Convention on Access to Information, Public
Participation in Decision-making and Access to Justice
In Environmental Matters

Task Force on Access to Information

Fourth meeting
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OVERVIEW OF CASE LAW ON ACCESS TO ENVIRONMENTAL INFORMATION

This background paper was prepared on the basis of summaries of relevant case law available on the UNECE web-portal for exchange of jurisprudence concerning the Aarhus Convention[1]. It aims to provide additional information for the discussion on systemic issues relevant to the agenda of the fourth meeting of the Task Force on Access to Information under the Aarhus Convention.

Delegates are invited to consult this document in advance of the meeting in order to gain an overview of the challenges encountered by the Parties in the implementation of the Aarhus Convention and to discuss further needs to be addressed under auspices of the Task Force on Access to Information.

[1] Available from http://www.unece.org/env/pp/tfaj/jurisprudenceplatform.html and http://aarhusclearinghouse.unece.org/resources/?c=1000094

1. Environmental information: improving public access

(a) Scope of environmental information and its provision by different public authorities

(i) EUROPEAN UNION, CJEU (First Chamber), Case C-279/12, 19 December 2013

Fish Legal, Emily Shirley *v.* Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd, Southern Water Services Ltd

(Link: http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/CJEU_C279_12_FishLegal/CJEU_C279-12_FishLegal_final.pdf)

Key words: Access to information, scope of environmental information, concept of public authorities, water companies, EU Directive 2003/4

Case summary: In August 2009, Fish Legal (a non-profit-making organisation whose object is to combat pollution and other damage to the aquatic environment and to protect angling and anglers) asked two water companies, United Utilities Water plc and Yorkshire Water Services Ltd for information concerning discharges, clean-up operations and emergency overflow. The same month, Mrs. Shirley wrote to the water company, namely Southern Water Services Ltd, in order to ask for information relating to the sewerage capacity for a planning proposal in her village in the county of Kent. Both entities did not receive the requested information from the water companies concerned within the periods prescribed under regulations 5 and 7 of the Environmental Information Regulations 2004 ("the EIR 2004") which transposes Directive 2003/4 of the European Parliament and the Council of 28 January 2003 on public access to environmental information into national law. Fish Legal and Mrs. Shirley complained to the Information Commissioner who held, in March 2010, that the water companies concerned were not public authorities for the purposes of the EIR 2004 and that he therefore could not adjudicate on their respective complaints. Fish Legal and Mrs. Shirley then appealed against the decisions against the First-tier Tribunal which dismissed the appeals on the same principal ground.

According to article 2(2)(a) of Directive 2003/4, a "public authority" is defined as the government or other public administration, including public advisory bodies, at national, regional or local level. Provision (b) of article 2 states that the wording "public authority" covers "any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment". Article 2(2)(c) of the directive adds that any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b) is also a "public authority".

The CJEU held that undertakings, such as the water companies concerned, which provide public services relating to the environment are under the control of a body or person falling within article 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as "public authorities" if they do not determine in a genuinely autonomous manner the way in which they provide those services. In addition, the CJEU pointed out that both Directive 2003/4 and the Convention are designed to achieve the widest possible systematic availability and dissemination to the public of environmental information held by or for public authorities and

that it is clear from article 3(1) of Directive 2003/4 that if any entity is classified as a public authority for the purpose of one of the three categories referred to in article 2(2) of that directive, it is obliged to disclose all the environmental information falling within one of the six categories set out in article 2(1) of the directive.

The CJEU concluded that the water companies were required to disclose only the environmental information which they hold in the context of the supply of the public services but not if it is not disputed that the information does not relate to the provision of such services.

Note: On 19 February 2015, the Upper Tribunal reached a decision in the case. After having carried out the test laid down by the CJEU by undertaking a comparison between the powers that have been vested in the companies in question and the powers that result from the rules of private law, the Tribunal concluded that the water companies have some special powers that were not available under the normal rules of private law. The examples of these water companies' powers analysed by the Tribunal in the decision were sufficient to satisfy the test laid down by the CJEU. As a result, the water companies were recognized as public authorities for the purposes of the Aarhus Convention, EU Directive on Environmental Information and Environmental Information Regulation. Finally, the Upper Tribunal concluded also that the water companies provided the information requested by Fish Legal and Mrs Shirley late but no further steps were required of them.

(ii) EUROPEAN UNION, Court of First Instance, T-264/04, 25 April 2007

WWF-EPP v. Council of the European Union

(Link:
http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/CFI_T264-04_WWF_EPPvCouncil/Summary_EU_CFI_T264-04_WWF_EPP.pdf)

Key words: access to information, European Community institutions, access to documents, transparency

Case summary: On 23rd February 2004, WWF-European Policy Office (EPO) applied to the Council, under Article 6 of Regulation EC No. 1049/2001 ('the Transparency Regulation') in order to obtain access to documents on the topic of 'WTO – Sustainability and Trade after Cancun', concerning a meeting of the so-called 'Article 133 Committee'. The documents sought were preliminary papers prepared by the Commission including, inter alia, reports on the state of the Cancun negotiations and on the outcome of the current EU approach in the negotiations and the Minutes or resolutions/recommendations arising from that meeting. In its application, WWF referred to the proposal which became EC Regulation No. 1367/2006 on the application of the Aarhus Convention to the EC's institutions and bodies ('The Aarhus Regulation') to support one of its claims.

