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# Is Article 113 of the Control Regulation compatible with the public's right of access to environmental information and documents?

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## Top Lines

This study analyses the compatibility of Article 113 of Regulation 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy (the “Control Regulation”)<sup>1</sup> with the public's right to access documents and environmental information held by the European Union (EU) institutions.

The study focuses in particular on the second subparagraph of Article 113, which makes public access to documents containing information collected under the Control Regulation conditional on Member States' consent. The General Court of the EU has confirmed that this provision effectively allows Member States to veto the disclosure of information that they have transferred to the EU institutions without having to give any reasons. This analysis will show that this runs counter to the EU framework on access to documents held by the EU institutions, particularly the United Nations Economic Commission for Europe (UNECE) Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, which is binding upon all of the Member States and the EU itself.<sup>2</sup>

Due in part to Article 113 of the Control Regulation, there is very little information in the public domain regarding the real status of the implementation of the Control Regulation. Indeed, decision-makers (in particular in national parliaments and in the European Parliament), fishers and civil society organisations do not have the information necessary to assess whether the Control Regulation is effectively implemented. This lack of transparency creates a culture of mistrust and the potential for misinformation and mismanagement, ultimately jeopardising the objectives of the Common Fisheries Policy. We therefore call on members of the European Parliament and the Council of the EU to seize the opportunity of the revision of the Control Regulation to bring Article 113 into alignment with the EU legal framework on public access to documents, including the EU's international obligations under the Aarhus Convention.

To this end, we suggest the following amendment to Article 113:

Current article 113	Proposal for amending article 113
1. Member States and the Commission shall take all necessary steps to ensure that the data collected and received within the framework of this Regulation shall be treated in accordance with applicable rules on professional and commercial secrecy of data.	1. Member States and the Commission shall take all necessary steps to ensure that the data collected and received within the framework of this Regulation shall be treated in accordance with applicable rules on professional and commercial secrecy of data.
2. The data exchanged between Member States and the Commission shall not be transmitted to persons other than those in Member States or Community institutions whose functions require them to have such access unless the Member States transmitting the data give their express consent.	2. The data exchanged between Member States and the Commission <del>shall not may</del> be transmitted to persons other than those in Member States or Community institutions whose functions require them to have such access unless the Member States transmitting the data <del>give their express consent</del> <b>provides a reasoned refusal to disclose the data.</b>
3. The data referred to in paragraph 1 shall not be used for any purpose other than that provided for in this Regulation unless the authorities providing the data give their express consent for the use of the data for other purposes and on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.	3. The data referred to in paragraph 1 <del>shall not may</del> be used for <del>any a</del> purpose other than that provided for in this Regulation unless the authorities providing the data <b>provide a reasoned refusal for it to be so used and</b> <del>give their express consent for the use of the data for other purposes and</del> on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.
4. Data communicated in the framework of this Regulation to persons working for competent authorities, courts, other public	

<sup>1</sup> Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, OJ L 343, 22.12.2009, p. 1–50.

<sup>2</sup> See Article 216(2) TFEU, which establishes that the EU's international agreements bind EU institutions and its Member States.

