



**LEUPHANA**  
UNIVERSITÄT LÜNEBURG



**COMMERCIAL AND INDUSTRIAL INFORMATION,  
INTELLECTUAL PROPERTY RIGHTS AND  
INTERESTS OF A THIRD PARTY**

**AARHUS CONVENTION TASK FORCE ON ACCESS TO  
INFORMATION  
GENEVA, 8-10 DECEMBER 2015**

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# Agenda

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## Rationale of the Aarhus-Convention

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- I Wide Interpretation of the Right of Access to Information - Narrow Interpretation of Grounds for Refusal/Public Interest Test

## Restrictions

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- II Commercial and Industrial Information - Article 4 (4)(d)

- III Intellectual Property Rights - Article 4 (4)(e)

- IV Interests of a Third Party - Article 4 (4)(g)
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## Conclusions

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# I

## Wide Interpretation of the Right of Access to Information

### Article 4 (1)

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, **make such information available to the public**, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) **Without an interest** having to be stated;

(b) **In the form requested** unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

### EU-Directive 2003/4 – Recital 16

(16) The right to information means that the disclosure of information **should be the general rule...**



# Narrow Interpretation of Grounds for Refusal/Public Interest Test

—Article 4 (4) last para AC

- The aforementioned grounds for refusal 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**.

—Art. 4 (2) EU-Directive 2003/4

- The grounds for refusal mentioned in paragraphs 1 and 2 shall be **interpreted in a restrictive way**, taking into account for the particular case the **public interest** served by disclosure. In every particular case, the public interest served by disclosure shall be **weighed against the interest served by the refusal**. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on **emissions into the environment**.



# Narrow Interpretation of Grounds for Refusal/Public Interest Test

## —Aarhus Implementation Guide:

- **“restrictive way”**: process required to ensure that exception is not arbitrary and that actual harm to interest is caused
- **“public interest served by disclosure”**:
  - **“Sofia Guidelines”**: “aforementioned grounds for refusal are to be **interpreted in a restrictive way** with the public interest served by disclosure weighed against the interests of nondisclosure in each case”
  - **ACCC/C/2007/21**: “in situations where there is a **significant public interest** in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure”
- **“high priority** on releasing information on emissions”

Source: Aarhus Implementation Guide, 2<sup>nd</sup> edition 2014, p 90



## Article 4 (4): Grounds for Refusal

4. A request for environmental information may be **refused** if the disclosure would adversely affect:...

(d) The **confidentiality of commercial and industrial information**, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) **Intellectual property rights**;...

(g) The **interests of a third party** which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material...



## II

# Commercial and Industrial Information - Article 4 (4)(d)

### —Aarhus Implementation Guide:

- **Purpose:** protecting legitimate economic interests of private entities
- **3-fold tests:**
  1. commercial or industrial **secrets**: national law must protect its confidentiality
  2. **“legitimate economic interest”**:
    - a) Establish a process
    - b) Determine confidentiality
    - c) Determine harm
  3. **Exception from exception**: information concerning pollutant emissions

Source: Aarhus Implementation Guide, 2<sup>nd</sup> edition 2014, p 87 et seq



# Commercial and Industrial Information - Article 4 (4)(d)

## — Prerequisites

- Related to a **business activity – competition situation**
- Familiar only to a **limited group of people**
  - Not defined by the number of persons
- Kept secret according to the **will of the business proprietor**
  - Must not be expressly stated
- **Legitimate economic interest** for confidentiality
  - Information held by a polluter normally not confidential when relating to the environmental condition, such as emissions into air, water and land, transfers of waste and waste-water
  - Not related to company itself, but to its environs
  - **“Know-how”** only protected if it reaches quality of commercial and industrial information

Source: Schomerus/Schrader/Wegener,  
Umweltinformationsgesetz, 2<sup>nd</sup> edition, 2001 p 271 et seq





