REQUEST FOR INTERNAL REVIEW

UNDER TITLE IV OF THE AARHUS REGULATION

Of specific provisions of Commission Decision (EU) 2024/3080 of 4 December 2024 establishing the Rules of Procedure of the Commission and amending Decision C(2000) 3614 and its annex[1]

SUBMITTED BY

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Hereafter "the Applicant"

To

European Commission, Secretariat-General, Unit for 'Transparency, Document Management and Access to Documents' and Directorate-General for Environment

According to Article 10 of Regulation 1367/2006[2] and Commission Decision (EU) 2023/748[3]

[1] OJ L, 2024/3080, 5.12.2024.

[2] 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) as amended by Regulation (EU) 2021/1767 (OJ L 356, 8.10.2021, p. 1-7).

[3] Commission Decision (EU) 2023/748 of 11 April 2023 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council as regards requests for the internal review of administrative acts or omissions (OJ L 99, 12.4.2023, p. 23–27).

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BACKGROUND

1. In the Commission's own words "*Transparency, integrity, and accountability are the essential prerequisites of a democracy based on the rule of law. They are key principles to promote good governance and build trust in the policy-making process, thereby enhancing the legitimacy and credibility of public institutions. Safeguarding the effectiveness of the citizens' right of access to documents held by the institutions is a cornerstone of the European Commission's pledge for transparency*." [4] New rules for the access of Commission's documents contradict this ambition.

2. This Request for Internal Review concerns the European Commission's (the '**Commission**') decision to provide new detailed rules for the application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, in respect of Commission's documents (hereafter the '**Rules of Procedure**' and their '**Annex**').

3. The Applicant takes issue with a number of limitations to the right to access the Commission's documents contained in the Rules of Procedure and the Annex. With its right hand, the Commission is giving improved transparency promises on lobbying[5], while its left hand is taking away a great number of documents that used to be disclosed, or is making the conditions for disclosure much stricter than previously required, notably by the case law of the Court of Justice – the only authority for the interpretation of EU law.

4. Whereas additional limitations to transparency are a general problem for the exercise of democratic rights, as safeguarded by Article 42 of the EU Charter of Fundamental Rights, this is particularly salient in relation to environmental information. The Parties to the Aarhus Convention agreed that "*public authorities hold environmental information in the public interest*" and that access to environmental information, together with the right to participate and access justice "*contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*".[6] In order to protect these rights, the Aarhus Convention and Regulation 1367/2006 that implements it in Union law, provide that environmental information – that is, very broadly, "any information in written, visual, aural, electronic or any other material form on" the state of the environment, factor affecting the environment or political or legal measures that may have an impact on it, just to name a few[7] – shall be widely accessible to the public.

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[4] Report from the Commission on the application in 2023 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM/2024/266 final, Introduction.

[5] Commission Decision (EU) 2024/3081 of 4 December 2024 on transparency measures concerning meetings held between Members of the Commission and interest representatives, and repealing Decision 2014/839/EU, Euratom (OJ L, 2024/3081, 5.12.2024) ; Commission Decision (EU) 2024/3082 of 4 December 2024 on transparency measures concerning meetings held between Commission staff holding management functions and interest representatives, and repealing Decision 2014/838/EU, Euratom (OJ L, 2024/3082, 5.12.2024).

[6] Preamble and Article 1 Aarhus Convention.

[7] See the full definition of 'environmental information' under Article 2(1)(d) Regulation 1367/2006.

5. However, the new rules that ClientEarth is hereby contesting effectively restrict access to environmental information as defined under Article 2(1)(d) Regulation 1367/2006.

6. The present request concerns several different such restrictions to access and failures to publish environmental information. For example, the new rules limit eligibility to request access to Commission's documents to EU citizens and residents whereas discrimination based on citizenship or the place of residence is prohibited under the Aarhus Convention and Regulation 1367/2006: environmental information, because it concerns everyone and is a prerequisite for the public to exercise its democratic rights to participate in the decision-making and hold those breaching environmental law accountable, should be accessible to the public without discrimination. The new rules further create or expand a number of presumptions of non-disclosure, now covering categories of documents, such as opinions of the Commission's legal service, that are indispensable for the exercise of civil society's democratic rights to be informed of, and influence decision-making in environmental matters. Documents being part of authorisation proceedings, such as authorisations of active substances, are also presumed to be confidential. Draft impact assessments and opinions of the Regulatory Scrutiny Board would be made public only at the same time as legislative proposals – which is common practice but has been found unlawful by the Court of Justice already back in 2018. Disclosure of these documents, and many others, will be limited by the contested provisions, even though they may contain environmental information.

7. This present Request for internal review demonstrates that such limitations contravene environmental law within the meaning of Article 2(1)(g) Regulation 1367/2006. It is only by reviewing these unlawful rules that the Commission will be able to keep its pledge to safeguard democracy in environmental matters.

1. LEGAL FRAMEWORK

1.1 The Aarhus Convention

8. On 17 February 2005, the European Community approved the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed in Aarhus on 25 June 1998 (hereafter '**the Aarhus Convention**').[8]

9. Article 1 Aarhus Convention sets out its objective as follows: "*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party* ***shall guarantee the rights of access to information****, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention*" (emphasis added). The Convention thereby recognises the right of everyone to a healthy environment and sets out the procedural aspects of that right, including the right to access environmental information, as defined in its Article 2(3).

[8] Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

10. To facilitate that Parties to the Convention respect, promote, protect and fulfil this right in practice, the Convention includes a number of concrete obligations which all Parties have accepted to respect. In relation to environmental information, the Convention requires Parties to ensure that public authorities provide access to environmental information on request (Article 4 Aarhus Convention) as well as collect and disseminate environmental information (Article 5 Aarhus Convention). Moreover, the Convention establishes that environmental information shall be accessible to the public without discrimination as to citizenship, nationality, domicile or, for legal persons, place of registration (Article 3(9) Aarhus Convention).

11. As regards environmental information held by Union institutions and bodies, these obligations are implemented in Regulation 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 (hereafter '**Regulation 1367/2006'**).[9,10] As the Court has consistently held, the Aarhus Convention must accordingly be taken into account in interpreting Regulation 1367/2006.[11]

1.2 Regulation 1367/2006

12. In accordance with Article 1, Regulation 1367/2006 seeks to ensure the "widest possible systematic availability and dissemination" of environmental information,[12] as defined in its Article 2(1)(d).

13. To that end, recitals 12, 13 and 15 as well as Article 3 Regulation 1367/2006 clarify that 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 (hereafter '**Regulation 1049/2001'**) [13] should apply to requests for environmental information, except for certain aspects clarified in Article 6 Regulation 1367/2006.[14] Accordingly, Regulation 1049/2001 must also be interpreted in accordance with the Aarhus Convention.[15]

14. As regards dissemination of environmental information, Articles 4 and 5 Regulation 1367/2006 build upon Regulation 1049/2001 while providing for certain clarifications and additions.

[9] OJ 2006 L 264, p. 13, as amended by Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021.
[10] As confirmed by recitals (3) and (4) as well as Article 1(1)(a) Regulation 1367/2006.
[11] See for example, judgment of 23 November 2016*, Commission v Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, ECLI:EU:C:2016:889, para. 61.
[12] See also judgment of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, ECLI:EU:C:2018:660, paragraph 98 and the case law cited.
[13] OJ 2001 L 145, p. 43.
[14] See also judgement in case C-57/16 P precited, paragraph 99 and the case law cited.
[15] Judgment of 1 February 2023, T-354/21, *ClientEarth v Commission*, ECLI:EU:T:2023:34, para. 38 and case law cited.

1.3 Regulation 1049/2001

15. Recital 1 of Regulation 1049/2001 clarifies that it has been adopted to contribute to the objective of Article 1 TEU, namely to create 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.[16] As consistently held by the Court, that same "*core EU objective is also reflected in Article 15(1) TFEU, which provides that the institutions, bodies, offices and agencies of the European Union are to conduct their work as openly as possible, […] in Article 10(3) TEU and in Article 298(1) TFEU, and in the enshrining of the right of access to documents in Article 42 of the Charter of Fundamental Rights of the European Union*."[17]

16. Article 1 Regulation 1049/2001 provides that the purpose of that regulation is to confer on the public as wide a right of access as possible to documents of the EU institutions.[18] The same as Regulation 1367/2006, Regulation 1049/2001 establishes rules facilitating access to information for the public "either following a written application or directly in electronic form or through a register" (Article 2(4) Regulation 1049/2001).

17. As stated in its recital 4, Regulation 1049/2001 was adopted under Article 255(2) of the EC Treaty. This provision has been replaced in the Lisbon Treaty by the already mentioned Article 15 TFEU. Article 15(3), second subparagraph, TFEU states that "*General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure*." Both Regulation 1049/2001 and Regulation 1367/2006 are regulations falling under Article 15(3), second subparagraph, TFEU.

1.4 The Rules of Procedure and their Annex (Commission Decision 2024/3080)

18. On 4 December 2024, the Commission adopted its new Rules of Procedure. As confirmed by recital 6 of the Rules of Procedure and recital 2 of the Annex, the detailed rules for the application of Regulation 1049/2001 have been adopted in accordance with Article 15(3), third subparagraph, TFEU. Article 15(3), third subparagraph, TFEU provides that: "*Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, **in accordance with the regulations referred to in the second subparagraph***" (emphasis added).

19. Accordingly, all the specific provisions contained in the Rules of Procedure and its Annex need to comply with Regulations 1049/2001 and 1367/2006. This also follows from the hierarchy of norms given that both Regulations 1049/2001 and 1367/2006 are legislative

[16] See also judgement in case C-57/16 precited, paragraph 73 and the case law cited.
[17] Judgment in case C-57/16 precited, paragraph 74 and the case law cited.
[18] See also judgement in case C-57/16 P precited, paragraph 76 and the case law cited.

acts in the sense of Article 289 TFEU, while the Rules of Procedure and the Annex have been adopted by the Commission acting alone.

20. Given that, as explained in paragraph 13 above, Regulation 1367/2006 relies both for access to environmental information requests and active dissemination of environmental information on Regulation 1049/2001, these Rules of Procedure will also be applied to the handling of environmental information by the Commission. The fact that the Rules of Procedure will apply to environmental information follows from Article 2(2) of the Annex, which provides that "'document' refers to the definition of 'document' as provided in Article 3(a) Regulation (EC) No 1049/2001, which include documents containing environmental information. This also follows from the fact that the Commission has not adopted another set of procedural rules specific to the handling of environmental information, nor would this be practical, given that applicants are not required to indicate that they are requesting environmental information when making their request.

21. The Rules of Procedure contain in their Chapter V rules on transparency, data protection and security. Moreover, as per its heading, the Annex contains "detailed rules for the application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents". As set out below, the Applicant considers that some of these provisions contravene environmental law.

1.5 Commission Decision 2021/2121

22. Articles 2(5) and 5(1) of the Annex make a cross-reference to Article 7 Commission Decision (EU) 2021/2121 of 6 July 2020 on records management and archives[19] (hereafter '**Commission Decision 2021/2121'**). This Decision applies to records held by the Commission and its archives and provides for rules for the management of such records. It states that "*The records held by the Commission form the basis of its operation and daily work. They are part of the Commission's assets and fulfil the functions of facilitating the exchange of information, providing evidence of action taken, meeting the institution's legal obligations and preserving its memory*" (recital 1). The Decision recognises that "*Provisions on records management and archives should be aligned with the obligation to provide access to documents held by the Commission in accordance with the principles, arrangements and limits set out in Regulation (EC) No 1049/2001 of the European Parliament and of the Council*" (recital 6).

23. Article 7 Commission Decision 2021/2121 provides that *"Documents shall be registered if they contain important information which is not short-lived or if they may involve action or follow-up by the Commission or one of its departments.*"

[19] OJ L 430, 2.12.2021, p. 30–41.

2. SCOPE OF THE REQUEST

24. The Applicant is hereby requesting the Commission to review the following provisions (the '**Contested Provisions'**) under Article 10 Regulation 1367/2006:

    - Article 63(1) of the Rules of Procedure and Article 3(1) of the Annex;
    - Article 65(1) of the Rules of Procedure, and Articles 1 and 2(1) of the Annex;
    - Article 2(3) and 2(5) of the Annex;
    - Article 3 of the Annex;
    - Article 4(2), first subparagraph, points (c) and (f), as well as Article 4(2), second and third subparagraphs of the Annex;
    - Article 5(2) of the Annex;
    - Article 5(4) of the Annex.

25. As demonstrated under section 3.2.2 below, the Applicant submits that the Contested Provisions are severable from other provisions in the Annex and from the remainder of the Rules of Procedure, so that they can be reviewed and amended or withdrawn without affecting the remainder of the rules.