The Aarhus Regulation grants the public a right of access to environmental information coupled with a progressive dissemination of such information. So, differently from the Transparency Regulation it applies only to the environment. Moreover, it foresees a right of access to information instead of a right of access to documents. WWF's case therefore raised the issue of whether, in practice, there is a difference between the 'old regime' of access to environmental documents and the new Aarhus regime of access to environmental information.

The Council consulted the Commission under Article 4(4) of the Transparency Regulation but then refused to grant access to the documents on the grounds that it would seriously undermine the EU's commercial interests as well as its economic relations with third countries (Article 4(1)(a), 3rd and 4th indents of the Transparency Regulation respectively). The Council invoked the same grounds to refuse partial access.

The second part of the application – referring to the minutes of the meeting – was also refused since the Council contended that there were no minutes or similar documents. Furthermore, the Council stated that it was not obliged to produce minutes or release information that was not part of an existing document.

On 30th June 2004, WWF applied to the Court of First Instance, requesting it to annul the contested decision. An oral hearing was held on 8th November 2006. On 25th April 2007, the CFI dismissed WWF's application on the basis that: (1) the Council had given sufficient reasons under Article 7(1) of the Transparency Regulation to refuse WWF's request and that it did not err in its assessment that the first part of the request for access related to sensitive information, the release of which – under the exceptions in Article 4(1)(a), 3rd and 4th indent of the Transparency Regulation – could undermine the public interest; (2) it accepted that the Council had correctly applied Article 4(6) of the Transparency Regulation by not granting partial access to the documents relating to the first part of the request of access for the abovementioned reasons; and (3) the right of access to documents under Article 2 of the Transparency Regulation had not been violated by the Council's refusal to produce (inexistent) minutes or any other related documents.

As such, the CFI ruled that the 'concept of document must be distinguished from that of information'. Thus, the Community institutions are only obliged to disclose information held in the form of a formal document, as opposed to " … any information in written, visual, aural or electronic or any other material form" as defined in Article 2(3) of the Aarhus Convention (and Article 2(d) of the Aarhus Regulation).

(iii) ITALY, Council of State (Consiglio di Stato), Case Nr. Sez. IV, n. 3917, 22 July 2005

Italia Nostra, Legambiente, WWF *v.* Presidenza del Consiglio dei ministry et al.

(Link:
http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/ITALY/Italia_Nostra/Italy_2005_Italia_Nostra.pdf)

Key words: public participation, access to information, national implementation

Case summary: After a judgment by the Regional Administrative Tribunal (Region of Lazio), three environmental associations (Italia Nostra, Legambiente and WWF) brought an action before the Council of State against Italian public authorities, as well as against the private companies in charge of building the bridge on the Straits of Messina. Among other claims, the associations challenged the legitimacy under domestic law and under international law (Aarhus Convention, implemented by the 2001 law, n. 108) of the preliminary building permit issued by the Italian 'Inter-Ministerial Committee on the economic planning' (CIPE). In particular, the associations argued that during the permit procedure, both of the public participation and access to environmental information principles had been violated. (…)

Regarding the association's access to environmental information claim, the Court highlighted the importance of combining availability and access to information in order to grant access to environmental information effectively. The Court also stressed that the right to information is to be implemented within the framework of national legislations in accordance with the Convention's provisions. However, also on this point the Court dismissed the claim and upheld the first instance judge's argument relating to the compliance of the procedure in question with relevant provisions.

(iv) ITALY, Council of State (Consiglio di Stato), Case Nr. sez. IV, n. 5795, 7 September 2004

National Organisation of Nuclear Physics *v*. Engineers Association

*(Link:*http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/ITALY/Nuclear_Physics/Italy_2004_Nuclear_Physics.pdf)

Key words: standing and sufficient Interest, access to information, public participation

Case summary: A national organization (the Engineers association) brought an action before the Regional Administrative Tribunal (RAT) against the National Organisation of Nuclear Physics ('National Organisation') for being denied access to environmental information such as the status of air, soil, fauna and flora regarding a specific area. RAT upheld the claim and ordered the National Organization to provide all the information requested. The decision was appealed by the National Organisation to the Council of State, which evaluated the access to information principle in light of previous domestic legislation (1997 legislative decree, n. 39), which was then replaced with the 2005 legislative decree (n. 195), implementing EU Directive 2003/4 on access to environmental information. The appellant claimed that the National Organisation was not entitled to have access to justice because no specific link existed between the organisation's aims (under its constitutional statute) and the 'environmental situation in which they operate'. In this regard, a professional association, representing the professional interests of its members, cannot demonstrate a qualified link with the status of the environment. On this point, the Court stated that under the legislative decree 1997, n. 39, a specific and qualified interest is not required in order to receive environmental information, as everyone is entitled to receive it. In fact, free access to environmental information fosters transparency of the 'environmental situation' and continuous monitoring of the quality of the environment. Eventually, the Council of State affirmed the right of the Engineers association to have access to the environmental information in question, and confirmed the first instance judgment.