<p>authorities and the Commission or the body designated by it, the disclosure of which would undermine:</p> <p>(a) the protection of the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data;</p> <p>(b) the commercial interests of a natural or legal person, including intellectual property;</p> <p>(c) court proceedings and legal advice; or</p> <p>(d) the scope of inspections or investigations;</p> <p>shall be subject to applicable rules on confidentiality. Information may always be disclosed if this is necessary to bring about the cessation or prohibition of an infringement of the rules of the common fisheries policy.</p> <p>5. The data referred to in paragraph 1 shall benefit from the same protection as is accorded to similar data by the national legislation of Member State receiving them and by the corresponding provisions applicable to Community institutions.</p> <p>6. This Article shall not be construed as an obstacle to the use of the data, obtained pursuant to this Regulation, in the framework of legal actions or proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy. The competent authorities of the Member State transmitting the data shall be informed of all the instances where those data are utilised for these purposes.</p> <p>7. This Article shall not prejudice the obligations pursuant to international conventions concerning mutual assistance in criminal matters.</p>	<p>4. Data communicated in the framework of this Regulation to persons working for competent authorities, courts, other public authorities and the Commission or the body designated by it, the disclosure of which would undermine:</p> <p>(a) the protection of the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data;</p> <p>(b) the commercial interests of a natural or legal person, including intellectual property;</p> <p>(c) court proceedings and legal advice; or</p> <p>(d) the scope of inspections or investigations;</p> <p>shall be subject to applicable rules on confidentiality. Information may always be disclosed if this is necessary to bring about the cessation or prohibition of an infringement of the rules of the common fisheries policy.</p> <p>5. The data referred to in paragraph 1 shall benefit from the same protection as is accorded to similar data by the national legislation of Member State receiving them and by the corresponding provisions applicable to Community institutions.</p> <p>6. This Article shall not be construed as an obstacle to the use of the data, obtained pursuant to this Regulation, in the framework of legal actions or proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy. The competent authorities of the Member State transmitting the data shall be informed of all the instances where those data are utilised for these purposes.</p> <p>7. This Article shall not prejudice the obligations pursuant to international conventions concerning mutual assistance in criminal matters.</p> <p><b>8. This Article is without prejudice to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents and 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.</b></p>
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## 1 Overview of Article 113 of the Control Regulation

The Common Fisheries Policy (CFP) aims to ensure that fishing activities are environmentally, economically and socially sustainable in the long term. It therefore includes rules for managing European fishing fleets and for conserving fish stocks.

As noted by the European Commission, *“the success of the Common Fisheries Policy depends very much on the implementation of an effective control system”*.<sup>3</sup> To ensure that the rules of the CFP are followed in practice, the Control Regulation establishes *“a system for control, inspection, and enforcement with a*

<sup>3</sup> Report from the Commission to the European Parliament and the Council, Implementation and evaluation of Regulation (EC) 1224/2009 establishing a Union control system for ensuring compliance with the rules of the common fisheries policy as required under Article 118, SWD(2017) 134 final, p. 2.

*global and integrated approach [...] so as to ensure compliance with all the rules of the common fisheries policy in order to provide for the sustainable exploitation of living aquatic resources by covering all aspects of this policy.*<sup>4</sup> This system includes rules to monitor fishing activities, to allow data collection for managing fishing opportunities, to enable tracing and checking of fisheries products, and to ensure that sanctions are applied when rules are breached. EU Member States have an important responsibility in implementing this system, including an obligation to collect and retain specific information and to transfer such data to the EU Commission, other EU agencies and the competent authorities in other Member States.

Title XII of the Control Regulation deals specifically with “data and information”. Chapter I defines the rules concerning analysis of, access to and exchange of data, followed by a second chapter called “confidentiality of data”, consisting of two articles. Article 112 deals succinctly with the protection of personal data, clarifying that the Control Regulation does not affect the level of protection regarding the processing of personal data and clarifying which laws apply to the protection of personal registration data. Article 113, the text of which is broadly based on Article 37 of the Control Regulation’s predecessor, Council Regulation (EEC) No 2847/93 dating back to 1993, deals with a variety of other interests under the title “confidentiality of professional and commercial secrecy”.

Article 113:

1. Member States and the Commission shall take all necessary steps to ensure that the data collected and received within the framework of this Regulation shall be treated in accordance with applicable rules on professional and commercial secrecy of data.
2. The data exchanged between Member States and the Commission shall not be transmitted to persons other than those in Member States or Community institutions whose functions require them to have such access unless the Member States transmitting the data give their express consent.
3. The data referred to in paragraph 1 shall not be used for any purpose other than that provided for in this Regulation unless the authorities providing the data give their express consent for the use of the data for other purposes and on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.
4. Data communicated in the framework of this Regulation to persons working for competent authorities, courts, other public authorities and the Commission or the body designated by it, the disclosure of which would undermine:
  - (a) the protection of the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data;
  - (b) the commercial interests of a natural or legal person, including intellectual property;
  - (c) court proceedings and legal advice; or
  - (d) the scope of inspections or investigations;shall be subject to applicable rules on confidentiality. Information may always be disclosed if this is necessary to bring about the cessation or prohibition of an infringement of the rules of the common fisheries policy.
5. The data referred to in paragraph 1 shall benefit from the same protection as is accorded to similar data by the national legislation of Member State receiving them and by the corresponding provisions applicable to Community institutions.
6. This Article shall not be construed as an obstacle to the use of the data, obtained pursuant to this Regulation, in the framework of legal actions or proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy. The competent authorities of the Member State transmitting the data shall be informed of all the instances where those data are utilised for these purposes.
7. This Article shall not prejudice the obligations pursuant to international conventions concerning mutual assistance in criminal matters.”