## Commercial and Industrial Information - Article 4 (4)(d)

### — Two different concepts:

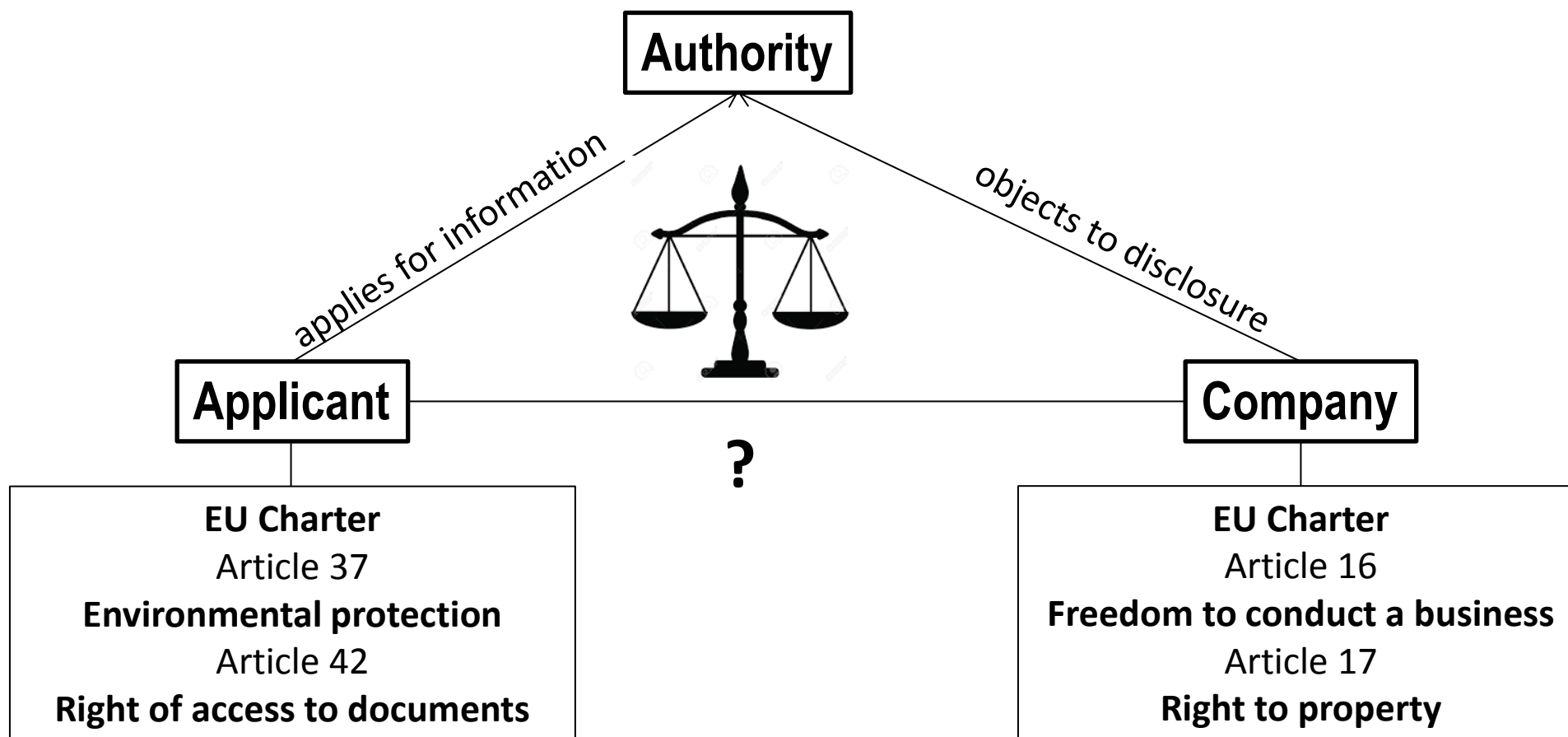
Source: Dirk Bünger, *Deficits in EU and US Mandatory Environmental Information Disclosure*, 2012, p 100 et seq

- **Competition law concept:** competing private interests
- **Environmentally related concept:** access to information without having to state an interest
  - Recital 7 of Directive 2003/4/EC: “Disparities between the laws in force in the Member States concerning access to environmental information held by public authorities can create **inequality within the Community** as regards access to such information or as regards conditions of competition.”
  - Environmental information law is in danger of being encroached upon for economic purposes
- Solution: conflict of interest should be solved on a **fundamental rights basis**



