligation on the government to disclose information. Rossi quotes from the ECtHR affirmations that Article 10 "cannot be construed as imposing on a State […] positive obligations to collect and disseminate information on its own motion" and that "it is difficult to derive from the Convention a general right of access to administrative data and documents". However, in the inherent systemic nature of human rights, even the ECtHR seems to be willing to acknowledge the right to information, where it is necessary to protect other Convention rights. An example of this approach is the very obligation of States to secure a right of access to information in relation to *environmental issues*, developed under the right to private and family life (Article 8) and the right to life (Article 2). (Rossi 2021, p. 191-2)

PROTECTION OF THE ENVIRONMENT AND ACCESS TO INFORMATION IN THE EUROPEAN CHARTER OF HUMAN RIGHTS

In connection with the Charter, Krommendijk points out the dominance of procedural fundamental rights in the environmental case law of the CJEU, most notably Article 47 of the Charter. This underscores the attention in the literature for the further incorporation of the Aarhus Convention within EU Law, as Krommendijk calls it a kind of 'Aarhus-isation' of EU law. (Krommendijk 2023, p. 619) The right is textually limited to 'documents', while in the specific EU legislation on access to environmental information, information includes 'any information in written, visual, aural, electronic or any other material form'.

The above provisions represent the 'sword' function, while Articles 16, 17, 20 and 21 of the Charter, though, have primarily been used by companies as a 'shield' to protect their interests against public or governmental measures that were at least partly taken to protect the environment. Such 'anti-environmental' cases do not necessarily reflect a 'turn against environmental rights' or against the 'greening' of existing (international) human rights law, but

we have to acknowledge that human rights law and (unfortunately) environmental law, too, represents a continuous balancing effort between different, not seldom antagonistic interests.

Contrary to the list given above, Articles 2, 7, 35 and 37 of the Charter are mostly used as ‘swords’ in the interests of environmental protection. Unfortunately, the two provisions that lend themselves best to a ‘greening’ of the Charter, Articles 2 and 7, have only played a marginal role in the environmental case law of the CJEU. These provisions can be used as a ‘sword’ to force the authorities to act against environmental harm or pollution causing interferences with these human rights, thereby providing a higher level of environmental protection. Access to environmental information, naturally is always part of these more complex environmental protection actions of the members and associations of the public, based both on substantive environmental rights, right to health, right to property, and also on the system of procedural rights of public participation.

PRIMARY EU LAW

The most relevant provision on access to environmental information is beyond doubt, Art 15 of TFEU. Article 1, second paragraph of TEU already states that decisions need to be taken ‘as openly as possible and as closely as possible to the citizen’. This way access to information and the subsidiarity principle got close to each other. This is really a fertile parallelism and leads our thinking to the inherently local nature of environmental protection and public participation and makes capacity building an indispensable part of this approach, where larger, professional (mainstream) NGOs might play an important role, too.

Article 15(3) TFEU ensures that ‘any 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's institutions, bodies, offices and agencies, whatever their medium. We have to highlight first of all the ‘right language’, which is a long disputed achievement and opens multiple ways of implementation and judicial enforcement, compared to the rather two dimensional solution that would make access to information a responsibility of the governments and their administrative bodies. That would mean usually that the access is dependent on the actual financial and technical conditions and entails unavoidably a certain level of discretionary power. The second considerable feature of Article 15(3) is its exhaustive form in relation to the bodies and organisations within the EU. While the Aarhus Convention excludes legislative bodies from its scope, the EU has explicitly subjected its legislative institutions to access to information provisions. Alongside several provisions directing institutions acting in a legislative

capacity to provide information on their own motion, any member of the public can request EU institutions acting in a legislative capacity to provide access to previously undisclosed information. In contrast, later in Article 15(3) it is stipulated that the Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising administrative tasks.

This relatively broad scope of the affected institutions of the access to information provisions of the TFEU is reflected in the Documents Regulation (Regulation 1049/2001), too, which aims to give 'the fullest possible effect to the right of public access to documents'. As a general rule, 'documents drawn up or received in the course of a legislative procedure shall be made directly accessible'. Notably, both legal sources are in harmony with Article 42 of the Charter of Fundamental Rights, as discussed above in the previous sub-chapter.

Access to environmental information held by EU institutions has great importance for the environmental protection work in the Member States, too. Practicing environmental lawyers of J&E quite often experience that certain data, in the field of clean air protection or environmental liability, just to mention two areas, are much more easily accessible from the EU sources than from the authorities of the Member States themselves. In addition to that, environmental data on the EU registers are of guaranteed quality and exhibited in a logical, user-friendly manner. As we will see below, the progressive interpretation of the texts of the Documents and the Aarhus Regulations, in particular of the list of exceptions to documents' accessibility, has led to the development of CJEU case law, that has broadened the extent and the content of right to access to environmental information.

The CJEU practice on access to environmental information

HUMAN RIGHTS BASED DECISIONS AND DECISIONS BASED ON THE PRINCIPLES OF ENVIRONMENTAL LAW

Both human rights and principles of environmental law (sustainability principles) are constitutional level, background rules that serve as basic directions for legislation and

implementation of the Union and national level environmental laws. Legal practice in the field of environment needs them in order to make long-term social and environmental values prevail above the myopic political and economic interests, too frequently reflected in the secondary environmental laws of both national and EU level environmental laws.[21]

As we have pointed out earlier, human rights references can be used in access to environmental information cases mostly only indirectly and in connection with the responsibilities of the State to protect human life, dignity, dwelling and environment as a whole. The best proxy to participation rights, as we have seen, too, is the freedom of speech, which cannot be detached from the other side: the listeners shall have access to the said things without interference or distortion from the governmental bodies. Unfortunately, we haven't found a CJEU decision in access to environmental cases that were based on global, European or EU human rights legal background.

Both the parties and national courts pay limited attention to the Charter in environmental cases. Often, the referring court considers and relies on the Charter when the plaintiffs invoke the Charter. If national courts remain silent on the Charter and limit their questions to secondary EU law or Treaty provisions, the CJEU is also likely to forego Charter engagement. References to the Charter by the referring court, however, do not always lead to similar engagement with the Charter by the CJEU.

Krommendijk undertook to give reasons of the limited role of the Charter in the environmental case law, i.e. of the fact that the CJEU barely relies on the Charter to provide protection against environmental harm and pollution. According to this author, reliance on the Charter is often unnecessary from a substantive point of view, because citizens can rely directly on the EU secondary law. There is a limited added value, he says, in the Charter rights in large parts of EU environmental law, because of clear, precise and unconditional statutory obligations and specific limit values, such as in the Air Quality Directive or the Water Framework Directive. (Krommendijk 2023, p. 623) We might disagree here, because the practice of the J&E lawyers and other professional environmental NGO networks, first of all ClientEarth who had a large campaign on the inefficiency of the zonal plans (AQPs) under the Air Quality Directive in highly polluted areas all over Europe, contradicts to this too optimistic theoretical approach. J&E's wide range of comparative studies in the field of Natura 2000, environmental liability,

21 Brian Preston, retired Chief Judge of the Land and Environment Court in New South Wales wrote: since 2005 in my long practice I haven't heard a case in which someone wished to ask a permit to protect the environment; rather, economic role-players ask (and receive) permits to pollute and obstruct the environment. (Preston, 2015)

municipality level environmental protection, just to mention a few, largely underpin our scepticism about the high level effectiveness of EU secondary environmental laws[22].

As concerns the principles of environmental law, Colombo, who analyses climate protection case law exhibited in his study that courts on all levels in Europe deploy environmental principles, primarily the precautionary and intergenerational principles in 'sword' type cases. (Colombo 2024) Indeed, we can name several dozens of decisions, where the CJEU uses environmental principles, not seldom in order to highlight and amend the shortcomings of the detailed secondary laws on national or EU level. Examples are mostly from the field of integration principle[23], precautionary principle[24] and public participation principle[25]. This abundance of use of general environmental legal principles, we think, clearly underpins again that the secondary law cannot reach its main legislative goals protecting environmental law through substantive and procedural provisions.

In the latter group, we have only found an older case that supports access to environmental information with the help of references to the principles of environmental law, first of all to the principle of public participation, naturally. In the Kraaijeveld case[26] the Court said:

---

[22] See at https://justiceandenvironment.org/publications

[23] Case C-513/99 Concordia *Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-7213, para. 57; Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées* [1985] ECR 531, Para. 13; Case 302/86 *Commission v. Denmark (Danish Bottle)*, Para. 9; Case C-176/03 *Commission v Council (Environmental Crime)* [2005] ECR I-7879, para. 48; Case C-440/05 *Commission v Council (Ship Source Pollution)* [2007] ECR I-9097Para. 128-9; C-105/09 & C-110/09 *Terre wallonne and Inter-Environnement Wallonie*, paragraph 32, C-295/10, *Valčiukiene and others*, paragraph 37, C-567/10, *Inter-Environnement Bruxelles*, paragraph 20, C-41/11 *Inter-Environnement Wallonie and Terre wallonne*, paragraph 40, C-463/11, *L v M*, paragraph 31, C-444/15 *Associazione Italia Nostra Onlus*, paragraph 47; Case C-160/17 *Thybaut and Others* - para. 62, 64 and Case C-104/17 *SC Cali Esprou SRL v. Administratia Fondului pentru Mediu*.

[24] Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw* [2004] ECR I-7405, para. 44-5 and 57; Case C-157/96 National Farmers' Union and Others [1998] ECR I-2211, paragraph 63; Case C-323/17 *People Over Wind, Peter Sweetman v. Coillte Teoranta*, para. 30 and 38; Orleans and Others, C-387/15 and C-388/15, EU:C:2016:583, paragraph 50; Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305, Paras. 382-387; Case C-343/09, *Afton Chemical,* paras. 60 and 61; Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, para. 113

[25] Case C-305/18 *Verdi Ambiente e Societa (VAS) - Aps Onlus, Movimento Legge Rifiuti Zero per l'Economia Circolare Aps v. Presidenza dei Consiglio dei Ministri et al.*, para. 58; Case C-323/17 *People Over Wind, Peter Sweetman v. Coillte Teoranta*, para. 39; Case C-243/15 *Lesoochranárske zoskupenie* VLK, 8th November 2016, EU:C:2016:838, para. 49; Case C-72/95 *Kraaijeveld and Others v. Gedeputeerde Staten van Zuid-Holland*, Para. 56; Case C-51-76 *Verbond van Nederlandse Ondernemingen*, para. 22; and Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*, para. 45.

[26] Case C-72/95 Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland

'As regards the right of an individual to invoke a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive' (Point 56).

This is an explanation of the social and legal function of access to environmental information in a specific case and the legal possibility of direct reference to the use of a principle in individual practical cases. Notably, the members and associations of the public can play an excellent multiplicator role, in order to spread out important legal analyses about environmental protection and about failures of governments to perform their tasks in this field.

As Krommendijk points out, a further important limitation of the Charter is that it applies to Member States on the basis of Article 51 of the Charter 'only when they are implementing Union law'.

In addition to the aforementioned obstacles at the national level, it has also been proven difficult for natural or legal persons and environmental or human rights NGOs to gain direct access to the CJEU via Article 263 TFEU. The most explicit and recent case that illustrates this is the 'People's Climate Case' Carvalho[27]. The applicants argued that the EU insufficiently reduces greenhouse gas emissions in violation of a wide variety of Charter rights (Articles 2, 3, 15, 16, 17, 20, 21 and 24). The CJEU dismissed the request because of low level connection between the subject of the case and the applicant persons using the so called *Plaumann argument*:

"the contested act does not affect them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons".

The CJEU added that the fact that the contested acts infringe fundamental rights is not sufficient in itself to establish such individual concern. Krommendijk concludes here again, that EU citizens shall rely upon the secondary environmental law or access to information laws rather than the human rights based rules. Nonetheless, he still sees merit in further efforts from private

[27] Case T-330/18 Armando Carvalho and Others v European Parliament and Council of the European Union

persons and their environmental organisations, which perhaps will change the legal practice in the near future. (Krommendijk 2023, p. 623)

Indeed, in its recent case law, the CJEU pointed out the need to take into account the "broad interpretation of the principle of access to documents of the EU institutions […] borne out by Article 15(1) TFEU, […] the second Paragraph of Article 1 TEU and Article 298 TFEU, and by the enshrining of the right of access to documents in Article 42 of the CFR"[28]. According to Rossi, however, the Court has been cautious (indeed, reluctant) to rely on Article 11 of the CFR, and in general on the right to freedom of expression, as a legal basis that could help define the content and the scope of the right of access to documents held by public authorities in the EU legal system. Still, Article 11 guarantees to "everyone", not only to EU citizens and residents, the right to freedom of expression, that "shall include freedom […] to receive and impart information". Further, according to Article 51 of the CFR, its provisions are addressed to all the institutions and bodies of the Union as well as to Member States "when they are implementing Union law", and, unlike Article 42, it is not subject to conditions and limits deriving from the Treaties.[29] (Rossi 2019, p. 198)

THE CONCEPT OF ENVIRONMENTAL INFORMATION

Documents Regulation, 2001	Aarhus Regulation, 2006	Environmental Information Directive, 2003	Aarhus Convention (1998, 2002)
Definitions, environmental information			
Article 2.3, 2.4, 3.a All *documents* held by an institution, drawn up or received by	Article 2 d Identical with the Directive; further definitions of plans and programmes, *environmental law*,	Article 2.1, 2.3 Identical with the Aarhus Convention, an extra element in the human health	Article 2.3 "Environmental information" *in any material form*; state of environment, including GMOs;

[28] Case C-213/15 P, *Commission v. Breyer et al.,* 18 July 2017, para. 52.