The first and fourth paragraphs of Article 113 essentially seek to ensure the protection of data that is related to certain specific interests, including professional and commercial secrecy, court proceedings, and inspections and investigations. These paragraphs provide that the data collected and received under the Control Regulation shall be subject to the “applicable rules on confidentiality” relating to these specific interests.

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<sup>4</sup> Recital 2 of the Control Regulation.

By contrast, the second and third paragraphs are not limited to data related to a specific interest but cover all of the data exchanged between Member States and the Commission. Article 113(2) provides that such data cannot be transmitted to persons other than those whose functions require them to have it unless the Member State that transmitted the data has given their express consent. In a similar vein, Article 113(3) specifies that the data cannot be used for any purpose other than that provided for in the Regulation unless the Member State that provided it has given its express consent. These provisions have been interpreted by the General Court as allowing Member States to veto public access to any data transmitted to the Commission under the framework of the Control Regulation even if it is unrelated to the protection of a specific interest, like commercial secrecy. This will be discussed in more detail in section 3 below.

## 2 The EU legal framework on public access to environmental information and documents

### Access to Environmental Information under the Aarhus Convention

Access to environmental information is governed by the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed on 25 June 1998, (the 'Aarhus Convention'). The Aarhus Convention has been signed and ratified by every EU Member State, as well as the EU itself. The right to "environmental information" is contained in Articles 4 and 5.

In particular, Article 4 lays down a closed list of exceptions to the right to information that are very similar to those in Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, but with important differences when it comes to information supplied by third parties (see below).

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 (the "Aarhus Regulation")<sup>5</sup> was adopted in order to transpose the provisions of the Aarhus Convention on access to environmental information into EU law.<sup>6</sup>

The broad definition of 'environmental information' in the Aarhus Regulation is essentially the same as that in the Convention:

*"Article 2 of Regulation 1367/2006 – Definitions*

*1. For the purpose of this Regulation:*

*(...)*

*(d) 'environmental information' means any information in written, visual, aural, electronic or any other material form on:*

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<sup>5</sup> 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, OJ L 264, 25.9.2006, p. 13–19.

<sup>6</sup> Case C-60/15 *Saint-Gobain Glass Deutschland v Commission*, ECLI:EU:C:2017:540, paragraph 79.

*(i) 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, including genetically modified organisms, and the interaction among these elements;*

*(ii) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);*

*(iii) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;*

*(iv) reports on the implementation of environmental legislation;*

*(v) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii);*

*(vi) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii)."*

The vast majority of the data transferred by Member States to the Commission under the Control Regulation falls within the definition in Article 2(1)(d)(iii) of the Aarhus Regulation, as the information concerns measures and/or activities affecting or likely to affect biological diversity in coastal or marine areas.

The Aarhus Regulation guarantees "the right of public access to environmental information received or produced by Community institutions or bodies and held by them".<sup>7</sup> Concerning the principles and conditions to exercise this right of public access to environmental information, the co-legislators opted to rely on the corresponding provisions in Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents ("Regulation 1049/2001"),<sup>8</sup> rather than transposing the Aarhus Convention into the Aarhus Regulation.

This means that when a member of the public requests a document containing environmental information from an EU institution, the normal procedures and exceptions apply, subject to Article 6 of the Aarhus Regulation which contains certain specific obligations regarding how to interpret the exceptions.<sup>9</sup> As a result, the exceptions invoked by the EU institutions to refuse access to environmental information do not always correspond to the EU's international obligations under the Aarhus Convention. Significantly, on at

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<sup>7</sup> Article 1(1)(a) of the Aarhus Regulation and Article 4 of the Aarhus Convention.

