Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 22 June 2011 [1]

Case C-204/09

Flachglas Torgau GmbH
v
Bundesrepublik Deutschland

(Reference for a preliminary ruling from the Bundesverwaltungsgericht (Germany))

(Access to environmental information held by public authorities — Aarhus Convention — Directive 2003/4/EC — Bodies acting in a legislative capacity — Confidentiality of proceedings provided for by law)

1. In accordance with Directive 2003/4,[2] public authorities must in principle be required to make environmental information held by or for them available to any applicant at his request. However, the Directive permits Member States to exclude public bodies acting in a legislative capacity from the definition of a 'public authority'. In addition, access may be refused to certain types of document, or if disclosure would adversely affect the confidentiality of proceedings of authorities where such confidentiality is provided for by law.

2. The German Bundesverwaltungsgericht (Federal Administrative Court) seeks guidance, in particular, on the extent to which executive authorities of the State may be regarded as acting in a legislative capacity and possible temporal limitations on that exclusion, and on the precise scope of the criterion that confidentiality of proceedings is 'provided for by law'.

The Aarhus Convention

3. The European Union, the Member States and 19 other States are parties to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Convention'), which entered into force on 30 October 2001. The Convention is based on three 'pillars' – access to information, public participation, and access to justice. Its preamble includes the following recitals:

'Recognising that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

1 — Original language: English.

2 — Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26) ('the Directive').

Recognising the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings'.

4. Article 2(2) of the Convention defines 'public authority' as, in particular, 'government at national, regional and other level', together with any natural or legal persons having public duties, responsibilities or functions, particularly with regard to the environment, but excludes from that definition 'bodies or institutions acting in a judicial or legislative capacity'.

5. Article 4 of the Convention, which introduces the first pillar, is entitled 'Access to environmental information'. Its first two paragraphs require parties to ensure, essentially, that public authorities, in response to a request for environmental information, make such information available to the public as soon as possible, without an interest having to be stated. Article 4(4) lays down certain grounds on which a request may be refused. These include, under Article 4(4)(a), cases in which disclosure would adversely affect, inter alia, 'the confidentiality of the proceedings of public authorities where such confidentiality is provided for under national law'. The final subparagraph of Article 4(4) states: '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.'

6. In the second pillar, Article 8 of the Convention, though not directly concerning access to information, has been referred to during the proceedings. It is entitled 'Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments' and provides, in particular: 'Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.' To that end, they should fix sufficient time-frames for effective participation, make draft rules publicly available, give the public the opportunity to comment, directly or through representative consultative bodies, and take the result of public consultation into account as far as possible.

7. Article 9 embodies the third pillar of the Convention and deals with access to justice. In particular, it requires parties to the Convention to ensure that any person dissatisfied with the response to his or her request for information has access to a proper judicial review procedure allowing for adequate and effective remedies.

8. The Convention was approved on behalf of the European Community by Council Decision 2005/370,[3] the annex to which contains a declaration by the European Community ('the Declaration') which reads, in so far as relevant, as follows:

'In relation to Article 9 of the Aarhus Convention the European Community invites Parties to the Convention to take note of Article 2(2) and Article 6 of [the Directive]. These provisions give Member States of the European Community the possibility, in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on requests for information.

Therefore the ratification by the European Community of the Aarhus Convention encompasses any reservation by a Member State of the European Community to the extent that such a reservation is compatible with Article 2(2) and Article 6 of [the Directive].'

3 — Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1). The text of the Convention is reproduced on p. 4 et seq. of that issue of the Official Journal.

9. In ratifying the Convention on 20 May 2005, Sweden lodged a reservation which, in so far as is relevant, reads as follows: 'Sweden lodges a reservation in relation to Article 9.1 with regard to access to a review procedure before a court of law of decisions taken by the Parliament, the Government and Ministers on issues involving the release of official documents.' Germany ratified the Convention on 15 January 2007, without entering any reservations.

The Directive

10. The Directive was adopted in 2003, before the Council approved the Convention. Recital 5 in its preamble makes it clear that it aimed to make what was then Community law consistent with the Convention with a view to its conclusion by the Community. The Directive covers the first pillar of the Convention, together with those parts of the third pillar which are relevant to access to information.

11. Recital 16 in the preamble states:

'The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. ...'

12. Article 1(a) indicates that one of the objectives of the Directive is 'to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise'.

13. In its first sentence, Article 2(2) defines 'public authority' as a 'government or other public administration, including public advisory bodies, at national, regional or local level', again together with any natural or legal person having public responsibilities or functions in relation to the environment. The second and third sentences state: 'Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, [4] Member States may exclude those bodies or institutions from that definition.'

14. Article 3(1) of the Directive provides:

'Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.'

15. The relevant parts of Article 4 read as follows:

'1. Member States may provide for a request for environmental information to be refused if:

…

(d) the request concerns material in the course of completion or unfinished documents or data;

(e) the request concerns internal communications, taking into account the public interest served by disclosure.

