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elni REVIEW

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Editorial

Brexit is definitively making the headlines in Europe and so too shall it be in the current issue of the *elni Review*.

How the United Kingdom will one day really be able to leave the EU is still very uncertain. But whatever the proposed scenarios, one cannot avoid the fact that such a rupture, necessarily, will also concern environmental law and policy. An impact that has not escaped many key actors, including Commissioner Barnier and the House of Lords (report on *Brexit: Environment and Climate Change, February 2017*). It will have an impact both in the UK but also possibly in the EU, as will be developed in the current issue.

The reader certainly knows that UK Environmental Law, like the law of every Member State, is very deeply europeanised. Its ambition, as brilliantly demonstrated in the recent case law on air pollution (*CJEU, Client Earth, 2014*), is decisively bound to the control of the CJEU. But the UK wants to quit the realm of the CJEU, according to the Great Repeal Bill White Paper, while 'keeping' the current acquis. What does this possibly mean, as far as environmental protection is concerned?

As to the other side of the coin, the rupture will also possibly affect, somehow, environmental law and policy in the EU. In the rich encounter of various conceptual approaches, the UK has indeed brought a wave of challenging new ideas, in the 'big bowl' in which EU law is being processed. And this not least because the UK is a country abiding by a strong common law tradition.

The two first contributions of this issue, one on the 'UK Environmental Law Post Brexit' and the other on 'The Implications of Brexit for Future EU Environmental Law and Policy', are the written tracks of presentations that were given by *Prof. Veerle Heyvaert* (LSE, London) and *Céline Charveriat* (IEEP, Brussels), on 11 May 2017 in Brussels, at the occasion of a new elni forum. That forum on Brexit and Environmental Law took place at the Université Saint-Louis Bruxelles, at the joint invitation of CEDRE and ELNI, under the chair of Prof. Delphine Misonne and Prof. Gerhard Roller.

In their contribution on UK Environmental Law Post Brexit, *Veerle Heyvaert* and *Aleksandra Cavoski* go beyond assumptions and investigate what a gradual repatriation of EU law might mean, for specific areas (climate, ETS, biodiversity, air and water), for public authorities but also for civil society – where will be the guarantees civil society shall still need in order to challenge domestic policies? The authors also envisage how cooperation between the UK and the EU could actually proceed in the future, on environmental law issues. Because there is actually no escape, or rather "*an inescapable physical reality*": environmental problems will continue to require concerted action.

In their paper on 'The Implications of Brexit for Future EU Environmental Law and Policy', *Céline Charveriat* and *Andrew Farmer* present their thoughts on the possible consequences of Brexit for EU environmental policy in a, by necessity, quite speculative context. But they actually demonstrate that the first effects of Brexit on EU policy are already at work. There is a "*general atmosphere of environmental policy making*", that should not be underestimated. The context might further lead to a 'distraction' from important issues and even impede crucial discussions, such as on the possible renewed interest in an EU carbon tax.

Thomas Ormond in his programmatically entitled article 'The EU as guarantor of environmental protection in Germany' adds another perspective as to how the EU shapes Member State environmental law and policy, highlighting inter alia "*innovation from Brussels*" such as EIA, access to environmental information and climate protection, as well as the systematic and risk-based approach as hallmark of EU legislation.

Next, *Ludwig Krämer* comments on ECJ C-442/14 and C-673/13P (see already the case report in *elni Review* 2016/2) which concern the diverging interests of disclosing environmental information on the one hand, and protecting confidential business information on the other – two judgments which according to *Krämer* are likely to have a far-reaching influence on the disclosure of product information.

Finally, *Fatima Arib* in 'Promoting the Green Economy in Morocco' analyses the main contextual features, including socio-economic, environmental as well as regulatory aspects and identifies progress made by Morocco and the challenges lying ahead.

We hope you enjoy reading.

The editors welcome submissions of contributions addressing current national and international environmental law issues (e.g. transboundary EIA) for *elni Review* 2017/2 by 15 September 2017.