<sup>8</sup> 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, Official Journal L 145, 31.05.2001 p. 43 - 48.

<sup>9</sup> Article 6 of the Aarhus Regulation: "1. As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of 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 Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

2. In addition to the exceptions set out in Article 4 of Regulation (EC) 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".

least one occasion, the Court of Justice has relied on the wording of the exceptions in Article 4 of the Aarhus Convention to interpret the exceptions in Article 4 of Regulation 1049/2001 in the context of documents containing environmental information.<sup>10</sup> It is noteworthy in this regard that Article 4 of the Aarhus Convention lays down a closed list of exceptions to the right to environmental information, two of which seek to protect the interests of a third party who transmitted the information in question to a public authority. However, the prior and express consent of the entity that communicated the information at stake can only be considered in two situations. First, with regard to information communicated by natural persons and their personal data<sup>11</sup> and second, when a third party has supplied the information requested voluntarily.<sup>12</sup>

## Public access to documents held by the EU institutions and bodies

The public's right to access documents held by the EU institutions and bodies is a fundamental principle enshrined in the EU Treaties and the EU Charter of Fundamental Rights.<sup>13</sup>

The principles and conditions for the application of the right of access to documents have been elaborated in detail by the EU co-legislators in Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents ("Regulation 1049/2001").<sup>14</sup> As noted by the Court of Justice of the EU, Regulation 1049/2001 "*reflects the intention expressed in the second paragraph of Article 1 of the EU Treaty — inserted by the Treaty of Amsterdam — of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen... To that end, Regulation No 1049/2001 is designed — as is stated in recital 4 and reflected in Article 1 — to confer on the public as wide a right of access as possible to documents of the institutions*".<sup>15</sup>

Regulation 1049/2001 establishes a complete system for accessing documents held by the EU institutions, including a clear definition of the scope of the public's rights, a closed list of exceptions to those rights and the procedure to be followed. Article 2(3) clarifies that the Regulation applies to "*all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.*" The term "document" is defined in Article 3(a) as "*any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*".

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<sup>10</sup> See case C-60/15 *Saint-Gobain Glass Deutschland v Commission*, ECLI:EU:C:2017:540.

<sup>11</sup> Article 4(4)(f) Aarhus Convention.

<sup>12</sup> Article 4(4)(g) Aarhus Convention.

<sup>13</sup> First, Article 1 TEU states that, "[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen." This principle is reiterated in Article 10(3) of the Treaty on European Union, which states that, "[e]very citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen". Second, the specific right of access to documents is guaranteed in Article 42 of the EU Charter of Fundamental Rights, which states that "*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.*" Finally, Article 15(3) of the Treaty on Functioning of the European Union further develops this principle by giving citizens a right to access documents of the Union's institutions, "*subject to the principles and the conditions to be defined in accordance with this paragraph*".

<sup>14</sup> See case C-64/05 *Sweden v Commission* ECLI:EU:C:2007:802, paragraph 53, which makes it clear that Regulation 1049/2001 implements Article 15 TFEU in that it has the purpose of "*defining the principles, conditions and limits on grounds of public or private interest concerning the right of public access to documents, so as to give the fullest possible effect to that right.*"

<sup>15</sup> Case C-60/15 *Saint-Gobain Glass Deutschland v Commission*, ECLI:EU:C:2017:540, paragraphs 60 – 61.



The right of access to documents is not an absolute right and other legitimate interests are protected through the closed list of exceptions elaborated in Article 4 of Regulation 1049/2001. These exceptions have, nonetheless, to be construed and applied strictly, as the relevant case-law of the European Courts has frequently reiterated.<sup>16</sup> In addition, Articles 2(3) and 9 lay down special rules for the treatment of documents that have been classified as containing “sensitive information” on account of the fact they protect the public interest as regards public security, defence, military matters, international relations or financial, monetary or economic policy.

Articles 4(1) to 4(3) of Regulation 1049/2001 contain exceptions that seek to protect certain specific interests, ranging from the public interests of security, defence and international relations to individuals' commercial interests and the integrity of the institutions' decision-making procedures.

