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elni REVIEW

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Editorial

On 25 September 2015, in New York, 193 Heads of State and Government adopted a resolution entitled 'Transforming our world: the 2030 Agenda for Sustainable Development' in the United Nations General Assembly. This Resolution defines 17 Sustainable Development Goals as well as 169 targets and can be considered the final integration of ecological, economic and social Sustainable Development objectives, supported by a separately established financing framework, the Addis Ababa Action Agenda, as well as a transparent and inclusive reporting system to observe progress as to the achievement of its goals and targets.

elni Review puts the spotlight on the current state of play as regards legal arrangements and implementation in respect to some of the Resolution's major objectives. Among these is the target to, "by 2030, combat desertification, restore degraded land and soil, including land affected by desertification, drought and floods, and strive to achieve a land degradation-neutral world". Measured by this benchmark, and having in mind that 2015 was the "International Year of Soils", researchers from the *Ecologic Institut* (Berlin) analyse the national and international implementation of the "land degradation neutral world" target.

The impact of water quality, as well as quantity of quality water, on Sustainability Development is inter alia reflected in Goals 6 and 14 of the Agenda 2030. In addition, according to certain EU Water Framework Directive objectives, European waters have to achieve "good ecological and chemical status" by 2015. Against this background, experts from the *EU Network for Implementation and Enforcement of Environmental Law (IMPEL)* assess perspectives and actions to improve water quality in Europe.

Another sustainable development hotspot is the climate, which is addressed inter alia in the Resolution's 13th Goal. Amongst the most prominent instruments to combat climate change are emissions trading systems (ETS). *Jonathan Verschuuren* and *Floor Fleurke* examine the enforcement of the EU ETS in the Member States.

Furthermore, *Anaïs Berthier* questions access to the transposition of EU environmental law by Member States by analysing a ruling of the EU General Court in case C-612/13P (ClientEarth v Commission).

This issue's *Recent developments* section provides an update on the TTIP-related ISDS discussions, a conference report on how the perception of chances and risks affect innovations for sustainability as well as a statement on environmental impact assessment law in Turkey.

Julian Schenten/Gerhard Roller

October 2015

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Access to the transposition of EU environmental law by Member States: Only if no infringement proceedings initiated

Anaïs Berthier

1 Introduction

Ensuring a better implementation and enforcement of EU environmental law by Member States is one of the well-established commitments of the European Commission. One reason for this is the general consensus about the fact that the non-implementation of environmental law has huge repercussions, not only on the environment itself but on public health as well as the economy. However, Case C-612/13P[1] shows that the way in which the Commission approaches this commitment is in contradiction with its goal.

The Applicant in this case, ClientEarth, an environmental NGO, sought to access 'conformity-checking studies' carried out by consultants at the request of the European Commission on the way in which Member States transpose EU directives in the environmental field. These studies compare the provisions of the relevant directive with those of the national legislation, transposing them in order to conclude whether the State is in compliance or not. The directives (the implementation of which were in question) concern the quality of drinking and bathing water, access to information and public participation in environmental matters, hazardous waste, waste of electric and electronic equipment, batteries and accumulators, and the management of waste from extractive industry. All these issues affect the life of every single person living in the EU and beyond.

The Commission divided the documents covered by the confirmatory application into two groups. The first group consisted of 22 of the studies and 8 action plans. The Commission granted ClientEarth full access to those documents, except for the names of the authors of some of the studies. The second group consisted of 41 of the studies (the 'Studies at Issue'). The Commission granted ClientEarth partial access to those studies. The Commission refused to disclose the legal analysis of the transposing measures and the conclusions reached on the compliance of the Member States, and an annex containing a 'Table of concordance' between the legislation of the Member State concerned and the relevant European Union law. The Commission further divided the Studies at Issue into two categories. The first category comprised one study where the assessment and dialogue with the Member State concerned on the implementation of European Union law had recently begun. The second category comprised 40 studies on which dialogue with the Member States concerned had progressed further.