3. ADMISSIBILITY

26. Article 10 Regulation 1367/2006, as amended, entitles any non-governmental organisation that meets the criteria set out in Article 11 Regulation 1367/2006 to make a request for internal review to the Union institution or body that adopted an administrative act, as defined in Article 2(1)(g) Regulation 1367/2006, on the grounds that such an act or omission contravenes environmental law.

27. The present request fulfils the requirements of this provision because: *(i)* the Applicant meets the criteria set out in Article 11 Regulation 1367/2006 ; *(ii)* the Rules of Procedure and the Annex constitute an administrative act in the sense of Article 2(1)(g) Regulation 1367/2006 insofar as they set rules for the application of Regulation 1049/2001 and *(iii)* the legal grounds raised in this request (which the Contested Provisions contravene) constitute environmental law.

3.1. The Applicant meets the criteria set out in Article 11 Regulation 1367/2006

28. Since Regulation 1367/2006 entered into force, ClientEarth has submitted a number of requests for internal review and the EU institutions and bodies have always accepted that ClientEarth fulfils the criteria under Article 11(1) Regulation 1367/2006. In line with Article 2(5)(d) of Commission decision 2023/748, ClientEarth is submitting the replies to three of

its most recent internal review requests, as evidence that it fulfils the criteria under Article 11 Regulation 1367/2006.[20]

29. For the avoidance of any doubt, ClientEarth also submits the documents listed in points (a) to (c) of Article 2 Commission decision 2023/748, specifically:

    A. Statute of ClientEarth AISBL in its current form, as published in the Belgian Official Journal (*Moniteur belge*) – see **Annex 1**, in French;
    B. Annual activity reports of ClientEarth for the years 2022 and 2023– see **Annexes 2 and 3**, in English;
    C. An official extract of the Belgian Companies Register, dated 18 April 2023, which proves ClientEarth's incorporation as a legal person under Belgian law since 25 October 2018, *i.e.* for well over 2 years at the time of submission – see **Annex 4**, in French.

30. These documents demonstrate that ClientEarth meets all the criteria under Article 11(1) Regulation 1367/2006.

31. In particular as to Article 11(1)(b) and Article 11(1)(d) Regulation 1367/2006, the present request seeks to ensure that the Rules of Procedure and their Annex, in particular the Contested Provisions, do not contain any unlawful limitation to access to environmental information, within the meaning of Article 2(1)(d) Regulation 1367/2006. This objective is fully in line with ClientEarth's statutory purpose to protect the environment, as, as recognised in the preamble to the Aarhus Convention, access to information on the state of the environment is a prerequisite for the public to assert their right to live in an environment adequate to their health and their wellbeing.[21] Access to environmental information is also paramount for being able to participate in the elaboration of policies or legislation affecting the state of the environment, and for being able to hold public authorities to account for their failure to comply with environmental law. In this respect, ClientEarth regularly requests documents from the Commission[22] and often challenges unlawful refusals to disclose environmental information before the Court of Justice, including in cases where the Commission had relied on presumptions of confidentiality of certain categories of documents.[23] ClientEarth is also frequently engaged in advocacy and capacity-building in relation to access to environmental information held by the EU institutions, for instance through the participation in related consultations[24] and through the organisation of workshops and webinars.[25]

[20] See Commission decision of 6 July 2022, ref. fisma.b.2(2022)5339092 and its annex; Commission decision of 5 May 2023, ref ARES(2023)3182983; Commission decision of 26 June 2024, ref ARES(2024)4618938.
[21] Recital (8) Aarhus Convention.
[22] See ClientEarth's access to documents requests published on asktheeu.org or the Commission's portal.
[23] See, among others, the judgments in cases C-249/23P, C-612/18P, C-57/16P.
[24] See, for example, ClientEarth's contribution to the European Ombudsman's public consultation on transparency and participation in EU decision making related to the environment: https://www.ombudsman.europa.eu/en/doc/correspondence/en/169590 .
[25] See, for example, recordings, here: https://www.youtube.com/watch?v=5xFWyjX8lWA and here: https://www.youtube.com/watch?v=7uT0hPPjtIQ .

3.2. The Contested Provisions are contained in an administrative act in accordance with Article 2(1)(g) Regulation 1367/2006

32. Article 2(1)(g) Regulation 1367/2006, as amended, defines "administrative act" as "*any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1)*."

3.2.1 The Rules of Procedure and the Annex are non-legislative acts adopted by a Union institution

33. In accordance with Article 289 TFEU, "*[l]egal acts adopted by legislative procedure shall constitute legislative acts*." The Rules of Procedure were not adopted by such a legislative procedure. Rather, they are a Commission decision adopted on the basis of 249 TFEU, according to which "*The Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate. It shall ensure that these Rules are published*." The non-legislative character of the Rules of Procedure is further confirmed by Article 17(6) TEU, according to which "*The President of the Commission shall: (a) lay down guidelines within which the Commission is to work; (b) decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;* […]".

34. As far as Chapter V of the Rules of Procedure and the Annex are concerned, Article 15(3), third subparagraph, TFEU provides that "*Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph*." By contrast, "*General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure*." (Article 15(3), second subparagraph, TFEU). This makes clear that detailed provisions relating to the access to an institution's documents are not to be provided in a legislative act, but in an administrative act.

35. The Applicant concludes that the Rules of Procedure and the Annex are non-legislative acts in the sense of Article 2(1)(g) Regulation 1367/2006.

3.2.2 The Rules of Procedure and the Annex have legal and external effects insofar as they contain provisions for the application of Regulation 1049/2001

36. Firstly, the Applicant submits that the Contested Provisions are severable from the rules of procedure concerning the internal organisation and ways of working of the Commission contained in the remainder of the Rules of Procedure and in the Annex. Consequently, the

legal and external effects of the Contested Provisions ought to be assessed independently from the remainder of the Rules of Procedure and of the Annex.

37. According to the case law of the Court of Justice, the "*partial annulment of an EU act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act*"[26], something which the Court will not permit if the removal of the provision sought to be annulled would have the effect of "*altering the substance*" of the overall act. As the Court clarified in the *Commission v Poland* case, assessing what the *'substance*' of the overall act is requires an objective *"consideration of the scope of [the challenged] provisions, in order to be able to assess whether their annulment would alter the [relevant act's] spirit and substance*." The Court has also stated that *"[a]ltering the substance of a measure would mean turning it into an act which its author would not have had the intention of adopting or would not have adopted*."[27] In this case, it is clear that the Annex is severable from the remainder of the Rules of Procedure. The Annex was adopted on the basis of Article 15(3), third subparagraph, TFEU, which is a different legal basis than the general Rules of Procedure. Severability is also clear from the facts that the Annex has a dedicated scope, i.e. detailed rules on access to documents. Chapter V 'Transparency, data protection and security' of the Rules of Procedure also has a dedicated scope.

38. The same reasoning applies to the Contested Provisions, which are clearly severable from other specific provisions relating to access to documents contained in the Rules of Procedure and the Annex. The Contested Provisions relate specifically to certain categories of documents which would be subject to restrictions to transparency – (eligibility limited to EU residents, presumptions of non-disclosure, limitations to the obligation to register documents etc). As stated in the *Commission v. Poland* case cited above, there is no reason to believe that the Commission would not have adopted general rules on the handling of access to document requests (Articles 6, 8 and 9 to 14 of the Annex), on the implementation of judgments and Ombudsman recommendations (Article 15) or on the principle of sincere cooperation (Article 17), to name a few, in the absence of the Contested Provisions.

39. Therefore, the Applicant submits that it is possible to review and amend or withdraw the Contested Provisions without impacting neither the remainder of the Rules of Procedure, nor the remainder of the Annex. The severability of these provisions also implies that their legal effects shall be assessed independently.

40. Secondly, the Applicant submits that the Rules of Procedure, the Annex and the Contested Provisions contained therein have legal and external effects, insofar as they contain provisions concerning the application of Regulation 1049/2001. In this respect, the Contested Provisions differ from rules of procedure that only have an internal effect. In particular, the Contested Provisions go well beyond provisions on the handling of access to documents requests, or management of public dissemination of documents.

[26] Judgment of 18 March 2014, *European Commission v European Parliament and Council of the European Union*, C-427/12, ECLI:EU:C:2014:170, paragraph 16 and the case law cited.
[27] Judgment of 29 March 2012, *European Commission v* Poland, C-504/09 P, ECLI:EU:C:2012:178, paragraphs 99 and 108.

41. The Court of Justice has already recognised that the Council's procedural rules on the right of public access to documents have legal effects on third parties.[28] This finding necessarily applies to Commission's rules, adopted on the same legal basis and for the same purpose. Precisely, the Contested Provisions directly affect EU citizens' rights to access Commission's documents.

42. As recalled recently in the *ClientEarth v. European Investment Bank* judgment: "*According to settled case-law, in order to determine whether acts or decisions are 'intended to produce legal effects vis-à-vis third parties' within the meaning of Article 263 TFEU, it is necessary to look to the substance of those acts rather than their form and to examine whether they produce binding legal effects such as to affect the interests of a third party by bringing about a distinct change in his or her legal position (see, to that effect, orders of 21 June 2007, Finland v Commission, C-163/06 P, EU:C:2007:371, paragraph 40 and the case-law cited, and of 2 September 2009, E.ON Ruhrgas and E.ON Földgáz Trade v Commission, T-57/07, not published, EU:T:2009:297, paragraph 30 and the case-law cited). That does not apply to internal measures that do not produce any binding legal effect outside of the EU institution, body, office or agency which adopted them (see, to that effect, judgment of 17 July 1959, Phoenix-Rheinrohr v High Authority, 20/58, EU:C:1959:14, p. 181). […] Lastly, nor does that apply to acts or decisions that are purely implementing measures (see, to that effect, judgment of 25 February 1988, Les Verts v Parliament, 190/84, EU:C:1988:94, paragraphs 7 and 8; see also, to that effect, Opinion of Advocate General Ruiz-Jarabo Colomer in Ismeri Europa v Court of Auditors, C-315/99 P, EU:C:2001:243, paragraph 47).*"[29] In order to determine whether the Rules of Procedure and the Annex have legal and external effects, it is enough that the contested provisions affect those rights and that it was the Commission's intention of doing so, having regard to the substance of the act.

43. In this case, first, the Annex is not a purely implementing measure in the sense of the case law cited in the previous point. It is a Commission decision that finds its legal basis directly on Article 15(3), third subparagraph, TFEU and is thus an autonomous legal act, which purpose is to provide for "specific rules".

44. Second, the Contested Provisions (both in the Rules of Procedure and in the Annex) bring about a change in EU citizens' legal position. Article 15(3), first subparagraph, TFEU provides that "*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph*." This fundamental right is also protected by Article 42 EU Charter of Fundamental Rights. In accordance with Article 52(2) of the Charter, the right of access to documents is exercised under the conditions and within the limits for which provision is made in Article 15(3) TFEU. According to the third subparagraph of this provision, EU institutions shall elaborate specific provisions regarding access to its documents. It is clear from Article 15(3), third subparagraph, TFEU that the purpose of rules to be adopted by the Commission for access

[28] Judgment of 30 April 1996, *The Netherlands v. Council*, C-58/94, ECLI:EU:C:1996:171, paragraph 38.
[29] Judgment of 27 January 2021, *ClientEarth v. EIB,* T-9/19, ECLI:EU:T:2021:42, paragraph 153.

to its documents is to guarantee and frame the exercise of EU citizens' rights – thus such rules necessarily affect their legal position.

45. In this case, it is apparent that the Commission intended to affect the legal position of applicants, indeed to limit the public's rights to access information. Providing for presumptions of confidentiality for certain categories of documents, or for other limits to disclosure in the Contested Provisions represent a position taken by the Commission on whether certain categories of documents should be accessible by the public and in which manner – and which public is eligible to access Commission documents. Such rules were not already present in Regulation 1049/2001 nor in Regulation 1367/2006. [30] As demonstrated below in the grounds for review (section 4), the Contested Provisions go beyond a mere interpretation of Regulation 1049/2001 and set new rules or criteria limiting access to documents that, the Applicant argues, breach Regulation 1367/2006 read in conjunction with Regulation 1049/2001 and in light of the Aarhus Convention.

46. Lastly, in January 2025 the Commission has already announced it would not disclose documents to non-EU residents or citizens on the basis of the new rules: the Commission expressly replied to a request that "*since December 6, 2024 new rules of procedure have come into force which mean that access to document requests are no longer accepted from non-EU citizens. […] If you are not an EU citizen your application will be closed in due course*"[31], thereby announcing a change of rules clearly affecting the legal position of third parties[32] i.e. citizens and residents of third countries, who are no longer eligible to request Commissions documents. [33] Moreover, a reply to a confirmatory application clearly states in its title that it is a "decision of the European Commission pursuant to Article 11 [of the Annex]", hence confirming that the Commission intends to rely on the Annex as a legal basis for its decisions.[34] This is additional evidence that the provisions relating to the application of Regulation 1049/2001 contained in the Rules of Procedure and its Annex are capable of, **and were intended to,** produce legal effects outside the Commission.