[29] Case C-213/15 P, Commission v. Breyer et al., 18 July 2017, para. 52. See also Case C-57/16 P, ClientEarth v. Commission, para. 74 1 See Case T-331/11, Besselink v. Council, 12 September 2013, para. 47

it and in its possession, in all areas of activity of the European Union; Documents drawn up or received in the course of a *legislative procedure* shall be made directly accessible; 'document' is a content *whatever its medium* concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility.	administrative act and *omission* are included – mostly but not exclusively in respect to the second and third pillars, so that it might be relevant for access to information, too.	group is contamination of the *food chain*; 'Information held by a public authority' shall mean environmental information in its possession, which has been *produced or received* by that authority.	factors, substances, energy; activities or measures, policies, legislation, plans and programmes; economic analyses; human health and safety, conditions of human life, cultural sites and built structures.

(emphases by the author)

The major differences are mostly of editing nature, it really depends on the different systems of definitions under different legal cultures how the legislators regulate the concepts of environmental information, environmental law and the closely related concepts of authorities that hold the information. A major conceptual difference can be, however, between document and information. The latter seems to be broader, therefore may contain explanatory notes or direct exchange with the requesters, while using the term of document mostly leaves it to the requestor to interpret what she received from the authorities. There are slight differences in the substantive elements the different legislators find important to specify, but the definitions are

broad enough to encompass all the elements mentioned in the four legal sources. Undoubtedly, the systematic comparison of them, and cross references might be of significant help in the interpretation of the term 'environmental information'.

(*the problem of neighbouring fields of administrative law*) As concerns the practice of access to environmental law, it is a typical conflict between the legal interpretation of authorities and the representatives of the public, whether an administrative action that is not labelled as "environmental" might or might not contain environmental information once the subject of the case has significant effects on the natural or built environment. In other terms, this is the problem of the "neighbouring fields", containing several dozens of branches of administrative law, including mining, forestry, public health, spatial planning or construction laws. In respect to the lastly mentioned branch, in the early case of Mecklenburg[30], still relying on Directive 90/313/EEC, Mr. Mecklenburg requested the town of Pinneberg and Kreis Pinneberg – Der Landrat ('Kreis Pinneberg') to send him a copy of the statement of views submitted by the competent local environmental protection authority in connection with planning approval for the construction (that might be called a physical plan or a construction permit under different legal regimes) of a so called 'bypass road'. Constructions and built environment, typically bypass roads are environmentally controversial projects in most cases of this sort. Kreis Pinneberg rejected Mr. Mecklenburg's request on the ground that the authority's statement of views was not 'information relating to the environment' within the meaning of Article 2(a) of Directive 90/313/EEC, transposed into German law by the Umweltinformationsgesetz (Law on information on the environment).

Mr. Mecklenburg's appeal was handled by the Schleswig-Holsteinische Oberverwaltungsgericht (Germany), which wished to clarify if the requested information constituted an 'administrative measure for the protection of the environment' within the meaning of Article 2(a) of Directive 90/313/EEC, therefore made a request for a preliminary ruling to the Court of Justice. According to the Court, it follows from the wording of that provision that the Community legislature intended to make the concept of 'information relating to the environment' a broad one, embracing both information and activities relating to the state of various aspects of the environment mentioned therein, and that the term 'administrative measures' is merely an example of the terms 'activities' or 'measures' covered by the Directive. In order to constitute 'information relating to the environment' for those purposes, therefore, it is sufficient for a statement of views put forward by the administration to be an act capable of adversely affecting

[30] Case C-321/96. Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat.

or protecting the state of one of the sectors of the environment covered by the Directive (paragraphs 19-22 of the court decision). (C-321/96)

(*private law actions of authorities*) In another older case, in Commission v France the problem emerged about the activities of the authorities that have significant effects, while do not fall into the category of administrative measures, rather the authority behaves like any other private person, for instance builds a new building, has a noisy operation and alike. The Commission brought an action under Article 226 EC for a declaration that, by failing to transpose Articles 2(a) and 3(2), (3) and (4) of Council Directive 90/313/EEC correctly, the French Republic had failed to fulfil its obligations under that Directive and under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 288 TFEU). The French Republic considered that the provisions of Law No. 78-753 of 17 July 1978 establishing various measures to improve relations between administrative authorities and the public and various administrative, social and fiscal provisions and Decree No. 88-465 of 28 April 1988 on the procedure for access to administrative documents, actually transposed Directive 90/313/EEC into French law. Even though, the French Government acknowledged that *documents held by a public authority acting as a private person and without any connection with public service* were not covered by Law No. 78-753. The French law considered that such documents could not constitute 'information relating to the environment' within the meaning of Directive 90/313/EEC.

According to the Court, in the light of its actual wording and taking account, in particular, of the use of the words 'any ... information', the scope of application of Article 2(a), and consequently of Directive 90/313/EEC, must be considered to have been intended to be wide. It thus covers all information which relates either to the state of the environment or to activities or measures which could affect it, or to activities or measures intended to protect the environment, without the list in that provision including any indication such as to restrict its scope, so that 'information relating to the environment' within the meaning of Directive 90/313/EEC must be understood to include documents, too, which are *not related to carrying out a public service* (paragraphs 44, 47). (C-233/00) Our opinion is that this case can be generalised into wider fields of actions of administrative bodies, which we might call organising measures, not directly connected to imposing any rights or responsibilities onto the subjects of administrative laws.

We note here, furthermore, that the older cases signal for us that these kinds of contradictions in connection with the neighbouring fields of environmental law with regard to the definition of environmental information might have settled down by now. This might be true in respect of construction law, however, but not yet in respect of other neighbouring fields, such as public health.

Scope of the term “environmental information” in food safety cases

(*are fruits and vegetables included in the term ‘environment’?*) In the Stichting Natuur en Milieu case the issue was a refusal to disclose studies of residues and reports on field trials submitted in connection with a procedure for extending the authorisation of a product within the scope of Directive 91/414 concerning the placing of plant protection products on the market. In adopting that Directive, the European Union legislature noted, inter alia, that plant protection products can have harmful side effects upon plant production, and their use may involve risks and hazards for humans, animals and the environment, too, especially if they are placed on the market without having been officially tested and authorised or they are incorrectly used. It is therefore undeniable that the information concerned by the contested decision, relating to residues of a plant protection product on food, forms part of an authorisation procedure whose purpose is precisely to prevent risks and hazards for humans, animals and the environment. On that basis, the information in itself concerns the state of human health and safety, therefore fall under the definition of environmental information, as set out in Article 2(1)(f) of Directive 2003/4. Some residual (…) interpretation problems might be raised, however, that in accordance with Article 2(1)(f), information of that kind falls within the scope of Directive 2003/4 only in so far as the state of human health and safety may be affected through the changes introduced in the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, and the interaction among these elements. In our view, it is difficult to deny that living species (fruits, vegetables etc. even if not growing wild, but produced by agricultural practices) form an element of the environment, therefore their contamination and its possible health consequences represent environmental information.

In the Stichting Natuur en Milieu case, the Court held, in a more complex argument that although the provision of information on the presence of residues of plant protection products in or on plants such as lettuce, does not directly involve an assessment of the consequences of those residues for human health, it concerns elements of the environment which may affect human health if excess levels of those residues are present, which is precisely what that information is intended to ascertain. In those circumstances, the term ‘environmental information’ must be interpreted as including information submitted within the framework of a national procedure for the authorisation or the extension of the authorisation of a plant protection product with a view to setting the maximum quantity of a pesticide, a component thereof or reaction products which may be present in food or beverages. (Case C-266/09)

The Glyphosate story

On the national, as well as the European level, longstanding legal disputes on access to information concerning plant protection substances are a subject of analyses in the environmental legal literature, too. Glyphosate is an active substance used in plant protection products, first authorised in 2002 under Council Directive 91/414/EEC. Originally patented by Monsanto, glyphosate is now produced by several companies operating in the agrochemical sector, and has become the most widely used pesticide worldwide, not least due to its compatibility with GMO crops.

(*possible differences between data served upon secret conditions and those that have to become public*) In 2010, a consortium of producers (Glyphosate Task Force) filed an application for renewal of glyphosate's authorisation to German authorities, under the newly enacted Regulation 1107/2009[31]. The national competent authority (the German Federal Institute for Risk Assessment) issued a favourable renewal assessment report (RAR), the public version of which was made available by the European Food Safety Authority (EFSA) in March 2014. Notably, the national level information became accessible only on the European level. Pending EFSA's own risk assessment, however, as Morvillo reports, a scientific dispute over glyphosate's safety arose, when the International Agency for Research on Cancer (IARC), a body of the World Health Organisation, concluded that glyphosate was "probably carcinogenic". EFSA, on the contrary, found the active substance "unlikely to pose carcinogenic hazard to humans", and so did the European Chemicals Agency (ECHA). Among the various methodological reasons for this divergence, EFSA mentioned the different data sets underpinning its assessment and the IARC's: while IARC only relied on published studies, EFSA considered a larger body of evidence, some of which was not published and confidential. The scientific controversy surrounding glyphosate's carcinogenicity, together with public concerns over the independence of the scientific assessments, fuelled a heated political debate (resulting in a European Citizens' Initiative and in the establishment of a special committee within the European Parliament). It was only in December 2017, after multiple extensions of procedural deadlines and intensive bargaining procedures at Committee level, that the marketing authorisation for glyphosate was renewed for five years, the minimum time span according to the 2009 regulation. (Morvillo 2019, p. 421) However, the scientific base of this decision is less than satisfying. While at the first glance the German and EU authorities brought

[31] Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC

better established decisions, the WHO organisation acted in a more superficial way, in essence, in our views, the opposite happened: IARC based its evaluation on published (scientifically controlled, proof read, exhibited to a wide range of professional debates) materials, while the national and European authorities relied upon more imbalanced, unilateral studies only.

Several private persons and MEPs requested all the information behind the permit, but according to EFSA, the disclosure would seriously harm the commercial and financial interests of the relevant companies, which had invested significant sums to develop those studies. A clearcut environmental conflict has emerged: between large business interests that are less sensitive on the risks of their research and investment than the members and organisations of the public. EFSA declared that the requested parts of the studies did not constitute information which "relates to emissions into the environment" for the purposes of the Aarhus Regulation, and that they were not necessary in order to verify the correctness of the scientific risk assessment. (Morvillo 2019, p. 423)

(*interpretation of 'release into the environment'*) Mr. Tweedale and four MEPs brought two independent actions to the General Court *under Art 263 TFEU*, seeking the annulment of EFSA's respective negative decisions[32]. The two actions raised identical pleas in law and resulted in "twin judgments", although not merged by the court. According to the Court of Justice's case law[33], the emissions covered by the "Aarhus Regulation" are to be understood as those "affecting or likely to affect elements of the environment, in particular air, water and soil". As Morvillo points out, while the concept does not include purely hypothetical emissions, it does reach beyond emissions that are actually released into the environment, covering also "foreseeable emissions under normal or realistic conditions of use of that product or substance" as envisaged in the marketing authorisation. While in general the placing on the market of a product does not necessarily entail its release into the environment, the case of plant protection products is peculiar: by their very function, such products, and the active substances contained therein, are meant to be released into the environment, so that their foreseeable emission is in principle all but hypothetic. (Morvillo 2019, p. 423) Release into the environment can be understood in a double meaning here, first the soil and plants the farmers spread out the plant protection substances onto, and also the animals and humans who consume the products with residual materials from the pesticides also represent a part of the living environment. We need

[32] Case T-329/17 and Case T-716/14

[33] Case C-673/13 Commission v Stichting Greenpeace Nederland and PAN Europe, paras 73-74; Case C-442/14, Bayer CropScience and Stichting De Bijenstichting [2016], para 81

to mention here surface and underground waters these substances are washed into during their whole life-cycle.

Glyphosate having been authorised at the European level since 2002, and been widely used, its residues are present in water, plants and food everywhere. The Court turned to examine whether the information contained in the requested studies can be considered information that relates to emission into the environment. This definition issue is delicately close to vital substantial legal issues, such as balancing between the social-economic and social-ecologic interests at stake. Morvillo points out, analysing the court decisions at hand that defining the intensity of the link between the requested information and emissions into the environment is crucial for the presumption under Art 6(1) of the Documents Regulation – overwhelming public interest test, see in the sub-exemptions chapter later. Too vague a link would deprive the exception based on commercial interests of any practical effect, thus jeopardising "the balance which the EU legislature intended to maintain between the objective of transparency and the protection of those interests", and resulting in "a disproportionate interference with the protection of business secrecy". On the other hand, too high a threshold would undermine the purpose of the regulation and its underlying principles: transparency and openness.

In clarifying the concept of information which "relates to emissions into the environment", the court looked at both its content and its purpose. As to the content, not only does the concept cover information on "emissions as such (nature, composition, quantity, date and place of those emissions)", as argued by EFSA, but also data concerning "the medium to long-term consequences of those emissions on the environment". The ratio for this conclusion is to be found in the Court's case law on the interpretation of Art 4(4)(d) of the Aarhus Convention, as transposed by Art 4(2)(d) of Directive 2003/4. According to such case law, the public interest in disclosure goes beyond the mere understanding of what will be released into the environment, to include specifically "the way in which the environment could be affected by the emissions in question", and therefore the effects of the emissions. In both Tweedale and Hautala, the requested studies contain information related to toxicity and carcinogenicity, and, more generally, to the assessment of glyphosate's health effects under the most unfavourable exposure conditions. Access to these studies enables citizens to understand the manner in which human health could be affected by glyphosate being released into the environment. Thus EFSA cannot refuse disclosure on the basis of commercial interests of the data owners. (Morvillo 2019, p. 424) While we can be satisfied with the conclusions of Tweedale and Hautala cases, we have to observe the painful absence of the human rights arguments: being poisoned by longstanding chemical residuals in everyday food concerns our right to life, health and the

knowledge and the possibility to direct our consumer behaviour also our right to dignity very closely.