The Commission stated that the withheld parts of the Studies at Issue were covered by the exception to the right of access to documents provided for in the third indent of Article 4(2) of Regulation 1049/2001[2], with regard to the protection of the purpose of investigations. Secondly, the Commission stated that the withheld parts of the Studies at Issue were also covered by the exception to the right of access to documents provided for in the first subparagraph of Article 4(3) of Regulation 1049/2001, concerning the protection of the decision-making process of the institutions. The Commission considered that there was no overriding public interest at stake and thus maintained its refusal to transmit part of the Studies at Issues.

The General Court ruled that the Commission was entitled to rely on the exception of the third indent of Article 4(2) to refuse disclosure of the Studies at Issue, applying the following reasoning: (i) the Studies at Issue were "*part of an investigation conducted by the Commission*", whose purpose, in the framework of infringement proceedings, is "*to induce the Member State to comply voluntarily with the requirements of the Treaty or, when appropriate, to give it the opportunity to justify its position*" (par. 50-52), (ii) the Commission is entitled to maintain "*the confidentiality of documents assembled in the course of an investigation relating to infringement proceedings where their disclosure might undermine the climate of trust which must exist between the Commission and the Member State concerned […]*" (para 60). The studies were covered by a presumption of confidentiality.

The General Court also rejected the applicability of the Aarhus Convention. The General Court finally dismissed the Appellant's claim that the Commission violated Articles 4(2) *in fine* of Regulation 1049/2001, due to the existence of an overriding public interest on the grounds that the Appellant has not shown, having regard to the particular circumstances of the cases, "*any issue of particularly pressing concern*" but rather relies upon "*non-specific considerations*" which do not constitute an overriding public interest (para 109).

The Applicant put forward three grounds of appeal. The first one argued that the General Court erred in

1 C-612/13P, ClientEarth v Commission, ECLI:EU:C:2015:486.

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

law in its interpretation of the third indent of Article 4(2) of Regulation 1049/2001. This argument was two-fold. The first part concerned an erroneous interpretation of the concept of 'investigations' within the meaning of Article 4(2). The Applicant argued that the concept presupposes the existence of a formal decision by the Commission as a college and that no such decision had been taken to order such studies. The second part was about the erroneous interpretation of the concept of "*undermining the protection of the purpose of investigations*" within the meaning of the third indent of Article 4(2). In the second part of the appeal, the applicant argued that the General Court erred in law in ruling that the third indent of Article 4(2) of Regulation 1049/2001 was compatible with Article 4(1) and (4)(c) of the Aarhus Convention. In the third part of the appeal, it was argued that the General Court erred in its interpretation of the overriding public interest test for the purpose of the last clause of Article 4(2) of Regulation 1049/2001.

This article analyses the ruling of the Court of Justice and addresses, in the first part, the legal reasoning behind the refusal from the EU courts to apply the Aarhus Convention to EU institutions. The second part elaborates on the concept of investigation under Article 4(2) third indent of Regulation 1049/2001 and the limits the Court placed on the presumption of confidentiality established by previous case-law for documents pertaining to administrative files.

2 The Aarhus Convention, a two-speed convention?

The issue at stake is whether the EU institution dealing with a request for information, such as the Commission, must comply with Articles 4(1) and 4(4) of the Aarhus Convention, or whether it may rely upon Regulations No. 1367/2006 and 1049/2001 to justify a refusal, without consideration of the compatibility of such refusal with the provisions of the Aarhus Convention. ClientEarth's claim is that the Commission violated Articles 4(1), (2) and (4) of the Aarhus Convention, to the extent that those provisions do not allow any exception to the right of access to documents intended to protect the purpose of investigations other than those of a criminal or disciplinary nature[3]. The possibility of keeping information confidential only within criminal and disciplinary enquiries seems justified as they are conducted against individuals, not public authorities or institutions. Investigations conducted within infringement proceedings are neither criminal nor disciplinary; this exception should not apply in this case. The parties to the Convention may not depart from the exceptions provided by the Convention. As stated in the Convention's implementation guide: "*Paragraphs 3 and 4 outline the only circumstances under which exceptions to the general rule apply*".[4]