47. For all these reasons, the Applicant submits that the Rules of Procedure and the Annex have legal and external effects within the meaning of Article 2(1)(g) Aarhus Regulation, insofar as they set rules for the application of Regulation 1049/2001.

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[30] See by analogy Judgment of 9 October 1990, *France v. Commission*, C-366/88, ECLI:EU:C:1990:348, paragraphs 10 and 23-24.
[31] See the exchanges relating to Michael Veale's request for documents relating to "All responses to the consultation on Trustworthy General-Purpose AI" on AskTheEU.org, at: https://www.asktheeu.org/en/request/all_responses_to_the_consultatio?unfold=1 (last consulted on 30 January 2025).
[32] See by analogy Order of the General Court of 13 April 2011, *Planet AE v. Commission*, T-320/09, ECLI:EU:T:2011:172, paragraphs 46-47 and 51.
[33] Compare with the previous rules i.e. Article 1 to the annex of Commission Decision of 5 December 2001 amending its rules of procedure (2001/937/EC, ECSC, Euratom), (OJ L 345 , 29/12/2001 p. 94 – 98): "*Pursuant to Article 2(2) of Regulation (EC) No 1049/2001, citizens of third countries not residing in a Member State and legal persons not having their registered* [sic] *in one of the Member States shall enjoy the right of access to Commission documents on the same terms as the beneficiaries referred to in Article 255(1) of the Treaty*."
[34] Commission decision of 22 January 2025, C(2025)593 final, available at: https://www.asktheeu.org/en/request/13425/response/57126/attach/2/C%202025%20593%201%20EN%20ACT%20part1%20v2.pdf?cookie_passthrough=1 (last consulted on 30 January 2025).

3.2.3 The Contested Provisions contravene environmental law within the meaning of point (f) of Article 2(1) Regulation 1367/2006

48. Pursuant to Article 2(1)(f) Regulation 1367/2006, 'environmental law' means "*Union legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources,` and promoting measures at international level to deal with regional or worldwide environmental problems*." The EU General Court has held that this concept "*must be interpreted, in principle, very broadly*."[35]

49. Regulation 1367/2006 undoubtedly pursues the objectives of Union policy on the environment. The very objective of Regulation 1367/2006 as amended, as set in its Article 1, is to "*contribute to the implementation of the obligations arising under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, hereinafter referred to as 'the Aarhus Convention', by laying down rules to apply the provisions of the Convention to Union institutions and bodies, in particular by:*

    (a) guaranteeing the right of public access to environmental information received or produced by Union institutions or bodies and held by them, and by setting out the basic terms and conditions of, and practical arrangements for, the exercise of that right;

    (b) ensuring that environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination. To that end, the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted; […]"

50. As explained in section 1.2 above, Regulation 1367/2006 relies on certain provisions of Regulation 1049/2001 in relation to access to environmental information held by the Commission, and only supplements Regulation 1049/2001, where relevant. In that regard, Regulation 1367/2006 and Regulation 1049/2001 must therefore be read and applied jointly, and accordingly also jointly constitute environmental law for the purposes of Article 2(1)(f) Regulation 1367/2006. To hold otherwise would be absurd, as Regulation 1367/2006 does not itself include most of the rules that make access to environmental information effective, such as a procedure to request information.

51. As set out in detail below, the Applicant submits that the Contested Provisions contravene specific provisions of Regulation 1367/2006 in conjunction with specific provisions of Regulation 1049/2001.

52. There can therefore be no doubt that the Contested Provisions have the potential to contravene provisions which pursue the objectives of EU policy to the environment and therefore constitute environmental law for the purposes of Article 2(1)(f) of the Regulation 1367/2006. Accordingly, the present Request is admissible.

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[35] Judgment of 14 March 2018, *TestBioTech v Commission*, T-33/16, EU:T:2018:135, paragraphs 44-46.

4. GROUNDS OF REVIEW

53. The Applicant contends that the Contested Provisions contravene environmental law, in particular Regulation 1367/2006 in conjunction with Regulation 1049/2001, also read in light of the Aarhus Convention, insofar as the Contested Provisions restrict access to environmental information, notably by (1) precluding natural and legal persons who are not citizen, resident or registered in the EU to access environmental information; (2) unduly restricting the notion of "documents held by the Commission" and of "documents drawn by" it that may be searched and disclosed, as well as imposing limits on the documents that are registered and retained; (3) establishing new general presumptions of non-disclosure covering certain categories of environmental information, limiting the possibility to rebut these presumptions and extending existing presumptions of non-disclosure; and (4) restricting the categories of "legislative documents" that the Commission is required to publish and the timing of that publication.

4.1 First plea: The Commission breached Regulation 1367/2006 by precluding non-citizens, non-residents and NGOs registered abroad from filing environmental information requests

54. Article 65(1) of the Rules of Procedure and Articles 1 and 2(1) (definition of 'applicant') of the Annex prevent natural persons who are not EU citizens or do not reside in the European Union and legal persons having their registered office outside of the European Union from requesting environmental information. This contravenes Article 3 Regulation 1367/2006 read in light of Article 4(1) in conjunction with Article 3(9) Aarhus Convention.

55. Article 65(1) of the Rules of Procedure and Articles 1 and 2(1) of the Annex now[36] limit access to the Commission's documents to "*citizens of the Union and natural or legal persons residing or having their registered office in a Member State*." It appears that the Commission effectively intends to reject requests for documents made by non-EU residents or non-EU citizens on this basis.[37]

56. As a preliminary observation, the Applicant understands that this reduced scope of eligibility is not meant to apply to the last subparagraph of Article 4(2) of the Annex according to which "*Parties to the proceedings under points (e) to (k) have the right to access the file pursuant to Article 41(2)(b) of the Charter of Fundamental Rights and the*

[36] Compare with the previous rules, which explicitly allowed access to documents to legal and natural persons from third countries: Article 1 to the annex of Commission Decision of 5 December 2001 amending its rules of procedure (2001/937/EC, ECSC, Euratom), precited.
[37] See the exchanges relating to Michael Veale's request for documents relating to "All responses to the consultation on Trustworthy General-Purpose AI", precited.
See also the exchanges relating to Tara Tamang's request for documents relating to the Fort Vert Natural Reserve, Information for Master's Thesis at the University of Oxford, in particular the Commission's request for the applicant's EU citizenship since she is resident in the UK, available at: https://www.asktheeu.org/en/request/the_fort_vert_natural_reserve_in#incoming-57206

applicable sector-specific legislation", when parties to the proceedings are residents or registered outside the Union – which is common in competition cases and authorisation proceedings, for instance. A discrimination based on the place of residence or registration in this respect would necessarily breach Article 41(2)(b) of the Charter.

57. The Applicant submits that the limitation of eligible beneficiaries of the right to access Commission's documents in Article 65(1) of the Rules of Procedure and in Articles 1 and 2(1) of the Annex contravenes the clear and precise provisions of Regulation 1367/2006 read in light of the Aarhus Convention cited below, when the documents contain environmental information.

58. Article 3 Aarhus Regulation provides that "*Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities*."[38] These terms are directly borrowed from Article 3(9) Aarhus Convention, which provides that "*Within the scope of the relevant provisions of this Convention, the public shall have access to information, […] without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities*."

59. The Aarhus Convention Implementation Guide, which the Court confirmed can be taken into account in the interpretation of the Aarhus Convention,[39] clarifies in that regard:

"*Article 3, paragraph 9, makes it clear that distinctions based upon citizenship, nationality, residence or domicile, place of registration or seat of activities are not permitted under the Convention. This non-discrimination clause is another of the key provisions of the Convention. It establishes that* ***all persons, regardless of origin, have the exact same rights under the Convention as citizens of the Party concerned***" (emphasis added).[40]

60. The definition of 'applicant' in Article 2(1)(a) Regulation 1367/2006 is consistent with this principle of non-discrimination and ensures the broadest access possible to environmental information ("*For the purpose of this Regulation: (a) applicant' means any natural or legal person requesting environmental information*"). In the same manner, "the public" who is eligible to access environmental information is defined under Article 2(4) Aarhus Convention as natural and legal persons and their associations, without a possibility for the Parties to restrict the public to their nationals and residents or entities registered in their jurisdiction.

61. Therefore, the Applicant requests the Commission to review Article 65(1) of the Rules of Procedure, as well as Article 1 and the definition of 'applicant' in Article 2(1) of the Annex in relation to documents containing environmental information.

[38] See also recital (6) Regulation 1367/2006.
[39] Judgement of 13 July 2017, C-60/15 P, *Saint-Gobain Glass Deutschland v Commission*, ECLI:EU:C:2017:540, para. 44
[40] Aarhus Convention Implementation Guide, second edition (2014), p. 72.

4.2 Second plea: The Commission breached Regulation 1367/2006 in conjunction with Regulation 1049/2001 by restricting the definition of documents "held by" the Commission

62. Article 2(3), 2(5) and 5 of the Annex restrict the definition of a document "held by" or "drawn up by" the Commission, in contravention of Article 3 Regulation 1367/2006 read together with Article 2(3) Regulation 1049/2001 and in light of Article 4(1) Aarhus Convention.

4.2.1 The definitions of documents "held by" and "drawn up by" the Commission breach Article 3 Aarhus Regulation read together with Article 2(3) Regulation 1049/2001

63. One of the main objectives of Regulation 1367/2006, as stated in Article 1(1)(a), is "*guaranteeing the right of public access to environmental information* ***received or produced by Community institutions or bodies and held by them*** *[…]"* (emphasis added). As recalled under section 1.2 above, in accordance with Article 1, Regulation 1367/2006 seeks to ensure the widest possible systematic availability and dissemination of environmental information. This right is also guaranteed by the Aarhus Convention.

64. The essential provisions relating to access to environmental information in Regulation 1367/2006 apply to documents "held by" the institutions: see notably Articles 3 (scope of application), 4(1) (collection and dissemination), 7 (documents not held by the institution) and 8 (cooperation). However, Regulation 1367/2006 does not define which documents are deemed to be held by the institutions.

65. To that end, recitals 12, 13 and 15 as well as Article 3 Regulation 1367/2006 clarify that Regulation 1049/2001 should apply to requests for environmental information, except for certain aspects clarified in Article 6 Regulation 1367/2006.[41]

66. Article 2(3) Regulation 1049/2001 provides that "*This Regulation shall apply 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*." This broad definition is consistent with the objective of broad access to environmental information cited above, as well as with the specific provisions in Regulation 1367/2006 requiring the institutions to record environmental information it holds on databases to facilitate their dissemination and access, and to redirect applicants to third parties who can hold relevant information that is not held by the institution, also to ensure that applicants can access information that is effectively held by someone (Article 4(1) and 7, notably).

[41] See also judgment in case C-57/16 P precited, paragraph 99 and the case law cited.

67. By contrast, Article 2 of the Annex distinguishes documents "held by", "drawn up" and "received" by the Commission and defines them in narrow terms. Article 2(5) of the Annex defines "documents held by" the Commission as (a) documents that are registered in accordance with Article 7 Commission Decision 2021/2121; and (b) in essence, documents that are created on a Commission's information technology application and stored on a corporate device for professional use.

68. Firstly, the Applicant submits that Article 2(5) of the Annex contravenes Article 3 Regulation 1367/2006 in conjunction with Article 2(3) Regulation 1049/2001 because the latter provision already defines "documents held by the Commission". It was therefore not for the Commission to provide for a (re-)definition of those terms. As already mentioned in paragraph 34 above, it is clearly not the intention of Article 15(3), third subparagraph, TFEU to empower the Commission to redefine terms already defined in the legislative act adopted on the basis of Article 15(3), second subparagraph, TFEU. Rather, Article 15(3), third subparagraph, TFEU specifically clarifies that the specific provisions regarding access to documents to be included in the Rules of Procedure of the EU institutions shall be "in accordance with" those regulations, i.e. with Regulation 1049/2001. Such a redefinition also conflicts with the hierarchy of norms, given that Regulation 1049/2001 is a legislative act which expresses the will of the democratically legitimised EU legislator.

69. To make matters worse, Article 2(5) of the Annex provides for an entirely new definition, which does not even confirm that documents "held by" the Commission shall encompass all the documents "drawn up by" and "received by" it, as prescribed by the existing definition under Article 2(3) Regulation 1049/2001.

70. The Applicant considers that for this reason alone, Article 2(5) of the Annex contravenes Article 3 Regulation 1367/2006 in conjunction with Article 2(3) Regulation 1049/2001.