# Commercial and Industrial Information - Article 4 (4)(d)

## —Actors involved





## Commercial and Industrial Information - Article 4 (4)(d)

### — ACCC/C/2010/51 (Greenpeace; Nuclear Power Plant, Romania), Findings of Compliance Committee of 28 March 2014:

- “90. Article 4, paragraph 4 (d), of the Convention allows authorities to refuse access to commercial and industrial information, where such information is protected by law in order to protect legitimate economic interests. The Convention does not define which information is “**commercial and industrial**”, but the criteria and the process for characterization of information as confidential on this basis should be clearly defined by law, so as to prevent authorities from withholding information in an arbitrary manner.
- 91. The Convention does not define “**legitimate economic interests**” either. While the exemption from the obligation to disclose information in article 4, paragraph 4 (d), is predominantly focused on protecting legitimate economic interests of private entities, it may also be used to protect legitimate economic interests of public bodies, for example those referred to in article 2, paragraph 2 (b) and (c), or, in certain exceptional circumstances, even of entire States,...
- 92. Even so, in the present case the Committee does not find that a **study, prepared by an entity which is closely related to the public administration and aimed at selecting the possible locations for an NPP** could be considered as “commercial or industrial information”, as referred to in article 4, paragraph 4 (d), of the Convention....”



## Commercial and Industrial Information - Article 4 (4)(d)

— For example: procedure according to **German Environmental Information Act**

➤ **Hearing** of potential holder of commercial and industrial information

- Holder may identify information given to authority as secret
- As a rule, authority must assume that this is the case
- Authority may request further details

➤ No such procedure under **German Freedom of Information Act**

➤ No such provisions under **Aarhus Convention or Directive 2003/4/EC**

### Section 9 (1) German Env. Inf. Act 2004

There shall be a **hearing** of the people concerned prior to the decision on the revelation of the information protected by para. 1 No 1-3. Usually the authority has to assume that a third party has been affected provided that he has **identified transmitted information** as trade and business secrets. If the authority so requires, the third party shall **demonstrate in detail** that it is a case of a trade or business secret.

Source: Thomas Schomerus, Informationsansprüche im Atom- und Strahlenschutzrecht, 2010, p 252 et seq ([https://doris.bfs.de/jspui/bitstream/urn:nbn:de:0221-201011233819/3/BfS\\_2010\\_3608S70001.pdf](https://doris.bfs.de/jspui/bitstream/urn:nbn:de:0221-201011233819/3/BfS_2010_3608S70001.pdf))



## Commercial and Industrial Information - Article 4 (4)(d)

### — OVG Rheinland-Pfalz, decision of 6.9.2012, 8 A 10096/12: wide interpretation

- Applicant wants **access to safety report** of chemical company (all in all ca 150 applications!)
- Denied by authority
  - not because report itself contains secrets
  - but it may allow to draw conclusions regarding confidential information
- Court followed this reasoning, hold by Federal Administration Court (25.7.2013, 7 B 45/12)
- Procedural problem: **publicity** of court trial
- Solution: **“in-camera procedure”**

Source: Fischer/Fluck, Informationsfreiheit versus Betriebs- und Geschäftsgeheimnisse, NVwZ 2013, 337

#### Section 99 Code of Administrative Court Procedure

(1) Authorities shall be obliged to submit certificates or files, to transmit electronic documents and provide information. If the knowledge of the content of these certificates, files, electronic documents or this information would prove disadvantageous to the interests of the Federation or of a Land, or if the events **must be kept strictly secret** in accordance with a statute or due to their essence, the competent supreme supervisory authority may **refuse the submission** of certificates or files, the transmission of the electronic documents and the provision of information.

(2) On request by a party concerned, the Higher Administrative Court shall find by order without an oral hearing whether the refusal to submit certificates or files, to transmit the electronic documents or to provide information is lawful. If a supreme federal authority refuses the submission, transmission or information on grounds that the interests of the Federation would be impaired were the content of the certificates or files, of the electronic documents and the information to become known, the Federal Administrative Court shall decide; ... The members of the court shall be obliged to **maintain confidentiality**; the grounds for the decision **may not provide an indication of the nature and content of the secret** certificates, files, documents and information.