Article 4(4) and 4(5) of Regulation 1049/2001 seek to protect the interests of third parties that supplied documents to the EU institutions. Article 4(4) provides that the institution shall consult the third party with a view to assessing whether an exception is applicable (unless it is clear that the document shall or shall not be disclosed). Article 4(5) allows the Member States to object to the disclosure of documents on the basis of the substantive exceptions laid down in Article 4(1) to (3).

There has been much debate over whether Article 4(5) represented the reintroduction of the “authorship rule”, which was the backbone of the access to documents regime that was in place until the adoption of Regulation 1049/2001 and allowed the institutions to refuse access to documents that had not been authored by them.<sup>17</sup> In case C-64/05 P, *Sweden v Commission*, the Court of Justice of the EU confirmed that Article 4(5) does not reinstate the “authorship rule” and does not confer on the Member State concerned a general and unconditional right of veto.<sup>18</sup> Rather, Article 4(5) entitles the Member State to object to the disclosure of documents only on the basis of the substantive exceptions laid down in Article 4(1) to (3) and if it gives proper reasons for its position. This is because, according to the Court, “[t]he provisions of Article 4(1) to (3) of Regulation No 1049/2001, which provide for various substantive exceptions, and of Articles 2(5) and 9, which lay down special rules for sensitive documents, thus take care to define the objective limits of public or private interest that are capable of justifying a refusal to disclose documents held by the institutions, whether they were drawn up by them or received by them, and in the latter case whether they originate from Member States or other third parties.”<sup>19</sup>

### 3 Interplay between Article 113 of the Control Regulation and the public's right of access to environmental information and documents

Case T-653/16 *Malta v European Commission*<sup>20</sup> is the first and only time the General Court of the EU has ever been called to interpret Article 113 of Regulation 1224/2009. The case concerned two requests, submitted by Greenpeace to the European Commission, to access documents pursuant to Regulation

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<sup>16</sup> IBID, paragraph 63 and the caselaw cited.

<sup>17</sup> See, for the Council, Article 1(2) together with Article 2(2), Decision 93/731. And, for the Commission, Article 2 (1 and 2) and Annex (Code of Conduct), Decision 94/90.

<sup>18</sup> Case C-64/05 P *Sweden v Commission* ECLI:EU:C:2007:802, paragraphs 54 – 60.

<sup>19</sup> IBID, paragraph 57.

<sup>20</sup> Case T-653/16 - Malta v Commission, ECLI:EU:T:2018:241.

1049/2001. The documents concerned allegedly irregular shipments of live Bluefin tuna from Tunisia to a fish farm located in Malta and the administrative inquiry that followed under Article 102(2) of the Control Regulation. The Commission granted Greenpeace access to various documents originating both from its services and from the Maltese authorities.

The Republic of Malta initiated proceedings before the General Court, claiming that the Commission's decision to grant access to documents containing information that was transmitted by the Maltese authorities without its consent was in breach of Article 113(2) and (3) of the Control Regulation.

According to the Court, the actual wording of Article 113(2) and (3) of the Control Regulation means that data collected and transmitted by a Member State to the Commission pursuant to that regulation cannot, in principle, be transmitted to 1) persons other than those whose responsibilities require them to have such access, or 2) be used for any purposes other than those provided for in the regulation, unless the Member State who transmitted the data gives its express consent.

The Court then went on to examine the application of these provisions in the context of a request for public access to documents pursuant to Regulation 1049/2001, finding there is no hierarchy between the Control Regulation and Regulation 1049/2001. Both regulations should be applied in a manner that is compatible with the other and which ensures coherence.

The rules on access to documents, particularly those set out in Article 4 of Regulation No 1049/2001, can therefore not be interpreted or applied without taking into account the specific rules in Article 113(2) and (3) of the Control Regulation. In fact, the Court considered that Article 113(2) and (3) of the Control Regulation lay down specific rules ensuring enhanced protection of certain data, whether or not personal and regardless of its level of confidentiality, solely on the basis that it was provided by a Member State. Therefore, where a request based on Regulation No 1049/2001 seeks to obtain access to documents containing data within the meaning of the Control Regulation, Articles 113(2) and (3) establish prior and express consent of the Member State that transmitted the data in question as an unqualified condition for allowing public access to that data.