(*the high stake of the Glyphosate cases*) It is aptly established by Holleben that such cases spread their effects to a series of neighbouring fields of law, too: the two analysed decisions relate to plant protection law. They do, however, have implications on the entire area of chemicals' regulation, at least that branches of law we call neighbouring fields of law from the viewpoint of environmental protection and the integration principle. Also all other substance-related laws contain provisions on the protection of commercial and industrial secrets, some of which – similarly to Article 63(2) of Regulation 1107/2009 quoted above – are endowed with special statutory protection against disclosure (see for instance Article 118(2) of the REACH Regulation and Article 66(2) Biocidal Products Regulation). The stake of the definition issues is high, because, as we will see later, according to the Court's interpretation of Art. 6(1) sentence 1 of the Aarhus Regulation, such commercial and industrial secrets must be disclosed to a large extent. (Holleben 2013, p. 569)

GMO release

In the Sausheim case, the Court implicitly held the 'location of release' of genetically modified organisms an environmental information. First indent of Article 25(4) of Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms determines all the information relating to the location of the release submitted by the notifier to the competent authorities of the Member State on whose territory that release is to take place. This happens in the context of the procedures referred to in Articles 6, 7, 8, 13, 17, 20 or 23 of that GMO Directive. An exception relating to the protection of *public order or other interests* protected by law cannot be relied on against the disclosure of the information set out in Article 25(4) of Directive 2001/18. (Case C-552/07)

We have to note that the importance of this decision is underlined by the fact that it is in harmony with the 2005 GMO Amendment of the Aarhus Convention (not yet in force), while naturally it is just highlighting a narrower scope of problems the Amendment will address.

GHG emission trade

In the Flachglas Torgau case, the Court held that a request for the reporting of trading data, relating to the names of holders of the transferring accounts and acquiring accounts of the emission allowances, namely Kyoto units involved in those transactions and the date and time

of those transactions, falls exclusively under the specific rules governing public reporting and confidentiality contained in the GMO related Directive 2003/87 and Regulation No. 2216/2004. In that regard, Article 19(2) of Directive 2003/87 does indeed provide that such information is to be recorded in the national registries, and that those registries are to be accessible to the public and to contain separate accounts to record the allowances held by each person to whom and from whom allowances are issued or transferred.

(*specific rules on access to environmental information seem to overwrite the four main legal sources of this topic*) Article 19(3) of that Directive relates to a standardised and secured system of registries, necessary for the implementation of that Directive, by which the Commission inter alia laid down the rules for guaranteeing public access to the data recorded in that system and the confidentiality thereof as appropriate. According to this, trading data such as that requested in the main proceedings of a public authority wishing to renegotiate an agreement on public service delegation is confidential data. Such data, in the absence of the prior consent of the relevant account holders, may be freely consulted by the general public only in the public area of the Community's independent transaction log's website from 15 January onwards of the fifth year following the year of completion of the transactions relating to transfers of emission allowances. From such a distant time, needless to say, it is very difficult to attach any meaningful opinion on the transactions and there is not too much point in interfering into this business from climate protection viewpoints.

The Central Administrator who has sole competence to report to the general public the data referred to in paragraph 12 of Annex XVI to that Regulation, the administrator of the national registry who has received a request for reporting of such trading data, must independently reject that request since, in the absence of the prior consent of the relevant account holders, that administrator is required to guarantee the confidentiality of that data *until it has become legally reportable to the general public* by the Central Administrator as above said. (Case C-204/09, Points 41, 45, 53 and 59)

We see that the GHG gas trade rules totally prevail above the rules of access to environmental information. The Court did not see a serious infringement of environmental democracy and of the effectiveness of public participation, because the majority of the relevant data will be actively published at the EU register. However, the time factor, as we said, might play a key role here, because by the time the public gets access to the trading data, the business could hardly be renegotiated in a way that responds better to the climate protection interests and other social-economic interests at stake.

Normative acts

(*preparatory works of administrative bodies that precede the actual legislative process*) In the Deutsche Umwelthilfe case the Court made an important differentiation between the acts of the legislators and the acts of those administrative bodies who do the lengthy procedure of preparation. Such a preparation work undoubtedly fall under the administrative tasks of the relevant authorities and usually encompasses wide array of data protection, expert research, discussions with the stakeholders and possibly public debates. The Court explained this in a concise, clear manner: "the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative capacity' as public authorities, required to allow access to the environmental information which they hold, may not be applied to ministries when they prepare and adopt normative regulations which are of a lower rank than a law. (Case C-515/11)

We might note, however, that this simple decision might allow for an *a contrario* conclusion, too, namely that when an administrative body enacts law itself, within its own portfolio, such a procedure can be a state secret. We can have some reservations here though: legislative procedures need lengthy preparation phases, which clearly belong to the administrative sphere in all cases, even in such cases, too; where the administrative body would issue a normative act. Transparency and accountability, especially the question of due consideration of certain environmental and closely connected issues, might demand stronger public control, including access to information in all preparation processes, no matter who will issue the legislative act at the end.

THE CONCEPT OF 'AUTHORITY'

Documents Regulation, 2001	Aarhus Regulation, 2006	Environmental Information Directive, 2003	Aarhus Convention (1998, 2002)
Definitions, authorities			
Article 1.a (Goals) „(…) the right of access to *European*	Article 2.1.c In respect to access to information, not	Article 2.2 Identical with the Aarhus Convention, except	Article 2.2 Government at all levels; *quasi authority; public*

Parliament, Council and Commission (hereinafter referred to as 'the institutions') documents provided for in Article 255 of the EC Treaty in such a way as to *ensure the widest possible access to documents*"	only European Parliament, Council and Commission shall provide access to environmental information, but *all the Community's institutions* and bodies, too, including those acting in *legislative* capacity	the Directive does not exclude *judicial and legislative* bodies but leaves it to the discretion of the MSs.	*services*; regional institutions. Not including *judicial or legislative* bodies.

(emphases by the author)

While the two general Aarhus documents use the term 'authority', the two Regulations referring to the EU level administration have to use the more general term 'institution', we can say, naturally. Legislative bodies are included in the Transparency and the Aarhus Regulations on the EU level, while expressly excluded by the Convention and left to the discretion of the Member States in the Directive. Judicial bodies are not included in any of the document, while the Directive leaves it open for the domestic legal systems. Quasi authorities, public services are included expressly in the Convention and the Directive and silently but unambiguously in the Regulations with the broadest possible term of 'institution'. It is important to mention that the Documents Regulation, based on its primary legal background edits into the text the most general interpretation tool that not only fits into the set of sub-exemptions, but could represent the highest level legislative declaration of this sort.

This is a clear picture, possibly with some arguments concerning public services. We have found only a single case in the CJEU practice in this respect. This is about the water management sector, where a couple of decades ago, in the height of the neo-liberalist wave in governance, a tide of privatisation swept through. Apart from other serious problems in connection with access to equal or at least acceptable water services, water privatisation raised some interpretation problems in respect to access to environmental information, too.

(*water utilities company*) In the Fish Legal case the Court of Justice considered that undertakings, such as water companies, which provide public services relating to the

environment could be under the control of a body or person falling within Article 2(2)(a) or (b) of Directive 2003/4/EC, and should therefore be classified as 'public authorities' by virtue of Article 2(2)(c) of that Directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services, since a public authority covered by Article 2(2)(a) or (b) of the Directive is in a position to exert decisive influence on their action in the environmental field. As we see from the Court's explanation, water utilities provide such a vital social service that it is almost unimaginable that they can bring any major policy decisions on their own, without the scrutiny of the water administration and, unavoidably from the consumers, too.

The mere fact that the entity is a commercial company subject to a specific system of regulation for the sector in question cannot exclude control within the meaning of Article 2(2)(c) of Directive 2003/4/EC, since it may ensue from the system concerned that the entity does not have genuine autonomy vis-à-vis the State. This is the case even if the latter is no longer in a position of formal ruling, following *privatisation* of the sector in question, to determine the entity's day-to-day management (paragraphs 68, 70, 71, 73, operative part 2 of Fish Legal). In addition, Article 2(2)(b) of Directive 2003/4/EC must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. As is clear from Article 3(1) of Directive 2003/4/EC, the Directive's central provision which is essentially identical to Article 4(1) of the Aarhus Convention, if an entity is classified as a public authority for the purposes of one of the three categories referred to in Article 2(2) of that Directive, it is obliged to disclose to any applicant all the environmental information falling within one of the six categories of information set out in Article 2(1) of the Directive that is held by or for it, except where the application is covered by one of the exceptions provided for in Article 4 of the Directive (paragraphs 78, 83, operative part 3). (C-279/12)

THE CONCEPT OF 'PUBLIC'

Documents Regulation, 2001	Aarhus Regulation, 2006	Environmental Information Directive, 2003	Aarhus Convention (1998, 2002)
Definitions, the public, the applicant			
Article 2.1	Article 2	Article 2.5, 2.6 Identical with the	Article 2.4

The main rule that the applicants are citizens of the Union, and any natural or legal person residing or having its registered office in a Member State, but *MSs may grant access to documents to any natural or legal person* not residing or not having its registered office in a Member State	Identical with the Directive, while it underlines (in Article 3) that *European citizenship or residency is not a prerequisite* for the application	Aarhus Convention. 'Applicant' shall mean any natural or legal person requesting environmental information. (note: no definition is needed for 'the public concerned' because that is used only for the second pillar)	"The public" natural or legal persons, associations, organizations or groups; 2.5 "*The public concerned*" affected or likely to be affected by, or having an interest; environmental NGOs

(emphases by the author)

Contrary to the second and third documents addressing the national level, the two European Regulations opens wide the possibility to request information from the European institutions, albeit the Documents Regulation provides for it only as a possibility. We note that the concept of 'public concerned' is relevant only to Article 6-8 and partly Article 9 of the Convention and their European counterparts, because the legislators determine the circle of persons who can actually have a say in environmental decision-making narrower than that of the persons who just have access to information.

It is a tremendous achievement of the European environmental democracy that after the first couple of years of legal arguments, the circle of persons that can have access to information is mostly undisputed. At least we can conclude it from the fact that we haven't found relevant CJEU cases in this respect.

PASSIVE INFORMATION SERVICING AND TIMELINESS

Documents Regulation, 2001	Aarhus Regulation, 2006	Environmental Information Directive, 2003	Aarhus Convention (1998, 2002)
Passive information servicing			
Article 6.1, 10.2 *Only written format application* is accepted; an existing version and format (including electronically or in an alternative format such as *Braille, large print or tape*) with *full regard* to the applicant's preference. However, Article 2.4 and 10.2 allows for interpretation that access to information is either active or passive.	Article 3 Refers to the Documents Regulation	Article 3.1, 3.3 Identical with the Aarhus Convention, but no separate mentioning on documentation;	Article 4.1 In response to a request for environmental information; including copies of the actual documentation; without an interest having to be stated; in the form requested *unless* it is already publicly available in another form.
Timeliness			

Article 7.1, 7.3	Article 3	Article 3.2, 3.4	Article 4.2 and 4.7
1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application; In exceptional cases, for example in the event of an application relating to a very long document or	Refers to the Documents Regulation	Identical with the Aarhus Convention.	As soon as possible and at the latest within one month, unless the volume and the complexity of the information justify an extension of this period up to two months after the request.

to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.			

(emphases by the author)

We have not found relevant CJEU cases for these two topics either, but out of different reasons. The general responsibility of institutions/authorities to serve the requested documents/information is practically included in all cases that deal with access to environmental information, so it would not be possible to focus on this single issue here. As concerns timeliness, most probably the inherently lengthy nature of the European legal remedies prevents the public to apply for them in such cases where the time factor itself is the central issue of the case.

EXCEPTIONS BASED ON ADMINISTRATIVE REASONS

Documents Regulation, 2001	Aarhus Regulation, 2006	Environmental Information Directive, 2003	Aarhus Convention (1998, 2002)
Exemptions, based on authority interests/circumstances			
Article 4.3, 6.2-3	Article 6	Article 5.1	Article 4.3

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; a document containing *opinions* for internal use as part of deliberations and *preliminary consultations* within the institution concerned, *even after the decision has been taken*; application *not sufficiently precise*. 3. In the event of an application relating to *a very long* document or to a *very large number* of documents, the institution	Refers to the Documents Regulation	Identical with the Aarhus Convention, but added: Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the *name of the authority* preparing the material and the *estimated time needed for completion*.	The authority *does not hold* the environmental information; the request is *manifestly unreasonable* or formulated in too general a manner; material in the *course of completion*; *internal communication*.

concerned may confer with the applicant *informally*, with a view to finding a *fair solution*			

(emphases by the author)

All the administrative exemptions are present in all of the four documents, with different editing and wording solutions, but in essence with identical content. The Documents Regulation refers to the aftermath of the decision, allowing internal communication to remain secret, while the Aarhus documents leave this question open. In connection with the reasonable requests for information 'not held' by the authority theoretically we might expect automatisms within the administrative system to find out the location of the information in question, even within the normal (original) time frames. This should be so not only because of the singular responsibility of the State administration as such, but the fast growing information technology means available for the authorities, too. We note that sub-exemptions in some respect (but not fully) might remedy this inconsistency.