Delphine Misonne/ Julian Schenten
June 2017

Emissions into the environment and disclosure of information
Comments on ECJ C-442/14 and C-673/13P

Ludwig Krämer

1 Introduction

The Court of Justice of the European Union (ECJ) issued two judgments which concern the diverging interests of disclosing environmental information on the one hand, and protecting confidential business information on the other. The two judgments are likely to have a far-reaching influence on the disclosure of product information[1].

2 The judgments

2.1 Case C-442/14

In the first case[2], an environmental organisation sought access to documents on studies and other data which Bayer, a producer of pesticides, had submitted to the Dutch competent authorities in view of obtaining an authorisation to use the active substance Imidaclopid in pesticides, a substance which is suspected to be responsible for the death of bees. Bayer objected to the disclosure, arguing that it would negatively affect its copyright, its right to keep commercial and industrial information confidential and its data protection rights. The competent Dutch authority disclosed parts of the documents. Both sides addressed a Dutch court which asked the ECJ for a preliminary ruling.

The ECJ considered it irrelevant that Bayer, when applying for an authorisation of the pesticides in question, had not indicated that the studies and other information which it had submitted in support of its application, should be treated confidential. Such a request could, so the ECJ, also be made once a request for disclosure of the supporting documents had been introduced.

The ECJ then examined the question of whether the NGO could request disclosure of the laboratory, field or translocation[3] studies. This depended on the question of whether these studies contained information on "*emissions, discharges and other releases into the environment*" and constituted thus, according to Article 2(1)(b) of Directive 2003/4,[4] environmental information.

The ECJ declared that the objective of Directive 2003/4 – which implemented the Aarhus Convention – was "*to ensure a general principle of access to environmental information held by or for public authorities and […] to achieve the widest possible systematic availability and dissemination to the public of environmental information*". Therefore, "*the disclosure of information must be the general rule and the grounds for refusal [...] must be interpreted in a restrictive way*".

Furthermore, the ECJ stated that the term 'emissions into the environment' was not limited to emissions from industrial installations, as an Interpretation Guide which had been published under the auspices of the Aarhus Convention had suggested. Indeed, the Court found that the terms 'emissions', 'discharges' and 'releases' are used interchangeably in EU legislation, and no provision in EU law pointed to such a limitation. Such a limiting, restrictive interpretation was also incompatible with the objective of Directive 2003/4.

It cannot be said, according to the ECJ, that normally a product which is placed on the market, is released into the environment. However, it is the normal use of a product such as a pesticide or a biocide to be released into the environment "*by virtue of its function*". Therefore, actual or foreseeable emissions from such products must be considered as emissions into the environment. In contrast, "*purely hypothetical*" emissions do not come under the notion of 'emissions into the environment', as such emissions do not affect and are not likely to affect the environment.

The term 'information on emissions into the environment' included, according to the ECJ, not only the emissions as such, but also data concerning the medium to long-term consequences of those emissions on the environment. This included information on residues.

The ECJ concluded: 'information on emissions into the environment' *"covers information concerning the nature, composition, quantity, date and place of the emission into the environment of plant protection products and biocides and substances contained therein, 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 those data come from studies performed entirely or in part in the field or from laboratory or translocation studies"*.

After having thus clarified the field of application of Directive 2003/4, the ECJ addressed Article 4(2) of the Directive[5] which provided for the possibility not to dis-

1 See also: B. Wegener: Kein „Mund auf - Augen zu" - der freie Zugang zu Informationenüber Emissionen in die Umwelt, Zeitschrift für Umweltrecht 2017, p. 146.