In contrast with Article 4(5) of Regulation 1049/2001, the Court found that the restriction laid down in Article 113(2) and (3) is not subject to express and prior opposition of the Member State concerned, nor to reliance by that Member State on one of the substantive exceptions laid down in Articles 4(1) to (3) of Regulation No 1049/2001 or in Article 113(4) of the Control Regulation. In addition, the Court found that the Member State is not obliged to provide a statement of reasons for its opposition.

In coming to these conclusions, the Court considered that Member States intended to maintain their power to monitor and control all forms of transmission of data provided in the framework of the Control Regulation.<sup>21</sup> The Court referred in particular to the fact that the Council did not change the Commission's proposal for Article 113 in spite of the opposition of the Swedish delegation which considered the authorship rule to be incompatible with Regulation No 1049/2001.

The Court decided that without the prior and express consent of the Maltese authorities, the Commission acted unlawfully in granting access to the data and annulled the Commission's decision. The Commission did not appeal the judgment to the Court of Justice.

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<sup>21</sup> Article 113(2) and (3) of Regulation No 1224/2009 is, in essence, identical to Article 37(3) and (5) of Regulation No 2847/93 as it stood before the entry into force of Regulation No 1049/2001.

## 4 Critical Analysis of the General Court's judgment in Malta v Commission

In the judgment described above, the General Court considered that public access to all of the data collected under the Control Regulation is subject to the discretionary control of the Member State responsible for providing it – regardless of its content and without an obligation to state reasons in the event of a refusal of disclosure.

**However, there is no underlying rationale capable of justifying the application of one of the strictest confidentiality rules currently in force to the information generated by Member States under the Control Regulation.**

The General Court's judgment is flawed for a number of reasons.

### Failure to consider the Aarhus Convention

The Court did not consider whether the information in question constituted “environmental information” and therefore did not apply the Aarhus Regulation and the Aarhus Convention itself.

As stated above in section 2, it is clear that:

- (1) much of the information at stake in the case constituted “environmental information” within the meaning of Article 2(d) of the Aarhus Regulation; and
- (2) there is no exception in the Aarhus Convention that allows an EU institution to refuse access to the environmental information collected and transmitted under the Control Regulation based solely on the condition of prior and express consent of the Member State in question.

Moreover, Article 4(7) of the Aarhus Convention also creates an obligation to state reasons when refusing access to environmental information while the General Court states that Article 113 is not subject to a statement of reasons for any opposition.

**The interpretation of Article 113 of the Control Regulation in Malta v Commission is therefore incompatible with the Aarhus Convention and the Aarhus Regulation.<sup>22</sup>**

### Failure to give due consideration to the EU Charter of Fundamental Rights

The General Court very quickly dismissed the Commission's argument that Article 113 disproportionately undermines the right to access to documents contained in Article 42 of the Charter of Fundamental Rights (CFR). It based its conclusions on the fact that this right is not unconditional; that Article 113 “applies only” to data originating from the Member States and that it does not stop the public from seeking access to the data directly from the Member States.

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<sup>22</sup> It should be noted that this battle between access to environmental information and confidentiality requirements is not new. A clear example of this was when the Commission introduced uniform rules on defeat devices in the wake of the Dieseltgate scandal. The new rules contained a blanket requirement for public authorities and EU institutions to keep crucial information to ascertain the existence of defeat devices strictly confidential, a provision that was challenged in the EU General Court because it breached the Aarhus Convention and the public's right to access information on emissions (case T-667/17). The Commission therefore withdrew the provision.

This reasoning is flawed. First, Article 52(1) of the CFR states that “[a]ny 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.” The Court did not engage in an analysis of Article 113 as a limitation to the fundamental right contained in Article 42 of the CFR to the legal standard required. If it had done so, it may have found that Article 113, as interpreted by the Court, is not a necessary limitation and is disproportionate.