(v) TAJIKISTAN, Hudjand Municipal Court, Case Nr. 2-583, 21 April 2011

Citizen I.A. v. the Environment Protection Department of the town of Hudjand

Link:
http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/TAJIKISTAN/Hudjand_case/2011_Tajikistan_request4information_ENG.pdf

Key words: Access to environmental information

Case summary: Citizen I.A. addressed the Environment Protection Department of the town of Hudjand to get information about the distilling plant. In his query the applicant requested information regarding the extent to which the air emissions of the plant were hazardous to the environment and whether its wastes were hazardous for feeding to cattle. He also requested access to the environmental impact statement on the activity of the plant.

The Environment Protection Department of the town of Hudjand failed to answer the letter on the grounds that citizen I.A. had not indicated the purpose of the request for this information. This refusal to reply was appealed to the Hudjand Municipal Court.

In its judgment of April 21, 2011, the court upheld I.A.'s claim on lack of action from the part of this Environment Protection Department. In its judgment, the court held that the authority had violated the national programme on access to justice in environmental matters. This lack of action resulted in violation of the constitutional right of the applicant to access to information and failure to meet the requirements of the Aarhus Convention and the Law of Tajikistan on Public Appeals.

(c) Associated costs

EUROPEAN UNION: CJEU (Fifth Chamber), Case C-71/14, 6 October 2015

East Sussex County Council *v.* Information Commissioner, Property Search Group, Local Government Association

(Link:
http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/CJEU_C71_14_EastSussexCouncil/CJEU_C71-14_EastSussexCouncil_final.pdf)

Key words: EU Directive 2003/4, Charge for supplying environmental information, Reasonable amount, Costs of maintaining a database and overheads

Case summary: PSG Eastbourne, a property search company, requested environmental information from the East Sussex County Council in order to supply the information received for commercial purposes to persons involved in the transaction. The County Council supplied the information requested and imposed several charges amounting to GBP 17 (approximately EUR 23), applying a standard scale of charges. PSG Eastbourne filed a complaint against the charges made by the County Council. The Information Commissioner issued a decision notice finding that the charges were not in accordance with regulation 8(3) of the Environmental Information Regulation 2004 ("EIR 2004") since they "included costs other than postage or photocopying costs or other disbursements associated with supplying the information requested". The County Council, supported by the Local Government Association, appealed to the First-tier Tribunal against that decision arguing that the charges were lawful and did not exceed a reasonable amount.

According to article 5(2) of Directive 2003/4, public authorities may make a charge for supplying any environmental information, but the charge must not exceed a reasonable amount. The referring tribunal asked the CJEU whether Article 5(2) of Directive 2003/4 must be interpreted as meaning that "the charge for supplying a particular type of environmental information may include part of the cost of maintaining a database and the overheads attributable to the time spent by the staff of the public authority on, first, keeping the database and, secondly, answering individual requests for information, properly taken into account in fixing the charge". The CJEU held that in order to determine what constitutes "supplying" environmental information within the meaning of article 5(2) of Directive 2003/4, article 5(1) of this directive must also be taken into account: according to article 5(1) and in conjunction with article 3(5) of the directive, the Member States are obliged not only to establish and maintain registers and lists of environmental information held by public authorities, or information points, and facilities for the examination of that information, but also provide access to those registers, lists and facilities for examination free of charge. Therefore, the concept of "supplying" environmental information is delimited meaning that what constitutes supplying of environmental information under article 5(1) of Directive 2003/4 must be free of charge and only other costs that do not arise from the establishment and maintenance of the registers, lists and facilities for examination are entitled to be charged by the national authorities under article 5(2) of Directive 2003/4. In particular, the costs of "supplying" environmental information encompass not only postal and photocopying costs but also the costs attributable to the time spent by the staff of the public authority concerned on answering an individual request for information. Therefore, article 5(2) of Directive 2003/4 must be interpreted as meaning that "the charge for supplying a particular type of environmental information may not include any part of the cost of maintaining a database, such as that at issue in the main proceedings, used for that purpose by the public authority but may include the overheads attributable to the time spent by the staff of the public authority on answering individual requests for information, properly taken into account in fixing the charge".

In addition, article 5(2) of Directive 2003/4 states as a further condition that the total amount of charge provided for in that provision must not exceed a reasonable amount. In order to assess whether a charge has a deterrent effect, the CJEU held that both the economic situation of the person requesting the information and the public interest in protection of the environment must be taken into account.

In the present case, the CJEU concluded that the charges at issue in the main proceedings must be reduced in order to exclude the costs associated with the establishment and the maintenance of the database and did not appear to exceed what is reasonable.