Time span of the secrecy of internal communication

(*secrecy lasts until the information remains fully within the authority*) In the Land Baden-Württemberg case the Court has forwarded an important sentence about the internal information-exchange secret. According to it, information which circulates within a public authority and which, on the date of the request for access to that information, has not left the internal sphere of that authority – as the case may be, after being received by that authority – shall not be public, provided that it was not or should not have been made available to the public before it was so received. (Case C-619/19) What is especially important here is the approach that whenever the information has left the administrative body, either as part of the explanation of a decision or as inter-agency communication or otherwise, it shall not qualify as administrative secret anymore.

(*such secrecy can last for long, if it can be justified*) In the same case, ensuing from the above statement, the Court also established that the applicability of the exception to the right of access to environmental information provided for in respect of internal communications of a public authority is *not limited in time*. However, that exception can apply only for the period during which protection of the information sought is *justified*. (Case C-619/19) In our view, these two

statements draw a multi-dimensional, but manageable definition of the internal communication secret. At the same time, a conclusion can be made that the time span of secrecy of internal communication cannot be exactly determined since as time goes on, justification of such secrecy will become more and more difficult. E.g. the decision and other details might have come out, structure and personnel changes might have happened in the administrative body, outside revisions of the procedures might have taken place and so on.

Proceedings of public authorities

(*conditions of secrecy of the proceedings of authorities*) The protection of 'internal communication' and the possibly more general 'proceedings of authorities' are in some countries identical, in others they are regulated separately, but at any rate are in close connection with each other. In the An Taisce case the Court stated that exception based on the proceedings of public authorities shall be interpreted narrowly, in a way that it covers only information exchanged in the course of the final stages of the decision-making process of public authorities, which are clearly defined as proceedings under national law and in respect of which such law provides for a duty of confidentiality. (C-84/22)

This is an important distinction in the environmental cases where not seldom the final administrative decision-making phase is preceded by lengthy expert examinations and exchanges with the stakeholders – according to the Court, such information should not qualify as administrative secret based on intra-agency communication provisions.

(*burden of proof concerning the internal proceedings nature*) In the Stichting Natuur case the Court underlines that the condition of this confidentiality is the existence not only in national law of the Member State concerned of a rule which provides, generally, that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, but the national law shall *clearly define the concept of 'proceedings'*, too, which can be for the national court to determine, too. (Case C-204/09)

In light of the above decision, it is everything but easy to forge a clear definition of internal proceedings in an environmental administrative decision-making procedure that concerns wide range of interests, as a rule. The Stichting Natuur decision puts the burden of proof on the shoulders of the authorities wishing to exclude the public from certain parts of their internal communications.

(*what else are the preparatory materials for than to discuss the underlining options?*) In a third important case in this topic, the ClientEarth case, the Court pointed out that the Aarhus

Regulation explicitly provides that EU institutions or bodies acting in a legislative capacity are covered by the provision regulating access to environmental information. A refusal by the European Commission to disclose documents developed during its considerations as whether to initiate a procedure for having a law to be adopted by the Council of the European Union and the European Parliament led to a decision by the Grand Chamber of the CJEU. (Case C-57/16) The Commission proposed two new legislative measures concerning the follow up of the implementation of EU environmental legislation by Member States and in issues concerning access to national courts in environmental matters. For both issues*, impact statements* were prepared, together with draft opinions from the Impact Assessment Board.

Upon the request of ClientEarth, the Commission refused to provide access to these documents, referring to the reasons that it was still discussing in what form to move forward (options included in a non-binding communication, or a legislative proposal). The European Commission brought up the most frequent argument that confidentiality should be maintained during its deliberations in order to be free from external pressures. Indeed, the Access to Documents Regulation enables the refusal of a document to be disclosed relating to a matter where the decision has not yet been taken, if disclosure would seriously undermine the decision-making process. A refusal to disclose information may not be based on this ground in a situation where there is an 'overriding public interest in disclosure', however. According to the Commission, 'disclosure would restrict its room for manoeuvre, reduce its ability to reach a compromise, and might create external pressures which could hinder those delicate processes, during which an atmosphere of trust ought to prevail.' (observed by Peeters 2020, p. 24) In our view, in the heart of public participation lies the possibility/necessity of social discussions above the meaningful alternatives worked out by the experts of the authority.

(*no general assumption of secrecy, all cases need specific explanations*) The Grand Chamber warned in the ClientEarth case that, in harmony with the above quoted decisions, the European Commission should not have an assumption that documents used during the deliberations on whether or not to initiate a legislative proposal do not have to be released generally. Instead, the Commission should provide specific argumentation in each case when it claims administrative secrecy, based on the grounds of refusal listed in the Documents Regulation and the Aarhus Regulation, as to why it would be legitimate not to disclose such documents. The Court went further, underlining the principle that citizens must be able to control the decision-making processes. (Case C-57/16) Taking this principle into the Court's consideration, such justification may be difficult to find in the majority of cases.

(*expert opinions, impact studies*) The Court also provided a wide interpretation of what is to be understood by 'documents adopted by the EU institutions when acting in their legislative capacity' and made this applicable to documents drawn up in the context of an impact assessment procedure (which in practice may or may not be followed by a proposal for a secondary law). Then, although the CJEU recognized that the Commission 'must be able to enjoy a space for deliberation in order to be able to decide as to the policy choices to be made and the potential proposals to be submitted', this does not mean that the Commission may, generally keep legislative documents, including impact assessments, confidential since that would be detrimental to the democratic rights of EU citizens. More precisely, the Court stated that it would limit 'the expression by the public or the interested parties of their views on the choices made and the policy. (Case C-57/16)

(*the difference between the decision-making and the whole preceding administrative procedure*) The differentiation made in the previous points is put onto more general bases in the Saint-Gobain case. Saint-Gobain Glass Deutschland GmbH ('Saint-Gobain') asked the Court to set aside the judgment of the General Court of the European Union of 11 December 2014 (T-476/12, not published, EU:T:2014:1059), by which that court dismissed its action for annulment of the Commission's decision of 17 January 2013 refusing full access to the list communicated by the Federal Republic of Germany to the Commission under the procedure provided for in Article 15(1) of Commission Decision 2011/278/EU of 27 April 2011. In that internal communication between the Member State and the Commission the provisional allocation of the emission quotas was discussed, including those in connection with Saint-Gobain, too. The General Court considered, first, that the decision-making process at issue had not yet been closed at the time of information request and its dismissal. The General Court also observed that that administrative procedure 'merited greater protection' and that there is a greater risk that access to internal documents forming part of the procedure in question may have negative repercussions on the decision-making process. Such information can be used by interested parties to exert influence selectively, which may in particular adversely affect the quality of the final decision. Probably the heaviest argument of the first instance court was a formal one. The court observed that the administrative procedures are governed by strict time limits, compliance with which would be compromised if the Commission had to examine and respond to reactions to internal discussions during that procedure. This is the old „we have no time for democracy" argument.

The Fifth Chamber in the second instance decision established that the General Court's interpretation of the first subparagraph of Article 4(3) of Regulation No. 1049/2001 was confusing the concepts of decision-making process and the concept of administrative

procedure itself, and that mistake had the effect of expanding the scope of the exception to the right of access provided for by that provision to the point where it allows a European Union institution to refuse access to any document, including documents containing environmental information, held by that institution, in so far as that document directly relates to matters dealt with as part of an administrative procedure pending before that institution. „Yet the concept of 'decision-making process' referred to in that provision must be construed as relating to decision-making, without covering the entire administrative procedure which led to the decision. Such an interpretation follows, first of all, from the very wording of the provision, referring as it does to documents which 'where the decision has not been taken by the [Union] institution'. Next, that interpretation addresses the requirement of strict interpretation of the first sentence of Article 4(3) of Regulation No. 1049/2001, which requirement is all the more compelling where the documents communication of which is requested contain environmental information." (Points 76-79)

The Court therefore responded to the reservations of the first instance court piece by piece. It established first of all, that when the administrative procedure at issue had not yet been closed on the date of adoption of the contested decision, this fact does not in itself establish that disclosure of the documents requested would seriously undermine the Commission's decision-making procedure.

Second, 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 do not suffice to prove that disclosure of those documents would seriously undermine the decision-making process of the institution concerned.

(*a winning company: is it a double bite from the apple?*) Consequently, the Court established that the appeal was well founded, the judgment under appeal had to be set aside. As Peeters observed, that was a victory for a polluting industry using the 'Aarhus right' to request environmental information regarding governmental decision-making concerning its own installations. In other terms, this time the 'shield function' of access to environmental information rights operated. (Peeters 2020, p. 28) This is not a unique development in other parts of the world. European and American environmental lawyers have a totally different approach in this matter. While the European approach is basically that the legal infrastructure of access to environmental information is first and utmost tailored to support the general public and the environmental NGOs seeking environmental justice, in the US environmental information, including the files of the Environmental Protection Agency (EPA) represent a public asset, which is primarily used by the economic sector. (Bell, 2003) Naturally, it is really strange

for the European lawyers, who argue usually, that the business sector has ample opportunities to exert very effective influence on the national and European level environmental policies, the playing field of environmental law, especially environmental democracy should be left for the less influential parts of our society.

(*denied access to information of ongoing infringement cases*) Yet, from our side, let us finish this chapter with an NGO case, even if it an exceptionally lost case, because of the high level secrecy of the procedures of infringement cases at the Commission. The Liga para a Protecção da Natureza ('the LPN') is a non-governmental organisation whose objective is the protection of the environment. In 2003, it lodged a complaint with the European Commission in which it claimed that the dam construction project on the River Sabor, in Portugal, infringed Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. In 2007, the LPN applied to the Commission for access to information on the processing of its complaint and asked for the possibility to consult certain documents. The Commission rejected those requests on the ground that the requested documents concerned an ongoing procedure, both as regards the exception laid down in the third indent of Article 4(2) of the Documents regulation, relating to the protection of inspections, investigations and audits, and as regards the exception laid down in Article 6(1) of the Aarhus Regulation, under which an overriding public interest in disclosure must be deemed to exist where the information requested relates to emissions into the environment, with the exception of investigations, in particular those concerning possible infringements of Community law. Similarly to the previously discussed case, after the General Court rejected the LPN's action for annulment of the decision at issue, LPN and the Republic of Finland lodged an appeal against the General Court's judgment before the Court of Justice.

The Court of Justice ruled, inter alia, on the question whether it was appropriate to recognise the existence of a general presumption that, in the circumstances of the case, the disclosure of documents relating to an infringement procedure would undermine protection of the purpose of the investigation. Since the wording and the scheme of Article 6(1) of the Aarhus Regulation indicate clearly the express intention of the legislature to remove infringement procedures from the scope of that provision as a whole, the Court concluded that the General Court had not erred in law by holding that Article 6(1) of the Aarhus Regulation did not affect the examination which the Commission must carry out pursuant to Regulation (EC) No. 1049/2001 when a request for access concerns documents relating to an infringement procedure at the pre-litigation stage (paragraphs 84-85). (C-514/11)

EXEMPTIONS: THIRD PERSONS' INTEREST

Documents Regulation, 2001	Aarhus Regulation, 2006	Environmental Information Directive, 2003	Aarhus Convention (1998, 2002)
Exemptions, based on State interests			
Exemptions, based on third party interests			
Article 4.1.b, 4.2 Privacy and the *integrity* of the individual, in particular in accordance with Community legislation regarding the protection of personal data; commercial interests of a natural or legal person, *including* intellectual property.	Article 6.2 In addition to the exceptions set out in Article 4 of Regulation No. 1049/2001, Community institutions and bodies may refuse access to environmental information where disclosure of the information would adversely affect the protection of the *environment* to which the information relates, such as the breeding sites of rare species.	Article 5.2, Point d-h Identical with the Aarhus Convention but added maintaining *statistical* confidentiality and *tax secrecy*.	Article 4.4. Point d-h Commercial and industrial information secrets; intellectual property rights; personal data relating to a natural person; information supplied without legal obligation; *environmental protection reasons*.

(emphases by the author)

The 'shields' of third persons against curious 'outsiders' are included in a relatively long list, while in certain cases, naturally, sensitive environmental data shall be protected, too. Statistical confidentiality and tax secrecy are unique elements in the Directive, their environmental

relevance might be not too high. An interesting editing solution is in the Documents Regulation that handles intellectual property as a group of commercial secrets, which is partly true, but intellectual property has immaterial values to protect, too. Another remarkable feature of that Regulation is the protection of integrity of individuals, which raises the possibility to shield one's dignity and goodwill, too. In non-environmental matters these aspects might be important.

Commercial and industrial secrets

(*balancing community and private interests*) In the frequently quoted Stichting Natuur case in connection with a request for information in respect to placing plant protection products on the market, the main issue was how the public interest served by disclosure is weighed against the interest served by the refusal of the request for environmental information that represents business secret. As we have seen earlier, the sectoral agricultural and chemical safety rules in Article 14 of Directive 91/414 are considered in such cases, together with the Environmental Information Directive. In this balancing exercise the clear-cut *lex specialis – lex generalis* logic might not work. The authorities in such cases shall evaluate the public interest served by disclosure and whether it appears to outweigh the interest served by the refusal to disclose. As a supporting interpretation tool, they also have to ascertain if the request for access to that information relates to emissions into the environment. (Case C-266/09)

(*international commercial negotiations*) In the 2004 WWF case the NGO referred to Article 6 of the Documents Regulation to obtain access to documents of a meeting of the so-called 'Article 133 Committee'. The documents sought were preliminary papers prepared by the Commission including, inter alia, reports on the state of the Cancun negotiations of WTO on agricultural matters. WWF also referred to the already known text of the Aarhus Regulation, which, differently from the Documents Regulation would apply only to environmental documents. The Commission refused to grant access or even a partial access to the documents on the ground that it would seriously undermine the EU's commercial interests as well as its economic relations with third countries (Article 4(1)(a), 3rd and 4th indents of the Documents Regulation respectively). The CJEU accepted the arguments of the Commission that access to provenly existing documents could undermine the public interest and that applies to partial access, too.