Second, the General Court insinuated that Article 113 applies to such a small body of data that it is not disproportionate. But, in reality, Article 2 (1) of the Control Regulation defines its scope as applying to “*all activities covered by the common fisheries policy carried out on the territory of Member States or in Community waters or by Community fishing vessels or, without prejudice to the primary responsibility of the flag Member State, by nationals of Member States*”. It is clear from this wording and from the majority of the Control Regulation’s provisions that Member States are its primary interlocutor and bear the bulk of responsibility for collecting and managing fisheries data.

Third, the Court’s conclusion as to the practical implications of Article 113 for the right to access information at Member State level is flawed. In fact, the Court’s interpretation of Article 113(2) and (3) of the Control Regulation does render access to documents very difficult. Indeed, the Court’s interpretation provides a strong legal basis for Member States to also refuse access to information requests at national level on the basis of Article 113.

In addition to the right of access to documents in Article 42 of the Charter, Article 113 also has the potential to limit other fundamental rights, including the right to a high level of environmental protection contained in Article 37 and the right to consumer protection contained in Article 38 of the Charter. The Court made no analysis of the implications of Article 113 on these rights and whether limitations are justified in light of Article 52(1) of the Charter.

**The interpretation of Article 113 of the Control Regulation in Malta v Commission is therefore incompatible with the EU Charter of Fundamental Rights.**

## Wrong application of Regulation 1049/2001

The Court interpreted the provisions of Article 113(2) and (3) of the Control Regulation as having a similar rationale as Article 9(3) of Regulation 1049/2001 and justified its interpretation by reference to this analogy.

Article 9(3) of Regulation 1049/2001 indeed allows the disclosure of “sensitive” documents only with the consent of the entity from which they originate. However, what the Court failed to take into account is that documents can only be classified as “sensitive” in the first place “*in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters*” (Article 9(1)). Therefore, Article 9(3) of Regulation 1049/2001 should be seen as a specific rule that further elaborates the exceptions contained in Article 4(1) of the same regulation. It does not allow Member States or any other entity unfettered discretion to designate certain documents as “sensitive” and block public disclosure unconditionally.

Second, the Court stated that there is no hierarchy between the two regulations and both should be applied in a manner that ensures compatibility and coherence. Unfortunately, the Court made no effort to find a compromise so as to interpret and apply both regulations “in a manner compatible with each other”. The

Court concludes that a request made under Regulation 1049/2001 to access documents in the context of the Control Regulation should be exclusively governed by Regulation 1224/2004 [– in other words, effectively discarding Regulation 1049/2001 entirely.]

The Court cited case C-28/08 *Commission v Bavarian Lager*<sup>23</sup> and case C-127/13 P *Strack v Commission*<sup>24</sup> as an analogy for this conclusion. In both of these cases, the CJEU held that a request for access to documents containing personal data must be decided in accordance with the provisions of Regulation 45/2001 on data protection exclusively. However, the General Court failed to note that this is because the exception relating to the protection of personal data in Regulation 1049/2001 “requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with Regulation No 45/2001”.<sup>25</sup>

Third, the Court goes against the general obligation to state reasons whenever a refusal to a request for access to documents takes place, pursuant to Regulation 1049/2001, Article 296 TFEU and Article 41 (2) of the EU Charter of Fundamental Rights.

**The interpretation of Article 113 of the Control Regulation in Malta v Commission is therefore incompatible with Regulation No 1049/2001.**

## How to amend Article 113 of the Control Regulation?

Article 113 of the Control Regulation, as interpreted by the General Court, does not comply with the EU founding treaties, the Charter of Fundamental Rights or the Aarhus Convention. As such, the ongoing revision of the Control Regulation offers an opportunity for the EU co-legislators to put this right and to ensure that the public, including Members of the European Parliament (MEPs) and national parliamentarians, have access to the fisheries data they need to monitor compliance with the CFP.

For the sake of clarity, the authors of this note do not advocate for unfettered public access to the data collected under the Control Regulation. We do not rule out that the disclosure of certain data may undermine commercial interests or indeed any of the other interests listed in the exceptions to the right of access to environmental information contained in the Aarhus Convention or Regulation 1049/2001.

What is clear, however, is that the EU framework on access to documents and environmental information should regulate public access to this data. Only in this way can decision-makers ensure an appropriate balance between the public interest in disclosure of fisheries data against the private and public interest in secrecy. With this in mind we would suggest the following alternative wording to Article 113 in bold.