3. The application of certain restrictions on access to environmental information in accordance with the Convention's provisions

(a) Proceedings of public authorities, international relations, national defense, public security and the course of justice

(i) EUROPEAN UNION, CJEU (Second Chamber), C-612/13 P, 16 July 2015

ClientEarth *v.* European Commission

(Link:
http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/CJEU_C612_13P_ClientEarth/CJEU_C612-13_ClientEarth_final.pdf)

Key words: Access to information, Access to documents, Investigation, European Union institutions, Grounds for refusal, Protection of the purpose of, Regulation 1049/2001

Case summary: The Commission refused access to part of the documents requested by ClientEarth (documents related to studies about the extent to which Member States' legislation conformed to EU environmental law). The Commission relied on the exception to disclose of article 4(2) of Regulation 1049/2001, claiming that disclosure of the documents would undermine, inter alia, 'the purpose of investigations'. ClientEarth brought an action before the General Court seeking the annulment of the implied decision. This action was dismissed by the General Court (case T-111/11) and ClientEarth appealed against the General Court's decision at the CJEU.

The CJEU made a distinction between the studies which "had already been placed in a file relating to the pre-litigation stage of infringement proceedings opened with the sending of a letter of formal notice to the Member State concerned" and the studies where it was uncertain that a pre-litigation proceeding would be initiated and where the Commission had not formally notified the concerned Member State. Concerning the former ones, the CJEU confirmed that the Commission was entitled to apply a general presumption of confidentiality according to which the disclosure of these documents "would have jeopardised the proper progress of that stage and the pursuit, in a climate of mutual trust, of an amicable resolution to the dispute between the Commission and the Member State under investigation (…)". However, such a general presumption could not prevail with respect to the latter studies: the Commission could not extend the scope of the general presumption of confidentiality by withholding studies where it was uncertain that a pre-litigation proceeding would be initiated. According to the CJEU, "such reasoning is incompatible with the requirement that such a presumption must be interpreted and applied strictly (…) and, more generally, to the principle that the public should have the widest possible access to the documents held by the institutions of the European Union."

The CJEU concluded that the Commission should have examined and explained, on a case-by-case basis, how a full disclosure of the latter studies to ClientEarth would have "actually and specifically undermined the interest protected by the exception laid down in the third indent of article 4(2) of Regulation No 1049/2001.".

(ii) HUNGARY: Tubes Hill case, Kfv.IV.37.629/2009/70, 17 March 2010

(Link:
http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/HUNGARY/Hungary_2010_Tubes_Radar_Station_Summary.pdf)

Key words: standing, right to bring an action, exclusion of private persons from the action, access to environmental information, environmental impact assessment, scope of review, decision-making on activities serving national defence purposes

Case summary: The case concerned the plan of the Ministry of Defence of the Republic of Hungary to build a radar-station on Tubes Hill above the city of Pécs forming part of NATO's early warning defence system. Tubes is part of the Misina-Tubes nature protection area, it has local protection as part of the Municipal Forest Park, furthermore, providing habitat for several protected species of plant and it is part of the Natura 2000 network of nature protection areas.

In the review procedure, the Supreme Court quashed the decision of the defendant (the construction department of the Ministry of Defence) and ordered the first-instance administrative authority to conduct a new procedure. The Supreme Court also quashed the partial decision of the Municipal Court of Budapest, in which the court excluded private persons from the action.

In their petition for judicial review, the plaintiffs referred to the Aarhus Convention enacted by Act LXXXI of 2001. According to the plaintiffs the defendant violated the provisions of the Convention as it did not meet the requirement to provide information on environmental matters.

In an earlier Administrative Legal Unity Resolution (No 1/2004), the Supreme Court declared that environmental NGOs have legal standing not only in cases where the environmental administrations are the leading licensing authorities but also in cases in which they participate in the procedure as a co-authority (in this case, in the construction permitting administrative procedure by the construction department of the Ministry of Defence). Consequently, environmental NGOs shall have legal standing even in procedures that not primarily about environmental cases, but where the environmental inspectorates hold at least partial responsibilities.

Article 9, para. 1, of the Convention states that any person who considers that his or her request for information has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with, shall be granted access to a review procedure before a court of law. It followed that the plaintiffs' claim could not have been rejected based simply on the impact assessment of radiation. The Supreme Court considered that the right to bring an action based on the international convention required careful examination on the part of the proceeding court since the rejection would violate not only national law but the international obligations of the Republic of Hungary.

(b) Material in the course of completion or internal communication

(i) FRANCE, Conseil d'Etat, Case N° 266668, August 7, 2007, N° 266

Conseil d'Etat *v.* Prefect of Morhiban

*(Link:*http://www.unece.org/fileadmin/DAM/env/pp/compliance/TFon_A_to_J/France_2007_Morbihan.pdf)

Key words : access to environmental information, preliminary documents, grounds for refusal

Case summary: On 19 February 2004, the Rennes Administrative Tribunal refused to annul the decision of the prefect of Morbihan. The Morbihan decision would denied the association of inhabitants of the Morbihan coast to access the unabridged version of the minutes of the

site commission meeting of 4 April 2002. The Conseil d'Etat decided that it was illegal to refuse access to the document merely because it was of preliminary nature and would be preceded by a final decision. Hence, it annulled the decision of the Rennes Administrative Tribunal and the decision of the prefect of Morbihan. Thus, a decision refusing access to information concerning preliminary documents is not compatible with Art.3 of Directive 90/313/EEC, which limits the refusal for a request for environmental information if the request concerns unfinished document.