Source: Bernhard Wegener, Umweltinformationsfreiheit –  
ernst genommen: Der Fall Glyphosat, ZUR 2014, 32

## Commercial and Industrial Information - Article 4 (4)(d)

### — Two Cases on Glyphosat, two differing court decisions:

- **Glyphosat**: herbicide, major producer: Monsanto; important role for GMO-plants, toxicological evaluation under discussion
- **Two requests** by Stichting Greenpeace Nederland – EU Commission and German Federal Office of Consumer Protection and Food Safety (BVL)
  - Access to information on impurities in the active substance
  - Denied by both institutions: information on tested substances could allow conclusions on production procedure
- **General Court of the European Union** (T-545/11 Judgement of 8 October 2013, Stichting Greenpeace Nederland/PAN Europe vs. European Commission):  
**access granted**
- **Administrative Court Braunschweig** (decision of 12.12.2012 – 2 A 1033/12):  
**access denied**



## Commercial and Industrial Information - Article 4 (4)(d)

### — T-545/11 Judgement of the General Court of 8 October 2013, Stichting Greenpeace Nederland et al vs. European Commission (I)

#### ➤ Wide interpretation of emissions:

- "...neither the logic of the right of access to documents of the EU institutions... nor the wording of the latter regulation...implies that the **notion of emission into the environment** should be interpreted restrictively."
- "... the **Implementation Guide** refers to the **notion of emission** under Council Directive 96/61/EC ... which defines emission as 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 (the installation being a stationary unit where one or more activities listed in Annex I are carried out). ... It must be pointed out that neither the scope of application of the Aarhus Convention nor that of Regulation No 1367/2006 is limited to the consequences of such activities. Therefore, the **definition of emission into the environment** which emerges from the Implementation Guide cannot be used to interpret Regulation No 1367/2006



## Commercial and Industrial Information - Article 4 (4)(d)

### — T-545/11 Judgement of the General Court of 8 October 2013, Stichting Greenpeace Nederland et al vs. European Commission (II)

#### ➤ No limitation to principle of publicity of emissions

- “. The **public interest in disclosure** of the information had already been taken into account, since the possible effects of glyphosate emissions were shown in other parts of the draft report that had already been disclosed to the public, in particular those concerning relevant impurities and metabolites. ...”
- “The first sentence of Article 6(1) of Regulation No 1367/2006 lays down a **legal presumption that an overriding public interest in disclosure exists where the information requested relates to emissions** into the environment, except where that information concerns an investigation...”
- “...the provisions of the **TRIPS Agreement**,...constitute an integral part of the European Union legal order.”
- No absolute protection of **right to property**

See also critical remarks by v. Holleben, Judgment of the General Court of the EU on Access to Information under Substance Law, EJRR 2013, 565





# Commercial and Industrial Information - Article 4 (4)(d)

## —Administrative Court Braunschweig (decision of 12.12.2012 – 2 A 1033/12)

### ➤ **Environmental information:**

- “Bei den von den Kläger begehrten Daten handelt es sich um Umweltinformationen im Sinne des Umweltinformationsgesetzes. ... enthalten damit Informationen, die sich im Sinne von § 2 Abs. 3 Nr. 2 und Nr. 6 UIG auf Umweltbestandteile auswirken oder wahrscheinlich auswirken bzw. den Zustand der menschlichen Gesundheit und Sicherheit im Sinne von § 2 Abs. 3 Nr. 6 UIG betreffen können“

### ➤ **No environmental information on emissions:**

- „Für ein auf Emissionen von Anlagen begrenztes Verständnis des unbestimmten Rechtsbegriffs der Umweltinformationen über Emissionen spricht auch die Systematik des Gesetzes“

### ➤ **Commercial and industrial secrets:**

- „... handelt es sich um Betriebsgeheimnisse im Sinne von § 9 Abs. 1 Nr. 3 UIG, für die ein überwiegendes öffentliches Interesse an der Bekanntgabe nicht gegeben ist“...Durch eine Offenbarung der Informationen über die Zusammensetzung des Wirkstoffs Glyphosat würde die Berufsfreiheit der Zulassungsinhaber erheblich beeinträchtigt.“