71. Secondly, even if it were accepted that Article 2(5) of the Annex is not already in contravention of environmental law on this basis, the Applicant submits that the only application of the Annex that would be consistent with Article 2(3) Regulation 1049/2001 is to consider that all documents "drawn up" and "received" by the Commission are deemed to be held by it.

72. Nevertheless, the definition in Article 2(5) of the Annex, read together with Article 2(3) of the Annex, unlawfully excludes a certain number of documents from the scope of "documents held by the Commission":

    (a) Documents that *are* created on a Commission's information technology application on a corporate device and for professional use, as per Article 2(5)(b), but have not been approved for transmission (see definition of "documents drawn up by" in Article 2(3) of the Annex);

    (b) Documents that are *not* created on a Commission's information technology application and not registered, pursuant to Article 2(5)(a) read together with Article 5(1) and 5(2) of the Annex.

73. It implies that, for instance, a number of handwritten notes (before they are transferred to an information technology application, if they are), draft documents or communications made on private devices (that wouldn't presumably be subject to approval for transmission by a responsible person, nor registered), or some documents received by the Commission, would fall outside the scope of "documents held by the Commission". For the avoidance of doubt, it is irrelevant, for the determination of what is a document held by the Commission, whether some of these documents could be deemed to be internal documents and subject to a presumption of non-disclosure under certain conditions.

74. The new definition of "documents held by the Commission" bears important legal consequences as it delimits the scope of application of Regulation 1049/2001: only documents "held by the Commission" will be searched when a request is made (Article 10(1) of the Annex) and then potentially disclosed.

75. However, it cannot be excluded, in principle, that categories of documents which wouldn't be deemed to be "held by the Commission" as per the definition in Article 2(5), read together with Article 2(3) and 5(1) and (2) of the Annex, may contain environmental information. There is no requirement in Regulation 1367/2006, nor in the Aarhus Convention that (i) a responsible person shall consider that the information is ready for transmission, nor that (ii) the information has been registered as a prerequisite to disclosure. Regulation 1049/2001 does not limit access to documents (including those received by the Commission) to those that are registered either.[42]

76. While the Applicant acknowledges that responding to access requests by the public is challenging for any public body, it should be noted that requests to access environmental information are at times also based on, for instance, information by a leak or obtained by an investigative journalist from a whistleblower, which gives a clear indication that a specific document exists and may evidence maladministration related to the environment. Under such circumstances, the applicant effectively assists the Commission services in identifying the related piece of environmental information, no matter the format. Regulation 1367/2006 in conjunction with Regulation 1049/2001 clearly obliges the Commission services to process such requests.

77. By establishing that these categories of environmental information are not documents "drawn up" and/or "held by" the Commission, Article 2 of the Annex thereby effectively restricts access to environmental information, which is defined in much broader terms in Article 2(1)(d) Regulation 1367/2006 as "any information in written, visual, aural, electronic or any other material form". As explained in the Aarhus Convention Implementation Guide:

> *"Environmental information may be in any material form, which specifically includes written, visual, aural and electronic forms. Thus, paper documents, photographs, illustrations, video and audio recordings and computer files are all examples of the*

[42] See in this respect, EU Ombudsman decision of 12 July 2022 in case 1316/2021/MIG - Decision on the European Commission's refusal of public access to text messages exchanged between the Commission President and the CEO of a pharmaceutical company on the purchase of a COVID 19 vaccine, paragraph 19.

material forms that information can take. Any other material forms not mentioned, existing now or developed in the future, also fall under this definition […]."[43]

78. It clearly follows from this definition and the associated explanations that it is not permissible to exclude documents based on their material form (such as contained on a private device in the form of a text message or on paper), nor based on the fact that they have not been approved for transmission or registered. In certain cases documents that have not been approved for transmission, have been created and stored on a private device or received by a third party and not registered, will be covered by one of the exceptions in Article 4(2) and (3) Regulation 1049/2001. However, it is not possible to exclude them from the access to environmental information regime altogether.

79. This is also not in line with the ordinary meaning and object and purpose of Article 2(4) Regulation 1049/2001. Clearly, the intention of this provision is to clarify that **all** documents, whether drawn up or received by the Commission, fall under the scope of the Regulation and therefore under the access to information regime. The terms "drawn up", "received" and "held by" are meant to convey this all-encompassing nature, rather than constituting vehicles to effectively restrict access. This also follows from the first subparagraph of Article 15(3) TFEU and from Article 42 of the Charter. As the Court has clarified: "[…] *a right of access to documents is ensured under the first subparagraph of Article 15(3) TFEU and enshrined in Article 42 of the Charter, a right which has been implemented, inter alia, by Regulation No 1049/2001, Article 2(3) of which provides that it applies to **all** documents held by the Parliament, the Council or the Commission"* (emphasis added).[44]

80. It is also evident that the Commission is aware that these new definitions are an effective restriction of the scope of application of Regulation 1049/2001 because it proposed to amend the definitions contained in Regulation 1049/2001 in a very similar manner, in 2008. The Commission proposed to amend the definition of a document in Article 3(a) Regulation 1049/2001 as follows, difference in bold:

> Current version: " 'document' **shall mean** 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**."
>
> Proposed version: " 'document' **means** any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) **drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution; data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system.**"[45]

[43] Aarhus Convention Implementation Guide, p. 51.
[44] Judgment of 5 March 2024, C-588/21 P, *Public.Resource.Org and Right to Know v Commission and Others*, ECLI:EU:C:2024:201,, para. 84 and case law cited.
[45] Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, COM/2008/0229 final - COD 2008/0090.

81. The consequence of this change would have been that no longer all documents falling within the sphere of the Commission's responsibility would have been subject to requests but rather only documents fulfilling certain requirements, including that they have been "formally transmitted". This latter requirement is comparable to the "approval for transmission" now inserted in Article 2(3) of the Annex. The Commission thereby seeks to circumvent the legislator's intention, in contravention of the Regulation.

82. The Applicant therefore submits that limiting the search and disclosure of environmental information to documents "held by" the Commission pursuant to the definitions in Article 2(3) and 2(5) of the Annex, both individually and when read together, contravenes Article 3 Regulation 1367/2006 in conjunction with Article 2(3) Regulation 1049/2001.

4.2.2 The exceptions to the obligation to register documents provided in Article 5(2) of the Annex unduly restrict access to environmental information in contravention of the essence of the right guaranteed by Article 3 Regulation 1367/2001 and Article 2 Regulation 1049/2001

83. As mentioned above, according to Article 2(5) of the Annex documents are deemed to be held by the Commission when they are either registered, or created on a Commission's information technology application and stored on a corporate device for professional use. As also already demonstrated above, some environmental information may fall outside of these definitions and therefore taken out of the scope of access requests. While these definitions will bar requesting access altogether, Article 5(2) of the Annex includes certain limitations to the Commission services' obligation to register documents, which will *de facto* prevent disclosure of documents, as it will prevent identifying these documents in internal searches. The Applicant considers that Article 5(2) of the Annex therefore contravenes Article 3 Regulation 1049/2001 in conjunction with Article 2 Regulation 1049/2001 for *de facto* excluding these documents from access requests.

84. Article 5(1) of the Annex provides that "*any content that constitutes important information that is not short-lived shall be registered pursuant to Article 7 of Commission Decision 2021/2121*." While what is deemed "important" is not defined, the Applicant understands, based on the public version of the Commission's practical registration criteria,[46] that the Commission so far considered that "a document which requires action or follow-up or involves the responsibility of the institution is important" – which corresponds to the criteria for registering a document set by Article 7 of Decision 2021/2121. However, Article 5(2) provides numerous exceptions to this registration obligation. The Applicant understand this to be a new limitation to Article 7 of Decision 2021/2121, even if this is not explicit.

85. Article 5(2) of the Annex creates a particular hurdle for accessing environmental information, in contravention of the principle of broad access safeguarded by Regulation 1367/2006 and the Aarhus Convention, cited above. Indeed, it is apparent that the Commission's staff will only search for documents that are registered in a database. The

[46] Ref. Ares(2015)182108 – 16/01/2015.

Commission's internal guidelines to staff on how to handle access to documents requests under Regulation 1049/2001 instruct staff to "*identify all documents falling under the scope of the request* ***by searching in Ares and other databases/websites***" (we emphasise). The accompanying Note to Directors General, Heads of Cabinet and Directors of Executive Agencies on document management and access to documents[47] notes that "*when processing a request for access, documents are searched* ***only*** *in Ares or in another document management system*" (emphasis added). This is why the Commission's guidelines on document management and access to documents state that "*Not registering such a document could prevent the institution from retrieving it at a later date. Keeping documents in a working space such as shared drives or electronic mailbox folders does not ensure their integrity, preservation and retrieval. It is therefore* ***essential that all documents that meet the registration criteria defined in the eDomec rules are actually registered***." (emphasised by the Commission).[48] The EU Ombudsman's findings in relation to access to the Commission President's text messages about the vaccines for Covid-19 were that indeed, the Commission generally only searches for registered documents. This confirms that Commission staff are not required to (nor may easily, in practice) search for documents that are not registered.

86. The list of exclusions from the obligation to register documents set under Article 5(2) of the Annex therefore prevents, *de facto*, access to environmental information. Although all the exceptions under Article 5(2) are potentially problematic to the extent that they may contain environmental information, the following items clearly contravene Regulation 1367/2006, read in conjunction with Regulation 1049/2001 and in light of the Aarhus Convention, as well as established case law, given that they put undue restrictions to access to the relevant information:

    (b) "*content circulated as part of an informal, preliminary exchange of views between European Commission staff*": It is unclear what constitutes an informal and preliminary exchange of views risking that this exception will be applied widely. It may be that the content of environmental information, either created or received by the Commission, is being discussed as part of these exchanges. This exception to the requirement to register documents defeats the Court of Justice's finding that preliminary discussions within an institution are subject to access to requests, and do not justify the application in the first subparagraph of Article 4(3) Regulation 1049/2001;[49]

    (e) "*informal, preliminary exchanges of views between European Commission staff with a view to determining the position of the administrative entity responsible for the document's content*": This is also a vague exception, which may be applied to many documents. It is also very similar to the exception under point (b), so the same considerations apply;

[47] Ref. Ares(2015)182108 – 16/01/2015.
[48] Ref. Ares(2015)182108 – 16/01/2015.
[49] Judgement of 17 October 2013, *Council v AccessInfoEurope*, C-280/11 P, ECLI:EU:C:2013:671, paragraph 60.

(f) *iterations of a preliminary document (e.g. a draft legislative proposal or policy communication or a draft impact assessment)*": it is very clear from the case law of the Court of Justice (notably C-57/16P precited and recently C726/22 P[50]) that draft proposals, impact assessments or policy communications (such as guidance documents) or more broadly, draft documents drawn up in the course of a decision-making process must be disclosed under certain circumstances. Their provisional nature is not *per se* an obstacle to disclosure.[51] Whereas the Court recognised that "the state of completion of the document in question" is relevant for assessing whether a draft may pose a risk to the decision-making process[52], point (f) of Article 5(2) of the Annex excludes from registration all draft documents, without nuance as to their state of completion.

87. As mentioned above, if such documents are not registered, it is very unlikely that they will be searched by Commission staff when handling a request or a confirmatory application (see Articles 10(1) and Article 11(5), fourth subparagraph of the Annex, together with the package of Commission's instructions to staff on the handling of access to information requests mentioned above).[53]

88. Moreover, in case the environmental information that is not registered for reasons set out in Article 5(2) of the Annex is contained in an email, this email will be deleted after 6 months in accordance with Article 5(3) of the Annex. Therefore, this environmental information will become permanently inaccessible due to this non-registration compounding the issue created by Article 5(2).

89. In light of the foregoing, Article 5(2), and in particular Article 5(2)(b), (e) and (f), of the Annex contravenes Article 3 Regulation 1049/2001 in conjunction with Article 2 Regulation 1049/2001 for *de facto* excluding documents that can contain environmental information from access requests.

4.2.3 The obligation to delete text messages under Article 5(4) of the Annex unduly restricts access to environmental information in contravention of the essence of the right to access information guaranteed by Article 3 of Regulation 1367/2006 and Article 2 of Regulation 1049/2001

90. Next to the limitations as to which documents are "drawn up" or "held by" as well as registered addressed above, Article 5(4) of the Annex provides that a whole category of documents that may contain environmental information, namely text messages, are to "automatically disappear". This creates another *de facto* restriction to the right to access environmental information, in contravention of Article 3 Regulation 1049/2001 in conjunction with Article 2 Regulation 1049/2001. Text messages could fall under Article

[50] Judgment of 16 January 2015, *Commission v Pollinis,* C-726/22 P, ECLI:EU:C:2025:17.
[51] Judgment in case C-57/16 P precited, paragraph 111.
[52] Idem.
[53] Ref. Ares(2015)182108 – 16/01/2015.