2.1 The General Court's ruling

According to the General Court, Articles 4(1) and 4(4) of the Aarhus Convention (and more generally the Aarhus Convention in its totality) "*cannot be seen, as regards its content, to be unconditional and sufficiently precise (…)*"[5]. This position is based on the following reasoning. Under Articles 4(1) and 4(4) of the Aarhus Convention, together, "*[a]ll parties to that convention have a wide discretion in respect of how to organize the way in which environmental information requested from public authorities is made available to the public*"[6]. Article 4(4)(c) is not sufficiently precise to be directly applicable, at least in relation to an institution of regional economic integration such as the European Union[7]. The Aarhus Convention (in particular Article 4(4)(c) thereof) is "*manifestly designed to be applicable principally to the authorities of the state which are contracting parties thereto and uses concepts appropriate to them […]. The convention does not take into account the specific features which are characteristics of institutions of regional economic integration […]*"[8]. "*There is nothing in Article 4(4)(c), or in the other provisions of the Aarhus Convention, which makes it possible to interpret the concept used in that provision and to determine whether an investigation relating to infringement proceedings can be covered by such concept*"[9].

The Appellant argued that the General Court erroneously interpreted and misapplied Article 4(4)(c) of the Aarhus Convention in stretching the scope of the exception beyond any reasonable limits and consequently breached its obligation to interpret the grounds for refusal to disclose information in a restrictive way in accordance with Article 4(4) last indent of the Convention and settled case-law. The General Court erred in holding that, as regards the grounds for refusal of a request for access to environmental information, the Aarhus Convention could not be seen as unconditional and sufficiently precise within the meaning of the relevant case-law. Consequently, the General Court misapplied the law as applicable to the Commission, and in particular the Commission's obligation to perform and interpret in good faith an international con-

3 Article 4(4)(c) of the Aarhus Convention provides that "*A request for environmental information may be refused if the disclosure would adversely affect: The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature*". Article 4(2) third indent of Regulation 1049/2001 provides that "*The institutions shall refuse access to a document where disclosure would undermine the protection of: the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure*".

4 *The Aarhus Convention, an implementation guide*, United Nations, p.53.
5 Para. 92.
6 Para. 94.
7 Para. 95.
8 Para. 96.
9 Para. 96.

vention in accordance with Articles 26, 27 and 31 of the Vienna Convention[10] and Article 216(2) TFEU.

2.2 The Court of Justice's ruling: Is the Aarhus Convention applicable to EU institutions?

The Court first recalled that under Article 216(2) TFEU, international agreements concluded by the Union are binding upon the institutions of the Union and consequently prevail over the acts laid down by those institutions[11]. It recalled the settled case-law of the Court that the validity of an act of the Union may be affected by the incompatibility of that act with such rules of international law[12]. The EU courts could undertake the examination of the alleged incompatibility of an act of the EU with the provisions of an international agreement to which the UE is a party only when (i) the nature and the broad logic of that agreement do not preclude it and (ii) those provisions appear, as regards their content, to be unconditional and sufficiently precise[13]. It then referred to the *Fediol* and *Nakajima*[14] cases according to which where the EU intends to implement a particular obligation assumed under the agreements concluded in the context of the World Trade Organisation (WTO) or where the EU legal measures refers expressly to specific provisions of those agreements, it is for the Court, when appropriate, to review the legality of the Union measure at issue in the light of the WTO rules, notwithstanding the direct applicability of the provisions at issue.

On this last point, the Court found that there was no need to assess whether this case-law was applicable in the present case since Regulation 1049/2001 and in particular Article 4(2) third indent thereof, makes no express reference to the Aarhus Convention and does not implement a particular obligation stemming from the convention.