### III

## Intellectual Property Rights - Article 4 (4)(e)

### — Aarhus Implementation Guide:

- Purpose: **protecting legitimate economic interests** of private entities
- Protection under international and national law
- Forms:
  - Primary forms:
    - **Copyright:** protects original expressions (art, literature, music, etc.),
    - **Patents:** protect novel ideas or inventions
    - **Trademarks:** protect symbols and names used in commerce
    - **Trade secrets:** protect all kinds of proprietary business information
  - Sui generis forms: plant breeders' rights, database protection and industrial designs et al.
- No protection of “generic” ideas and concepts, principles of nature or scientific fact

Source: Aarhus Implementation Guide, 2<sup>nd</sup> edition 2014, p 88



# Intellectual Property Rights - Article 4 (4)(e)

## — Initial considerations

- In practice, **only copyrights** are relevant
  - Not covered: private interests vs. competitors
  - From patents, trademarks et al regularly no restrictions for disclosure of information derivable
    - Widespread public registers
    - Exception: inventions before publication – covered by commercial and industrial information
- **Know-how** not covered by copyrights

## — EU primary law

- Intellectual property - Article 17 (2) - and right of access to documents - Article 42 – on same level (not clear for German Basic Law)

Source: Bernhard Wegener, Zum Verhältnis des Rechts auf freien Zugang zu Umweltinformationen zum Urheberrecht, 2010 ([http://www.bmub.bund.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/gutachten\\_urheberrecht\\_bf.pdf](http://www.bmub.bund.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/gutachten_urheberrecht_bf.pdf))



# Intellectual Property Rights - Article 4 (4)(e)

— Two questions:

**1. How far do copyrights reach with regard to the right of access to environmental information under the German Environmental Information Act (Umweltinformationsgesetz)?**

➤ In particular: research reports by third parties?

**2. Can public authorities claim copyrights of their own?**

➤ In particular: scientific activities such as meteorological information

○ Restriction of usage or charges for disclosure?

○ Further use of information?

Source: Bernhard Wegener, Zum Verhältnis des Rechts auf freien Zugang zu Umweltinformationen zum Urheberrecht, 2010 ([http://www.bmub.bund.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/gutachten\\_urheberrecht\\_bf.pdf](http://www.bmub.bund.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/gutachten_urheberrecht_bf.pdf))



# Intellectual Property Rights - Article 4 (4)(e)

Source: Bernhard Wegener, Zum Verhältnis des Rechts auf freien Zugang zu Umweltinformationen zum Urheberrecht, 2010 ([http://www.bmub.bund.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/gutachten\\_urheberrecht\\_bf.pdf](http://www.bmub.bund.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/gutachten_urheberrecht_bf.pdf))

## — First question: third parties' copyrights

- A copyright **protects the work of authorship**, not its information content.
- Relevant for restricting information disclosure is the **author's right** of first publication alone. This right does not expire by handing out the protected "work" to the authority.
- The **right to exploit a copyright**, in particular of reproduction or further utilization, could be infringed by disclosure.
- The authority is allowed to pass on the "work" to third parties if the **copyright's owner agrees**. The simple handing over of the "work" to the authority cannot be assumed as implied consent.
- Works of authorship covered by copyrights may be passed to a third party if it serves his or her **research purposes**.
- **Balancing clauses** in freedom of information laws limit copyright protection. The absence of such clauses can lead to problems regarding EU- and constitutional law.
- Copyright violations caused by an authority can result in **legal consequences under civil or criminal law** for the employees involved.