...

4 — Article 6 reflects Article 9 of the Convention, and provides for administrative and judicial review of decisions relating to access to information.

2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;

…

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) …, provide for a request to be refused where the request relates to information on emissions into the environment.

…

4. Environmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested.

…'

German law

16. The Umweltinformationsgesetz (Environmental Information Law, 'the UIG') implemented the Directive in Federal German law.

17. Paragraph 2(1)(1) of the UIG includes 'the government and other public administrative bodies' among those required to provide information. However, Paragraph 2(1)(1)(a) expressly excludes 'the highest Federal authorities, when acting in the context of a legislative process or issuing regulatory instruments ["*Rechtsverordnungen*"]'.

18. Under Paragraph 8(1)(2) of the UIG, if the disclosure of information would adversely affect the confidentiality of proceedings of authorities which are required to provide information under Paragraph 2(1), the request is to be refused unless there is an overriding public interest in disclosure, although access to environmental information concerning emissions cannot be refused on that ground. Under Paragraph 8(2)(2), a request for internal communications is likewise to be refused unless there is an overriding public interest in disclosure.

19. Certain provisions of the Verwaltungsverfahrensgesetz (Law on administrative procedure, 'the VwVfG') have also been cited.

20. Paragraph 28(1) of the VwVfG states:

'Before an administrative measure affecting a party's rights is adopted, that person shall be given an opportunity to state his position with regard to the facts material to the decision.'

21. Paragraph 29(1) and (2) of the VwVfG reads as follows:

'(1) An administrative authority must permit interested parties to consult the files concerning the procedure at issue, in so far as a knowledge of those files is necessary to protect or defend their legal interests. Until the conclusion of the administrative procedure, the first sentence does not apply to draft decisions, nor to work directly linked to their drafting. …

(2) An administrative authority is not obliged to permit the consultation of files when this would affect the normal performance of its tasks or where disclosure of the contents of the files would adversely affect the Federation or a *Land*, or where the facts must be kept secret by virtue of a law or by virtue of their nature, having regard in particular to the legitimate interests of the parties involved or of third parties.'

22. Paragraph 68(1) of the VwVfG provides, in particular, that administrative hearings are not to be public, although third parties may be authorised to attend unless a party objects.

Facts, procedure and questions referred

23. Flachglas Torgau GmbH ('Flachglas Torgau') is a glass manufacturer participating in greenhouse gas emissions trading. In that context, it asked the Federal Ministry for the Environment ('the Ministry') for information in its possession concerning a law on the allocation of greenhouse gas emission licences in the period 2005-2007. [5]

24. The information requested related both to the legislative process leading to the adoption of that law and to its implementation. In particular, it covered internal memoranda and written comments produced by the Ministry and correspondence, including emails, with the German Emissions Trading Agency, an independent authority.

25. The Ministry refused the request in its entirety. As regards information relating to its participation in the legislative process, it considered that, under Paragraph 2(1)(1)(a) of the UIG, it was not a 'public authority required to provide information'. Other information, which originated in confidential proceedings whose effectiveness could be adversely affected by disclosure, was covered by Paragraph 8(1)(2) of the UIG. Finally, its internal communications were protected by Paragraph 8(2)(2) of the UIG and there was no overriding public interest in their disclosure.

26. Flachglas Torgau challenged the refusal before the Verwaltungsgericht (Administrative Court), which allowed the claim in part. On appeal by Flachglas Torgau and cross-appeal by the Ministry, the Oberverwaltungsgericht (Higher Administrative Court) held that the Ministry had acted in the context of a legislative process and, under Paragraph 2(1)(1)(a) of the UIG, was not required to provide information in so far as it was involved in the drafting of legislation in a preparatory and attendant capacity. It also held, however, that the Ministry could not rely on the confidentiality of proceedings as a ground of refusal, and had not shown how disclosure would adversely affect the confidentiality of the consultation processes. It ordered the Ministry to reconsider its decision in the light of the judgment.

27. Both parties appealed to the Bundesverwaltungsgericht. Flachglas Torgau contended that EU law does not allow ministries to be excluded from the duty to provide information where they act in the context of the parliamentary legislative process and that, in any event, the protection for preparatory work on a law ends when the law is promulgated. It also argued that the Ministry could not plead confidentiality of proceedings as a ground of refusal, because EU law required an express statutory provision conferring confidentiality, beyond that found in the general laws relating to environmental information.

28. The Bundesverwaltungsgericht has referred the following questions to the Court:

'1 (a) Is the second sentence of Article 2(2) of [the Directive] to be interpreted as meaning that only bodies and institutions for whom it is, under the law of the Member State, to take the final (binding) decision in the legislative process act in a legislative capacity, or do bodies

5 — Gesetz über den nationalen Zuteilungsplan für Treibhausgas-Emissionsberechtigungen in der Zuteilungsperiode 2005 bis 2007.

and institutions which have been given certain functions and rights of involvement in the legislative process by the law of the Member State, in particular to table a draft law and to give opinions on draft laws, also act in a legislative capacity?