Not only does the reasoning of the Court unduly limit the application of the *Fediol* and *Nakajima* cases, it also wrongly assesses the way in which the Aarhus Convention is implemented at EU level. It is correct that Regulation 1367/2006 implements the Convention and applies it to EU institutions[15]. However, Article 3 of Regulation 1367/2006 provides that Regulation 1049/2001 shall apply to any request for access to environmental information held by Community institutions. In fact, Regulation 1049/2001 is therefore the legislation that applies the Convention provisions on access to information to EU institutions. The applicant claimed that the simple reference in Regulation 1367/2006 to Regulation 1049/2001 does not ensure the correct application of the Aarhus Convention as not all provisions of Regulation 1049/2001, such as Article 4(2) third indent, complies with the Convention. The right of access to environmental information is therefore more limited in breach of the Convention.

Moreover, Article 2(6) of Regulation 1049/2001 clearly indicates that "*[t]his Regulation shall be without prejudice to rights of public access to documents held by institutions which might follow from instruments of international law*". Regulation 1049/2001 was adopted after the EU signed the Convention which makes the Convention one of the instruments of international law that the Regulation must comply with. These two crucial elements have been completely overlooked by the Court. The ruling of the Court therefore avoids taking a decision on whether EU law governing the right to access information pertaining to investigations complies with the Aarhus Convention and in particular Article 4(4)(c). One can discuss whether *Nakajima* and *Fediol* were the relevant cases upon which to rely. Still the Court should have taken this opportunity to analyse other legal routes to at least allow it to assess whether there was a breach of international law. The lapidary ruling on that point falls short of providing a convincing decision and fails to clarify the situation with regard to the competence of the EU courts to examine the compliance of EU law with international conventions ratified by the EU. This ruling is in the same vein as *Vereniging Milieudefensie* in which the Court had also avoided examining the compatibility of Regulation 1367/2006 with the access to justice provisions of the Aarhus Convention. The Court then found that Article 4(1) and 4(c) of the Aarhus Convention were not unconditional and sufficiently precise to be relied upon to assess the legality of the third indent of Article 4(2) of Regulation 1049/2001.

The Court explained that the reference in Article 4(1) of the Convention to national legislation[16] indicates that that convention was manifestly designed with the national legal orders in mind and not the specific legal features of institutions of regional economic integration such as the EU, even when those institutions can sign and accede to the Aarhus Convention under Article 17 and 19 thereof[17]. The Court then found that it is for that reason that the Community, when approving the Aarhus Convention, made a declaration that "*the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Conven-*

10 Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969.
11 Para. 33.
12 Para. 34.
13 Para. 35.
14 Para. 36.
15 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, JO L 264/13.
16 Article 4(1) of the Aarhus Convention provides that "*Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation*, [emphasis added]..".
17 Para. 40.

tion". The Court concluded that neither the reference in Article 4(4)(c) of the Convention to enquiries of a criminal or disciplinary nature nor the obligation laid down in the second paragraph of Article 4(4) of the convention to interpret in a restrictive way the grounds for refusal of access can be understood as imposing a precise obligation on the EU legislature. Finally, the Court rejected that those provisions could infer "*a prohibition on giving to the concept of 'enquiry' a meaning which takes account of the specific features of the Union, and in particular the task incumbent on the Commission to investigate any failures of Member States to fulfil their obligations which might adversely affect the correct application of the Treaties and the EU rules adopted pursuant to the Treaties*"[18].