2 Court of Justice, case C-442/14, Bayer Crop, ECLI:EU:C:2016:890.

3 Translocation studies are studies which analyze the migration of the product or substance into the plant.

4 Directive 2003/4 on public access to environmental information, OJ 2003, L 41 p. 26.

5 Directive 2003/4 (*supra* note 4), Article 4(2): "*Member States may provide for a request for environmental information to be refused, if disclosure of the information would adversely affect [...] (d) the confidentiality of commercial or industrial information [...]; (e) intellectual property rights [...] Member States may not, by virtue of paragraph 2 […] (d) […] provide for a request to be refused where the request relates to information on emissions into the environment*".

close information, if it affects certain business interests. The ECJ discussed Bayer's objections to its above-mentioned interpretation. Bayer argued that the disclosure of such information would be against its freedom to conduct business and its right to property, which were protected under Articles 16 and 17 of the EU Charter on Fundamental Rights.[6] The Court held that the rights under the Convention could be limited by law[7] (Article 52 of the Charter); the EU legislator had concluded – and was entitled to do so – in Article 4(2) of Directive 2003/4, that the access to information on emissions into the environment should prevail over the confidentiality of commercial or industrial information. The ECJ applied the same reasoning as regards Article 39(3) of the TRIPS-Agreement[8] which also allowed limitations of the right to confidentiality in the general interest.

Finally, as regards the confidentiality of information under Article 63 of Regulation 1107/2009, the ECJ pointed out that this article provided itself that it applied "*without prejudice to Directive 2003/4*". This showed that in the case of conflict, the provisions of Directive 2003/4 should prevail.

2.2 Case C-673/13P

In the second case,[9] two NGOs had asked for access to documents concerning the toxicity of glyphosate, which various operators had submitted in order to obtain an authorisation for using glyphosate as a pesticide. The request concerned in particular a report which Germany had written on the application. The Commission had partly refused to grant access to those documents, arguing that the confidentiality of the information opposed disclosure. However, the General Court held that those parts of the report had to be disclosed which contained information on emissions into the environment, namely the identity and quantity of impurities present in the active substance for glyphosate, the data and quantities of the impurities in the various batches submitted by the various operators, as well as the composition of the pesticides which had been developed by the various operators concerned.

The Commission had appealed that judgment. The ECJ was thus called to decide whether the information mentioned constituted information on emissions into the environment.

The ECJ refused to follow the Commission in interpreting the term 'information which relates to emissions into the environment' in a restrictive way. It held that both Regulation 1049/2001[10] and 1367/2006[11] intended to give the widest possible right of access to environmental information. Therefore, any exception to this basic objective, but not the objective itself, had to be interpreted restrictively. Article 6(1) of Regulation 1367/2006[12] which contains an irrebuttable presumption that information on emissions into the environment shall prevail over the commercial interest of an operator, only constitutes an actual implementation of the general objective of the two Regulations, to grant the widest possible access to information.

The ECJ repeated its reasoning of case C-442/14 that 'emissions into the environment' were not limited to emissions from industrial installations. It did not see any argument for such an interpretation in EU law nor in the Aarhus Convention and therefore did not follow the Aarhus Convention Implementation Guide in this regard.

The General Court had argued that access to environmental information concerning emissions into the environment should be granted, as soon as there existed "*a sufficiently direct link*" between the information and the emissions into the environment. The ECJ found this formula too vague. It held that such an understanding would eliminate the difference between 'information' on the one hand and 'emissions into the environment' on the other hand. It therefore sent the case back to the General Court which should decide, whether the above-mentioned information – on impurities etc. – constituted information on emissions into the environment. Should the General Court answer this question in the negative, it would have to discuss the further arguments which the applicants had put forward in favour of a disclosure.

3 Discussion of the two cases

These two judgments contain quite a number of important statements which hopefully will determine future Court judgments. Several of the Court's findings were different from what the European Commission had defended or presented in Court, so that it might be expected that the Commission will, in the future, change its restrictive interpretation of the EU provisions on access to environmental information.

6 Charter of Fundamental Rights of the European Union, OJ 2000, C 346 p. 1, Article 16: "*The freedom to conduct a business in accordance with Community law and national laws and practices is recognised*". Article 17(2): "*Intellectual property shall be protected*".