(ii) SPAIN, Dam of Itoiz case, Supreme Court (Tribunal Supremo, Sala de lo Contencioso), Case N°STS 6202/2011, 29 September 2009

D. Norberto *v.* Administración General del Estado

(Link: http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/SPAIN/Sp_DamItoiz_A2I_2011_Summary.pdf)

Key words: Access to information, grounds for refusal, material in course of completion

Case summary: Mr. Norberto requested the full copy of all the auscultation reports of the dam of Itoiz, from January 2003 to April 2004, as well as the full copy of all the auscultation reports of the slopes and embankments of the dam. The public authority, Hydrographical Confederation of the Ebro (CHE), considered that Mr. Norberto was in fact demanding access to the memoire of the pile load test, which was not finished at the time, and on those grounds they refused to provide the information.

This first response was contested by Mr. Norberto before the Contentious-Administrative division of the High Court of Aragón. This time, the CHE alleged that the requested documents (the auscultation reports) were not finished as they contained "provisional" information which could be subject to subsequent modifications. The High Court of Aragón dismissed these allegations arguing that the lack of a legal definition of "unfinished document" should not lead to understand that every single document subject to later modifications, due to circumstances such as new developments, new data, technical assessments, etc, can be considered as being unfinished. On the contrary, once the auscultation report has been issued or signed to serve its initial purposes, it must be considered completed. The fact that later on, in view of new factual, technical or legal assessments, the content of the documents might be updated does not mean that the documents were unfinished, but only inaccurate or erroneous in their initial appraisals.

The decision of the High Court of Aragón was again contested before the Supreme Court by the State Lawyer, who reiterated that the requested reports were unfinished documents, of a provisional nature, containing information that might be adjusted during the subsequent stages of the filling process.

In its final ruling, the Supreme Court reconfirmed the decision of the previous instance and highlighted some of the arguments used by the Court of Aragón. An unfinished report (that is, a draft version which lacks, e.g., the necessary signature or the approval of the head of unit) cannot be mistaken for an unfinished administrative file or process, which consist of a number

of reports, all of them finished reports, that can be completed at a later stage by adding new data or results during the different stages of the process. In this context of "unfinished process", the auscultation reports already issued are to be considered as clearly completed.

(c) Commercial and industrial information, intellectual property rights and interests of a third party

(i) EUROPEAN UNION, CJEU (Grand Chamber), Case C-416/10, 15 January 2013

Jozef Križan and Others *v.* Slovenská inšpekcia životného prostredia

(Link:http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/CJEU_C416-10_Krizan/EU_2013_C416_10_Krizan.pdf)

Key words: reference for a preliminary ruling, Directive 85/337/EEC , Directive 96/61/EC, construction of a landfill site, permit, trade secrets, effect on the validity of the decision authorising the landfill site, EIA, effective legal remedy, interim measures, right to property

Case summary: This case was a referral to the CJEU for a preliminary ruling. Jozef Križan and others challenged a permit for the Pezinok land fill issued according to Directive 96/61 (the IPPC Directive) by the environment inspection authority of Bratislava. They also asked for access to the urban planning decision, which the authority refused with reference to commercial confidentiality. Križan and others appealed to second administrative instance, which revealed the information about the planning decision, but upheld the permit decision. Križan and others brought action to the administrative court of Bratislava, but were dismissed. However, on appeal, the Supreme Court annulled the permit, in essence because of the failures in the public participation and EIA procedures. The land fill operator then lodged an appeal to the Constitutional Court of Slovakia, which found that the annulment of the permit was an infringement of the company's fundamental right to property according to the European Convention of Human Rights (ECHR), and therefore remitted the case back to the Supreme Court. As this court questioned that the contested decisions were compatible with the European Union law, it asked for a preliminary ruling from CJEU about the refusal of the information, the effectiveness of the judicial procedure and the protection of the property rights of the operator.

The CJEU ruled that the IPPC Directive:

- requires that the public concerned have access to an urban planning decision, such as that at issue in the main proceedings, from the beginning of the authorisation procedure,

- does not allow the competent national authorities to refuse the public concerned access to such decision by relying on the protection of the confidentiality of commercial or industrial information where such confidentiality is provided for by national or European Union, and

- does not preclude the possibility of rectifying, during the administrative procedure at second instance, an unjustified refusal to make available to the public concerned an urban planning decision, provided that all options and solutions remain possible and

that regularisation at that stage of the procedure still allows that public effectively to influence the outcome of the decision-making process.