2(1)(d)(ii) or (v) Regulation 1367/2006 as information in written form on measures or on economic analyses drawn up in the environmental context.

91. Article 15(1) Commission Decision 2021/2121 provides that "*The retention period for the various categories of files and, in certain cases, records, shall be set for the whole Commission by way of regulatory instruments, such as the common retention list, or one or more specific retention lists drawn up on the basis of the organisational context, the existing legislation and the Commission's legal obligations*." The periods for retention in common retention list vary widely but are set generally between 2 and 10 years before, simply put, an (automatic or manual) decision is taken as to whether to keep the document in question, move it to the archive or delete it permanently.[54]

92. Article 5(4) of the Annex states, on the other hand, that "*text messaging applications shall comply with the Commission's information technology security recommendations for the automatic disappearance of messages*."

93. Through this provision the Commission establishes an obligation to automatically delete a whole category of documents. Under Article 5(4) of the Annex all text messages, even those stored on Commission's corporate devices regardless of their content, will be destroyed by automatically deleting them. Article 5(4) also effectively excludes these messages from registration, as they will not be considered important for the purposes of Article 5(1) of the Annex. They can also not in that way be captured by Article 2(5) of the Annex.

94. This undermines the essence of the right to information guaranteed by Article 3 Regulation 1367/2006 and Article 2 Regulation 1049/2001. As confirmed by CJEU case law, Regulation 1049/2001 contains a clear obligation to retain documentation related to the Commission's activities. For instance, in Case T-264/04 *World Wildlife Fund*, the General Court held that it

> "[..] *would be contrary to the requirement of transparency which underlies Regulation No 1049/2201 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner,* ***draw up and retain documentation relating to their activities***." [55]

95. It follows that "*the institutions cannot deprive of all substance the right of access to documents which they hold by failing to register the documentation relating to their activities*."[56]

96. This automatic deletion is also contrary to the Commission's obligation to collect and systematize environmental information pursuant to Article 4(1) Regulation 1367/2006 read in light of Article 5(1) and (2) Aarhus Convention. Collection and preservation of documents that may contain environmental information is a precondition for the effective exercise of

[54] See Commission Implementing Rules for Decision C(2020) 4482 on records managements and archives, SEC(2020) 800, as well as the Common Commission-level retention list for European Commission files, Ref. Ares(2022)8801492 of 19 December 2022.
[55] Judgment of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, ECLI:EU:T:2007:114, paragraph 61.
[56] Judgment of 25 September 2024, *British American Tobacco Polska Trading sp. z o.o. v Commission*, T-311/23, ECLI:EU:T:2024:645, paragraph 82.

the public's right of access to such information. Automatic deletion of a whole category of documents, as it is in the case of text messages, deprives the public of any opportunity to have their contents examined and either be granted access to them or receive due justification for any restrictions (other than that the messages no longer exist).

97. Accordingly, the Commission is obliged to collect and retain documentation relating to its activities, in particular when it contains environmental information. Automatic deletion of all text messages is in breach of that obligation. The Applicant therefore considers that Article 5(4) of the Annex is in contravention of Article 3 Regulation 1367/2006 in conjunction with Article 2 Regulation 1049/2001 by *de facto* restricting access to environmental information.

4.3 Third plea: The Commission breached Regulation 1367/2006 in conjunction with Regulation 1049/2001 by establishing and extending the application of general presumptions of non-disclosure of certain categories of environmental information

98. Article 4(2) of the Annex lists several categories of documents which are presumed to undermine the interests protected by Article 4(1) to (3) of Regulation 1049/2001. According to the second subparagraph of Article 4(2) of the Annex, no access to those documents will be granted unless the applicant demonstrates an overriding public interest in providing access prevailing over interests protected by Article 4(2) and 4(3) of Regulation 1049/2001. This essentially means that requests for access to documents falling within one of the broad categories of documents listed in Article 4(2) of the Annex will be rejected unless the applicant demonstrates an overriding public interest in disclosure.

99. The Applicant submits that Article 4(2)(c), (f), second subparagraph and third subparagraph, of the Annex contravene Articles 3 and 6 Regulation 1367/2006, in conjunction with Article 4 Regulation 1049/2001, by introducing new presumptions without adequate justification (section 4.3.1), limiting the possibility of the applicant to rebut these presumptions by showing an overriding public interest (section 4.3.2) and by extending the temporal applicability of the presumptions (section 4.3.3).

4.3.1 General presumptions of non-disclosure in relation to opinions of the Legal Service and ongoing authorisation proceedings unduly restrict access to environmental information in contravention of Articles 3 and 6 Regulation 1367/2006 in conjunction with Article 4 of Regulation 1049/2001

100. Points (c) and (f) of Article 4(2) of the Annex, among others, lists two new categories of documents to which a general presumption of confidentiality will apply, namely, "*opinions of the Legal Service*" and "*documents being part of ongoing administrative authorisation proceedings*". The Applicant submits that these general presumptions contravene Articles

3 and 6 Regulation 1367/2006, in conjunction with Article 4 Regulation 1049/2001. They are also contrary to the well-established case law of the CJEU granting access to documents falling within these categories.

101. Article 1 Regulation 1367/2006 read together with Article 4 Aarhus Convention guarantees to the public the widest possible access to environmental information. Article 3 Regulation 1367/2006 further specifies that Regulation 1049/2001 applies to any request by an applicant for access to environmental information held by Community institutions and bodies.

102. Both opinions of the Legal Service and documents forming a part of ongoing administrative authorisation proceedings can contain environmental information. Article 2(d) of Regulation 1367/2006 lists broad categories of information considered "environmental information". This includes information on any measures, including administrative, affecting or likely to affect or designed to protect the elements of the environment, including legislation, policies, plans, programmes, environmental agreements and activities (Article 2(d)(iii)). It also includes information on 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 (Article 2(d)(ii)).

103. The Commission's Legal Service acts as its legal adviser. Therefore its opinions can contain advice on any provision of environmental legislation, draft or adopted, as well as on international environmental agreements, negotiations or implementation of such agreements.[57] The Applicant submits that therefore, the opinions of the Commission's Legal Service can contain information on measures affecting, likely to affect or protecting the environment. For instance, in *ClientEarth and Leino-Sandberg v the Commission,* the General Court held that the Council must grant access to the opinion of its Legal Service, which dealt with the Commission's proposal to amend Regulation 1367/2006 to bring it in line with the findings of the Aarhus Convention Compliance Committee.

104. Similarly, various authorisation procedures under EU environmental law contain environmental information. Some examples are authorisations for the use of chemicals of high concern under Regulation 1907/2006,[58] authorisations for the placing on the market of active substances under Regulation 1107/2009,[59] authorisations for exemption from restriction of the use of certain hazardous substances in electrical and electronic equipment

[57] Article 53(1) and (2) of the Rules of Procedure.
[58] Art. 60 Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ 2006 L 396, p. 1.
[59] Art. 13 Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ 2009 L 309, p. 1.

under Directive 2011/65/EU[60] and authorisations for food additives, food enzymes and food flavourings under Regulation (EC) No 1331/2008[61].[62]

105. While exceptions laid out in Article 4 of Regulation 1049/2001 apply to the right of access to environmental information, Article 6 of Regulation 1367/2006 specifies that "*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*." Article 6(1) also specifies that an "*overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment*."

106. The existence of general presumptions of confidentiality under EU law is in principle permissible in certain situations, however, the CJEU case law sets clear criteria for their recognition:

- the documents must belong to the same category of documents or be documents of the same nature (judgment of 1 February 2008, *MSD Animal Health Innovation GmbH and Intervet international BV v European Medicines Agency*, T-729/15, ECLI:EU:T:2018:67, para 25);
- the application of a general presumption is essentially dictated by the overriding need to ensure that the procedures at issue operate correctly, and to guarantee that their objectives are not jeopardised. Accordingly, a general presumption may be recognised on the basis that access to the documents involved in certain procedures is incompatible with the proper conduct of such procedures and the risk that those procedures could be undermined, it being understood that general presumptions ensure that the integrity of the conduct of the procedure can be preserved by limiting intervention by third parties (judgment of 28 May 2020, *Campbell* v *Commission*, T-701/18, EU:T:2020:224, para 50);
- in relation to a procedure before an EU Institution, the specific rules governing access to those documents, which are laid down in the relevant regulations must also be considered (judgment of 1 February 2008, *MSD Animal Health Innovation GmbH and Intervet international BV v European Medicines Agency*, T-729/15, ECLI:EU:T:2018:67, para 29).

107. The CJEU has on several occasions assessed and recognized general presumptions of confidentiality in relation to specific clearly defined categories of documents and procedures. As recently summarized by Advocate General Medina:

[60] Articles 5 and 6 of Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (recast), OJ 2011 L 174, p. 88.
[61] Article 7 Regulation (EC) No 1331/2008 of the European Parliament and of the Council of 16 December 2008 establishing a common authorisation procedure for food additives, food enzymes and food flavourings, OJ 2008 L 354, p. 1.
[62] That the authorisation files may contain environmental information is confirmed by Article 12(5) of the regulation, according to which "*The Commission, the Authority and the Member States shall, in accordance with Regulation (EC) No 1049/2001, take the necessary measures to ensure appropriate confidentiality of the information received by them under this Regulation, except for information which* ***must be made public if circumstances so require in order to protect human health, animal health or the environment*****."** (emphasis added). In particular, "information that is relevant to the assessment of the safety of the substance" can never be confidential, as per point (d) of Article 12(1) of the regulation.

> "[..] as a general presumption of confidentiality constitutes an exception to the rule that the EU institution concerned is obliged to carry out a specific and individual examination of every document, it must be interpreted and applied strictly. The Court has recognized five categories of documents which enjoy general presumptions of confidentiality: (i) State aid administrative file documents; (ii) submissions before the EU Courts; (iii) documents exchanged in merger control; (iv) documents in infringement proceedings; and (v) documents relating to a proceeding under Article 101 TFEU."[63]

108. The CJEU has also recognized the exceptional nature of general presumptions of confidentiality. In *PTC Therapeutics International Ltd v. European Medicines Agency* it stated:

> "[..] the existence of a general presumption of confidentiality of certain categories of documents constitutes an exception to the obligation, laid down in Regulation No 1049/2001 on the institution concerned, to make a specific and individual examination of each document which is the subject of an application for access in order to determine whether it falls within the scope of one of the exceptions provided for in Article 4(2) of that regulation. In the same way that the case-law requires that the exceptions to disclosure referred to in the abovementioned provision be interpreted and applied strictly — inasmuch as they derogate from the principle of the widest possible public access to documents held by EU institutions (see, to that effect, judgments of 21 July 2011, *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraph 75, and of 3 July 2014, *Council* v *in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 48) —, the recognition and application of a general presumption of confidentiality must be considered strictly (see, to that effect, judgment of 16 July 2015, *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraph 81)."[64]

109. The Applicant notes that the Commission has failed to take into account the above criteria in establishing excessively broad general presumptions of confidentiality covering all opinions of the Legal Service and all documents forming a part of ongoing administrative authorisation proceedings.

4.3.1.1 General presumption regarding opinions of the Legal Service

110. Firstly, with regard to the opinions of the Legal Service the Applicant notes that the Commission has failed to consider the various roles of the Legal Service and the various subject matters and contexts in which such opinions can be issued. The Commission's Legal Service can act as the Commission's legal adviser in relation to draft legislation, international negotiations, the Treaties and powers to implement EU legislation.[65] It can also act as the Commission's legal representative before the CJEU, EFTA court, WTO and other arbitration tribunals and courts.[66] The opinions of the Legal Service can therefore

[63] Opinion of AG Medina of 22 June 2023, *Public.Resource.Org, Inc., Right to Know CLG v. European Commission*, C-588/21 P, ECLI:EU:C:2023:509, paragraph 100, see also Judgment of 4 September 2018, *ClientEarth v Commission,* C-57/16, ECLI:EU:C:2018:660, paragraph 81.
[64] Judgment of 5 February 2018, *PTC Therapeutics International Ltd v. European Medicines Agency*, T-718/15, ECLI:EU:T:2018:66, paragraph 36; see also judgement of 8 June 2023, *Council v Pech,* C-408/21, ECLI:EU:C:2023:461, paragraph 67.
[65] Article 53(1) and (2) of the Rules of Procedure.
[66] Article 53(3) of the Rules of Procedure.

cover a wide variety of subjects depending on the context and procedure they address. Thus, the opinions of the Legal Service, although issued by the same service, vary significantly in their context, nature and content. Application of a general presumption of confidentiality to all opinions of the Legal Service without considering their specific content is therefore overly broad and denies access to opinions of the Legal Service that should be disclosed to the public.