7 EU Charter (*supra* note 6), Article 52: "*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only, if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*".

8 Agreement on trade-related aspects of intellectual property rights of 1995, Article 39(3): "*Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical product which utilize new chemical entities, the submission of undisclosed tests or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use*".

9 Court of Justice, case C-673/13P, Commission v. Greenpeace and PAN, ECLI:EU:C:2016:889.

10 Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L 145 p. 43.

11 Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006, L 264 p. 13.

12 Regulation 1367/2006 (*supra* note 11), Article 6(1): "*As regards Article 4(2), first and third indents, of regulation 1049/2001 [...] an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment*".

I see the following positive and new elements in the Court's decisions:

3.1 Large access to environmental information

It is very welcome that the ECJ confirmed the principles which it had already laid down in earlier judgments, though perhaps not always with the same clarity: access to information – including to environmental information – shall, according to EU law, be granted to the widest possible extent. This requirement of the EU Treaties[13] is repeated in Regulation 1049/2001. And it also applies with regard to access to environmental information (Regulation 1367/2006 and Directive 2003/4). Exceptions to this principle have to be interpreted strictly.

In the past, several judgments of the General Court on access to environmental information appear to restrict the basic rule of free access to environmental information. Furthermore, they appear to overemphasize the different possible limitations to this free access, with the result that the restrictions became the main legal rule and the free access to information the exception.[14] It can only be hoped that these two new judgments also help the General Court and the European Commission to reconsider their policy and strategy with regard to access to environmental information.

3.2 Studies on pesticides/biocides are information on emissions

When an applicant asks for authorization to market a pesticide, a biocide, another chemical product or a genetically modified organism, the studies which he submits in order to support his application shall be made, on request, publicly accessible. The nature of the study – laboratory study, field study or translocation study – is irrelevant. The applicant can not specify that such studies only be made available in reading rooms or otherwise restrict access to them.

This decision will probably end the secrecy with which, until now, such studies were accompanied. Applicants argued in the past that their intellectual property or their copyright would be impaired by a disclosure of the documentation accompanying their application – and the authorizing administrations regularly followed their reasoning. The ECJ's decisions are now likely to bring to an end this practice – and this is only fair: when a substance or a product is put into the environment, the public has a right to know what kind of effects it will have on humans, animals, plants, soil, water etc. The environment is not the property of the applicant, and he has no right to contribute, by his substances or products, to any impairment of it. The authorizing public authorities do not constitute a sufficiently efficient filter, as they have neither the human nor the financial or material resources to repeat studies, launch alternative studies or make field studies.

It will now be up to civil society – individual persons, researchers, laboratories, academics, environmental and consumer protection organizations, and trade unions – to request access to the studies which accompany the application for authorization of a substance or a product that is to be put into the environment. This begins with those substances and products of a suspected hazardous – toxic, carcinogenic etc. – nature. In this way, discussions on whether a specific substance or product is hazardous can take place in public and no longer more or less exclusively and secretly between producers (applicants) and public authorities.

3.3 Information on products that are placed on the market is environmental information

The ECJ limited its decisions to products which, as part of their function, put emissions into the environment, such as pesticides or biocides. It explicitly declared that it referred to emissions, not to products as such, in order to maintain the difference between an emission and a product. However, the core of the ECJ's jurisprudence is also applicable to products. Indeed, both Regulation 1367/2006 and Directive 2003/4 consider information on 'substances' which may have an effect on the environment as 'environmental information'. For this reason, a request for disclosure of information on substances which are contained in a product and may – for example under the influence of rain, erosion, chemical processes or otherwise – be released and then impair the environment, is a request for environmental information and will therefore normally be successful.