Furthermore, the CJEU stated that Article 15a of the IPPC Directive means that members of the public concerned must be able to ask the court or competent independent and impartial body established by law to order interim measures such as temporarily to suspend the application of a permit, pending the final decision.

The CJEU finally said that a decision of a national court, taken in the context of national proceedings implementing the obligations resulting from article 15a of the IPPC Directive and from article 9, paragraphs 2 and 4, of the Aarhus Convention, which annuls a permit granted in infringement of the provisions of that directive is not capable, in itself, of constituting an unjustified interference with the developer's right to property enshrined in article 17 of the Charter of Fundamental Rights of the European Union.

(ii) EUROPEAN UNION, CJEU (Third Chamber), C-106/14, 10 September 2015

Fédération des entreprises du commerce et de la distribution (FCD) and Fédération des magasins de bricolage et de l'aménagement de la maison (FMB) *v* Ministre de l'Écologie, du Développement durable et de l'Énergie.

(Link:
http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/CJEU_C106_14_FCD_FMB/CJEU_C106-14_FCD_FMB_final.pdf)

Key words: access to product information, environment and protection of human health, duties to notify and provide information, Regulation 1907/2006, REACH Regulation

Case summary: This request for a preliminary ruling concerned the interpretation of article 7(2) and 33 of Regulation 1907/2006 (REACH). Those provisions make it obligatory to provide information on the presence of a substance of very high concern in a concentration above a 0.1% threshold in articles. The main question was whether this obligation only covered products as a whole, or also products with individual components crossing the threshold. The CJEU held that the definition of an 'article' is applicable to any object meeting the criteria in article 3(3) REACH, and that there is no need to draw a distinction between articles incorporated as a component of a complex product and articles present in an isolated manner. In relation to article 7(2) REACH, the CJEU clarified that producers of articles have a duty to notify substances of very high concern that are present in concentrations above 0.1% of the weight in articles that they make or assemble but they are not required to notify the presence of such substances in articles produced by a third party that they use. Importers of products made up of more than one article, on the other hand, must determine for each article, whether a substance of very high concern is present in a concentration over 0.1%. Finally, in relation to the information duty under article 33 REACH, the CJEU held that the supplier of a product, of which one or more constituent articles contains a substance of very high concern in a concentration above 0.1%, must inform the recipient and, on request, the consumer, of the presence of that substance by providing them, at a minimum, with the name of the substance in question.

(e) Ensuring the legitimate application of the restrictions

(i) BELGIUM, Council of State (Supreme Administrative Court), Case Nr. 192.371, 14 April 2009

NIRAS *v.* Belgische Staat and Federale Beroepscommissie voor toegang tot milieu-informatie

(Link:
http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/BELGIUM/ConseilEtatNIRAS/Belgium_2009_NIRAS.pdf)

Key words: access to environmental information, grounds for refusal, restrictive interpretation, balancing, separation of information, administrative appeal, judicial appeal

Case summary: A member of the federal parliament (from the Green Party) requested the National Agency for Radioactive Waste and Nuclear Fuel (NIRAS/ONDRAF) for access to a report on the analysis of potential nuclear passives (ie the expected costs for the clean up at the end of their lifetime and the expected costs relating to the treatment and storage of radioactive waste for a very long period) of nuclear sites and installations in Belgium. Access was refused for reasons of public security, public order, confidentiality of commercial and industrial information and the impossibility to separate confidential from non confidential information. The Federal Appeals Commission for Access to Environmental Information declared on 9 March 2009 the appeal of the MP against this refusal was partially founded, and declared that NIRAS/ONDRAF could only refuse access to both the information regarding the exact site of the storage of radioactive substances and forms in which they are kept. Access to all the other information should be granted. NIRAS/ONDRAF asked the Council of State on 3 April 2009 to suspend immediately the decision of the Appeals Commission. In its judgment on 14 April 2009, the Council of State rejected this demand of NIRAS/ONDRAF. Article 27 of the Federal Act of 5 August 2006 concerning public access to environmental information should be interpreted in a restrictive way because it contains exceptions on the fundamental right to transparency, enshrined in Art. 32 of the Constitution. In each case, the public interest served by disclosure should be balanced against the interests protected by the refusal grounds of Art. 27. Where possible, government agencies should opt for the separation of confidential from non-confidential information. The Court found that the decision of the Appeals Commission is well reasoned and does not violate relevant legislation. This judgment on the demand of suspension of the decision of the Federal Appeals Commission, was confirmed by the final judgment of the demand for annulment of the same decision, delivered on 9 June 2011, Nr. 213.77

(ii) EUROPEAN UNION, CJEU (Second Chamber), C-615/13 P, 16 July 2015

ClientEarth and Pesticide Action Network Europe (PAN Europe) *v.* European Food Safety Authority (EFSA)

(Link:
http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/CJEU_C615_13P_PAN_EFSA/CJEU_C615-13_PAN_Europe-EFSA_final.pdf)

Key words: Access to information, placing of plant protection products on the market, disclosure of information, confidentiality of personal data, transfer of personal data, Regulation EU 1049/2001

Case summary: The European Food Safety Authority (EFSA) promulgated a draft guidance document for applicants who wish to place plant protection products on the market (pursuant to article 8(5) of EU Regulation 1107/2009). ClientEarth and PAN Europe (the applicants) submitted an application to EFSA requesting access to documents under EU Regulation 1049/2001. EFSA initially withheld its documents but then retracted its position in 2011, granting access to all the information requested except for the names of the external experts who made certain comments on the draft of that guidance document.

