Access to environmental information - How to tackle contentious exceptions

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Access to environmental information

- Previous webinar covered the basics – available on our website page “Access to justice for a greener Europe” – event.
  https://www.clientearth.org/challenging-non-disclosure-of-environmental-information-register-to-our-webinar/

- Quick recap:
  - Access to environmental info requests possible to EU bodies + public authorities in all EU Member States
  - All information shall be disclosed unless it is covered by an exception

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Recap: What is environmental information?

Wide definition:

- Information in any form (written visual, aural, elecronic, etc)
- On the state of the elements of the environment (e.g. air, water, soil, land, biological diversity)
- Factors affecting or likely to affect the elements of the environment (substances, energy, noise, emissions, etc)
- Measures affecting or likely to affect such elements and factors
- Reports on the implementation of env legislation
- Economic analyses used in the framework of measures;
- State of human health and safety, conditions of human life.

Art 2(3) Aarhus Convention, 2(1)(d) Reg 1367/2006, 2(1) Directive 2003/4

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The exceptions from disclosure

- Art 4 of Regulation 1049/2001 + Art 6 Regulation 1367/2006 list exemptions from disclosure for EU institutions = closed list
- Largely the same for MS under Article 4 Directive 2003/04
- CJEU has established that the same case law applies for request to MS and to EU authorities

  T-329/17 *Hautala and Others v EFSA,* paras 102-105

Recap: General obligations

On EU level:

- For all info: Interpret exceptions from disclosure strictly + weigh interest to keep confidential vs public interest
- For env info except infringements: even higher threshold of restrictive interpretation
- For legislative documents: additional need for increased transparency

On MS level:

- Only access to environmental info regulated by EU law
- For all env info: interpret exceptions restrictively + weigh interest to keep confidential vs public interest

For both levels:

- EU body must demonstrate for each document how disclosure would specifically + actually undermine protected interest – unless general presumption (see later)
- Disclose/consider emissions into the environment (see later)

Art 1(a) Reg 1049/2001; Art 6(1) Reg 1367/2006; Art 4(2), second ind, Dir 2003/4

C-57/16 P *ClientEarth*, paras 51; 78; 84-87

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Today's focus

(In our experience) most contentious exceptions:

1. Only EU: inspections/investigations/audits
2. Commercial/industrial information
3. Undermine decision-making / internal documents
4. Emissions into the environment (counter-exception to 1+2)

(1) Purpose of investigations / inspections / audits

Only applicable on EU level - contained in: Art 4(2), 3rd ind Reg 1049/2001

Test: Disclosure would "specifically and actually undermine" the "purpose" of an investigation *et al*

- does not automatically extend to all follow-up = must show that investigations *et al* are still ongoing + carried out in reasonable period
- must "endanger the completion" of investigations *et al*

T-344/15 *France v Commission*, paras 83 + 86-89 + T-391/03 and T-70/04, *Franchet and Byk v Commission*, paras 109-12; T-471/08 *Toland v Parliament*, paras 43-58

Not fulfilled in C-331/15 P *France v Schlyter* (see esp para. 81)

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Definition of “investigation”

- Not exhaustive but:
  - covers structured + formalised procedure to collect + analyse info to enable an institutions to take a position
  - Not necessarily aim at detecting/pursuing offence/irregularity – can just be fact-finding to assess situation
  - must not result in legislative act but can be e.g. report/recommendation
- Not yet clear guidance on inspection or audit

C-331/15 P *France v Schlyter*, paras 45-48 – Not fulfilled in T-471/08 *Toland v Parliament*, paras 43-58

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General presumptions of non-disclosure

- Normal rule: Institution refusing access must demonstrate how disclosure of specific doc would actually + specifically undermine a protected interest
- General presumption: Institution may presume that disclosure of a document belonging to a category would “in principle” undermine the interest

If an institution invokes a general presumption, only 2 possible arguments:

1. Specific document is not / no longer covered by the presumption;
2. An overriding public interest nonetheless justifies disclosure.

C-514/11 *LPN v Commission*, para 66; T-441/17, para. 59; T-380/08, para. 27

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Example: Infringement proceedings

Very extensive presumption:

- Covers pre-litigation phase, including pilot procedure until a definitive position that no infringement procedure will be launched or judgement rendered

  C-514/11 *LPN v Commission*, para. 65: C-562/14 P *Sweden v Commission*, para. 45; C-514/07 P *Sweden v API and Commission,* para. 122.