(b) May Member States exclude bodies and institutions acting in a judicial or legislative capacity from the definition of "public authority" only if their constitutional provisions at the date of the adoption of [the Directive] made no provision for a review procedure within the meaning of Article 6 of that Directive?

(c) Are bodies and institutions, when acting in a legislative capacity, excluded from the definition of "public authority" only for the period until the conclusion of the legislative process?

2 (a) Is the confidentiality of proceedings within the meaning of Article 4(2)(a) of [the Directive] provided for by law where the national provision enacted to implement [the Directive] lays down generally that a request for access to environmental information is to be refused if the disclosure of the information would adversely affect the confidentiality of the proceedings of authorities which are required to provide information, or is it necessary, for that purpose, for a separate statutory provision to provide for the confidentiality of the proceedings?

(b) Is the confidentiality of proceedings within the meaning of Article 4(2)(a) of [the Directive] provided for by law where under national law there is a general unwritten legal principle that the administrative proceedings of public authorities are not public?'

29. Flachglas Torgau, the German Government and the Commission have all submitted both written and oral observations to the Court.

Assessment

Approach to interpretation of the Directive

30. The Convention and the Directive reflect a determination to ensure increased transparency. The preparatory work[6] and the preambles[7] to both instruments emphasise transparency and access to information, in particular with respect to the ability of citizens to hold public authorities to account. Indeed, it is hardly controversial to say that in general, transparency is beneficial. In particular, public availability of information may encourage better practice on the part of those taking decisions on the basis of that information.

31. Admittedly, unlimited transparency is not envisaged. If the benefits brought about by a transparent system are not controversial, nor is it controversial to acknowledge that transparency may give rise to difficulties, as the German Government has pointed out. The Court, however, while recognising such difficulties, has tended in similar contexts to opt for interpretations which promote transparency.[8]

6 — See the Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making, Sofia 1995, the subsequent Draft Elements for the Aarhus Convention (CEP/AC.3/R.1, p. 2) (both available at http://www.unece.org/env/pp/archives.htm), the initial proposal for the Directive (COM(2000) 402 final), p. 4, and point 1.3 of the Opinion of the Economic and Social Committee on that proposal (OJ 2001 C 116, p. 43).

7 — See points 3 and 10 above.

8 — See, for example, Case C-321/96 *Mecklenburg* [1998] ECR I-3809, paragraph 25, or Case C-552/07 *Azelvandre* [2009] ECR I-987, paragraph 52.

32. In the event of ambiguity, therefore, the Directive should be interpreted so as to favour transparency and access to information, and any provision limiting its scope in that regard – such as Article 2(2), allowing for a limitation of the category of authorities which must be required to make information available, or Article 4(1) and (2), allowing disclosure to be refused in certain circumstances – should be construed strictly. Indeed, in relation to the latter, the Directive itself specifically requires grounds for refusal to be interpreted restrictively.

Question 1

33. Pursuant to Article 2(2) of the Directive, Germany has excluded from the obligation to make environmental information available 'the highest federal authorities, when acting in the context of a legislative process or issuing regulatory instruments'. The body requested to provide information in the present case was a federal ministry, rather than a parliamentary body. By the three parts of its first question, the referring court therefore wishes to know, essentially, (a) whether the Directive allows exclusion of bodies whose role in the legislative process is limited to submitting or commenting on legislative proposals, (b) whether an exclusion is possible at all for bodies whose decisions were already subject to a review procedure and (c) whether any exclusion is permitted only until the legislative process is concluded. I shall however examine point (b), which seems logically prior, before point (a) – which, in turn seems more closely linked to point (c).

(b) Possibility of exclusion for bodies whose decisions were already subject to a review procedure within the meaning of Article 6

34. The second and third sentences of Article 2(2) read:

'Member States may provide that [the definition of a public authority] shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.'

35. The referring court seeks clarification of the relationship between those two sentences. In other words, does the third sentence delimit the circumstances in which a Member State may make use of the option in the second sentence (Flachglas Torgau's contention) or does it set out a separate option which may be used in specific circumstances but is independent of that in the second sentence (the view favoured by the German Government and the Commission)?

36. It is common ground that, at the time of adoption of the Directive, German constitutional law did provide for judicial review of decisions such as that of the Ministry in the present case. Consequently, if Flachglas Torgau's interpretation were to prevail, there would be no scope at all for Germany to exclude bodies such as the Ministry from the definition of public authority, even when acting in a legislative capacity.

37. On any reading, the relationship between the two sentences is unclear. As the Commission points out, the third sentence was added at a late stage in the legislative process, in the Conciliation Committee convened under Article 251(3) EC.[9] If the insertion was made at that stage for a specific purpose, the drafters may not have fully considered its relationship to the surrounding text or its implications for the interpretation of that text. What, though, was the specific purpose served? Unfortunately, again as the Commission points out, the preparatory documents offer no clear information. Two hypotheses have been put forward.