# Intellectual Property Rights - Article 4 (4)(e)

## — Second question: public authorities' copyrights

- German jurisdiction: **no exclusion of authorities' copyrights** through Article 5 German Copyright Act
  - Higher Administration Court of Baden-Württemberg denies such rights for authorities with regard to section 9 German Env. Information Act “protection of private interests”
- In practice, copyrights do not lead to restrictions for freedom of information; **FoI-laws supersede right of first publication**
- However: FoI-laws do not grant **right to further commercial use** of information
  - Anti-discrimination rules (EU re-use-directive 2003/98/EC)
- Authorities may limit the **mode of disclosure** in favour of their own copyrights
  - In such cases, authorities must consider freedom of information

Source: Bernhard Wegener, Zum Verhältnis des Rechts auf freien Zugang zu Umweltinformationen zum Urheberrecht, 2010 ([http://www.bmub.bund.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/gutachten\\_urheberrecht\\_bf.pdf](http://www.bmub.bund.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/gutachten_urheberrecht_bf.pdf))

### Article 5 German Copyright Act (Urheberrechtsgesetz)

- (1) **Acts, ordinances, official decrees and official notices, as well as decisions and official head notes** of decisions do not enjoy copyright protection.
- (2) The same applies to other **official texts** published in the official interest for general information purposes, subject to the proviso that the provisions concerning the prohibition of alteration and the indication of sources in Article 62 (1) to (3) and Article 63 (1) and (2) shall apply mutatis mutandis.



## Intellectual Property Rights - Article 4 (4)(e)

### — ACCC/C/2005/15 (Alburnus Maior, NGO, Romania):

#### ➤ Communication to ACC of 20 June 2005:

It is with great concern that numerous of these consulted parties, including Alburnus Maior took note of MMGA's recent announcement<sup>5</sup> that the scoping list for the Rosia Montana EIA was finalized. This was done without any form of public participation and in a complete lack of transparency. **The absence of public participation and consultations for the Rosia Montana EIA scoping stage is a violation of Art. 6, pct. 3, 4, 6, 7 and 8 of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters; as ratified by Romania with Law 86/2000.**

#### ➤ ACCC findings of 16 April 2008:

- “28. **EIA studies** are prepared for the purposes of the public file in administrative procedure. Therefore, the author or developer should not be entitled to keep the information from public disclosure on the grounds of intellectual property law.
- 29. The Committee wishes to stress that in jurisdictions where copyright laws may be applied to EIA studies that are prepared for the purposes of the public file in the administrative procedure and available to authorities when making decisions, it **by no means justifies a general exclusion of such studies from public disclosure**. This is in particular so in situations where such studies form part of “information relevant to the decision-making” which, according to article 6, paragraph 6, of the Convention, should be made available to the public at the time of the public participation procedure.



Source: Aarhus Implementation Guide, 2<sup>nd</sup> edition 2014, p 89

## IV

# Interests of a Third Party - Article 4 (4)(g)

### — Aarhus Implementation Guide:

- Purpose: protecting legitimate economic interests of private entities
- Protection under international and national law necessary
- Conditions for the exception:
  - **Third party**: “a person not a party to a particular agreement or transaction, but a person who may have rights or interests therein” (not a party in the sense of Article 2, para 2!)
  - **Voluntarily**: not, if third party can be obliged to provide information
  - Public authority (“second party”) must have denied consent to disclosure
- Recommendation:
  - **Specification of disclosure** between “second” and “third” party





## Interests of a Third Party - Article 4 (4)(g)

- Protects trustful relationship between **authorities and information providers**
  - Authorities depend on voluntarily forwarded information for controlling complex technical installations et al
- No legal information requirement
  - Example: **EMAS information**
- Negative consequences for third parties' interests
  - Example: **whistleblowers**
- Previous consent of information owner?
- Public interest test?

Source: Schlacke/Schrader/Bunge, Aarhus-Handbuch, 2010, p 73

**Article 4 (1) Directive 2003/4/EC**  
(g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;



## Conclusions

- Further development in the implementation of the principle of narrow interpretation of exceptions from access to environmental information, based on commercial and industrial information, intellectual property rights and interests of a third party, challenges authorities and courts and requires **decision-making on a case-to-case basis**.
- The European Court of Justice and national **courts** have contributed widely to the interpretation of such exceptions, mainly in favour of access to information.
- However, there are still differences between environmental information and general **freedom of information laws**. For instance, in the latter, procedural provisions such as the public interest test are not common.
- By abolishing such discrepancies, freedom of information law should be further developed towards a **comprehensive and homogeneous legal system**.



## Sources

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# Thank you for your attention!

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