This holding constitutes an erroneous application of the Aarhus Convention. Article 2(d) of the Convention provides a definition of 'public authority' which is the entity subject to all the provisions of the Convention. Article 2(d) expressly includes EU institutions in referring to "*[t]he institutions of any regional economic integration organization referred to in article 17 which is a party to the Convention.*" Article 17 of the Convention provides that "*[t]his Convention shall be open for signature [...] by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.*" EU institutions are thus subject to all the provisions of the Convention without distinction or exception from the other parties to the Convention. Further, the EU (at the time, the European Community) participated -- along with the other parties -- in the negotiation of the Aarhus Convention and could have therefore made a reservation as to the application of the exceptions to the right of access to information provisions of the Convention if it had considered that its "*specific features*" did not allow the same application as for the States parties. However, no reservation was made by the EU on that point. Yet, reservations can only be made "*when signing, ratifying, accepting, approving or acceding to a treaty*" in accordance with Article 19 of the Vienna Convention. Article 27 of the Vienna Convention also provides that a party to an international treaty "*may not invoke the provisions of its internal law as justification for its failure to perform a treaty*." Specific features are therefore not accepted as a justification for non-application of a convention.

The declaration made by the Community at the time of ratification of the Convention is not specific enough to overcome that requirement. Quite the opposite, it proves exactly the contrary. This declaration explicitly states that the Aarhus Convention was to apply not only to the Member States but to the EU institutions: "*it was felt important not only to sign up to the Convention at Community level but also to cover its own institutions, alongside national public authorities*". According to the Court's interpretation, the declaration would allow the EU institutions to decide on a discretionary basis which provisions of the Convention apply to them and would amount to providing the EU with a blanket exemption from certain provisions of the Convention.

This reasoning puts into question the applicability of international conventions to the EU as the Court creates an 'à la carte' option for the EU institutions. Yet, there should be no differentiation in the application of the Convention among the parties. Article 216(2) TFEU and Article 26 of the Vienna Convention prohibit such an interpretation.

2.2.1 Reference to national legislation

Considering that the reference to "*the framework of national legislation*" deprives Article 4 of the Aarhus Convention of its unconditional and precise character is quite overarching and makes the scope of implementation of international conventions rather limited.

The requirements provided by Articles 3 and 4(1) of the Aarhus Convention are standard clauses in international conventions to ensure the compatibility of national law with the provisions of the international convention in question. Similarly, Article 3 of the Aarhus Convention cannot be construed as allowing the parties to the Convention to subject application of the conditions under which public authorities and EU institutions must disclose environmental information to discretionary limitations which would have the effect of rendering Article 4 meaningless and depriving it of any practical effect. Nor can it be construed as precluding Article 4(4)(c) from being directly applicable. The fact that Article 3 provides that parties need to adopt measures does not make the applicability of Article 4(4), in its implementation or effects, subject to adoption of any subsequent measure. The role which Article 3 confers on these measures is to facilitate compliance with the Convention provisions. It cannot be regarded as limiting the immediate application of the access to information rights and limits provided by the Convention.

2.2.2 The preciseness and specificity of Article 4 of the Aarhus Convention

Article 4 of the Aarhus Convention is one of the more specific and precise provision of the Convention. Indeed, it does not leave any room for manoeuvre to the State Parties and must be applied as it is. Moreover, Article 4(4)(c) is just as precise and specific -- if not more so -- than Article 4(2) third indent of Regulation 1049/2001. Article 4(2) of the Convention specifies the time-limit within which the information must be

18 Para. 42.

disclosed ("*as soon as possible and at the latest within one month*") and the possibility of extending the deadline ("*up to two months*") under certain specific conditions ("*unless the volume and the complexity of the information justify an extension*"), and this in accordance with the obligation to provide reasons justifying a refusal. These provisions are therefore just as specific and precise as Articles 7 and 8 of Regulation 1049/2001. Article 4(4)(c) is even more specific and precise than Article 4(2) third indent of Regulation 1049/2001 since it provides for the types of enquiries that can justify a decision to withhold information, whereas Article 4(2) third indent only applies to 'investigations' in general. The specificity and precise character of Article 4 of the Aarhus Convention can therefore not be validly questioned.