(*information and documents*) The second part of the application targeted the principal differentiation between documents and information, which is a complex "neither with nor without you" problem. While the Commission obviously had information on the Committee meeting, it was not obliged to produce minutes and denied the existence of such a document. Most interestingly, the Court established that Article 2 of the Documents Regulation had not been

violated by the refusal to produce (possibly inexistent) minutes or any other related documents. The Court ruled that the 'concept of document must be *distinguished from that of information'*. Thus, the Community institutions are only obliged to disclose information held in the form of a formal document, as opposed to " ... any information in written, visual, aural or electronic or any other material form" as defined in Article 2(3) of the Aarhus Convention (and Article 2(d) of the would-be Aarhus Regulation). (T-264/04)

(*balancing of interests shall not amount to disapplying a clear and unconditional provision of a European Union regulation*) In the 2011 Greenpeace case the Court denied the Commission's view that it is necessary to ensure that the Documents Regulation and the Aarhus Regulation are interpreted consistently with Art. 16 and 17 of the Charter of Fundamental Rights, i.e. with the protection of the freedom to conduct a business and the right to property, and with Art. 39(2) and (3) of the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS). The Court stated in paragraph 44:

"Nevertheless, it cannot be accepted that, for the purpose of ensuring a consistent interpretation of European Union law, the validity of a clear and unconditional provision of secondary legislation may be called into question. Under the pretext of ensuring a fair balance between the protection of the fundamental right to property, which encompasses intellectual property rights, and the protection of other fundamental rights, the Commission seeks, by its line of argument, not to ensure a consistent and harmonious interpretation of the Documents regulation and the Aarhus Regulation with the provisions of the Charter, of Directive 91/414 or of Regulation No. 1107/2009, but to preclude the application of the first sentence of Article 6(1) of the Aarhus Regulation No. 1367/2006. Such an approach cannot, in any event, be accepted, since it would amount to disapplying a clear and unconditional provision of a European Union regulation, which is not even claimed to be contrary to a superior rule of law." (T-545/11, analysed by Holleben 2013, p. 567)

(*burden of proof shifted to the producers in two steps*) Holleben further discusses the protection of commercial and industrial secrets in sectoral laws as compared to the Documents Regulation and the Aarhus Regulation in cases, when they collide with sectoral laws on chemical safety and agriculture. Article 14 of the Directive on Plant Protection Products[34] stipulates that Member States and the Commission shall, without prejudice to the Directive on the freedom of access to information on the environment, ensure that information submitted by applicants

[34] Council Directive of 15 July 1991 concerning the placing of plant protection products on the market (91/414/EEC)

involving industrial and commercial secrets is treated as confidential if the applicant wishing to have an active substance included in Annex I or the applicant for authorization of a plant protection product so requests, and if the Member State or the Commission accepts that the applicant's request is warranted. However, some basic information about the plant production products shall be public, such as the names and content of the active substance or substances and the name of the plant protection product, the name of other substances which are regarded as dangerous under the relevant Directives, the physio-chemical data concerning the active substance, as well as some safety information, such as decontamination and first aid measures in case of accidents.

Article 63 of the Regulation 1107/2009[35] repealing Regulation 91/414 has chosen a different method of regulation. When they request that information submitted under this Regulation is to be treated as confidential they shall provide verifiable evidence to show that the disclosure of the information might undermine commercial interests, or the protection of privacy and the integrity of the individual in economic sense. Furthermore this Regulation prescribes a tentative list of information that shall normally fall under this presumed secret category, which might make it difficult to broaden the circle of secrecy. In accordance with this negative list, it shall be deemed to undermine the protection of commercial interests or of privacy and the integrity of individuals concerned if the information is about the method of manufacture; the specification of impurity of the active substance except for the impurities that are considered to be toxicologically, ecotoxicologically or environmentally relevant; information on the complete composition of a plant protection product and other specific cases. We do not see the reasons why one should not use both the negative and the positive list on the exemptions together, even if the 2009 regulation formally repelled the 1991 one.

The new Regulation acknowledges the primacy of Directive 2003/4/EC, similarly to the previous one. We have to add that the irrebuttable presumption of Art. 6(1) sentence 1 Aarhus Regulation has to prevail, too, together with the similarly irrebuttable presumption of Art. 4(2) sentence 4 of Directive 2003/4. Both legal texts demand disclosure without balancing of conflicting interests in case of information on emissions into the environment. (Holleben 2013, p. 578)

(*broad interpretation of 'emissions into the environment'*) By letter of 7 February 2006, the Ville de Lyon requested the CDC to communicate to it the volumes of the greenhouse gas emission

[35] REGULATION (EC) No. 1107/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC

allowances ('the emission allowances') sold in 2005 by the operators of 209 urban heating sites situated throughout France to which emission allowances were allocated, and also the dates of the transactions and their recipients (the Court called them together 'the trading data'). According to the Ville de Lyon, that data was useful to it for comparative purposes, for the renegotiation of an agreement delegating a public service in respect of urban heating. In a positive decision the CJEU refused a restrictive interpretation of the notion "emissions into the environment". According to the opinion of the Court, the principle of widest possible access to environmental information also and in particular extends to information on "emissions into the environment". It is stated in paragraph 53: "(…) in order for the disclosure to be lawful, it suffices that the information requested relates in a sufficiently direct manner to emissions into the environment." The notion "emissions into the environment" within the meaning of Art. 6(1) sentence 1 of the Aarhus Regulation is neither defined in the Aarhus Regulation nor in the Convention directly. However, we can conclude it from the definition of "environmental information" in Art. 2(1)d of the Regulation, according to which "environmental information" means, inter alia: "information […] on factors such as […] emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment". (Case C-524/09)

In the legal action, the Commission rightly invoked *this Aarhus Convention Implementation Guide, which on page 60 for interpreting the term emission refers to the definition of the IPPC Directive 96/61/EC, i.e. to the direct or indirect release of substances from installation*s. The Court rightly points out that this Implementation Guide cannot bindingly interpret the Aarhus Convention. On the other hand, the General Court in its decision T-338/08 did in fact invoke the Implementation Guide for interpreting the Convention. At least, the Implementation Guide clearly points out that in 2000, i.e. a short time after the Convention was enacted, the necessity of disclosing information on substances actually released into the environment without any consideration to commercial and industrial secrets was seen only with respect to emissions from industrial installations. At that time, nobody thought of emissions from the use of substances or preparations.

Personal data

(*name of experts*) The European Food Safety Authority (EFSA) promulgated a draft guidance document for applicants who wish to place plant protection products on the market (pursuant to article 8(5) of EU Regulation 1107/2009). ClientEarth and PAN Europe (the applicants) submitted an application to EFSA requesting access to documents under EU Regulation

1049/2001. EFSA initially withheld its documents but then retracted its position in 2011, granting access to all the information requested, except for the names of the external experts who made certain comments on the draft of that guidance document. ClientEarth appealed this latter decision to the General Court of the European Union. The General Court rejected the applicants' request (T-214/11) for the names of the external experts and the case came before the CJEU.

Firstly, the CJEU held that the information requested was 'personal data' within the meaning of Article 2(a) of Regulation 45/2001 because it would connect a scientific expert to a particular comment he or she had made. Secondly, it held, in line with the General Court's approach, that two cumulative conditions must be fulfilled before a transfer of personal data could be granted: the transfer must be 'necessary' (Article 8(b) of Regulation 45/2001) and must not prejudice the legitimate interests of the data subject. Finally, the CJEU disagreed with the General Court, finding that the transfer of personal data was necessary 'so that the impartiality of each of those experts in carrying out their tasks as scientists in the service of EFSA could be specifically ascertained' and in order to dispel with the accusations of partiality made against EFSA and ensure its decision-making processes are transparent. Moreover, EFSA had not given any specific reasons to suggest that the transfer might prejudice the legitimate interests of the data subjects. Therefore, CJEU set aside the judgment of the General Court of the European Union in ClientEarth and PAN Europe v. EFSA (T-214/11) and annulled the decision of EFSA. (C-615/13)

Intellectual property

(*when the owner of intellectual property failed to ask for confidentiality*) As we pointed out in connection with the content of the Documents Regulation, there is an approach to the concept of intellectual property that it can be handled under the more general terms of commercial secret. However, we see some major differences between handling these two exemptions by law. In the 2015 ClientEarth case the Court established that Article 4(2) of the Directive must be interpreted that the applicant for authorisation to place a plant protection product or biocide on the market, did not, during the procedure for obtaining that authorisation, request that information submitted under that procedure be treated as confidential does not preclude the competent authority, which has received, following the closure of that procedure, a request for access to the information submitted on the basis of Directive 2003/4 by a third party, from refusing the request, if necessary, pursuant to point (d) of the first subparagraph of Article 4(2)

of that Directive on the ground that the disclosure of that information would adversely affect the confidentiality of commercial or industrial information. (Case C-442/14)

We have to note here that in our understanding in the field of civil law the principle of private control prevails generally; the lord of his own case is the holder of civil rights and no one will protect his interest on his behalf. If some companies fail to protect their interests and rights, although they had all the means to do so, we doubt that the authorities should do so. It is even truer in the specific field of intellectual property, where there is a significant social interest in spreading out new, and advanced scientific knowledge.

EXEMPTIONS: STATE SECRETS

Documents Regulation, 2001	Aarhus Regulation, 2006	Access to Information Directive, 2003	Aarhus Convention (1998, 2002)
Exemptions, based on State interests			
Article 4.1.a, 4.2 Public security, defence and military matters, international relations, the *financial, monetary or economic* policy of the Community or a Member State; Court proceedings and legal advice, inspections,	Article 3 Refers to Article 4 of the Documents Regulation	Article 5.2 Point a-c Identical with the Aarhus Convention.	Article 4.4 Point a-c International relations, national defence or *public security*, course of justice, *fair trial*, enquiry of a criminal or disciplinary case.

investigations and audits.			

(emphases by the author)

We have to note here that State secrets might seldom collide with environmental protection interests, while in the Documents Regulation this kind of exemption might represent more importance in practice. Even if so, environmental and environmental democracy cases of the CJEU do not touch upon such issues.

SUB-EXEMPTIONS

We show all the sub-exemptions in the below table, noting that many of them can be found only in the Convention and as concludes they have limited relevance in the CJEU practice for the time being.

Documents Regulation, 2001	Aarhus Regulation, 2006	Environmental Information Directive, 2003	Aarhus Convention (1998, 2002)
Sub-exemptions concerning administrative interests			
Article 4.3 If disclosure of the document would *seriously undermine* the institution's decision-making process, unless there is an *overriding public interest* in disclosure.	Article 6.1 Explicitly states that exceptions to the mandatory disclosure of environmental information should be *interpreted in a strict* manner.	Article 4.1 Identical with the Aarhus Convention.	Article 4.3, tail Taking into account the public interest served by disclosure.
Sub-exemption in case of certain State secrets			
Article 4.2	Article 3		

In case of court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an *overriding public interest* in disclosure.	Refers to Article 4 of the Documents regulation		
Sub-exemption in case of business secret			
Article 4.2, tail *Overriding public interest* in disclosure	Article 3 Refers to Article 4 of the Documents Regulation	Article 4.2, tail This sub exemption is broader (including administrative proceeding, personal data, voluntary data and environmental data), but in all instances left to the *discretion* of Member States.	Article 4.4.d, tail Information on *emissions which is relevant* for the protection of the environment shall be disclosed.
Sub-exemptions in case of State and third party secrets			
	Article 6 1. As regards Article 4(2), first and third indents of the Documents Regulation, with the exception of	Article 4.2 Identical with the Aarhus Convention, but refers to all exemptions, with an additional	Article 4.4, tail Grounds for refusal shall be interpreted in a *restrictive way*, taking into account the *public interest* served by

	investigations, in particular those concerning possible infringements of Community 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 the Documents Regulation, 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.	balancing responsibility in respect to personal data.	disclosure and taking into account whether the information requested relates to *emissions* into the environment.
Sub-exemption in case an authority does not hold the requested information			
	Article 7	Article 4.1	Article 4.5

	Identical with the Directive, but specifies *15 working days* as the latest, for informing the applicant of the Community institution or body or the public authority within the meaning of Directive 2003/4/EC to which it believes it is possible to apply for the information requested or *transfer the request* to the relevant Community institution or body or the public authority and inform the applicant accordingly.	Identical with the Aarhus Convention.	The public authority shall, *as promptly as possible*, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or *transfer the request* to that authority.
Sub-exemption where the separation of confidential information is possible			
Article 4.6 If only parts of the requested document are covered by any of the exceptions,		Article 4.4 Identical with the Aarhus Convention.	Article 4.6 When information exempted from disclosure *can be separated* out without prejudice to

the remaining parts of the document shall be released.			the confidentiality, authorities shall make available the remainder of the environmental information.
Sub-exemption when the request is formulated in an insufficient manner			
Article 6.2-3 If an application is not sufficiently precise, the institution *shall ask the applicant to clarify* the application and shall *assist* the applicant in doing so, for example, by providing information on the use of the public registers of documents; in the event of an application relating to a *very long* document or to a *very large* number of documents, the institution concerned may confer with the applicant		Article 3.3 If a request is formulated in too general a manner, the public authority *shall ask the applicant to specify* the request and *shall assist* the applicant in doing so, e.g. by providing information on the use of the public registers referred to in paragraph 5(c).	

informally, with a view to finding a *fair solution*.			