- Applies as long as infringement procedure „reasonable foreseeable, not purely hypothetical“

  T-344/15 *France v Commission*, para. 90

- Extends to conformity checking studies where letter of formal notice sent = documents related to an „ongoing administrative or court procedure“

  C-612/13 P *ClientEarth v Commission*, para 78

= very difficult to receive info held by EC on MS violations

of EU law

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Overriding public interest?

In practice very high threshold:

- General considerations not sufficient, must rely on “specific circumstances” C-514/11 *LPN and Finland v Commission,* para 94
- If transparency invoked must show that “especially pressing” and therefore able to prevail over protected interests C-514/11 *LPN and Finland v Commission,* paras 92-93
- Must be separate from private interest T 755/14 *Herbert Smith Freehills v Commission*, para. 75; T-312/17 *Campbell v Commission*, para. 60
- So far only cases in which institution defended disclosure of commercial info submitted by an applicant e.g. T-235/15 *Pari Pharma v EMA*

Overriding public interest?

Example: Case T- 712/15 *Justice & Environment v Commission*

- Infringement procedure for violation of air quality standards
- Argued that documents would facilitate public participation in air quality plans + an EIA procedure & an associated court case + facilitate giving legal assistance + help take part in Commission procedure + inform public
- General Court: insufficient

Presumptions related to investigations

Court of Justice:

1. State aid file, including pre-notification phase + after closure;

   C-139/07 *Commission v Technische Glaswerke Ilmenau*, paras 55-7; C-271/15 P *Sea Handling v Commission,* para 41; C-666/17 P *AlzChem v Commission*, T-751/17 *Commune de Fessenheim and Others v Commission,* paras 50-3.

2. Court submissions as long as proceedings are pending;

   C-514/07 *Sweden and Others v API and Commission*, para 94

3. Documents exchanged in merger proceedings

   C-404/10 *Commission v Editions Odile Jacob*, para 123, C-477/10 P *Commission v Agrofert Holding*, para 59

4. Files related to a competition investigation (incl docs exchanged under 2002 Leniency Notice; can even be table of content).

   C-365/12 P *Commission v EnBW,* paras 92-3

General Court: OLAF proceedings T-110/15 *IMG v Commission*, para. 37

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General presumption refused

T-128/14 *Daimler v Commission*: Investigation by Commission following refusal by Member State to register a vehicle under Air Quality Directive:

- France refused to register certain Mercedes cars – EC investigated – Daimler sought access to file
- Constitutes an investigation (para 136)
- No general presumption (para 164)
  - Considered not justified that would undermine trust btw MS & EC
  - Would not undermine purpose

(2) Commercial/industrial info + IP

Slightly different formulations:

- EU level: Institution shall withhold info if disclosure would "undermine the protection of commercial interests of a natural or legal person, including intellectual property"
- MS level: May withold info if disclosure would adversely affect:
  - confidentiality of commercial / industrial info if provided for by national or Community law to protect a legitimate economic interest;
  - intellectual property rights;

See: Art 4(2), ind. 1, Reg 1049/2001 & Art 4(2)(d) and (e) Dir 2003/4

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Basic test acc to General Court

- It "is not possible to regard all information concerning a company and its business relations as requiring the protection which must be guaranteed to commercial interests“ T-437/08 *CDC Hydrogene Peroxide*, para. 44
- "it must be shown that the documents at issue contain elements which may, if disclosed, seriously undermine the commercial interests of a legal person." T-189/14, *Deza v ECHA*, para. 56 & T-516/11 *MasterCard,* para. 82
  - Called into question by AG in Opinions on pending cases C-175/18 & 178/18

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Indications as to what is commercial info

- General Court: Applies in particular if info relates inter alia to undertaking's:
  1. commercial strategies or
  2. customer relations or
  3. Info particular to that undertaking which reveals its expertise

T-377/18 *Intercept Pharma Ltd,* para. 54; T-189/14, para. 56; T-545/11 RENV *Stichting Greenpeage Nederland and PAN Europe v Commission*, para. 101; *MasterCard and Others v Commission*, paras 82 to 84

Also mentioned by CJEU: sales figures + market shares + business relations

C-477/10 *Commission v Agrofert Holding*, para. 56 & C-365/12 P, *EnBW*, para. 79, T-44/17, para. 43