9 — Now, after amendment, Article 294(10) TFEU.

38. Flachglas Torgau notes that the third sentence was added after an unsuccessful attempt by the Parliament to amend the second sentence to read 'Member States may provide that, *in applying the provisions of this Directive concerning access to justice*, the definition of "public authority" does not include bodies when and to the extent to which they act in a judicial or legislative capacity' (emphasis added).[10] That proposal thus sought to subject all public authorities to the requirement to make environmental information available, allowing an exclusion only from the need to provide for judicial review of any refusal of a request for information. Flachglas Torgau suggests that the third sentence of Article 2(2) was included during the conciliation process as a sort of quid pro quo in exchange for the rejection of the Parliament's proposal, and was intended to impose a substantive condition on the exercise of the option in the second sentence.

39. The Commission and the German Government suggest a different reason, namely that the insertion was intended to pave the way for the reservation[11] which Sweden would be required to enter when ratifying the Convention, and to accommodate that reservation within the Directive. Sweden's intended reservation reflected its own internal legal situation, in which there was no procedure for judicial review of decisions of the highest State bodies on issues involving the release of official documents. The Declaration,[12] which referred specifically to Article 2(2) of the Directive in conjunction with any reservation entered by a Member State, then provided the necessary link. The German Government thus submits that, while the second sentence of Article 2(2) permits Member States to exclude bodies *when acting* in a judicial or legislative capacity, the third sentence allows a total exclusion of judicial or legislative bodies as such. The Commission further considers that the second and third sentences are alternative.

40. I am not convinced by Flachglas Torgau's explanation. Since the Parliament's proposed amendment was not accepted,[13] it would be surprising if the solution found in the Conciliation Committee went even further than that proposal in limiting the scope of the possible exclusion from the definition of 'public authority'. The Directive already goes further than the Convention in merely allowing Member States to make an exclusion from the definition, whereas the Convention states that the definition 'does not include' bodies or institutions acting in a judicial or legislative capacity. The Parliament's amendment would have limited the permitted exclusion to the sphere of judicial review. Flachglas Torgau's interpretation of the Directive, however, would preclude any exclusion at all other than in particular constitutional circumstances – which, we may infer, are uncommon, since only Sweden entered a reservation to the Convention in that regard.

41. The alternative reading proposed by the German Government and the Commission might appear more persuasive. The Swedish legal system did not permit judicial review of decisions involving the release of official documents taken by Parliament, the Government or Ministers. Sweden therefore entered a reservation in relation to Article 9(1) and 9(2) of the Convention with regard to judicial review of such decisions. It is understandable that Sweden would have been unwilling to bind itself by the Directive to an obligation to which it was intending to enter a reservation in international law. It would therefore have needed the Directive to allow a Member State in its specific circumstances to create a blanket exclusion for certain bodies, rather than an exclusion by reference to the capacity in which they were acting. The Declaration appears to support such a reading. It points out that Articles 2(2) and 6 give Member States the possibility, 'in exceptional cases and under strictly specified conditions', to exclude certain institutions and bodies from the rules on review procedures, and

10 — See Report A5-0074/2001 of the Committee on the Environment, Public Health and Consumer Policy of 28 February 2001, under Amendment 15, and Position of the European Parliament adopted at second reading on 30 May 2002 (OJ 2003 C 187 E, p. 118, at p. 122).

11 — See point 9 above.

12 — See point 8 above.

13 — At least from the Commission's point of view, the objection seems to have been that the amendment would have been inconsistent with the wording of the Convention, whereas the aim of the Directive was specifically to align Community law with the Convention (see Amended proposal for a Directive of the European Parliament and of the Council on public access to environmental information, OJ 2001 C 240 E, p. 289).

specifies that EU ratification of the Convention encompasses any reservation by a Member State which is compatible with those articles. The Declaration thus itself embodies a reservation, which enabled the EU to accede to the Convention without undermining a position adopted by any of its Member States.

42. However, both explanations are hypothetical, and it seems difficult to conclude with certainty that either is correct. The various parties may have had different assumptions during the conciliation process, so that it may be unwise to seek to derive a single legislative intention from the context. The wording itself is, as I have said, unhelpful. If the third sentence had been introduced by a word such as 'furthermore' or 'alternatively', the meaning might have been clearer. But it is not. All that can be said with certainty is that the drafting does not clearly support Flachglas Torgau's interpretation, which would imply a greater divergence between the Convention and the Directive than that advanced by the German Government and the Commission. Since a major aim of the Directive was to align EU law with the Convention, it seems preferable to take the latter approach, which deviates less from the Convention.