3 An overly broad definition of 'investigations' but a limited scope of the presumption of confidentiality

3.1 Everything is everything and everything is an investigation

Regarding the first part of the appeal, the Court started by examining whether the contested studies fell within the scope of an investigation within the meaning of Article 4(2) of Regulation 1049/2001. The Court found that the studies are among the instruments available to the Commission to oversee the application of EU law in the context of the obligation under Article 17(1) TEU and in order to decide when it is necessary to initiate infringement proceedings against those Member States found to be in breach of EU law. The studies fell consequently within the scope of the concept of 'investigations' within the meaning of the third indent of Article 4(2) of Regulation 1049/2001.

The concept of investigation is thus given an overly broad definition or rather no definition at all. No formal decision need to be taken by the Commission as a whole or even at a certain level of hierarchy. No formal procedure is foreseen, as long as the Commission is researching evidence and checking facts, it is conducting an investigation. The General Court in the *Schlyter* case had already ruled in the same vein that "*the concept of investigation [under Art. 4 of Regulation 1049/2001] covers all research carried out by a competent authority in order to establish than an infringement has taken place as well as the procedure by which an administrative body gathers and checks certain facts before making a decision*".[19]

First, the Court's interpretation lacks grounds. When in the field of competition and state aid law, the relevant regulations provide for specific rules under which the Commission is allowed to investigate companies' practices[20]. There is no similar regulation allowing the Commission to carry out investigations in the environmental field. Article 258 TFEU, which allows the Commission to initiate infringement proceedings, does not set out an investigation procedure, nor does it even mention the word 'investigation'. The two contexts are therefore totally different.

Secondly, the Court's interpretation stretches the applicability of the exception to the right of access to information provided under Article 4(2) third indent of Regulation 1049/2001 beyond reason. This will in turn allow the Commission and other EU institutions to withhold even more information that should be in the public domain.

3.2 The presumption of confidentiality limited to ongoing files

The Court went on to determine whether the presumption of confidentiality had been correctly applied by the Commission and the General Court. It asserted that the documents in a file relating to the pre-litigation stage of infringement proceedings constitute a single category of documents and no distinction should be made on the basis of the type of documents or on the author of the documents. It then relied on the judgment in *LPN and Finland v Commission* (C-514-11P and C-605/11P, EU/C/2013/738, paragraphs 52 to 65) to find that the Commission was entitled to refuse full disclosure of the contested studies which, at the time by which the Commission had replied to the request for access, had already led to sending a letter of formal notice to a Member State, under Article 258 TFEU. The Court held that at that stage the studies had consequently been placed in a file relating to the pre-litigation stage of infringement proceedings. As a consequence, disclosing them would have likely disturbed the nature and progress of that stage of proceedings, by making more difficult both the process of negotiation between the Commission and the Member State and the pursuit of an amicable agreement whereby the alleged infringement could be brought to an end. The Commission was therefore justified in considering that such full disclosure would have undermined the protection of the purpose of investigations.[21]

However, for the other studies which had not been followed by the sending of a letter of formal notice, the Court decided differently. It recalled that in all the cases in which the Court had recognized that documents enjoyed a general presumption of confidentiality, the refusal of access by the Commission related to a set of documents which were clearly defined by the

19 Case T-402/12, *Schlyter v Commission*, para. 53, ECLI:EU:T:2015 :2009.

20 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty, Article 17. Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Chapter III. Council Regulation No 645/1999 of 22 March 1999, laying down detailed rules for the application of Article 108 TFEU, Article 6.

21 Para. 72.

fact that they all belonged to a file relating to ongoing administrative or judicial proceedings. The Court concluded that this was not the case of the studies at issue. Such a general presumption of confidentiality could not apply to the studies which had not been followed by the sending of a letter of formal notice at the time of the Commission's reply, as it remained uncertain whether the outcome of those studies would be the opening of the pre-litigation stage of infringement proceedings against that Member State. The General Court had erred in extending the scope of the presumption of confidentiality to the contested studies. This was contrary to the requirement that the presumption be interpreted and applied strictly since that presumption is an exception to the rule that the institution concerned is obliged to make a specific and individual examination of every document subject of an application for access. The Commission should have examined on a case-by-case basis whether the studies could be fully disclosed to the applicant.