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Some lack of clarity

- Most significant Court of Justice case so far: location of an IED installation under urban planning not commercial info

  C-416/10 *Krizan*, paras 82-3

“Competitive advantage” test

- Appears necessary that information will allow competing companies to gain competitive advantage
  - Info could be “used profitably” by other undertakings because it gives an “economic, strategical or organisational and structural advantage” (state aid)
    - T-441/17, *Arca Capital Bohemia v Commission*, para. 53
  - Info held by publically owned company since it “engages in commercial activities, in the context of which it faces competition in the electricity market and is thus required to protect its interests in that market” (Euratom loan)

    T-307/16 *CEE Bankwatch Network v Commission*, para. 108
  - Information that would allow competitor to enter a specific market (EMA)

    T-235/15 *Pari Pharma v EMA*, para. 108

Content of contracts?

Not generally confidential, depends on content – examples:

- Court: description of tasks VS management/ monitoring, persons responsible, format of reports.. T-136/15 *Evropaïki Dynamiki v Parliament,* para. 51
- Court accepted redaction of info related to:
  - rights/obligations of the parties; prices charged
  - potential/identified business risks + Bank recommendation thereon,
  - agreement based on a template

  T-307/16 *Bankwatch*, paras 109-119

“Creative input” test?

- Includes “new scientific conclusions or relating to an inventive strategy which gives the undertaking a commercial advantage” + “individual and personal assessments that added value”
- NOT: compilation of “objective figures/data” by an undertaking
- NOT in itself sufficient: existence of copyright // financial value // complex, detailed or specialized scientific information

T-189/14, *Deza v ECHA* paras 60-67, 77, 80, 118-119, 154, 165
+ T-235/15 *Pari Pharma v EMA*, paras 77 one, 115, 125
+ T-377/18 *Intercept Pharma*, para. 61; Order in T-578/13 R.

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Special regime example: REACH

REACH incl 2 special categories of info:

1. active dissemination obligation (Art 119)
   - Indicates strong public interest in disclosure on request T-189/14, *Deza v ECHA* paras 127-9; T-245/11 *ClientEarth v ECHA*, para. 153
2. Legislative presumption of non-disclosure (Art 118)
   - Operates like a general presumption T-245/11, *ClientEarth v ECHA*, para. 176
   - Example: exact tonnage of the substance manufactured or placed on the market = would reveal market shares T-245/11, *ClientEarth v ECHA*, para. 178
     - Possibility to disclose range of product placed on the market? Practice in merger proceedings

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General presumptions of non-disclosure

Yes:

1. State aid file + merger proceedings (jointly with investigations)
2. Only GC: Tender information (tender's bid + price info) T-363/14 *Secolux*, para 49 + T-339/10 *Cosepuri v EFSA*, para 101 – neither appealed

No:

1. REACH application documents T-189/14, Deza v ECHA + T-245/11 ClientEarth v ECHA
2. Requests for quotations T-136/15 *Evropaïki Dynamiki v Parliament*, para. 63
3. EMA application documents (clinical study report, CHMP reports, MA file) T-33/17 Amicus Therapeutics UK and Amicus Therapeutics v EMA, paras 38 + 47; T-235/15 Pari Pharma v EMA, para. 60

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More clarification from the Court of Justice?

- AG Hogan proposes in cases C-175 & 178/18 P:
  1. General presumption of confidentiality for Clinical Study Report + Toxicity Study Reports – bc: competitors can use as road map + no data exclusivity outside EU
  2. Must not „seriously undermine“ – bc *de minimis* sufficient
  3. No weighing against public interest –bc: different in *Turco*
  4. Not necessary for information to be novel, i.e. no “creative input” test – bc: same as 1 + advantage for competitor sufficient

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More clarification from the Court of Justice?