111. The right of access to opinions of Legal Services of the EU institutions has been confirmed by the CJEU on multiple occasions. For example, in relation to the opinions of the Council's Legal Service issued in the context of a legislative process, the Court specifically rejected the argument that there should be a general presumption for opinions of the Legal Service related to a legislative procedure in *Turco*, concluding that:

> " [...] *the Court of First Instance erred in holding that there was a general need for confidentiality in respect of advice from the Council's legal service relating to legislative matters*."[67]

112. On the contrary, the Court has consistently held that legal opinions related to a legislative procedure must, in principle, be disclosed to the public. The Court stated:

> "[..] *it is apparent from the case-law that there is no real risk that is reasonably foreseeable and not purely hypothetical that disclosure of opinions of the Council's legal service issued in the course of legislative procedures might undermine the protection of legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001. The regulation accordingly imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process*."[68]

113. As the Court elaborated in *Hungary v Parliament and Council*:

> "*It is precisely openness in that regard which, by allowing divergences between various points of view to be openly debated, contributes to reducing doubts in the minds of citizens, not only as regards the lawfulness of an isolated legislative measure but also as regards the legitimacy of the legislative process as a whole* […]*, and contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 TEU and in the Charter, as stated in recital 2 of Regulation No 1049/2001*."[69]

114. The Court also acknowledged that in exceptional circumstances, it may be possible to withhold a specific legal opinion, due to it being of "particularly sensitive nature or having a particularly wide scope that goes beyond the context of that legislative process."[70] However, in such a case, a detailed statement of reasons needs to be given, meaning that

[67] Judgment of 1 July 2008, *Turco v Council and Sweden v Council,* Joined Cases C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374, paragraphs 56-57.
[68] Judgment of 13 March 2024, *ClientEarth and Päivi Leino-Sandberg v Council*, Joined Cases T-682/21 and T-683/21, ECLI:EU:T:2024:165, para. 34 and case law cited. See also judgment of 8 June 2023, *Council v Pech*, C-408/21 P, ECLI:EU:C:2023:461, para. 67 and judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, para. 58.
[69] Judgment in case C-156/21 precited, para. 59 and the case-law cited.
[70] Judgment in case C-156/21 precited, para. 60.

a general presumption can never be applied to legal opinions related to legislative procedures.

115. The Court has made a similar finding, namely, that an opinion of the Council's Legal Service can be disclosed to the public, in relation to opinions issued in the context of international negotiations.[71]

116. Lastly, in relation to access to legal advice given by the Legal Service on investigations in a merger case, the Court made clear that legal advice could not be protected wholly and indefinitely without specific reasons, even when it belonged to administrative proceedings covered by a recognised presumption of non-disclosure under Article 4(2) Regulation 1049/2001[72]:

> "*Concerning reliance on the exception relating to the protection of legal advice, particular importance should also be attached to the fact that, in the present case, the Commission's decision had become definitive and that no further action concerning the legality of that decision could be envisaged before the Union judicature. In such circumstances,* ***the institution concerned was under a duty to explain how access to that document was likely actually and specifically, and not on the basis of general and abstract considerations, to undermine the interest protected by that exception*** *(see, by analogy, MyTravel, paragraphs 110, 115 and 117).* […] *the Commission should have demonstrated that access, including partial access, to each of the internal documents sought was liable specifically, actually and seriously to undermine protection of its decision-making process and that,* ***more particularly, the disclosure of the documents containing legal advice would pose a reasonably foreseeable and not purely hypothetical risk to the protection of that advice"*** (emphasis added).[73]

117. Therefore the general presumption listed in Article 4(2)(c) of the Annex applicable to all opinions of the Legal Service, including those containing environmental information, breaches the right of access to environmental information, as well as the obligation to apply exceptions to disclosure strictly,[74] enshrined in Article 3 and 6 Regulation 1367/2006 read in conjunction with Article 4 Regulation 1040/2001.

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[71] Judgment of 3 July 2014, *Council v. 't Veld*, C-350/12 P, ECLI:EU:C:2014:2039.

[72] For the recognition that merger cases benefit from a presumption of non-disclosure, see Judgment of 27 February 2014, *Commission* v *EnBW*, C-365/12 P, EU:C:2014:112, paragraphs 16 and 81.

[73] Judgment of 28 June 2012, *Commission v Agrofert Holding e.a.,* C-477/10 P, ECLI:EU:C:2012:394, paragraphs 78-79. See also Opinion of Advocate General : Judgment of 28 June 2012, *Commission v Agrofert Holding e.a.,* C-477/10 P, ECLI:EU:C:2012:394, paragraphs 78-79. See also Opinion of Advocate General Cruz Villalón delivered on 8 December 2011 in case C-477/10 P, ECLI:EU:C:2011:817, paragraphs 81-82.

[74] Judgment of 18 December 2007, *Sweden v Commission*, C-64/05 P, ECLI:EU:C:2007:802, paragraph 66; judgement of 28 October 2010, *Sweden v MyTravel and Commission*, C-506/08 P, ECLI:EU:C:2010:643, paragraph 75; and judgment of 13 July 2017, *Saint-Gobain Glass v Commission*, C-60/15 P, ECLI:EU:C:2017:540, paragraph 63.

4.3.1.2 General presumption regarding ongoing authorisation proceedings

118. Secondly, the Applicant submits that the general presumption of confidentiality regarding all documents being part of ongoing administrative authorisation proceedings established under Article 4(2)(f) of the Annex is too broad and covers documents that should be made available to the public. A similar provision was proposed by the Commission in 2008 as Article 2(6) of Regulation 1049/2001.[75]

119. Under Article 4(2)(f) of the Annex all documents that form part of any authorisation proceedings carried out under EU law regardless of their content will be withheld unless the applicant can demonstrate an overriding public interest in their disclosure. The Applicant has already noted that there are numerous administrative authorisation procedures, including ones that directly relate to the environment with documents containing environmental information. Such documents should, in principle, be examined on a concrete and individual basis to ascertain whether an exception from disclosure can be applied.

120. It should be noted that such administrative authorisation processes form a significant body of EU decision-making which, according to Article 10(3) TEU is intended to take place as closely as possible to European citizens and allow for their democratic participation. Such a broad presumption of non-disclosure frustrates the objectives of both the founding EU Treaties.

121. It is unclear from the phrasing of the provision if the Commission intends to apply point (f) to proceedings for the authorisation of financing, such as in the context of the approval of the list of projects of common interests[76] or the approval of strategic projects for critical raw materials[77], for derogations from certain provisions of EU law, such as in the context of internal market rules on electricity,[78] or when the Commission approves plans or other decisions taken on national level, such as in the context of the approval of CAP strategic plans,[79] to name just a few examples. If yes, this would make this new, sweeping general

[75] Proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 30.4.2008 COM(2008) 229 final, p. 16.
[76] Article 3 Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 Text with EEA relevance, OJ 2013 L 115, p. 39.
[77] Article 7 Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020, OJ 2024 L 1252.
[78] Article 64 Regulation (EU) 2019/943 of the European Parliament and of the Council and Directive (EU) 2019/944 of the European Parliament and of the Council, relating to derogations to certain internal market rules authorised by the Commission for certain electricity projects, OJ 2019 L 158, p. 54.
[79] Article 118 Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013, OJ 2021 L 435, p. 1.

presumption even more problematic and confirm that it is not adopted in line with the applicable case law test.

122. The general presumption contained in Article 4(2)(f) of the Annex also contradicts specific regulations governing individual authorisation procedures. It is unclear whether the Commission has carried out a detailed analysis of each specific legal framework governing different administrative authorisation procedures as required by the above-cited case law.[80] This would have been highly relevant given that the CJEU has ruled on disclosure requests related to administrative authorisations on several occasions, and even explicitly confirmed that no general presumptions of non-disclosure apply to some of these procedures. For example, the Court has found no general presumption to exist regarding the authorisation procedure for the use of chemical substances under Regulation 1907/2006 and marketing of medicinal products under Regulations 141/2000 and 726/2004.

123. In *Deza v ECHA* the CJEU assessed the legal framework of Regulation 1907/2006 and whether a general presumption of confidentiality concerning information submitted in connection with the authorization procedure provided for in that regulation could be invoked concerning the report on chemical safety and analysis of alternatives included in the application for authorization to use di-(2-ethylhexyl)phthalate. The Court stated:

> "[..] Regulation No 1907/2006 expressly governs the relationship between that regulation and Regulation No 1049/2001. Article 118 of Regulation No 1907/2006 provides that Regulation No 1049/2001 applies to documents held by the ECHA. It does not restrict the use of the documents in the file relating to an authorisation procedure for the use of a chemical substance. That regulation does not in fact provide for the limitation on access to the file to the 'parties concerned' or to the 'complainants'. At the most, Article 118(2) precisely identifies certain information whose disclosure undermines the commercial interests of the person concerned. By contrast, Article 119(1) of that regulation lists other information which is to be made publicly available over the internet. No general presumption can therefore be inferred from the provisions of Regulation No 1907/2006."[81]

124. Similarly, the Court found no general presumption of confidentiality covering the authorisation procedure for marketing of medicinal products Regulations 141/2000 and 726/2004. In *MSD Animal Health Innovation GmbH and Intervet international BV v European Medicines Agency,* the Court held:

> "[..] it must be held that there is no general presumption of confidentiality of the documents and reports of an MA file for a medicinal product arising from the application of the combined provisions of Regulations Nos 1049/2001 and 726/2004. Thus, once the MA procedure for a medicinal product has ended, the documents in the administrative case file, including the safety study reports, cannot be considered to enjoy a general presumption of confidentiality on the implicit ground that they are, as a

[80] For instance, Article 11 Regulation (EC) No 1331/2008 provides for a principle of transparency of the process of authorisations of food additives and Article 12 specifies that some information can never, in any circumstances, be confidential including information on the safety of food products and information that is necessary to protect the environment.

[81] Judgment of13 January 2017, *Deza v ECHA*, T-189/14, ECLI:EU:T:2017:4, paragraphs 39-40.

matter of principle and in their entirety, clearly covered by the exception relating to the protection of the commercial interests of MA applicants. It is thus for the EMA to satisfy itself, by means of a concrete, individual examination of each document in the administrative case file, whether the document is covered in particular by commercial secrecy for the purposes of the first indent of Article 4(2) of Regulation No 1049/2001."[82]

125. Even a general presumption that only applies to ongoing administrative authorisation proceedings is too broad and has the effect of restricting access to documents that should be disclosed to the public. In restricting access to documents forming part of ongoing authorisation proceedings, the Commission has failed to take into account that some authorisation proceedings foresee disclosure of certain information as an inherent part of the process. For example, according to Article 64(2) Regulation 1907/2006 the European Chemicals Agency "*shall make available on its website broad information on uses, taking into account Articles 118 and 119 on access to information, for which applications have been received and for reviews of authorisations, with a deadline by which information on alternative substances or technologies may be submitted by interested third parties."* In addition to publishing information about the received applications, ECHA also organizes stakeholder consultations on chemical safety reports, analysis of alternatives, socio-economic analysis submitted by the applicants while the authorisation process is ongoing.[83] Thus access to certain information during the authorisation process under Regulation 1907/2006 is essential to reach its objectives. A general presumption of confidentiality under Article 4(2)(f) of the Annex therefore contradicts the specific legal framework governing authorisation procedures under Regulation 1907/2006.

126. It also appears that the Commission is aware that this rule would be an additional restriction and deviation from the existing legislative framework, given that a similar provision was proposed by the Commission in 2008 as a new Article 2(6) Regulation 1049/2001.[84]

127. The Applicant would also like to note that such a broad general presumption of non-disclosure for administrative authorisation proceedings is likely to have serious repercussions on transparency on national, Member State level. If a document is considered confidential by the Commission, the Commission will usually insist, based on the principle of loyal cooperation (Article 4(3) TEU), that Member States also do not disclose this document in accordance with their national transparency laws . An example of this, though outside of the environmental context, has been documented by Statewatch in 2011.[85] It is therefore only reasonable to assume that such a blanket exception for

[82] Judgment of 5 February 2018, *MSD Animal Health Innovation GmbH and Intervet international BV v European Medicines Agency*, T-729/15, ECLI:EU:T:2018:67, paragraph 38.
[83] See: https://echa.europa.eu/applications-for-authorisation-previous-consultations/-/substance-rev/5657/term (last consulted on 30 January 2025).
[84] Proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 30.4.2008 COM(2008) 229 final, p. 16.
[85] See Statewatch, 'The European Commission and the Dutch Senate - Parliamentary sovereignty in the EU under threat? - The EU-USA agreement on the exchange of personal data and later the US intervention on draft new EU Data Protection Regulation and the Snowden revelations', available at: https://www.statewatch.org/media/documents/analyses/no-239-statewatch-com-dutch-senate.pdf . In the letters between the Netherlands Minister of Security and Justice and the Dutch Senate Committee related to the matter and linked on p. 2 of the analysis, the Dutch Minister states that: "***Without***

administrative authorisation proceedings could also interfere with the application of transparency laws of the Member States, including those implementing Directive 2003/4/EC on public access to environmental information.[86]

128. In light of all the foregoing, the general presumption listed in Article 4(2)(f) of the Annex applicable to administrative authorisation proceedings, including those containing environmental information, breaches the right of access to environmental information, as well as the obligation to apply exceptions to disclosure strictly,[87] enshrined in Articles 3 and 6 Regulation 1367/2006 read in conjunction with Article 4 Regulation 1040/2001.