Current article 113	Proposal for amending article 113
<p>1. Member States and the Commission shall take all necessary steps to ensure that the data collected and received within the framework of this Regulation shall be treated in accordance with applicable rules on professional and commercial secrecy of data.</p> <p>2. The data exchanged between Member States and the Commission shall not be transmitted to persons other than those in Member States or Community institutions whose</p>	<p>1. Member States and the Commission shall take all necessary steps to ensure that the data collected and received within the framework of this Regulation shall be treated in accordance with applicable rules on professional and commercial secrecy of data.</p> <p>2. The data exchanged between Member States and the Commission <del>shall not</del> <b>may</b> be transmitted to persons other than those in Member States or Community institutions whose</p>

<sup>23</sup> C-28/08 P - Commission v Bavarian Lager, ECLI:EU:C:2010:378.

<sup>24</sup> C-127/13 P - Strack v Commission, ECLI:EU:C:2014:2250.

<sup>25</sup> Case C-28/08 *Commission v Bavarian Lager* ECLI:EU:C:2010:378, paragraph 59.

<p>functions require them to have such access unless the Member States transmitting the data give their express consent.</p> <p>3. The data referred to in paragraph 1 shall not be used for any purpose other than that provided for in this Regulation unless the authorities providing the data give their express consent for the use of the data for other purposes and on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.</p> <p>4. Data communicated in the framework of this Regulation to persons working for competent authorities, courts, other public authorities and the Commission or the body designated by it, the disclosure of which would undermine:</p> <p>(a) the protection of the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data;</p> <p>(b) the commercial interests of a natural or legal person, including intellectual property;</p> <p>(c) court proceedings and legal advice; or</p> <p>(d) the scope of inspections or investigations;</p> <p>shall be subject to applicable rules on confidentiality. Information may always be disclosed if this is necessary to bring about the cessation or prohibition of an infringement of the rules of the common fisheries policy.</p> <p>5. The data referred to in paragraph 1 shall benefit from the same protection as is accorded to similar data by the national legislation of Member State receiving them and by the corresponding provisions applicable to Community institutions.</p> <p>6. This Article shall not be construed as an obstacle to the use of the data, obtained pursuant to this Regulation, in the framework of legal actions or proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy. The competent authorities of the Member State transmitting the data shall be informed of all the instances where those data are utilised for these purposes.</p> <p>7. This Article shall not prejudice the obligations pursuant to international conventions concerning mutual assistance in criminal matters.</p>	<p>functions require them to have such access unless the Member States transmitting the data <del>give their express consent</del> <b>provides a reasoned refusal to disclose the data.</b></p> <p>3. The data referred to in paragraph 1 <del>shall not</del> <b>may</b> be used for <del>any</del> <b>a</b> purpose other than that provided for in this Regulation unless the authorities providing the data <b>provide a reasoned refusal for it to be so used and give their express consent for the use of the data for other purposes and on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.</b></p> <p>4. Data communicated in the framework of this Regulation to persons working for competent authorities, courts, other public authorities and the Commission or the body designated by it, the disclosure of which would undermine:</p> <p>(a) the protection of the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data;</p> <p>(b) the commercial interests of a natural or legal person, including intellectual property;</p> <p>(c) court proceedings and legal advice; or</p> <p>(d) the scope of inspections or investigations;</p> <p>shall be subject to applicable rules on confidentiality. Information may always be disclosed if this is necessary to bring about the cessation or prohibition of an infringement of the rules of the common fisheries policy.</p> <p>5. The data referred to in paragraph 1 shall benefit from the same protection as is accorded to similar data by the national legislation of Member State receiving them and by the corresponding provisions applicable to Community institutions.</p> <p>6. This Article shall not be construed as an obstacle to the use of the data, obtained pursuant to this Regulation, in the framework of legal actions or proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy. The competent authorities of the Member State transmitting the data shall be informed of all the instances where those data are utilised for these purposes.</p> <p>7. This Article shall not prejudice the obligations pursuant to international conventions concerning mutual assistance in criminal matters.</p> <p><b>8. This Article is without prejudice to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents and 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.</b></p>
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