(emphases by the author)

Generally, the scope and depth of sub-exemptions support higher level environmental democracy in harmony with the primary and human rights related laws of EU, compared to those of the Convention, which is an international piece of law, a result of (more) difficult compromises, however progressive by overall. We have within the EU an overriding public interest in disclosure, together with strict interpretation of the exemptions, contrary to the Convention's weaker „taking into account the public interest served by disclosure". Emissions shall be taken into consideration in the system of the Aarhus Convention exemptions, while in the EU, environmental emissions serve as a very strong presumption for establishing overriding public interest in disclosure (it „shall be deemed to exist where the information requested relates to emissions"). In the case when the authority/institution does not hold the requested environmental information it shall „as promptly as possible" take the arrangements, while the Aarhus Regulation determines 15 days for it, at least in respect to the EU system. The Documents Regulation has a stronger wording, too, for the separation of the non-secret part of the requested document than the Convention. Finally, in the case of 'manifestly unreasonable' request the Documents Regulation and the Directive contain more supportive provisions, while we have to note that the Convention's much more elaborated general capacity building chapter (in Article 3 and elsewhere) can balance this shortcoming.

Emissions into the environment as a restriction of refusal

(*nature, composition, quantity, date and place of foreseeable* emissions) As we have seen, emissions into the environment plays an important role when the authorities and the courts weigh the confronting interests of the business groups or other users of chemical substances potentially dangerous to the environment. In the majority of the cases, this is unambiguous, but in case of indirect emissions, emissions through certain products or activities with them, the question might arise if the given activity with a given substance qualifies as emission to the environment or not. In the Bayer case the Court interpreted the second subparagraph of Article 4(2) of the Directive as follows:

– 'emissions into the environment' within the meaning of that provision covers the release into the environment of products or substances such as plant protection products or biocides and substances contained in those products, to the extent that the release is *actual or foreseeable*

under *normal or realistic conditions* of use; 'information on emissions into the environment' means furthermore information concerning the *nature, composition, quantity, date and place* of the 'emissions into the environment' of those products or substances, and data concerning the *medium to long-term consequences* of those emissions on the environment, in particular information relating to *residues* in the environment following application of the product in question and studies on the measurement of the substance's *drift* during that application, whether the data comes from studies performed entirely or in part in the *field, or* from *laboratory* or *translocation studies*. (Case C-442/14)

Most importantly, the Court considers indirect and delayed emission as a significant emission into the environment in the meaning of the four (actually, three, directly) examined legal sources on access to information. Once this question was decided affirmatively, the Court further elaborated the details of operations with the substances in question that all might qualify as falling under the term emission or under the term environmental information in broader terms.

Overriding public interest

(*as combined with 'emissions into the environment'*) While the Documents Regulation lists several reasons that governments can use to refuse disclosure of information, it establishes that overriding public interest shall be taken into consideration. The Aarhus Regulation further reinforces this sub-exemption specifically for environmental information: 'an overriding public interest' in disclosure 'shall be deemed to exist where the information requested relates to emissions into the environment'. With this provision, the EU legislator established a stronger restriction to refusal of information compared to article 4 of the Aarhus Convention. In essence, it implies that if the information is about 'emissions into the environment', the disclosure is in essence obligatory. The CJEU in several cases had been called upon to adjudicate what is to be understood by 'emissions into the environment' related to a decision adopted by the European Commission to refuse information contained in documents about the substance glyphosate – as we have seen it previously from several angles. A Commission decision for refusal had been annulled by the General Court. On the same day of this judgment, the CJEU handed down a decision on a prejudicial question from a national court in which it also provided an interpretation of what is to be understood by 'emissions into the environment'. The term 'emissions' is not defined in the applicable Regulations, and a strict interpretation of this term took place in a line of earlier cases. Following the Bayer case and the so-called Glyphosate

cases[36] several decisions from the European Commission for the refusal of environmental information were found to be unlawful. More particularly, the CJEU urged that the refusal of a request for environmental information needs to be precisely and convincingly motivated and the fear of external pressure cannot be used to justify a general presumption of confidentiality with regard to the decision-making process by the Commission.

Interconnection with the separation sub-exemption

(*separation as a tool for balancing interests*) The Court warned in the Bayer case that the second subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as meaning, in the event of a request for access to information on emissions into the environment whose disclosure would adversely affect one of the interests referred to in points (a), (d), and (f) to (h) of the first subparagraph of Article 4(2) of that Directive, that only relevant data which may be extracted from the source of information concerning emissions into the environment must be disclosed where it is possible to separate those data from the other information contained in that source, which is for the referring court to assess. (Case C-442/14) The separation of the secret part of the requested information that made it ready to serve to the public was created originally in the interest of public access to information. In this case, however, the CJEU used this sub-exemption in favour of the polluter, considering and safeguarding its acceptable economic interests, without harming the right to environmental information (shield function).

Public interest test

(*public interest test match against double exemptions*) In the centre of the British Information Commissioner case stood a very controversial public health matter, the non-ionizing radiation of the mobile phone relays, spotted densely in modern cities. The public health authority operated a homepage 'Sitefinder' in order to inform the citizens about the approximate location of the relay stations, making them able to gauge the possible interconnections with single or multiple health symptoms. The Information Commissioner was hesitant to forward the exact location, capacity and other data about the towers for two separate reasons. One, the precise information on the mobile phone stations would endanger public security by allowing certain criminal groups to abuse it (possibly by making more difficult to trace them, or possibly

[36] Case C-673/13 P, European Commission v Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) [2016] CLI:EU:C:2016:889 (the Glyphosate appeal case); Whereas the case number of first instance is T-545/11, Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v European Commission [2013] ECLI:EU:T:2013:523.

liquidating a disturbing station for the time of a major crime). Second, it is a commercially sensitive data, whose publication might undermine the business interests of the mobile companies (possibly making the competition more transparent and shifting the achieved business advantages).

The CJEU started its decision with an important general statement:

"It should be noted that, as is apparent from the scheme of Directive 2003/4 and, in particular, from the second subparagraph of Article 4(2) thereof, and from recital 16 in the preamble thereto, the right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal."

However, from the grammatical formulation of the second sentence of the second subparagraph of Article 4(2) of the Directive that '[i]n every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal', in harmony with the opinion of the Advocate General, the Court arrived at the conclusion that this second subparagraph sets out the duty to weigh each of the grounds for refusal against the public interest served by disclosure of the information. If the sole purpose of the second sentence of the second subparagraph of Article 4(2) of Directive 2003/4 were to establish that duty, argued the Court, that sentence would be no more than a redundant and unnecessary repetition of the meaning conveyed by the first sentence of the same subparagraph.

As a conclusion, the Court observed that, when the interests involved are weighed, a number of separate interests may, cumulatively, militate the interest in favour of disclosure. The decision then sounds:

"Where a public authority holds environmental information or such information is held on its behalf, it may, when weighing the public interests served by disclosure against the interests served by refusal to disclose, in order to assess a request for that information to be made available to a natural or legal person, take into account cumulatively a number of the grounds for refusal set out in that provision." (Case C-71/10)

If we are coherent, we can turn this argument upside down: the interests of the millions of the citizens exposed to non-ionizing radiation from the mobile phone relays should be taken into consideration cumulatively, too. However, how painful it is, we should see (not accept) that the public health argument is indeed just 'one amongst the others'. Neither domestic authorities,

nor the CJEU can solve the painful contradictions of our modern life, in which we are victims of serious environmental harms and perpetrators, too. One can wonder if a meaningful majority of the citizens would be willing to abandon or seriously restrict their mobile phone use for the sake of being safer in this – never honestly revealed – potentially serious public health problem.

The balancing exercise shall be run individually

Holleben examines a dilemma formally similar to the one described in the previous point. In a case he cites it was questionable if Article 4 of Directive 2003/4 must be interpreted as meaning that the balancing exercise it prescribes between the public interest served by disclosure of environmental information and the specific interest served by a refusal to disclose must be carried out in each individual case submitted to the competent authorities, or that it can be defined in a general measure adopted by the national legislature. It is apparent from the very wording of Article 4 of Directive 2003/4 that the European Union legislature prescribed that the balancing of the interests involved has to be carried out in every particular case. Neither Article 14 of Directive 91/414 nor any other provision of Directive 2003/4 suggests that the balancing of the interests involved, as prescribed in Article 4 of Directive 2003/4, could be substituted by a measure other than an examination of those interests in each individual case. That does not, however, prevent the national legislature from determining, by a general provision, criteria to facilitate that comparative assessment of the interests involved, provided only that that provision does not dispense the competent authorities from actually carrying out a specific examination of each situation submitted to them in connection with a request for access to environmental information made on the basis of Directive 2003/4. (Holleben 2013, p. 579)

PROCEDURE OF REFUSAL

Documents Regulation, 2001	Aarhus Regulation, 2006	Environmental Information Directive, 2003	Aarhus Convention (1998, 2002)
Procedure of refusal			
Article 17.1	N/A	Article 3.4, tail, 4.5	Article 4.7

Each institution shall publish annually a *report* for the preceding year including the *number of cases in which the institution refused* to grant access to documents, the *reasons* for such refusals and the number of sensitive documents not recorded in the register.		Identical with the Aarhus Convention, (plus Article 3.5 contains detailed capacity building provisions, while less integrated than that of the Aarhus Convention.	In writing as a main rule; state the reasons; give information on review procedures.

(emphases by the author)

The Documents Regulation provides for an effective bureaucratic control mechanism: the authorities shall report annually on the refused cases and the reasons thereof. Needless to say, it might decrease the cases of frivolous, not well-based negative decisions on the requests for environmental information/documents.

COSTS

Documents Regulation, 2001	Aarhus Regulation, 2006	Environmental Information Directive, 2003	Aarhus Convention (1998, 2002)
Charge			
Article 10 Producing and sending the	N/A	Article 5	Article 4.8 A charge for supplying

copies may only be included in the total sum of the charge. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.		Identical with the Aarhus Convention.	information is *possible* but shall not exceed a reasonable amount; a **schedule of charges** shall be made available, together with the conditions of levying or waiver.

(emphases by the author)

We see again that the European law, by its nature, can be more progressive and detailed. While the Convention just hints that free information servicing is preferred, the Documents Regulation clearly restricts the reasons of charging the requester, as well as determines the cases when the servicing shall be totally free.

(*costs of maintaining a database vs. overhead costs*) The CJEU in the East Sussex Council case pointed out that Article 5(2) of the Directive must be interpreted as meaning that the charge for supplying a particular type of environmental information may not include any part of the cost of maintaining a database, such as that at issue in the main proceedings, used for that purpose by the public authority, but may include the overheads attributable to the time spent by the staff of the public authority on answering individual requests for information, properly taken into account in fixing the charge, provided that the total amount of the charge does not exceed a reasonable amount. (Case C-71/14)

(*separate legal remedy regarding reasonableness of costs*) Furthermore, Article 6 of the Directive must be interpreted as not precluding national legislation under which the reasonableness of a charge for supplying a particular type of environmental information is the subject only of limited administrative and judicial review as the case is in English law, provided that the review is carried out on the basis of objective elements. (Case C-71/14)

ACTIVE DISSEMINATION OF INFORMATION

The active form of access to environmental information has much less practical importance, we usually consider it secondary behind the passive form. Even if so, the four examined pieces of legislation deals with this topic in lengthy paragraphs. The most important of them are probably the rules on the acceptable minimum quality of environmental information and the so called super-active distribution that means quick and effective information servicing in emergency situations.