This is only common sense. Indeed, it was mentioned above that the environment is everybody's and is not the property of economic operators or public authorities. It follows from this that whatever substance or product is put on the market or placed into the environment is of common concern and cannot be kept confidential. No producer of a new car type who puts that type on the road – to conduct driving tests for example – can keep information on that car confidential. In the same way, no person who puts a product into the environment which could impair air or water, soil or fauna and flora, can claim that information on the product is confidential.

3.4 'Emission' is not limited to emissions from industrial installations

The ECJ underlined that the term 'emissions' is not limited to emissions from industrial installations. The affirmation of the Aarhus Convention Implementation Guide of 2009 which favours such a limitation, does not find any justification in EU law. The Aarhus Convention does not even mention 'emissions' as being part of environ-

13 See Articles 1(2), 10 and 11 TEU, 15 and 298 TFEU which all refer to 'open' administration and decision-making.

14 See, for example General Court, cases T-362/08 IFAW v. Commission, ECLI:EU:T:2011:6; corrected on appeal, case C-135/11P, ECLI:EU:C:2012:376; caseT-111/11, ClientEarth v. Commission, ECLI:EU:T:2013:482; partly corrected on appeal, case C-612/13P, ECLI:EU:C:2015:486; T-214/11, ClientEarth and PAN. v. Commission, ECLI:EU:T:2013:483; partly corrected on appeal, case C-615/13P, ECLI:EU:C:2015:489; T-603/11, Ecologistas en Acción v. Commission, ECLI:EU:T:2014:182; T-538/13 Natura Havel v. Commission, ECLI:EU:T:2014:738; T-476:12, St.Gobain v. Commission, ECLI:EU:T:2014:1059; T-424/14, ClientEarth v. Commission, ECLI:EU:T:2015:848.

mental information. Regulation 1367/2006 and Directive 2003/4 both mention "*emissions, discharges and other releases into the environment*". This terminology demonstrates the objective to include the broadest possible terms ("*other releases*") in the notion of environmental information.

The ECJ rejected the argument that laboratory studies on emissions did not concern 'emissions' and could thus be kept confidential. It deemed that all emissions which were actually made or could realistically be expected, constituted emissions under EU law. Laboratory studies which simulate agricultural practices, are therefore also considered information on environmental emissions. This also refers to residues of pesticides and to their metabolites.

In this context, the ECJ clarified that such information on emissions not only covers the emissions themselves, but also the consequences of the emissions on humans or the environment, a statement that had not been made so clearly before. The Court explains this reasoning by the fact that Directive 2003/4 seeks inter alia, as follows from its Recital 1, "*to contribute to greater awareness of environmental matters and more effective participation by the public in environmental decision-making*".[15] For this reason, information on the environment also includes the medium or long-term consequences which emissions might have on the environment.

Again, this decision is likely to have a considerable impact on access to other environmental information, as also other information – on industrial installations or infrastructure projects, the authorization of other products than pesticides or biocides, and even the type-approval of cars – must be extensive and detailed enough to allow individuals to participate in the discussion on the permitting.

It is not clear, though, how the ECJ draws the borderline between 'realistic and foreseeable' and 'hypothetical' emissions. Apparently, the tests which are conducted involve gradually increasing the dose of the active substance in question until the results become negative, for example until a specific percentage of the test animals die. The pesticide manufacturer would not conduct the tests if their results were 'purely hypothetical'. Rather, such tests are conducted in order to find out how high the active substance in a pesticide may be dosed. Therefore, it seems normal that in principle all tests which a manufacturer conducts in view of obtaining an authorization for the active substance, seek to determine how the quantity of the active substance can realistically be fixed. This means that no test performed by the manufacturer is hypothetical – this would be a waste of time and money – but are rather conducted in view of the obtaining a permit. They are thus practically never 'hypothetical'.

In particular, the animal toxicity studies conducted by manufacturers are not hypothetical. During such studies, animals are treated with high doses of a substance, in order to obtain reliable data on long-term effects of the substance, on the acceptable daily intake or on the permitted levels of that substance in food or feed (residues). Such studies with a high dose thus have a very realistic objective, as they serve for discussions with the authorities in view of the preparation of regulatory measures. In other terms: 'purely' hypothetical studies hardly exist.