43. I therefore consider the third sentence of Article 2(2) of the Directive to embody an option (which Germany has not in any event sought to use) entirely separate from that in the second sentence (which Germany has used). Consequently, the fact that Germany's constitutional provisions did indeed, at the date of adoption of the Directive, allow a review procedure for decisions of bodies such as the Ministry (so that the third sentence of Article 2(2) cannot be invoked in their regard) does not preclude it from making use of the second sentence and, in Paragraph 2(1)(1)(a) of the UIG, excluding from the definition of 'public authority' certain authorities according to the nature of their activity.

44. However, whether the content of that provision in fact corresponds exactly to that of the second sentence of Article 2(2) of the Directive is an issue to be addressed in the context of point (a) of the referring court's question.

(a) Bodies whose role in the legislative process is limited to submitting or commenting on legislative proposals

45. The second sentence of Article 2(2) allows Member States to exclude from the scope of the Directive bodies otherwise falling within the definition of 'public authority', 'when acting in a judicial or legislative capacity'. It seems clear, therefore, that a contextual, functional definition is intended, depending on the nature of the activity being carried out at a particular moment, rather than a structural definition in which the nature of the body in question assigns it to one or other of Montesquieu's three branches of government.[14] Moreover, as the Commission points out, only a functional interpretation allows the differing legislative systems in the Member States to be taken into account in such a way as to provide a reasonable measure of uniformity.

46. Under a structural classification, the Ministry would presumably belong to the executive branch of government, and would not be a legislative body. However, we are told, the executive branch is in Germany – as, probably, in all the Member States – the prime initiator of legislation in the federal parliament. And, during the progress of a bill through the legislature, the Ministry may be consulted and may proffer advice. In those regards, it clearly acts 'in the context of a legislative process', to use the terms of Paragraph 2(1)(1)(a) of the UIG. But is that the same as acting 'in a … legislative capacity' within the meaning of Article 2(2) of the Directive?

14 — It is true that the Spanish version of the Directive refers to 'entidades o instituciones en la medida en que actúen en calidad de *órgano* jurisdiccional o *legislativo*' (emphasis added), where other versions speak only of legislative capacity, competences or powers, but even that formulation stresses the activity at least as much as the inherent nature of the body concerned.

47. The Ministry may also, it appears, issue regulatory instruments, presumably implementing measures which it is empowered to adopt under primary legislation. Again, the question may be asked: is it acting in a legislative capacity when it does so?

48. It appears from the order for reference that Flachglas Torgau has requested information 'from the legislative proceedings' relating to the law in question – which, it seems, was enacted by the legislature proper and is not an implementing measure adopted by the Ministry itself. Although the national court is no more explicit as to the exact nature of the information requested,[15] I shall make the same assumption as that which underlies both the question itself and all the submissions made to the Court, namely, that it is the Ministry's involvement as initiator and adviser during the legislative process which falls to be assessed. I shall not, therefore, address the question whether the Ministry may be 'acting in a … legislative capacity' when exercising its other powers to issue regulatory instruments, a question which does not appear relevant to the main proceedings.

49. It seems appropriate to begin by considering the purpose of the exclusion for bodies acting in a judicial or legislative capacity. Unfortunately, however, any explicit explanation of that purpose appears to be lost in the mists of time.

50. The Directive was adopted in order to align what was then Community law with the provisions of the Convention, but there is no hint from the preparatory work on the Convention[16] that any particular consideration was given to the formulation of the exclusion, which was already present in the initial draft. Indeed, as the Commission has pointed out, much of the Convention was initially inspired by, and built upon, existing Community legislation, including the Directive's predecessor,[17] which already contained the exception in the same formulation.[18]

51. The only record I can find of any consideration being given to the purpose of the permitted exclusion is in the Parliament's report on its first reading of the proposal for the present Directive,[19] in which, attempting to limit the scope of the exclusion to the requirement for judicial review (as opposed to the requirement to make information available), it presumed that the reason for the restriction was the traditional idea of balance between legislature, executive and judiciary, but considered that the separation of powers would be more equitable if citizens had equal access to information held by all three branches of government. That hypothesis, however, is not very relevant to the question whether the executive branch may in certain circumstances act in a legislative capacity.

52. The German Government suggests that the reason for the exclusion was to shield legislative activity in the field of the environment – views on which are often strongly held and strongly expressed – from insistent demands for information, from vehement contestations of the information obtained and from strenuous attempts to influence the outcome on the basis of such information. It thus seeks to enable the entirety of the legislative process, from draft bill to enacted legislation, but in particular the discussions and exchanges which allow opinions to be formed, to take place in the absence of any such disruptions.

15 — And although Flachglas Torgau, in its observations, says only that its request concerned administrative instructions given by the Ministry with regard to the implementation of the law (as opposed to actual implementing measures with binding legal force); such instructions seem to be the subject of the second question.

16 — See http://www.unece.org/env/pp/archives.htm.

17 — Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56).

18 — The original proposal for that directive (OJ 1988 C 335, p. 5) used a different formulation: 'Bodies exercising judicial powers or legislative bodies'. There appears to be no record of the reason for the change from a structural to a functional definition as regards the legislative aspect. It may have been a matter of bringing it in line with the definition as regards the judicial aspect, a functional definition being, as I have indicated, best suited to take account of differences between legal and political systems.