4.3.2 The exclusion of Article 4(1) Regulation 1049/2001 from Article 4(2), second subparagraph, of the Annex contravenes Article 6(1) Regulation 1367/2006

129. Article 4(2), second subparagraph, of the Annex reads as follows: "*No access to those documents [,i.e. the documents covered by general presumptions of non-disclosure,] shall therefore be granted, unless the applicant demonstrates an overriding public interest in providing access prevailing over the interests protected by* ***Article 4(2) to 4(3)*** *of Regulation (EC) No 1049/2001*" (emphasis added).

130. This provision thereby modifies the existing test to assess whether there is an overriding public interest in the disclosure of environmental information, as established by Articles 3 and 6(1) Regulation 1367/2006 in conjunction with Article 4 Regulation 1049/2001, in case access to environmental information is withheld on the basis of Article 4(1) Regulation 1049/2001, because it removes the possibility for the applicant to demonstrate that the public interest in disclosure outweighs the interest under that provision.

131. While Article 4(2) and (3) Regulation 1049/2001 state that access to a document shall be refused if one of the exceptions applies, "*unless there is an overriding public interest",* this wording does not appear in Article 4(1) Regulation 1049/2001.

132. However, Article 4(4), final sentence, Aarhus Convention clarifies that for environmental information these grounds of refusal, the equivalents being contained in Article 4(4)(b) and (f) Aarhus Convention, "*shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment*."

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permission from the Commission*, the publication by parliament of a document that was sent with the purpose of confidential information, means that* ***the member state*** *who is responsible for the acts of parliament,* ***is in breach of*** *the security rules of the Commission and* ***the principle of loyal cooperation between institutions of the European Union and Member States pursuant to Article 4 paragraph 3 of the EU Treaty***" (emphasis added). The exchange of letters is available under this link: http://www.statewatch.org/media/documents/news/2014/jan/dutch-senate-letters-1-4.pdf , see pp. 2-3.

[86] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ 2003 L 41, p. 26.

[87] Judgment of 18 December 2007, *Sweden v Commission*, C-64/05 P, ECLI:EU:C:2007:802, paragraph 66; judgement of 28 October 2010, *Sweden v MyTravel and Commission*, C-506/08 P, ECLI:EU:C:2010:643, paragraph 75; and judgment of 13 July 2017, *Saint-Gobain Glass v Commission*, C-60/15 P, ECLI:EU:C:2017:540, paragraph 63.

133. For this reason, Article 6(1) Regulation 1367/2006 copies the same wording and makes clear that it applies for the grounds of refusal under Article 4 Regulation 1049/2001, other than those included in Article 4(2), first and third indents for which special rules apply. Accordingly, as far as a request concerns environmental information, the Commission still needs to weigh the public interest in disclosure, even if there is a general presumption of non-disclosure based on Article 4(1) Regulation 1049/2001. This has also been explicitly confirmed by the CJEU, which held: "*That provision [i.e. Article 6(1) Regulation 1367/2006], thus refers to the exceptions in* ***Article 4(1)****, (2), second indent, (3) and (5)"* (emphasis added).[88]

134. It is not clear which of the general presumptions of non-disclosure listed in Article 4(2) of the Annex would, in the view of the Commission, be based on Article 4(1) Regulation 1049/2001. However, since the Commission does not specify which general presumption of non-disclosure links to which exception from disclosure under Article 4 Regulation 1049/2001, it also needed to give due regard in its drafting to Article 6(1) Regulation 1367/2006 and the fact that a public interest test applies to all environmental information, even if covered by a general presumption of non-disclosure based on Article 4(1) Regulation 1049/2001.

135. In light of the foregoing, the rule included in Article 4(2), second subparagraph, of the Annex that an overriding public interest can only be demonstrated by the applicant in relation to the grounds of refusal in Article 4(2) and (3) Regulation 1049/2001, and not in relation to the grounds of refusal contained in Article 4(1) Regulation 1049/2001, contravenes Article 6(1) Regulation 1367/2006.

4.3.3 The extension of the period of applicability of general presumptions under Article 4(2), third subparagraph, of the Annex contravenes the duty of strict application of the exceptions under Article 6(1) Regulation 1367/2006 in conjunction with Article 4(7) Regulation 1049/2001

136. The Applicant further submits that Article 4(2), third subparagraph, of the Annex contravenes Article 6(1) Regulation 1367/2006 in conjunction with Article 4(7) Regulation 1049/2001 for extending the application of some or all of the general presumptions included under Article 4(2) Regulation 1049/2001 for an unjustified period.

137. Article 6(1) Regulation 1367/2006 provides that exceptions to disclosure must be interpreted restrictively. Article 4(7) Regulation 1049/2001 provides that "*The exceptions as laid down in paragraphs 1 to 3 shall* ***only apply for the period during which protection is justified*** *on the basis* ***of the content of the document****. The exceptions may apply for a maximum period of 30 years"* (emphasis added). The Commission's powers to adopt

[88] Judgment of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Finland v Commission*, C-514/11 P, ECLI:EU:C:2013:738, paragraph 83.

detailed rules *for the application of* Regulation 1049/2001 do not allow it to derogate from these provisions.

138. The third paragraph of Article 4(2) of the Annex provides that "*Proceedings are on-going until the act closing the proceedings can no longer be contested before the Union courts or a national court*." Given the wording ("proceedings are on-going when…"), the Applicants assumes that this time-limit is intended to apply only to the presumptions set under points (a), (b) and (f) of Article 4(2) which refer explicitly to on-going proceedings. However, if the Commission's intention was to apply this provision also to presumptions under points (d), (e), (g), (h), (i) and (j), this would further compound the contravention of environmental law set out below.

139. The Applicant submits that providing that a document is considered to be part of ongoing proceedings and can therefore not be disclosed until the act closing the proceedings can no longer be challenged before *national courts* is grossly excessive and in breach of Article 6(1) Regulation 1367/2006 read in conjunction with Article 4(7) Regulation 1049/2001. As stated above an exception can only apply for the period for which the protection is justified. Accordingly, an exception designed to protect ongoing administrative proceedings (if this is presumption is permissible at all, contrary to what has been argued above) or (pre-)infringement proceedings (points (a) and (f)) should only be applied as long as it can protect the objectives (decision-making) of those proceedings, that is, until such process has ended by a final decision or other act to that effect. Applicability of any exceptions beyond that point must be individually and specifically examined in relation to the legal framework of each administrative process and duly justified. The fact that future national proceedings may arise is at that point not reasonably foreseeable but purely hypothetical and can therefore, in light of established CJEU case law, not form the basis of the application of an exception from disclosure.[89]

140. Equally, protection of judicial proceedings (point (b)) is an exception that applies only in the specific context of a concrete judicial process and its applicability needs to be assessed individually. It is well-established case law that, in relation to the exception of judicial proceedings (which we presume underlines the new time-limit in the third paragraph of Article 4(2) of the Annex), a document can be covered by the exception of non-disclosure when it is "*closely connected to the legal aspects of* ***pending or potential (but imminent) proceedings****." [90]* The extension of the period of application of presumptions of confidentiality to proceedings listed in Article 4(2) of the Annex in order to protect hypothetical future judicial proceedings is contrary to the purpose of the exception of protection of judicial proceedings.

141. The time-limit set under the third subparagraph of Article 4(2) of the Annex is also clearly disproportionate. Article 267 TFEU enables a national court to refer a matter of validity (or potentially also interpretation) of an EU act to the CJEU so long as the EU act is in force and relevant to the national matter. It follows that an act closing proceedings listed under

[89] See most recently, judgement of 8 June 2023, *Council v Pech*, C-408/21 P, ECLI:EU:C:2023:461, para. 34 and case law cited.
[90] See recently Judgment of 13 November 2024, *PAN Europe v. Commission*, T-104/23, ECLI:EU:T:2024:823, paragraphs 41-42 and the case law cited; see also paragraph 49 on the imminent character of judicial proceedings in that case.

Article 4(2) could be contested before a national court for a very long, even immeasurable, period of time. For instance, the validity of a Commission decision to (re-)authorise an active substance (that may fall under point (f)) could be contested before a national court as part of a challenge of the authorisation of a product containing the active substance at any time during its period of validity, which is up to 15 years.[91] The Commission's decisions closing State aid cases (assuming the contested time-limit were to be applied to point (d)) could similarly be challenged via Article 267 TFEU for at least as long as aid is being granted under an authorised aid measure or scheme (which is often for 10 years).[92] In this context, whereas the time-limit for bringing an action to the CJEU against an act closing the proceedings is delimited by Article 263 TFEU, this is not the case for an action before a national court seeking to challenge the validity of a Commissions act closing proceedings in the sense of Article 4(2) of the Annex. Such a national action could be possible for a very long period of time, but may never become "imminent" with the degree of foreseeability that is required by the case law for invoking the exception of judicial proceedings.

142. Therefore, the third paragraph of Article 4(2), insofar as it precludes access to documents containing environmental information being part of certain proceedings until the act closing the proceedings can no longer be challenged before national courts contravenes Article 6(1) Regulation 1367/2006 read in conjunction with Article 4(7) Regulation 1049/2001.

4.4 Fourth plea: The Commission breached Regulation 1367/2006 in conjunction with Regulation 1049/2001 by restricting the definition of "legislative documents" to be made "directly accessible"

143. Article 63(1) of the Rules of Procedure and Article 3 of the Annex restrict the definition of legislative documents that are to be made directly accessible to the public in contravention of Article 4 Regulation 1367/2006 read together with Article 12 Regulation 1049/2001.

144. Article 4 Regulation 1367/2006 regulates the "collection and dissemination of environmental information" by the EU institutions, including the Commission. Article 4(1) Regulation 1367/2006 states that the Commission "*shall organise the environmental information which is relevant to [its] functions and which is held by [it], with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology in accordance with Articles 11(1) and (2), and 12 of Regulation (EC) No 1049/2001*."

[91] Articles 5, 13 and 14(2) Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market.

[92] Documents being part of State aid authorisation proceedings may contain environmental information when they are pertinent, for instance, for the assessment of the environmental benefits that a measure would bring, under the Guidelines on State aid for climate, environmental protection and energy 2022, or for the assessment of compliance of the measure with environmental law. See in this respect judgment of Grand Chamber of 22 September 2020, *Austria v Commission,* C-594/18P, ECLI:EU:C:2020:742, paragraphs 44, 45 and 100.

145. Article 4(1) Regulation 1367/2006 goes on to state that this environmental information shall be made "progressively available" in electronic databases. This recognises the need to increase over time the environmental information that the Commission makes electronically available.

146. Article 4(2) Regulation 1367/2006 contains, on the other hand, a list of the minimum information to be actively and systematically disseminated in that manner. This provision makes clear that this minimum information includes, first of all, the "*documents listed in Article 12(2) and (3) and in Article 13(1) and (2) of Regulation (EC) No 1049/2001*". Additionally, the provision includes a number of other specific items listed under points (a) to (g). Article 4(2) thereby recognises that the documents listed in Articles 12(2) and (3) as well as 13(1) and (2) Regulation 1049/2001 can contain environmental information. Article 12(1) Regulation 1049/2001 states that the EU institutions, including the Commission, "*shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned*." Article 12(2) Regulation 1049/2001 then specifies: "*In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.*" While the Commission's overall obligation to make documents directly accessible to the public is conditioned by the words "as far as possible", "legislative documents" should at the minimum be made available. Moreover, "legislative documents" are broadly defined in this provision. As the Court of Justice has held:

> "[…] *it is apparent from Article 12(2) of Regulation No 1049/2001, which implements the principle derived from recital 6 thereof, that not only acts adopted by the EU legislature, but also, more generally, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, fall to be described as 'legislative documents' and, consequently, subject to Articles 4 and 9 of that regulation, must be made directly accessible*."[93]

147. It therefore follows from the combined reading of Article 4 Regulation 1367/2006 and Article 12(2) Regulation 1049/2001 that the Commission is required to make such broadly defined legislative documents that contain environmental information "directly accessible" to the public.