3.5 Access to information on emissions prevails over confidentiality requests of the manufacturer

Economic operators had argued that EU pesticide and biocide legislation already weighed the different interests in another way, by providing in particular that information on emissions should be kept confidential. The ECJ was thus asked to decide which legislation should prevail -the one on the authorization of pesticides and biocides or the one on access to environmental information. The ECJ very pragmatically stated that the EU pesticide-biocide legislation explicitly provided that their provisions on the confidentiality of information should be without prejudice of the EU legislation on access to environmental information.[16] This meant that disclosure of information which was accessible under EU law on access to (environmental) information could not be restricted on the basis of pesticide or biocide legislation.

The ECJ was, rightly, quite succinct and categorical in this regard. However, some worried that if the ECJ were to let the provisions on access to information prevail, then economic operators would be likely to ask for the deletion in the pesticide/biocide legislation of the provision on the prevailing character of the transparency legislation.[17] Fortunately enough though, an amendment in the pesticide/biocide legislation would not change the interpretation given by the ECJ to the term 'emissions into the environment' in the present judgment. Indeed, the prevailing character of the provisions on access to environmental information is not only laid down in the EU pesticide/biocide legislation, but also in the Aarhus Convention itself.[18] The Aarhus Convention was concluded by

15 Case C-442/14, para. 85.

16 See Regulation 1107/2009 concerning the placing of plant protection products on the market, OJ 2009, L 309 p. 1, Article 63: "*1. A person requesting that information submitted under this Regulation is to be treated as confidential shall provide verifiable evidence to show that the disclosure of the information might undermine his commercial interests, or the protection of privacy or the integrity of the individual. 2. Disclosure of the following information shall normally be deemed to undermine the protection of the commercial interests or of privacy and the integrity of the individual concerned [...] 3. This Article is without prejudice to Directive 2003/4 [...]*".
In the same sense Directive 91/414 on pesticides which preceded Regulation 1107/2009, OJ 1991, L 230 p. 51, Article 14, Directive 98/8 on biocides, OJ 1998, L 123 p. 1, Article 19(1), which was since replaced by Regulation 528/2012, OJ 2012, L 167 p. 1, Article 66.

17 See Von Holleben, Judgment of the General Court of the EU on access to information under substance law, European Journal of Risk Regulation 2013, p. 578: "*Should the judgment of the General Court [in case T-545/11] became unappealable […] rectifications by the legislator - also with regard to the Aarhus-legislation (Aarhus Regulation 1367/2006, Directive 2003/4) - might then become necessary*".

18 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, Aarhus 1998, Article 4(4): "*A request for environmental information may be refused if the disclosure would adversely affect: [...] (d) The confidentiality of commercial and industrial information […] Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed*".

the EU and is thus part of EU law. It prevails over secondary EU legislation.[19] An amendment to secondary EU legislation can therefore not amend the substance of the Aarhus Convention and its implementing legislation (Directive 2003/4 and Regulation 1367/2006).

3.6 Information on products that are placed on the market

As regards chemicals, the Reach Regulation[20] contains in Article 118 a provision according to which "*(D)isclosure of the following information shall normally be deemed to undermine the protection of the commercial interests of the concerned person [...]*". Regulation 1049/2001 is referred to in Article 118, but contrary to Regulation 1107/2006, it is not stated that the confidentiality arrangements of Article 118 shall apply without prejudice to Regulation 1049/2001.