19 — Report A5-0074/2001, cited in footnote 10, under Amendment 15.

53. The basic point which the German Government makes has some merit as a hypothesis if we consider it, for the moment, as relating to the judiciary and to the legislature as such. The performance of both judicial and legislative functions could be impaired if information of all kinds concerning each and every stage of the process – analysing the relevant issues and data, deriving conclusions from that analysis and formulating a final decision – could be demanded of right at all times by any member of the public.[20] It seems reasonable to assume that considerations of that kind were in the minds of those who initially drafted the first of the instruments concerned[21] and have remained, albeit implicitly, in the minds of those who have participated in the drafting of the subsequent instruments.

54. Yet it is by no means desirable, nor would it appear consistent with the overall thrust of the Convention or the Directive, for legislative or judicial activity to take place in impenetrable secrecy. It is generally considered necessary, in order to ensure the rule of law and democratic government, for both courts of law and legislative assemblies to operate in the presence of the public (or at least of the media as an intermediary) other than in wholly exceptional circumstances – and it is, moreover, generally accepted that such circumstances are more common in the course of judicial than of legislative activity. Other than in wholly exceptional circumstances, therefore, in neither case should decisions be taken on the basis of facts, or for reasons, which are concealed from citizens.

55. Thus, in the judicial sphere, it is wholly appropriate for a bench of judges to deliberate in private (as a judge sitting alone must necessarily do). As a corollary, however, the reasons on the basis of which they reach their decision must be made public, together with the evidence and argument which they have taken into consideration. Mutatis mutandis – and leaving aside, for the moment, the issue of the temporal scope of the exclusion, which is the subject-matter of question 1(c) – I am prepared to accept a similar rationale for, and a similar limitation on, the exclusion from the obligation to make information available for bodies acting in a legislative capacity. But the fact that a particular topic excites lively public debate is not, in my view, a sufficient reason to shield the entire process of contemplating, preparing and putting through legislation from all requests for information

56. That does not yet, however, answer the question whether agencies of the executive, when submitting draft laws to the legislature or proffering their advice during the passage of legislation, are intended to be subject to the same protection from untimely and unrestricted demands for information.

57. An indication relied upon by Flachglas Torgau and mentioned by the national court in its order for reference derives from the Implementation Guide to the Convention, published by the United Nations Economic Commission for Europe (UN/ECE) in 2000,[22] which states, inter alia: 'The involvement of executive branch authorities in law-drafting in collaboration with the legislative branch deserves special mention. The collaboration between executive branch and legislative branch authorities in law-making is recognised in Article 8. As the activities of public authorities in drafting regulations, laws and normative acts [are] expressly covered by that article, it is logical to conclude that the Convention does not consider these activities to be acting in a "legislative capacity". Thus, executive branch authorities engaging in such activities are public authorities under the Convention.'

20 — See, with regard to judicial activities, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-0000, paragraphs 92 and 93. It does not necessarily follow, however, that a right to request procedural documents will automatically and in all contexts disturb the desired 'atmosphere of serenity' for the conduct of proceedings – see, for example, with regard to the European Court of Human Rights, Article 40(2) of the European Convention on Human Rights.

21 — See point 50 and footnotes 17 and 18 above.

22 — *The Aarhus Convention: an implementation guide*, prepared by Stephen Stec, Susan Casey-Lefkowitz and Jerzy Jendroska, for the Regional Environmental Centre for Central and Eastern Europe (http://www.unece.org/env/pp/acig.pdf), in particular at pp. 34-35 of the English version.

58. However, as the German Government and the Commission point out, that document has no authoritative status as regards the interpretation of the Convention. Its authors specify that the views expressed do not necessarily reflect those of the UN/ECE or of any of the organisations which sponsored the guide; nor does it appear to have been specifically approved by the Parties to the Convention. Moreover, the reference to Article 8 of the Convention does not seem pertinent with regard to legislative procedures of the kind at issue in the present proceedings, where an executive proposal is subject to parliamentary scrutiny by the people's elected representatives. Article 8 appears to concern, rather, direct public participation when executive regulations are drawn up.[23] Thus, a plausible approach to the relationship between the concept of 'legislative activity' in Article 2(2) and that of 'the preparation of executive regulations and/or generally applicable legally binding normative instruments' in Article 8 would be that the exclusion in the former relates solely to primary legislation involving some form of parliamentary scrutiny and debate, whereas the latter concerns secondary, implementing measures adopted under an enabling provision, in the absence of any such democratic process. While not entirely valueless, therefore, the evidence derived from the Implementation Guide should not be viewed as in any way decisive.

59. More important, in my view, as elements to be taken into consideration are: the emphasis on a functional definition of 'acting in a … legislative capacity'; the concern to ensure that the legislative process as such takes place without disruption; and the aim of both the Convention and the Directive to ensure transparency in environmental matters and the widest possible access to environmental information.