Documents Regulation, 2001	Aarhus Regulation, 2006	Environmental Information Directive, 2003	Aarhus Convention (1998, 2002)
Quality of environmental information			
Article 11 *To make citizens' rights under this Regulation effective*, each institution shall provide public access to *a register of documents*. Access to the register should be provided in electronic form. For each document the register shall contain a reference number (including, where applicable, the interinstitutional	Article 5 Identical with the Directive.	Article 8. 1-2 Identical with the Aarhus Convention, but more specifically refers to *timeliness, accuracy and comparability*; information on measurement procedures, including *methods* of analysis, sampling, and pre-treatment of samples are also included.	Article 5.1.a-b, 5.4 Public authorities shall possess and *update* environmental information which is *relevant* to their functions; mandatory systems shall be established so that there is an *adequate flow of information* to public authorities about proposed and existing activities which may significantly affect the environment; Parties shall, at regular intervals not

reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register.			exceeding three or four years, publish and disseminate a *national report* on the state of the environment.
Active information dissemination			
Article 12.1, 12.3 The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register; where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.	Article 4.2 Refers to Article 12(2) and (3) and in Article 13(1) and (2) of the Regulation; Identical with the Directive.	Article 7 Identical with the general responsibility in the Aarhus Convention but uses different adjectives to dissemination: *active and systematic*; the reports on the state of the environment; data or summaries of data derived from the *monitoring; authorisations* with a significant impact on the environment and environmental agreements or a reference to;	Article 5.2 Public authorities shall make environmental information available to the public in a *transparent and effective* manner inter alia: the *type and scope* of environmental information held by the relevant public authorities; they shall establish and maintain publicly accessible lists, registers or files; and *points of contact*.

		environmental impact studies and risk assessments.	
Super active information dissemination			
N/A	Article 8 (Cooperation) In the event of an imminent threat to human health, life or the environment, Community institutions and bodies shall, *upon request of public authorities* within the meaning of Directive 2003/4/EC, collaborate with and assist those public authorities in order to enable the latter to disseminate immediately and without delay to the public that might be affected all environmental information which could enable it to take measures to prevent or mitigate harm arising from the threat.	Article 7.4 Identical with the Aarhus Convention.	Article 5.1.c In the event of any *imminent threat* to human health or the environment, all information which could *enable* the public to take measures to prevent or mitigate harm; this shall be disseminated *immediately* and without delay to members of the public who may be *affected*.
Information in electronic format			

	Article 4 Identical with the Directive, adding references to Articles 11(1) and (2), and 12 of the Regulation; *databases shall be equipped with search aids* and other forms of software designed to assist the public in locating the information they require.	Article 7.1, 7.2 Identical with the Aarhus Convention but mentions computer telecommunication and electronic technology.	Article 5.3 Make environmental information *progressively available* in electronic databases, which are easily accessible to the public through public telecommunications networks; include: reports on the state of the environment; texts of relevant legislation, policies, plans and programmes and environmental agreements.
Information on legal issues			
Article 12.2 Legislative documents, which is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in	Article 4.2 Identical with the Directive; in addition to that: steps taken in proceedings for *infringements* of Community law from the stage of the reasoned	Article 7.2 Texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;	Article 5.5 Legislation and policy documents such as documents on *strategies, policies, programmes and action plans* relating to the environment, and *progress reports* on their

or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.	opinion pursuant to Article 226(1) of the Treaty.	policies, plans and programmes relating to the environment; progress reports about their implementation.	implementation, prepared at various levels of government; *international treaties, conventions and agreements* on environmental issues.
Direct business-community communication			
N/A	N/A	N/A	Article 5.6, 5.8 Parties shall *encourage* operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products; install voluntary *eco-labelling or eco-auditing* schemes; ensure sufficient *product information* in a manner which enables consumers to make informed

			environmental choices.

(emphases by the author)

Comparing the four legal sources in respect to the quality of environmental information, we have to start with the Documents Regulation that highlights the obvious truth that without good quality information public participation makes no sense and the citizens' right concerning access to information is practically null and void. The Aarhus Regulation follows and expands the pioneering Aarhus Convention text and adds to the important adjective ’relevant’ three more quality requirements: timeliness, accuracy and comparability. Further important contributions from the Regulations are their provisions on meta data: a very detailed register of the available documents (notably, it is included in the Convention too, but not as a feature of information quality but as a responsibility of active dissemination of information) and the methodology itself, by which the data were collected and processed. Regarding data collection a major innovation of the Convention was to ensure the adequate flow of data from the sources, primarily from the investors and operators of environmentally significant facilities.

The Convention defines the elements of the so called super-active information dissemination: where there is an imminent and serious threat situation, there such information shall be made available that enable the public to take measures to prevent or mitigate harm, and it shall be distributed immediately and with focussing on the members of the public who may be affected. The Aarhus Regulation, referring to the identical text of the Directive, determines an auxiliary role for the EU institutions in the cases of imminent threat, whenever the authorities of the Member States so request.

Active (without a request) distribution of environmental information shall be transparent and effective according to the Convention and active and systematic according to the Directive. These legal sources need to lead the practice of the European authorities together. The Directive follows its line concerning meta data, direct access to monitoring and environmental impact studies and risk assessments shall be ensured (the latter elements imported from the definition of environmental information). The Documents and the Aarhus Regulations’ important vision is a data system, in which the EU citizens can have a search in a register and when they found what they were looking for, with one click the relevant documents become directly accessible. Roughly 20 years ago it was already to be seen that the Internet and the Age of Information will overwhelm our culture soon. That foretelling is reflected in the Conventions phrase ’progressively available’.

Finally, all the four legislators were aware that access to information is part of a larger system of public participation and from this angle, it is of primary importance that the members and associations of the public get quality information on the relevant legal materials. They should have a holistic picture on the State's political and policy goals (plans, policies, programs, strategies etc.) and on the facts about the actual implementation of them. Furthermore, national environmental administrations are more and more parts of regional and global treaties, conventions and agreements and it is more than beneficial if the public has a close eye on the everyday domestic fulfilment of the progressive declarations on these international fora.

Direct communication between business groups and their surrounding communities or the wider public, including environmental groups is not missing from the EU law either, but rules, for instance referring to eco-labelling or eco-auditing are positioned elsewhere in the system of environmental law, as well as product information that belongs to the wider, but overlapping field of consumer protection law.

(*active information dissemination in case of dangerous substances*) In the FDC product information case, a 'shield' type of case, the Court pointed out that in connection with food safety issues, the danger of certain substances falling under the scope of the REACH, might entail active information distribution responsibilities, too. This request for a preliminary ruling by the Conseil d'État (France) concerned the interpretation of Article 7(2) and 33 of Regulation 1907/2006 (REACH). Those provisions make it obligatory to provide information on the presence of a dangerous substance of very high concern in a concentration above a 0.1% threshold in articles. The main question was whether this obligation only covered products as a whole (complex products), or also individual products with individual components crossing the threshold. The CJEU held that the definition of an 'article' is applicable to any object meeting the criteria in Article 3(3) of REACH, and that there is no need to draw a distinction between articles incorporated as a component of a complex product and articles present in an isolated manner.

In relation to Article 7(2) REACH, the CJEU also clarified that producers of articles have a duty to notify substances of very high concern that are present in concentrations above 0.1% of the weight in articles that they make or assemble but they are not required to notify the presence of such substances in articles produced by a third party that they use. Importers of products made up of more than one article, on the other hand, must determine for each article, whether a substance of very high concern is present in a concentration over 0.1%. Finally, in relation to the information duty under article 33 of REACH, the CJEU held that the supplier of a product,

of which one or more constituent articles contains a substance of very high concern in a concentration above 0.1%, must inform the recipient and, on request, the consumer, of the presence of that substance by providing them, at a minimum, with the name of the substance in question. (C-106/14)

This case points out that similarly to the passive (upon request) information servicing, sectoral environmental and neighbouring fields of law might play important role, and these specific laws should be read together with the procedural environmental laws.

(*active information distribution in physical planning of settlements*) Urban planning law, another important neighbouring field of environmental law, is an important branch of constitutional-administrative laws that contains active information dissemination responsibilities by the planning authorities/municipality councils. Notably, in principle, the reasons of refusal of an information request apply mutatis mutandis in case of active information dissemination instances, too. In a dispute between, on one hand, Mr. Križan and 43 other residents of the town of Pezinok, as well as that town, and, on the other hand, the Slovenská Inšpekcia životného prostredia (Slovak Environment Inspection) concerning the lawfulness of decisions authorising the construction and operation of a landfill site, the applicants initially invoked the incomplete nature of the application for a permit, since it did not include the urban planning decision required under the Slovak Law No. 245/2003, which transposed the IPPC Directive (96/61/EC). Furthermore, the applicant challenged the non-publication of that urban planning decision that had happened on the alleged ground that it constituted confidential commercial information.

After the Inšpekcia rejected that action, the applicants appealed to the Najvyšší súd Slovenskej republiky (Supreme Court of Slovakia) which referred several questions to the CJEU for a preliminary ruling, concerning inter alia, the interpretation of Directive 96/61/EC, as amended by Regulation (EC) No. 166/2006. The national supreme court asked the CJEU whether the public concerned should have access, from the beginning of the authorisation procedure for a landfill site, to the urban planning decision on the location of that installation and whether the refusal to make that decision available to the public could be justified by relying on the protection of the confidentiality of commercial or industrial information.

The Court held that Directive 96/61/EC concerning integrated pollution prevention and control must be interpreted as meaning that it does not allow the competent national authorities to refuse the public concerned any access, even partial, to a decision by which a public authority authorises, having regard to the applicable urban planning rules, the location of an installation

which falls within the scope of that Directive, by relying on the protection of the confidentiality of commercial or industrial information provided for by national or European Union law to protect a legitimate economic interest, taking account of, inter alia, the importance of the location of one or another of the activities referred to in Directive 96/61/EC. Even if certain elements included in the grounds for an urban planning decision may contain confidential commercial or industrial information, the protection of the confidentiality of such information cannot be invoked, in breach of Article 4(4) of Directive 2003/4/EC, to refuse the public concerned any access, even partial, to the urban planning decision concerning the location of the installation at issue in this case (paragraphs 82, 83, 91, operative part 2). (C-416/10)

RIGHT OF ACCESS TO ENVIRONMENTAL INFORMATION HELD BY THE EU

Even if working on domestic level issues, environmental organisations, local communities and private persons might have access to environmental documents easier through European institutions than from their national authorities. Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) applied to the Commission, on the basis of both Regulation (EC) No. 1049/2001 and Regulation (EC) No. 1367/2006, for access to several documents relating to the first authorisation of the placing of glyphosate on the market as an active substance, granted under Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market. In 2011, the Secretary General of the Commission granted access to the draft report drawn up by the Federal Republic of Germany, with the exception of volume 4 thereof, which the German authorities refused to disclose. The Secretary General of the Commission considered, inter alia, that there was no overriding public interest, within the meaning of Article 6(1) of Regulation (EC) No. 1367/2006, justifying the disclosure of that document and that it was apparent from the procedure by which glyphosate had been included in Annex I to Directive 91/414 that the requirements laid down by Regulation (EC) No. 1367/2006 concerning public disclosure of information on the environmental effects of that substance had been taken into account, with the result that the protection of the interests of the manufacturers of that substance had to prevail.

The General Court upheld the action for annulment brought by Greenpeace Nederland and PAN Europe against that decision, on the ground, inter alia, that the information in respect of which disclosure was sought related to emissions into the environment within the meaning of

the first sentence of Article 6(1) of Regulation (EC) No. 1367/2006. The European Commission brought an appeal against the General Court's judgment before the Court of Justice. In its judgment, which set aside the judgment under appeal, the Court held that the concept of 'information [which] relates to emissions into the environment' within the meaning of the first sentence of Article 6(1) of Regulation (EC) No. 1367/2006 may not be interpreted restrictively. Regulation (EC) No. 1049/2001 is intended, as is apparent from recital 4 and Article 1 thereof, to give the fullest possible effect to the right of public access to documents of the institutions. Likewise, Regulation (EC) No. 1367/2006 aims, as provided for in Article 1 thereof, to ensure the widest possible systematic availability and dissemination of the environmental information held by the institutions and bodies of the European Union. It is only in so far as they derogate from the principle of the widest possible public access to documents of the institutions that exceptions to that principle, in particular those provided for in Article 4 of Regulation (EC) No. 1049/2001, must be interpreted and applied strictly. The need for such a restrictive interpretation, moreover, was confirmed by recital 15 of Regulation (EC) No. 1367/2006. On the other hand, by establishing a presumption that the disclosure of information which relates to emissions into the environment, with the exception of information relating to investigations, is deemed to be in the overriding public interest, compared with the interest in protecting the commercial interests of a particular natural or legal person, with the result that the protection of those commercial interests may not be invoked to preclude the disclosure of that information, the first sentence of Article 6(1) of Regulation (EC) No. 1367/2006 derogates from the rule requiring the weighing up of the interests laid down in Article 4(2) of Regulation (EC) No. 1049/2001. Nonetheless, the first sentence of Article 6(1) thus allows actual implementation of the principle that the public should have the widest possible access to information held by the institutions and bodies of the European Union, with the result that a narrow interpretation of that provision cannot be justified (paragraphs 51-54).

The Court noted, however, in concluding that the judgment under appeal should be set aside, that that concept may not, in any event, include information containing any kind of link, even indirect, to emissions into the environment. If that concept were interpreted as covering such information, it would to a large extent deprive the concept of 'environmental information' as defined in Article 2(1)(d) of Regulation (EC) No. 1367/2006 of any meaning. Such an interpretation would deprive of any practical effect the possibility, laid down in the first indent of Article 4(2) of Regulation (EC) No. 1049/2001, for the institutions to refuse to disclose environmental information on the ground, inter alia, that such disclosure would have an adverse effect on the protection of the commercial interests of a particular natural or legal person and would jeopardise the balance which the EU legislature intended to maintain between the

objective of transparency and the protection of those interests. It would also constitute a disproportionate interference with the protection of business secrecy ensured by Article 339 TFEU (paragraph 81). (C-673/13)

Closing remarks

(*tiered legal arguments - a chance in the courtroom*) Such a quadruple legal basis that access to environmental information has in Europe, together with a rich collection of prestigious court cases we have seen in this short survey, is goldmine: one can carve out the best version of provisions for each problem of his or her access to environmental information case. The legal basis keeps broadening, the so-called neighbouring fields of administrative law breed newer and newer versions of access to information of environmental relevance, see for instance a very ambitious new example from the field of food safety.[37] These laws shall not deviate though from the general principles of transparency, good governance and democracy as they are solidly rooted in the international and European human right laws and the primary laws of the EU.

For practicing environmental lawyers, mixing legal references, bolstering our cases from several directions is a must. That is our major advantage in the courtroom, ahead of the well-trained but linear-thinking company lawyers. We might call it system approach or legal strategy not stemming from only the most specific provisions of law (titled as such) but from the problem itself.

Human rights references and references to the principles of environmental law (sustainable development) can lend an enhanced prestige to our arguments in an access to environmental information case and provides us a solid interpretation tool. General access to information laws on constitutional grounds can broaden the scope of the case and overcome those problems where someone questions the environmental nature of the information at hand. Such a tiered structure of arguments is not only giving us a certain amount of freedom of choice between different legal grounds but offers ample cross-interpretation opportunities, too.