- AG Hogan misguided in cases C-175 & 178/18 P because:
  1. General presumption: Equalizes risk of disclosure with general presumption, would extend to almost anything
  2. „Seriously undermined“: Needed because all info held by company may benefit competitor – needs threshold
  3. Weighing against public interest: Necessary to ensure “strict” application, ensure objective of openness + in *AccessInfo + in t‘Veld*
  4. „Creative input“: Important bc benefit for competitor + costs insufficient to delimit + would undermine EMA + REACH cases

  (T-189/14, Deza v ECHA + T-245/11 ClientEarth v ECHA)

(3) EU: Protection of decision-making process

- Covers: Contained in: Art 4(3), 1st sub-para Reg 1049/2001
  - Documents drawn up or received by an institution for internal use relating to a matter where the decision has not been taken by the institution
  - If disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
- Test: Case T-51/15 Pesticide Action Network Europe (PAN Europe) v Commission
  - access to the document would specifically and actually undermine the protected interest and the risk of harm must be reasonably foreseeable and not purely hypothetical.
- Currently no general presumption on this basis
  - Commission failed to establish GP to cover legislative impact assessments C-57/16 ClientEarth v Commission

(3) MS: Protection of decision-making process

National level:

contained in: Article 4(1)(e): the request concerns internal communications, taking into account the public interest served by disclosure;

And 4(2)(a): the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law.

Protection of decision-making process: scope

EU level:

- In the context of environmental information, CJEU: C-69/15 P Saint Gobain
  - the purpose of Regulation No 1367/2006 is to apply the Aarhus Convention to the institutions and bodies of the European Union
  - Article 4(4)(a) of the Aarhus Convention protects the confidentiality of the proceedings of public authorities
  - Therefore, the concept of 'decision-making process' must be construed as relating to decision-making, without covering the entire administrative procedure which led to the decision
  - Does not apply to data on which decision is based or entire administrative process!
  - Higher standard of transparency applies to legislative documents and environmental information C-57/16 P ClientEarth v Commission

Confidentiality of proceedings: scope

Article 4(2)(a) Directive 2003/4:

- CJEU: C-204/09 Flachglas Torgau GmbH v Germany
  - the condition that the confidentiality of the proceedings must be provided for by law can be fulfilled by the existence of a rule which provides that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, in so far as national law clearly defines the concept of 'proceedings'.
- ACCC: ACCC/C/2010/51 (Romania)
  - the term "proceedings" in article 4, paragraph 4 (a), relates to concrete events such as meetings or conferences and does not encompass all the actions of public authorities,. including all the related studies and documents;
  - The criteria in legislation for such exceptions should be as clear as possible, so as to reduce the discretionary power of authorities to select which proceedings should be confidential, because this might lead to arbitrary application of the exemption

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Internal communications: scope

National level:

Article 4(1)(e) Directive 2003/4: protects “internal communications”

- ACCC:
  - Not every document that is communicated internally can be considered as a internal communication: “For instance, factual matters and the analysis thereof may be distinguished from policy perspectives or opinions.” ACCC/C/2013/93 (Norway)
  - the exception did not protect a study that had been submitted to it by a “somehow-related-to-it-but-separate entity. ACCC/C/2010/51 (Romania)

Decision-making process: examples

- Common examples of justifications that have been rejected by CJEU:
  - Institution must be free from external pressure and undue influence so as not to compromise independence and restrict room for manoeuvre and ability to reach compromise, especially regarding sensitive subject-matter E.g. C-51/15 PAN Europe v Commission, C-57/16 ClientEarth v Commission
  - Disclosure would permit the public to raise questions or make criticisms in respect of the information relevant to the decision-making process
  - Interferences by the public would likely seriously to delay the decision-making process and to prejudice the dialogue between the Commission and the Member States;
  - Administrative procedures require greater protection from disclosure of documents than legislative activities. E.g. C-69/15 P Saint Gobain

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Decision-making process: examples

- CJEU response:
  - protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process. Nevertheless, the reality of such external pressure must be established with certainty, and evidence must be adduced to show that there was a reasonably foreseeable risk that that process would be substantially affected owing to that external pressure
  - Sensitivity of subject-matter is not specific enough: "Such general, vague and imprecise statements do not prove that there is genuine external pressure…and are not based on any concrete evidence such as to justify them." C-51/15 PAN Europe v Commission,
  - Transparency ensures the credibility of that institution's action in the minds of citizens and thus contributes to ensuring that that institution acts in a fully independent manner and exclusively in the general interest. It is rather a lack of public information and debate which is likely to give rise to doubts as to whether that institution has fulfilled its tasks in a fully independent manner and exclusively in the general interest). C-57/16 ClientEarth v Commission

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Decision-making process: examples