60. As regards the first of those elements, in submitting a draft measure to the legislature, an agency of the executive branch of government – such as the Ministry in the present case – is acting in fact at the interface between executive and legislative activity. On the one hand, it is an executive function to determine government policy and formulate that policy in the draft document; on the other hand, the actual submission of the draft is a function indistinguishable from that of an individual member of the legislature (or a group of such members) submitting a proposal for consideration, which cannot be categorised other than as legislative activity.[24] Similar considerations apply with regard to consultation and advice during the course of the legislative process. Yet, although the two functions can clearly be seen, it is impossible to separate them, at least in the context and during the course of the legislative process proper, from submission of the draft measure to final enactment of the legislation. They are, in that context, two sides of the same coin.

61. Consequently, it seems to me, the concern to ensure that the legislative process takes place without disruption must prevail in that context, or the very purpose of the exclusion would be frustrated. The conduct of the procedure would not be protected by an exclusion which applied to only one route of access to information (a request to the legislature itself) while another route (a request to the relevant part of the executive) remained open.

62. It is likely that, even though the involvement of the executive in the legislative process may follow broadly the same pattern in all Member States, there will be differences of detail from one Member State to another. Consequently, it will always be for the relevant national court to verify whether, in the legal and constitutional context of its Member State, the specific role performed by the executive *at the material moment* does indeed form part of the legislative process. Given that the exclusion constitutes an exception to the general aims of transparency and access to information promoted by the Convention and the Directive, the national court must be vigilant in carrying out this task.

23 — As the Commission points out, the use of the words 'and/or generally applicable legally binding normative instruments' in the heading to the article appears to reflect a concern to avoid terminology which, in some States, might designate too narrow a category of regulatory instrument; the text of the article itself cannot readily be applied to parliamentary procedures in a representative democracy.

24 — The German Government confirmed during the proceedings that individual members of the Bundestag also have a right to initiate legislation, and the same is probably true of most legislatures, even if the reality of government business may make it a rather uncommon procedure.

63. I would therefore answer point (a) of the referring court's first question to the effect that, under the second sentence of Article 2(2) of the Directive, executive bodies which, in the legal and constitutional context of their Member State, perform a role in the legislative process which is limited to submitting or commenting on legislative proposals may be excluded from the definition of 'public authority' when they are performing such a role.

64. Such an answer, it seems to me, is sufficient to deal with the issue raised in the main proceedings, without addressing in detail the alternative criterion suggested in the national court's question, namely whether only bodies which take the final, binding decision in the legislative process can be regarded as acting in a legislative capacity. As the Commission has pointed out, legislative procedures may vary considerably as between Member States, so that the relationship between acting in a legislative capacity and taking the final, binding decision on legislation cannot necessarily be defined in general terms.

65. In proposing that answer, I have not forgotten the third element which I have said should be taken into consideration, namely the aim of ensuring transparency and access to environmental information, but I regard that element as more relevant to point (c) of the first question, to which I now turn.

(c) Whether exclusion is permitted only until the legislative process is concluded

66. When a body is acting in a legislative capacity, it may be excluded from the category of public authorities required to disclose environmental information pursuant to the Directive. But does that exclusion come to an end at any point?

67. As the Commission and the German Government correctly point out, there is no explicit provision in either the Convention or the Directive for any temporal limitation to the exclusion.

68. I would contend, however, that – in so far as concerns bodies such as the Ministry in the present case, whose legislative role is confined to initiation and consultation – such a limitation can legitimately be inferred from a combined reading of the second sentence of Article 2(2) and Article 3(1) of the Directive.

69. My reading of those provisions would be consistent with the Directive's aim of ensuring transparency and access to environmental information, and with the Court's judgment in the *API* appeals.[25] It would also, admittedly, involve some qualification of the purely functional definition of 'acting in a … legislative capacity' which I have adopted so far. I shall endeavour to explain.

70. First, I note that Article 2(2) of the Directive defines 'public authority' primarily for the purpose of identifying bodies required to make environmental information available. By permitting an exclusion from that definition, it allows a limitation of the category of bodies subject to that requirement. The permissible exclusion covers only bodies 'when acting in a judicial or legislative capacity'. Although the explicit word 'when', contained in the English version, is not present in all language versions, the formulation seems to imply systematically that bodies may sometimes be acting in such a capacity and sometimes not – and that the exclusion can apply only when they are acting in that capacity.

71. Next, under Article 3(1) of the Directive, 'public authorities are required … to make available environmental information held by or for them'. If, pursuant to the second sentence of Article 2(2), the definition of 'public authorities' depends on the capacity in which they are acting, I deduce that the information which they must be required to make available can only be that which is held when they are acting in the capacity in question.

25 — Cited above in footnote 20.