---

[37] Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain and amending Regulations (EC) No. 178/2002, (EC) No. 1829/2003, (EC) No. 1831/2003, (EC) No. 2065/2003, (EC) No. 1935/2004, (EC) No. 1331/2008, (EC) No. 1107/2009, (EU) 2015/2283 and Directive 2001/18/EC

(*missing spots*) As we have pointed out in the Introduction part, environmental law itself and the law on access to environmental information within environmental law are very young disciplines. Consequently, there are no cases fitting each and every practical problem yet. That is exactly why the inherent system nature of the European and domestic environmental laws and the system approach detectable in CJEU decisions is vital. On the other hand, this initial map of decisions we have drawn here might serve as a useful tool for planning strategic litigation for public interest environmental lawyers within and outside the Justice and Environment network.

(*the time factor*) Access to environmental information is usually an urgent matter. We cannot use the information weeks, months, let alone years later, the plans develop quickly into environmental impact assessments and soon we learn that the construction permitting procedures are closed, too and the bulldozers have already started. That is why we need to have an instant package of the more or less holistic views on all possible aspects of such cases. If we can put on the table of negotiations clear arguments bolstered with quotations from the relevant case law of the CJEU we might convince the authorities, superior authorities, courts on several instances and the Government, at the end of the day. Let us be realistic: if the economic or political interests are mounting enough, these levels (even in some sad instances, all levels) might overlook the clear messages from the European Court. But this is not rule of law anymore.

Cases referred to

Case C-84/22 Judgment of the Court (Fourth Chamber) of 23 November 2023 (request for a preliminary ruling from the High Court (Ireland) – Ireland) – Right to Know CLG v An Taoiseach

Case C-61/21 Judgement of the Court (Grand Chamber) of 22 December 2022 JP v Ministre de la Transition écologique, Premier ministre,

Case C-619/19 (First Chamber) of 20 January 2021 (request for a preliminary ruling from the Bundesverwaltungsgericht – Germany) – Land Baden-Württemberg v D.R.

Case T-330/18 Order of the General Court (Second Chamber) of 8 May 2019; Armando Carvalho and Others v European Parliament and Council of the European Union

Case C-305/18 Judgment of the Court (Sixth Chamber) of 8 May 2019; Verdi Ambiente e Societa (VAS) – Aps Onlus, Movimento Legge Rifiuti Zero per l'Economia Circolare Aps v. Presidenza dei Consiglio dei Ministri et al.

Case T-329/17 Judgment of the General Court (Eighth Chamber) of 7 March 2019; Heidi Hautala and Others v European Food Safety Authority

Case C-323/17 Judgment of the Court (Seventh Chamber) of 12 April 2018; People Over Wind, Peter Sweetman v. Coillte Teoranta

Case C-160/17 Judgment of the Court (Second Chamber) of 7 June 2018 Raoul Thybaut and Others v Région wallonne

Case C-104/17 Judgment of the Court (Ninth Chamber) of 15 March 2018; SC Cali Esprou SRL v Administraţia Fondului pentru Mediu

Case C-57/16 Judgment of the Court (Grand Chamber) of 4 September 2018; ClientEarth v European Commission

C-387/15 and C-388/15 Judgment of the Court (Seventh Chamber) of 21 July 2016; Hilde Orleans and Others v Vlaams Gewest

Case C-243/15 Judgment of the Court (Grand Chamber) of 8 November 2016; Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín

Case C-213/15 Judgment of the Court (Grand Chamber) of 18 July 2017; European Commission v Patrick Breyer

Case C-60/15 Judgment of the Court of 13 July 2017, Saint-Gobain Glass Deutschland v Commission

Case T-716/14 Judgment of the General Court (Eighth Chamber) of 7 March 2019; Antony C. Tweedale v European Food Safety Authority

Case C-442/14 Judgment of the Court (Fifth Chamber) of 23 November 2016 (request for a preliminary ruling from the College van Beroep voor het bedrijfsleven – Netherlands) – Bayer CropScience SA-NV, Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden

Case C-106/14 Judgment of the Court (Third Chamber) of 09 September 2015 (request for preliminary ruling, Federation of businesses in the trade and distribution sector ("the FCD") and Federation of DIY and home improvement shops ("the FMB") v Ministry of Ecology, Sustainable Development and Energy of France

Case C-71/14 Judgment of the Court (Fifth Chamber) of 6 October 2015 (request for a preliminary ruling from the First-tier Tribunal (Information Rights) – United Kingdom) – East Sussex County Council v Information Commissioner

Case C-673/13 Judgment of the Court of 23 November 2016, Commission v Stichting Greenpeace Nederland and PAN Europe

Case C-615/13 Judgment of the Court (Second Chamber) of 16 July, 2015 (ClientEarth and Pesticide Action Network Europe (PAN Europe) v European Food Safety Authority (EFSA))

Case C-206/13 Judgment of the Court (Tenth Chamber), 6 March 2014; Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo

Case C-279/12 (Grand Chamber), 19 December 2013; Fish Legal and Emily Shirley v Information Commissioner and Others

Case T-545/11 Judgment of 08 October 2013; Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v European Commission

Case C-444/15 Judgment of the Court (Third Chamber) of 21 December 2016; Associazione Italia Nostra Onlus v Comune di Venezia and Others

Case C-515/11 Judgment of the Court (Second Chamber) of 18 July 2013 (request for a preliminary ruling from the Verwaltungsgericht Berlin – Germany) – Deutsche Umwelthilfe eV v Bundesrepublik Deutschland

Cases C-514/11 & C-605/11 Judgment of the Court of 14 November 2013, LPN and Finland v Commission

Case C-463/11 Judgment of the Court (Fourth Chamber), 18 April 2013; L v M (Request for a preliminary ruling from the Verwaltungsgerichtshof Baden-Württemberg)

Case T-331/11 Judgment of the Court of 12 September 2013; Besselink v. Council

Case C-41/11 udgment of the Court (Grand Chamber), 28 February 2012; Inter-Environnement Wallonie ASBL and Terre wallonne ASBL v Région wallonne

Case C-567/10 Judgment of the Court (Fourth Chamber), 22 March 2012; Inter-Environnement Bruxelles ASBL and Others v Région de Bruxelles-Capitale

Case C-416/10 Judgment of the Court (Grand Chamber) of 15 January 2013 Križan and Others

Case C-295/10 Judgment of the Court (Fourth Chamber) of 22 September 2011; Genovaitė Valčiukienė and Others v Pakruojo rajono savivaldybė and Other

Case C-71/10 Judgment of the Court (Third Chamber) of 28 July 2011 (reference for a preliminary ruling from the Supreme Court of the United Kingdom (United Kingdom) – Office of Communications v Information Commissioner

Case C-524/09 Reference for a preliminary ruling under Article 234 EC from the tribunal administratif de Paris (France), made by decision of 6 November 2009, received at the Court on 12 November 2009, in the proceedings Ville de Lyon v Caisse des dépôts et consignations

Case C-343/09 Judgment of the Court (Fourth Chamber) of 8 July 2010; Afton Chemical Limited v Secretary of State for Transport.

Case C-266/09 Reference for a preliminary ruling under Article 234 EC from the College van Beroep voor het bedrijfsleven (Netherlands), in the proceedings Stichting Natuur en Milieu, Vereniging Milieudefensie, Vereniging Goede Waar & Co. v College voor de toelating van gewasbeschermingsmiddelen en biociden, formerly College voor de toelating van bestrijdingsmiddelen

Case C-204/09 Reference for a preliminary ruling; Flachglas Torgau v Bundesrepublik Deutschland [2012]

Case C-263/08 Judgment of the Court (Second Chamber) of 15 October 2009; Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd

Cases C-105/09 & C-110/09 Judgment of the Court (Fourth Chamber) of 17 June 2010; Terre wallonne ASBL (C-105/09) and Inter-Environnement Wallonie ASBL (C-110/09) v Région wallonne

Case C-552/07 Judgment of the Court (Fourth Chamber) of 17 February 2009 (reference for a preliminary ruling from the Conseil d'État (France)) – Commune de Sausheim v Pierre Azelvandre

Case C-237/07 Judgment of the Court (Second Chamber) of 25 July 2008; Dieter Janecek v Freistaat Bayern

Case C-440/05 Judgment of the Court (Grand Chamber) of 23 October 2007; Commission of the European Communities v Council of the European Union (Ship Source Pollution)

Case T-264/04, Judgement of the Court (Court of First Instance) of 25 April 2007; WWF-EPP v. Council of the European Union

Case C-176/03 Judgment of the Court (Grand Chamber) of 13 September 2005; Commission of the European Communities v Council of the European Union (Environmental Crime)

Case C-127/02 Judgment of the Court (Grand Chamber) of 7 September 2004; Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij

Case C-236/01 Judgment of the Court of 9 September 2003; Monsanto Agricoltura Italia SpA and Others v Presidenza del Consiglio dei Ministri and Others

Case C-233/00 Judgment of the Court of 26 June 2003, Commission v France

Case C-513/99 Judgment of the Court of 17 September 2002; Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne

Case T-13/99 Judgment of the Court of First Instance (Third Chamber) of 11 September 2002; Pfizer Animal Health SA v Council of the European Union

Case C-293/97 Judgement of the Court of 29 April 1999, The Queen v. H. A. Standley and others

Case C-321/96 Judgment of the Court of 17 June 1998, Mecklenburg

Case C-157/96 Judgment of the Court of 5 May 1998; The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers' Union, David Burnett and Sons Ltd, R. S. and E. Wright Ltd, Anglo Beef Processors Ltd, United Kingdom Genetics, Wyjac Calves Ltd, International Traders Ferry Ltd, MFP International Ltd, Interstate Truck Rental Ltd and Vian Exports Ltd.

Case C-72/95 Judgment of the Court of 24 October 1996; Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland

Case 302/86 Judgment of the Court of 20 September 1988; Commission of the European Communities v Kingdom of Denmark (Danish Bottle)

Case 240/83 Judgment of the Court of 7 February 1985; Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)

Case C-51-76 Judgment of the Court of 1 February 1977; Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen

Document 62017CC0723 Opinion of Advocate General Kokott delivered on 28 February 2019.
Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer.

Document ECLI:EU:C:2022:359 Opinion of Advocate General Kokott delivered on 5 May 2022 in Case C-61/21, JP v Ministre de la Transition écologique, Premier ministre

Bibliography

Böhmann, Holger; Judge at the Federal Administrativ Court, Leipzig, Germany: Access to Environmental Information - A presentation of the recent CJEU case law Presentation at the meeting of the WG „Environment“ within AEAJ on 30 August 2018 in Salzburg

Colombo, Esmeralda: Principles of EU law in climate litigation; China-EU Law Journal, 2024

Esty, Daniel C. "Environmental Protection in the Information Age." New York University Law Review, vol. 79, no. 1, April 2004, HeinOnline

Fulop, Sandor: System behaviour of water and environmental law; Hungarian Journal of Hydrology, English edition, 2024/1, Budapest

Greenspan Bell, Ruth and Fulop, Sandor: Like Minds? Two Perspectives on International Environmental Law Review, May 2003

Hadjiyiann, Ioanna: The CJEU as the Gatekeeper of International Law: the Cases of WTO Law and the Aarhus Convention; British Institute of International and Comparative Law, 2021

Holleben, Horst von: Judgment of the General Court of the EU on Access to Information under Substance Law; EJRR 04|2013

Krommendijk, Jasper and Sanderink, Dirk: The role of fundamental rights in the environmental case law of the CJEU; European Law Open (2023)

Morvillo, Marta: The General Court Orders Disclosure of Glyphosate-related Scientific Studies: Tweedale, Hautala, and the Concept of Environmental Information in the Context of Plant Protection Products; European Journal of Risk Regulation, 10 (2019)

Papadaki, Maria, et al.: Effective enforcement of EU environmental law by individuals and NGOs; in: Proceedings of the 4th EMUNI Research Souk20017 - 18 April 2012

Peeters, Marjan: Judicial Enforcement of Environmental Democracy: a Critical Analysis of Case Law on Access to Environmental Information in the European Union; Chinese Journal of Environmental Law 4 (2020)

Preston, Brian J.: The effectiveness of the law in providing access to environmental justice: an introduction; in Martin, Paul; Bigdeli, Z. Sadeq; Daya-Winterbottom, Trevor; du Plessis, Willemien; Kennedy, Amanda (eds), "The Search for Environmental Justice" (Edward Elgar Publishing, 2015)

Rossi, Valentina: Government Transparency and the Right of Access to Information: Evolving International and European Standards and their Implementation in the Italian Legal System; (2019) https://www.sidi-isil.org/wp-content/uploads/2021/11/Rossi-IYIL-Vol.-28-pp-181-207.pdf

Sharman, Nicola: Objectives of Public Participation in International Environmental Decision-making; ; British Institute of International and Comparative Law; 2023. Published by Cambridge University Press

Aarhus Convention Access to Justice Task Force: Case collection (available at the Clearinghouse on the homepage of UNECE), 2015

Court of Justice of the European Union, Research and Documentation Directorate: Fact Sheet: Public Access to Environmental Information, December 2017

The World Bank: Governance and development; 30 April, 1992 Washington, DC http://documents.worldbank.org/curated/en/604951468739447676/Governance-and-development

Contact information:

author: dr. Sandor Fulop, PhD

organization: *Justice & Environment*

e-mail: info@justiceandenvironment.org

URL: www.justiceandenvironment.org

Funded by the European Union.

The Work Plan of J&E has received funding from the European Union through its LIFE NGO Grant funding scheme. The sole responsibility for the present document lies with the author and the European Commission is not responsible for any use that may be made of the information contained therein.