The General Court of the European Union rejected the applicants' request (T-214/11) for the names of the external experts and the case came before the CJEU. Firstly, the CJEU held that the information requested was 'personal data' within the meaning of article 2(a) of Regulation 45/2001 because it would connect a scientific expert to a particular comment he or she had made. Secondly, it held, in line with the General Court's approach, that two cumulative conditions must be fulfilled before a transfer of personal data could be granted: the transfer must be 'necessary' (article 8(b) of Regulation 45/2001) and must not prejudice the legitimate interests of the data subject. Finally, the CJEU disagreed with the General Court, finding that the transfer of personal data was necessary 'so that the impartiality of each of those experts in carrying out their tasks as scientists in the service of EFSA could be specifically ascertained' and in order to dispel with the accusations of partiality made against EFSA and ensure its decision-making processes are transparent.

Moreover, EFSA had not given any specific reasons to suggest that the transfer might prejudice the legitimate interests of the data subjects.

Therefore, CJEU set aside the judgment of the General Court of the European Union in ClientEarth and PAN Europe v EFSA (T 214/11) and annulled the decision of EFSA.

(iii) REPUBLIC OF MOLDOVA, The Moldsilva case, Court of Appeal Chisinau (Curtea de Apel Chisinau), June 23, 2008

Eco-TIRAS International Environmental Association of River Keepers *v.* State Forestry Agency "Moldsilva"

(Link:http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/REPUBLIC_OF_MOLDOVA/Summary_RepublicMoldova_2008_Moldsilva.pdf)

Key words: Environmental information, disclosure of information, grounds for refusal, access to justice

Case summary: A non-governmental organization, Eco-TIRAS International Environmental Association of River Keepers (Eco-TIRAS), submitted a request to the State Forestry Agency 'Moldsilva' (a government agency) for the disclosure of a number of contracts for the rent of lands administered by the State Forestry Fund. Moldsilva refused this request on the grounds of the large volume of the requested information, and also asked the NGO to justify its

interest in that information. The request for information was repeated, as was the refusal. The second time Moldsilva referred to the newly passed Governmental Regulation No. 187 that stipulated that the Agency had an obligation to keep confidential from third parties such information, and that if it failed to do so, the Agency would risk having to pay for any damages caused. None of the two letters of refusal provided the NGO with information on access to a review procedure.

Eco-TIRAS then brought an action in the Court of Appeal Chisinau challenging this decision and claiming that Moldsilva was obligated to provide the copies of all contracts as requested. The administrative action relied on the relevant provisions of Moldovan legislation, namely articles 21 and 25 of the Law on Access to Information and articles 5, 14, 16, 24 and 25, paragraph 1 (b), of the Law on Administrative Courts, and also referred to the definition of 'environmental information' contained in article 2.3 of the Aarhus Convention.

The Court of Appeal granted Eco-TIRAS standing, as the NGO was registered with the aim to contribute to the improvement of the environmental situation, sustainable use and protection of natural resources in Nistru (Dniestr) river basin. The court also found that Moldsilva's refusal was in breach of the Law on Access to Information, which stipulates that a person requesting access to information is under no obligation to justify his or her interest in doing so. Furthermore, in accordance with that law, access to information cannot be limited in cases where the information is of public interest and refers to the protection of environment. Even if the law allows for certain grounds for exceptions, Moldsilva had ultimately failed to prove that its refusal met those criteria and was necessary in a democratic society for the protection of the rights and legitimate interests of the person, and that the damage to those interests would be larger than the public interest in that kind of information. The court thus decided in favour of Eco-TIRAS, and mandated that the State Forestry Agency should provide the requested information.

4. Effective dissemination of environmental information

(i) LATVIA: Constitutional Court (Satversmes tiesa), Case Nr. 2002-14-04, 14 February 2003

20 Deputies of the Saeima *v.* Cabinet of Minister

Link:http://www.unece.org/fileadmin/DAM/env/pp/compliance/TFon_A_to_J/Latvia_2003_Olaine.pdf

Key words: access to environmental information, access to justice, public participation

Case summary: A group of members of parliament claimed that the Cabinet of Ministers 8 August 2001 Decree No. 401 'On the Location of the Hazardous Waste Incineration Facility in Olaine' was not in conformity with a number of provisions of Latvian law, including art. 111 and 115 of the Constitution of the Republic of Latvia ('the Satversme').

Art. 111 of the Satversme provides that the State shall protect human health and guarantee a basic level of medical assistance for everyone. Art. 115 of the Satversme provides: 'The State shall protect the right of everyone to live in a benevolent environment by providing

information about environmental conditions and by promoting the preservation and improvement of the environment'.