The General Court had to decide on a request for access to information on the precise tonnage of substances which were placed on the EU market.[21] It applied to the presumption of Article 118, accepting the argument of the manufacturers that disclosure of the precise tonnage would allow competitors to know the market share with regard to this product. The Court did not accept the argument of the applicants that the substances in question were highly toxic chemicals and that therefore, disclosure of information was in the general interest. And it failed to discuss the provision of Article 4(4)(d) of the Aarhus Convention, according to which the confidentiality is to "*protect a legitimate economic interest*".[22]

In my understanding, it makes a considerable difference, whether a carcinogenic or mutagenic chemical substance is placed on the EU market in 100 tonnes or in 1000 tonnes; it cannot seriously be denied that the environmental risk is significantly different. In my understanding, access to environmental information on a highly toxic chemical substance also includes access to information on the quantity of that substance which is put into circulation,[23] and no legitimate interest of the manufacturer can justify non-disclosure. That a competitor could derive from the quantity information on the market share of the manufacturer is doubtful, as is that the protection of information on the precise tonnage of a marketed substance can be considered a 'legitimate' interest.

The General Court limited itself to a discussion of whether placing a highly toxic chemical on the market constituted an emission into the environment (which was denied). It did not discuss whether the disclosure of information on a substance included information on the quantity which was put on the market. For these different reasons, I am of the opinion that the General Court's weighing of the different interests in question was not correct.

It is to be hoped that the ECJ will soon be able to clarify this question, in order to avoid that the fundamental right of access to environmental information is undermined by legislation which establishes presumptions of confidentiality on substances or products which are put into the environment by being placed on the market.

3.7 Access to information that relates "in a sufficiently direct manner" to emissions

The ECJ rejected the statement of the General court that information which "*relates in a sufficiently direct manner*" to emissions into the environment, should be considered as information on environmental emissions. The ECJ found this concept too vague and easily misconstrued. It therefore referred the case back to the General Court to decide whether the information in question – the studies, quantities of the substance, etc. – really refers to emissions into the environment.

It should be noted that the ECJ itself gave a broad interpretation of the term 'emissions into the environment' by including any release, by not limiting the term to emissions from industrial installations, by including studies on the effects of emissions, by including the consequences of such emissions on humans and the environment and by including metabolites, residues and drifts of emissions. Some of these inclusions may well qualify as being (indirectly) 'related' to emissions. Also, the term 'relate' is not limited to direct emissions. It would therefore only be consistent with the ECJ's judgment for the General Court to declare that the applicants' request for access to information referred to emissions into the environment, though, of course, the new judgment of the General Court is still outstanding.

4 Conclusion

The two judgments of the ECJ clarify the term 'emissions into the environment' which gives, under EU law, rather broad access to information. The ECJ included in this term the studies which are conducted on pesticides or biocides, the residues and metabolites of the chemical and also the drifting effects.

The ECJ rejected the arguments that the disclosure of studies and other information on pesticide emissions should be refused, in order to protect the interests of manufacturers. It stated that access to environmental information prevails over intellectual property rights or confidential commercial information, as far as emissions into the environment are concerned.

The two judgments are likely to have a considerable positive influence on the disclosure of information by public authorities within the EU.

19 See for example ECJ, cases C-401/12P to 403/12P, Council a.o. v. Vereniging Milieudefensie a.o., ECLI:EU:C:2015:4, para. 52: "*Pursuant to Article 300(7) EC (now Article 216(2) TFEU), international agreements concluded by the European Union bind its institutions and consequently prevail over the acts laid down by those institutions*".

20 Regulation 1907/2006 concerning the registration, evaluation, authorisation and restriction of chemicals (REACH), OJ 2006, L 396 p. 1.

21 General Court, case T-245/11, ClientEarth a.o. v. ECHA, ECLI:EU:T:2015:675.

22 That provision is mentioned in para. 198 of the General Court's judgment, but not further discussed.

23 As regards 'emissions into the environment', the ECJ explicitly held in case C-442/14 that the applicants had a right to know the quantity of emissions, see above.

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elni membership

If you want to join the Environmental Law Network International, please use the membership form on our web-site: http://www.elni.org or send this form to the elni Coordinating Bureau, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

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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
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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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  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **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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