148. Contrary to this obligation, the Commission has created in Article 3 of the Annex a closed list of documents that are to be made directly accessible which (a) fails to ensure that direct and timely accessibility of impact assessments and opinions of the Regulatory Scrutiny Board (hereafter, '**RSB Opinions**') (section 4.4.1. below) and (b) effectively restricts the definition of "legislative documents" held by the Commission that are to be made accessible (section 4.4.2. below).

[93] Judgment in case C-57/16 P precited, paragraph 85.

4.4.1 Timely publication of Impact Assessments and Regulatory Scrutiny Board Opinions (Article 63(1) of the Rules of Procedure and Article 3(1) of the Annex)

149. Impact assessments and RSB Opinions are one category of "legislative documents". This has been explicitly confirmed by the CJEU in its judgement on Case C-57/16 P *ClientEarth v Commission*. This case concerned a request for an impact assessment report for a proposed binding instrument setting a strategic framework for risk-based inspection and surveillance in relation to EU environmental legislation and an opinion of the Impact Assessment Board, together with a request for access to a draft impact assessment report relating to access to justice in environmental matters at Member State level in the field of EU environmental policy and an opinion of the impact assessment board.[94] The Court held: "*the documents at issue relate to impact assessments carried out with a view to the potential adoption of legislative initiatives by the Commission. […] [I]mpact assessment reports and the accompanying opinions of the Impact Assessment Board contain, in such a context, information constituting important elements of the EU legislative process, forming part of the basis for the legislative action of the European Union. […] It follows that […] such documents, in view of their purpose, are among those covered by Article 12(2) of Regulation No 1049/2001*."[95]

150. Impact assessments and RSB Opinions can also contain environmental information. This is illustrated by the same judgement of the Court, which explicitly confirmed that "the documents at issue contain environmental information within the meaning of Regulation No 1367/2006."[96] As the Court explained:

> "*Under Article 2(1)(d)(v) [Regulation 1367/2006], [environmental] information may be, in particular, any information, in written, visual, aural, electronic or any other material form, on cost-benefit and other economic analyses and assumptions used within the framework of measures such as policies, legislation, plans, programmes and environmental agreements. In that regard, it is apparent from paragraph 90 above that impact assessment reports contain, inter alia, the study of the impact, advantages and disadvantages of the various policy options envisaged by the Commission with a view to the potential adoption of an initiative, whether legislative or otherwise. In addition, in the present case, it is established that the documents at issue relate to legislative initiatives envisaged in respect of environmental matters*."

151. Article 3(1) of the Annex states that "*The Commission shall provide direct public access to legislative proposals as of their adoption. They shall be accompanied by the impact assessment and the Regulatory Scrutiny Board opinion*." Essentially the same rule is also contained in Article 63(1) of the Rules of Procedure, which states: "*The Commission shall make available to citizens the legislative proposals it submits to the European Parliament and/or the Council, accompanied by the impact assessments and the Regulatory Scrutiny Board opinions* […]."

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[94] The Impact Assessment Board has since been replaced by the Regulatory Scrutiny Board but its function has remained comparable.
[95] Judgment in case C-57/16 P precited, paragraphs 89, 91 and 93.
[96] Judgment in case C-57/16 P precited, paragraph 96.

152. While the Commission thereby acknowledges that impact assessments and Regulatory Scrutiny Board opinions are to be made accessible, it establishes that they are only to be published, as a rule, at the time when the associated legislative proposal is made available. The Commission thereby delays the publication of a completed legislative document. This is in direct contravention of both the wording of Article 12(2) Regulation 1049/2001 as well as the interpretation given by the Court in its judgement on Case C-57/16 P.

153. First, on the plain reading of the text, Article 12(2) Regulation 1049/2001 requires that legislative documents are made "directly accessible". There is no indication that the Commission would have any leeway in the timing of this disclosure.

154. Such delayed publication also undermines the democratic rights of EU citizens. As the Court confirmed in its judgement on Case C-57/16:

> "84. […] *it should be borne in mind that recital 6 of Regulation No 1049/2001 indicates that wider access should be granted to documents in cases where the EU institutions are acting in their legislative capacity. The possibility for citizens to scrutinise and be made aware of all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights as recognised, in particular, in Article 10(3) TEU (see, to that effect, judgments of 1 July 2008, Sweden and Turco v Council, C39/05 P and C52/05 P, EU:C:2008:374, paragraph 46, and of 17 October 2013, Council v Access Info Europe, C280/11 P, EU:C:2013:671, paragraph 33). As is emphasised, in essence, by ClientEarth, the exercise of those rights presupposes not only that those citizens have access to the information at issue so that they may understand the choices made by the EU institutions within the framework of the legislative process, but also that they may have* ***access to that information in good time, at a point that enables them effectively to make their views known regarding those choices***."
>
> […]
>
> 92. *Although the submission of a legislative proposal by the Commission is, at the impact assessment stage, uncertain, the disclosure of those documents is likely to increase the transparency and openness of the legislative process as a whole, in particular the preparatory steps of that process, and, thus, to enhance the democratic nature of the European Union by enabling its citizens to scrutinise that information and to attempt to influence that process. As is asserted, in essence, by ClientEarth, such a* ***disclosure, at a time when the Commission's decision-making process is still ongoing, enables citizens to understand the options envisaged and the choices made by that institution and, thus, to be aware of the considerations underlying the legislative action of the European Union. In addition, that disclosure puts those citizens in a position effectively to make their views known*** *regarding those choices before those choices have been definitively adopted, so far as both the Commission's decision to submit a legislative proposal and the content of that proposal, on which the legislative action of the European Union depends, are concerned"* (emphasis added). [97]

[97] Judgment in case C-57/16 P precited, paragraphs 84 and 92.

155. The Court thereby clearly recognises that access to impact assessments and RSB Opinions “in good time”, i.e. before adoption by the Commission of its legislative proposal, is the precondition for the exercise of the democratic rights of EU citizens, namely to “effectively make their views known” and thereby participate in the democratic process. If this was ensured by the publication of the impact assessments and the RSB Opinions at the time of the publication of the legislative proposal, the Court should have found that ClientEarth’s request for access to these documents could be refused by the Commission, as it would have been sufficient for ClientEarth and the wider public to be made aware at the time of the publication of an associated legislative proposal. Instead the Court explicitly explained why access to impact assessments and RSB Opinions “when the Commission’s decision-making process is still ongoing” is of crucial importance to protect the democratic rights of EU citizens.

156. Such delayed disclosure is also not in line with the purposes of the Regulation as set out in paragraphs 15-16 above.

157. Evidently, this would not preclude, as explicitly recognised by Article 12(2) Regulation 1049/2001, to exceptionally decide to not publish the whole or parts of specific impact assessments and RSB Opinions where this is justified by the exceptions contained in Article 4 Regulation 1049/2001. However, considering the Court’s reasoning in Case C-57/16 P, especially from paragraph 102 onwards, it will be clear that this will be a highly unusual situation. Considerations that apply to all Impact Assessments and RSB Opinions, such as the possibility for third parties to exert influence or pressure, have been explicitly rejected by the Court as a justification for withholding such documents. The general rule contained in Article 63(1) of the Rules of Procedure and in Article 3(1) of the Annex, that impact assessments and RSB Opinions will only be published at the stage of the legislative proposal, can therefore also not be justified on that basis.

158. In light of the foregoing, by determining that impact assessment documents and RSB Opinions are to be made accessible only when the legislative proposal is published, as opposed to the time when they are completed (i.e. when an impact assessment is sent to the RSB or when the RSB Opinion is sent to the Commission), Article 63(1) of the Rules of Procedure and Article 3(1) of the Annex fail to comply with Article 4 Regulation 1367/2006 in conjunction with Article 12(2) Regulation 1049/2001.

4.4.2 Publication of other legislative documents (Article 3 of the Annex)

159. Whereas the Rules of Procedure at least recognise that impact assessments and RSB Opinions are to be made accessible, though not in a timely manner, other legislative documents that contain environmental information are omitted altogether from Article 3 of the Annex. For a number of documents that can contain environmental information, it follows from CJEU judgements that they are legislative documents.

160. This includes: (a) legal service opinions concerning a legislative procedure, (b) four-column documents exchanged during legislative procedures and (c) minutes containing the content of discussions in comitology procedures. Article 4 Aarhus Regulation in conjunction with Article 12(2) Regulation 1049/2001 required the Commission to include at the very least these documents under Article 3 of the Annex.

161. First, as already mentioned in paragraphs 111-113 above, the CJEU has consistently held that Regulation 1049/2001 imposes, "in principle, an obligation to disclose" legal opinions related to a legislative procedure. There is also no doubt that such opinions constitute "legislative documents".

162. Second, in *de Capitani* the Court established that four column documents exchanged during legislative trilogues "form part of the legislative process".[98] It has also established that general considerations, such as the risk of public pressure on the legislator, the provisional nature of the information, a potential loss of trust between the legislative institutions or the need to have a space to think and so forth, do not justify withholding access.[99] The Court also confirmed that access once the trilogue process is closed was insufficient, acknowledging the need to provide timely access to the information.[100]

163. Third, in *Pollinis v Commission* the Court has established that committee discussions under comitology are not in principle sensitive,[101] meaning that "documents showing the individual positions of the Member States" within such committees should not as a rule be refused.[102] The Court also rejected considerations that apply to all such documents, for example the need to safeguard mutual cooperation and trust,[103] the complexity or sensitive nature of the discussions or associated divergent views between participants,[104] or the general need to be free from external pressure and have room for manoeuvre,[105] as a basis for withholding access. While the related claim was not directly addressed in *Pollinis,*[106] it is also evident that these documents are "legislative documents" as they constitute documents drawn up "in the course of procedures for the adoption of acts which are legally binding in or for the Member States."[107]

164. All of these documents can contain environmental information, as long as the associated legislative initiative or comitology procedure is envisaged in respect of environmental matters.[108]

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[98] Judgment of 22 March 2018, *De Capitani v Parliament*, T-540/15, ECLI:EU:T:2018:167, paragraph 75.
[99] Ibid, paragraphs 98-111.
[100] Ibid, paragraph 107.
[101] Judgment of 14 September 2022, *Pollinis France v Commission*, T-371/20, ECLI:EU:T:2022:556, paragraph 106. Upheld on appeal in judgment of 16 January 2024, *Commission v Pollinis France*, C-726/22 P, ECLI:EU:C:2025:17.
[102] Ibid, paragraph 107.
[103] Ibid, paragraph 111.
[104] Ibid, paragraphs 116-117.
[105] Ibid, paragraphs 127, 133 and 135.
[106] Judgment of 14 September 2022, *Pollinis France v Commission*, precited, paragraph 140.
[107] *ClientEarth*, C-57/16 P precited, paragraph 85.
[108] Compare *ClientEarth*, C-57/16 P precited, paragraph 97.

165. Since all of these judgments are based on challenges of individual refusal decisions, the Court does not explicitly address Article 4 Regulation 1367/2006 and Article 12(2) Regulation 1049/2001. This is simply because a claim that these documents should also be proactively disseminated, would have fallen outside of the scope of the dispute.

166. However, it clearly follows from the reasoning of the Court that these documents are "legislative documents" and that there is no general presumption of non-disclosure that would justify generally withholding them. Article 4 Aarhus Regulation in conjunction with Article 12(2) Regulation 1049/2001 would be deprived of all meaning if it were to be accepted that these documents are not to be proactively disseminated.

167. This dissemination obligation does not prevent the Commission from deciding not to publish a specific document because specific grounds for non-disclosure apply. As already mentioned above, this is inherent in the wording of Article 12(2) Regulation 1049/2001 itself and it is also reflected in the Court judgments cited in this section. However, these circumstances must be specific to the individual case. Accordingly, they cannot justify excluding the whole category of legislative documents from the application of Article 4 Regulation 1367/2006 in conjunction with Article 12(2) Regulation 1049/2001.

168. In light of the foregoing, the Commission contravened Article 4 Aarhus Regulation in conjunction with Article 12(2) Regulation 1049/2001 by omitting in Article 3 of the Annex (a) legal service opinions concerning a legislative procedure, (b) four-column documents exchanged during legislative procedures and (c) minutes containing the content of discussions in comitology procedures as documents to be made directly accessible to the public as soon as they are completed and transmitted (internally or to other institutions or Member States representatives, as the case may be).

5. CONCLUSION

In this Request for Internal Review, the Applicant has put forward legal arguments raising serious doubts about the lawfulness of the Contested Provisions.

The Applicant hereby asks the Commission to review the Contested Provisions in accordance with Article 10 Regulation 1367/2006. For the avoidance of doubt, we reiterate that the Contested Provisions are severable from other provisions in the Rules of Procedure and in the Annex (see section 3.2.2 above). Therefore, it is possible to review and amend or withdraw the Contested Provisions without impacting neither the remainder of the Rules of Procedure, nor the remainder of the Annex.