The Constitutional Court came to a number of conclusions: First, observation of formal legal requirements is not always adequate in determining public opinion on a particular project (e.g., public authorities should choose appropriate media for communication with the public). Second, the greater the expected impact on the environment, the more effort public authorities should make to inform the public. Third, public participation, as far as the public is concerned, is not a duty but a right. Fourth, the procedures of public participation do not require public authorities to adhere to all comments – the decisive criterion is whether the submitted comments have been considered and fairly assessed. Finally, the Court held, inter alia, that the contested Decree was in conformity with the applicable law.

(ii) LATVIA: Constitutional Court (Satversmes tiesa), Maskavas Stree Regulations, Case Nr. 2008-03-03, 24 September 2008

21 Deputies of the Saeima *v.* Riga City Council

*(Link:*http://www.unece.org/fileadmin/DAM/env/pp/compliance/TFon_A_to_J/Latvia_2008_Maskava.pdf)

Key words: access to environmental information, access to justice, public participation

Case summary: A group of members of parliament claimed that the regulations on use and building of a particular territory in the capital of Latvia were contrary to art. 115 of the Constitution of the Republic of Latvia ('the Satversme').

Art. 115 of the Satversme provides: 'The State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment'.

The Constitutional Court found that environmental, economic, and social interests must be balanced during the process of territorial planning. Moreover, environmental interests should not be treated more favourably than the others.

Different persons in different capacities had submitted their views during preparation of the Contested Regulations. The Court declared that not only neighbours, but also other persons are entitled to participate during the preparation of territorial planning documents, as they may have different interests in the relevant territory. Consequently, the Court held, inter alia, that the Contested Regulations were in conformity with art. 115 of the Satversme.

(iii) UKRAINE: Kyiv Administrative Appeal Court, Case regarding mandatory publication of conclusions of the state environmental expertiza on the Internet, № 2a-13786/10/2670, 22 November 2012

Environment-Law-People (ELP) v. the Ukrainian Ministry of Ecology and Natural Resources

(Link:
http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/UKRAINE/Ukraine_2012_StateEnvExpertizaConclusions_Eng_Final.pdf)

Key words: Public, Internet, *conclusions of state environmental expertiza*, environmental information, access to information, dissemination of environmental information

Case summary: In accordance with article 4, paragraph 1, of the Aarhus Convention, public authorities are obliged to provide environmental information to the public, including copies of actual documentation containing or comprising such information.

Article 6, paragraph 9, of the Convention guarantees that the public must be promptly informed of a decision after it is taken; in accordance with appropriate procedures, each party shall provide a text of the decision with the reasons and consideration on which the decision is based.

In accordance with paragraph 3 of the "Action Plan on Implementing the Decision of the Parties to the Aarhus Convention III/6f", approved by the Ukrainian Cabinet of Ministers № 1628-r on 27 December 2008, the Ukrainian Ministry of Ecology and Natural Resources is obliged to make the conclusions of the *state environmental expertiza*[2] public on the web-site and in the print edition of "Ecotizhden".

In September 2010, the claimant, international nonprofit organization "Environment-Law-People" (ELP), went to court with an administrative claim against the Ukrainian Ministry of Ecology and Natural Resources regarding the failure to provide the conclusions of the *state environmental expertiza* on the Ministry's web portal and its regional and district websites. The claimant also requested to fulfil the obligations of the Ministry to publish the conclusions of the *state environmental expertiza* adopted since 2009 on its official website. On 27 October 2011, the District Administrative Court of Kyiv took a decision partially satisfying the ELP's claim.

Disagreeing with the aforementioned judgment, the Ministry filed an appeal to the Kyiv Administrative Appeal Court to overturn the decision of the court of first instance, arguing that it was adopted in violation of substantive law, and adopt a new decision to dismiss the plaintiffs' claims.

The Kyiv Administrative Appeal Court dismissed the appeal, and affirmed the decision of the court of first instance. In particular, the Kyiv Administrative Appeal Court agreed with the decisions of the court of first instance regarding the validity of the plaintiffs claim vis-à-vis the failure of the Ministry of Ecology and Natural Resources to act, encompassing the failure to ensure the publication of the conclusions of *state environmental expertiza* on the Ministry's web portal and regional and district websites of the Ministry of Environmental Protection. Additionally, the court recognized the obligation to publish the conclusions of the *state environmental expertiza* adopted since 1 January 2009 on official website of the Ministry of Ecology and Natural Resources.

[2] The OVOS/*expertiza* system is a development control mechanism followed in many countries of Eastern Europe, the Caucasus and Central Asia. The Committee has held that the OVOS and the *expertiza* should be considered jointly as the decision-making process constituting a form of environmental impact assessment procedure (see ECE/MP.PP/C.1/2013/9, para. 44).

The Ukrainian Ministry of Ecology and Natural Resources was obliged to publish 1293 conclusions of the state environmental expertiza conducted from 1 January 2009 to 12 June 2011 on its official website.