- CJEU response:
  - The mere reference to a risk of negative repercussions linked to access to internal documents and the possibility that interested parties may influence the procedure do not suffice to prove that disclosure of those documents would seriously undermine the decision-making process of the institution concerned;
  - Regulation 1049/2001 does not set out any requirement for the Commission to examine or respond to public reactions following the disclosure of documents. Therefore, it cannot be held that such disclosure jeopardises compliance with time limits in administrative procedures conducted by the Commission;
  - Although the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity, that does not mean that such an activity falls outside the scope of Regulation No 1049/2001 which, as provided in Article 2(3) thereof, applies to all documents held by an institution, that is to say drreceived by it and in its possession, in all areas of Union activity
    C-69/15 P Saint Gobain

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Decision-making process: final remarks

- Very difficult to for institutions/public authorities to invoke this exception – only in abnormal situation of external pressure!

- If institutions/public authorities do invoke successfully, it still possible to argue that there is an overriding public interest in disclosure (see above – same considerations apply)

(4) Information on emissions into the environment

- EU level: Presumption that there is an overriding public interest in disclosure in terms of:
  - Article 4(2) Regulation 1049/2001, first and third indents - commercial interests of a natural or legal person and intellectual property & the purpose of inspections and audits (not investigations)
- National level: exception to the exceptions in Article 4(2(a), (d), (f), (g), (h), including:
  - the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;
  - the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest.

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Information on emissions into the environment?

- The concept of “information on emissions into the environment” may not be interpreted restrictively!
- 2 aspects to the concept:

1. What are “emissions”?
2. What is “information on emissions”, i.e. is there a sufficiently direct link between the information and the emission?

C-673/13 Commission v Greenpeace and PAN Europe, Case C-442/14 Bayer CropScience

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What are “emissions”?

- Emissions from industrial installations: yes, but not only!
  - the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land. T-245/11 ClientEarth and ClientEarth and International Chemical Secretariat v ECHA.
- Includes all emissions that are relevant to environmental protection, e.g. from pesticides and other chemicals
- No distinction between emissions/releases/discharges
- Emissions actually released into the environment: yes, but not only!
- Foreseeable emissions from a substance which, in the course of normal use is intended to be released into the environment into the environment
- NOT purely hypothetical emissions C-673/13 Commission v Greenpeace and PAN Europe, Case C-442/14 Bayer CropScience

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The link between the “information” and the “emissions”

1. Data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use, i.e. information on the nature, composition, quantity, date and place of the actual or foreseeable emissions.

2. information enabling the public to check the competent authority’s assessme actual or foreseeable emissions. C-673/13 Commission v Greenpeace and PAN Europe, Case C-4 Bayer CropScience

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Information on emissions into the environment

- These concepts applied by G.C. in cases concerning access to glyphosate studies with contrasting outcomes:

1. T- 545/11 RENV Stichting Greenpeace Nederland and PAN Europe v Commission: hypothetical emissions
2. T-329/17 Hautala and other v EFSA, T-716/14 - Tweedale v EFSA: foreseeable/actual emissions

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Information on emissions: final remarks

- Concept of “foreseeable emissions under normal or realistic conditions of use”:
  - Glyphosate cases refer to the conditions “under which the authorisation to place that product or substance on the market was granted”
  - BUT what does this mean in practice?
  - Includes foreseeable emissions, discharges, releases at any point during a product/substance’s life cycle?
  - Includes foreseeable emissions from product/substance once it becomes waste?

Information on emissions: final remarks

- Concept of information on foreseeable emissions from products/substances that are released under normal conditions of use:
  - "Although the placing on the market of a product or substance is not sufficient in general for it to be concluded that that product or substance will necessarily be released into the environment and that information concerning the product or substance relates to 'emissions into the environment', the situation is different as regards a product such as a plant protection product, and the substances which that product contains, which, in the course of normal use, are intended to be released into the environment by virtue of their very function."
  - i.e. includes information on the quantity of product/substance that is placed on the market, and the place of use.

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Thank you!

Next webinar

« Step by step practical guide to requesting environmental information and challenging refusals. »

January 2019, 12:30pm GMT+1

Registration to open soon on our website.

To know more about our LIFE project on Access to Justice EARL A2J and our next trainings, visit our website: https://www.clientearth.org/access-justice-greener-europe/

Have a look at our legal publications :

* Guide on access to justice in environmental matters at EU level: https://www.documents.clientearth.org/library/download-info/16209/

* Country-specific legal toolkits on access to justice at national level: https://www.clientearth.org/country-toolkits-on-access-to-justice/

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