This ruling is very welcome as it puts a limit on the presumption of confidentiality established in the case-law of the Court which already allows the Commission to withhold information pertaining to any administrative and judicial files. Specifically, it means that the Commission will need, in accordance with the test set out in the *Turco* case, to justify how disclosure would specifically and effectively undermine the protection of the investigation in order to refuse access to those studies which have not been followed by the opening of an infringement proceeding. The risk of having the protection of investigations undermined also needs to be reasonably foreseeable and not purely hypothetical. This should prove to be difficult and eventually lead to more environmental information being accessible to the public regarding the way in which the Member States transpose EU Directives in environmental matters. In turn, this should ensure greater accountability of both the Member States and the Commission in the way in which they implement and enforce environmental law. This ruling has potentially far-reaching consequences for other types of documents which are not part of ongoing procedures and will thus not fall under the scope of the presumption of confidentiality.

4 Conclusion

The ruling clarifies how the presumption of confidentiality is to be applied in future cases. The restriction of the scope of the presumption to conformity studies followed by a letter of formal notice is very welcome. It will ensure that a stricter test is applied to the disclosure of studies for which access is requested before infringement proceedings are initiated, leading to their full disclosure. The Commission should even go further than this and publish the studies automatically without waiting for requests from the public. Regulation 1367/2006 (Art. 4(1)) requires an "active and systematic dissemination" to the public of environmental information relevant to the EU institutions' functions. Yet, the environmental information actively disseminated in the Commission's public register falls short of this requirement. The publication of the analysis of Member States' environmental legislation received by the Commission would thus also be a sign of the Commission's willingness to improve its compliance with Aarhus standards as well.

The increased level of transparency stemming from this ruling could be stretched to other contexts in which the Commission and other EU institutions, agencies and bodies are required to take into account evidence, including scientific and legal, to form their decisions. Access to this information is the only way to ensure their accountability.

It is, however, regrettable that the Court supported the General Court's ruling on the need to keep studies followed by the opening of an infringement proceeding confidential. The studies concerned are not part of infringement proceedings. They are factual data on the way our governments transpose EU environmental law into national law; as such, they are quite simply sources of information. No confidential information is used or referred to in the studies. Any lawyer can make these studies provided they have the time and resources. They do not include correspondence between the Commission and the Member States nor are they documents communicating the strategy of the Commission. On the contrary, the studies all contain a disclaimer which indicates that the Commission is not bound by the content or the results of the study which prevents any legal action against the Commission. According to the reasoning of the Court, any information held by the Commission that puts into question the transposition of EU environmental law by Member States could be treated as confidential data as long as an infringement proceeding has been started. This raises questions regarding the Commission's interpretation of the transparency requirements enshrined in the EU Treaties with regard to the decision-making process.

The Court has comforted the Commission in its decision to negotiate behind closed doors with Member States infringing EU law and to protect these states from public scrutiny, the latter being qualified as "*undue external pressure*". This adds opaqueness to a process that is already inadequate given that the opening of infringement proceedings is at the complete discretion of the Commission and does not fall under the scrutiny of the Court. Yet, confidentiality does not guarantee better and faster compliance by Member States. On the contrary, it increases suspicion and lack of trust on the part of the public in the Commission and the EU as a whole. In the long term, this will result in making EU citizens turn their back on the political scene where decisions that affect the environment they live in are taken.

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We invite authors to submit manuscripts to the Editors as files by email using an IBM-compatible word processing system.

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Öko-Institut e.V.
Institut für angewandte Ökologie
Institute for Applied Ecology

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.
The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.
The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:
The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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I·E·S·A·R
Institute for Environmental Studies and Applied Research
FH Bingen

The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:
- Undertaking projects in develop-ing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research

- **European environmental policy**
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- **Companies and environment**
  - Environmental management
  - Risk management

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sofia

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover
- Product policy/REACh
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conversation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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