72. I have taken the view, in my analysis of point (a) above, that executive bodies whose role in the legislative process is limited to submitting or commenting on legislative proposals may be excluded from the definition of 'public authority' when they are performing such a role. Vis-à-vis each piece of legislation in respect of which they perform that role, the exclusion should therefore begin when they start performing it and end when they finish performing it. Before the first point in time, they are acting simply as part of the executive branch of government, defining and formulating intended policy. After the second point, they will be concerned essentially with ensuring that the legislation is implemented, again an executive function. It is only between the two points that they act in a (partly) legislative capacity and that, in order to ensure that the legislative process takes place without disruption, it must be possible to exclude them from the category of bodies required to make information available. And it is only between those points in time that information 'held by or for them' is held 'when acting in a … legislative capacity'.

73. I would contrast the situation of such bodies with that of others which, on a structural definition, form part of the legislature itself. With regard to the enactment of legislation, and with regard to the legislation enacted, bodies which form part of the legislature act exclusively in a legislative capacity. Their activity in that capacity has no beginning or end in time. There is therefore no temporal limitation on the possibility of their exclusion from the definition of 'public authority' within the meaning of the Directive.

74. I derive support for that analysis from the Court's judgment in the *API* appeals – delivered, admittedly, in a slightly different context but none the less, in my view, highly relevant.[26] In that judgment, the Court stated that 'although … the disclosure of pleadings lodged in pending court proceedings is presumed to undermine the protection of those proceedings, because of the fact that the pleadings constitute the basis on which the Court carries out its judicial activities, that is not the case where the proceedings in question have been closed by a decision of the Court. … In the latter case, there are no longer grounds for presuming that disclosure of the pleadings would undermine the judicial activities of the Court since those activities come to an end with the closure of the proceedings.'[27] The Court then pointed out that, in such circumstances, each request for access should be examined individually and that partial disclosure might be appropriate. It therefore upheld the General Court's decision to the effect that access to the documents in question could not be automatically refused on the ground that it would undermine the protection of court proceedings, once those proceedings had come to an end.[28]

75. It seems to me that, from the point of view of principle, a useful parallel can be drawn with the circumstances of the present case. The Directive brackets judicial and legislative activities together when providing for the possibility of an exclusion from the definition of a public authority. And, as I have explained above, the rationale in both cases is essentially the same. Thus, when an executive authority is a party to court proceedings, in particular when it is in a position such as that of prosecutor, its relationship to the judicial function is closely comparable to that which it has with the legislative function when submitting draft legislation. If, in the former case, it can no longer rely on systematic exclusion from the obligation to disclose information once the court proceedings are over, then it would make for a logical and coherent interpretation of EU law if, in the latter case, the same were true once the legislative proceedings had come to an end.

26 — Those appeals concerned requests, under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), for access to certain Commission documents relating to completed, and possibly to future, Court proceedings to which the Commission was, or was likely to be, a party (access to which, the Commission alleged, could be refused on the basis of Article 4(2), second indent, of that regulation). Although that regulation is not relevant to the present proceedings, it should be noted that Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of [the Convention] to Community institutions and bodies (OJ 2006 L 264, p. 13) brings together the three strands of Regulation No 1049/2001, the Directive and the Convention to apply their requirements to the EU institutions.

27 — Paragraphs 130 and 131 of the judgment.

28 — See Case T-36/04 *API* v *Commission* [2007] ECR II-3201, paragraph 135 et seq.

76. I therefore consider that, on a proper interpretation of the second sentence of Article 2(2) and Article 3(1) of the Directive, if executive bodies whose role in the legislative process is limited to submitting or commenting on legislative proposals are excluded from the definition of 'public authority' when they are performing such a role, that exclusion must be limited to the period between the beginning and the end of the legislative procedure concerned.

77. Here, I recall that, even if, once the legislative process is completed, a body such as the Ministry in the present case cannot be excluded from the definition of a public authority in respect of its participation in that process, the Directive permits public authorities, even when not acting in a judicial or legislative capacity, to withhold access to information on certain grounds.

78. Specifically, Article 4 allows Member States to provide for a request for environmental information to be refused, inter alia, if it concerns material in the course of completion or internal communications, or if disclosure would adversely affect the confidentiality of the proceedings of public authorities, or of commercial or industrial information, or the interests or protection of persons who supplied the information on a voluntary basis, or the protection of the environment. One or more of those exceptions might be found to apply to information such as that sought by the applicants in the present case. However, under Article 4(2), such grounds for refusal must be interpreted restrictively, taking account in each particular case of the public interest served by disclosure. More specifically, Member States may not, on the basis of those exceptions, provide for a request to be refused where the request relates to information on emissions into the environment.

Question 2

79. The two parts of the referring court's second question concern information which is not covered by the exclusion for bodies acting in a legislative capacity but which may perhaps be withheld to protect the confidentiality of proceedings. Since Article 4 of the Directive allows that option only 'where such confidentiality is provided for by law', the referring court asks, essentially, how specific and explicit such provision must be.

80. A preliminary point to be borne in mind, though not specifically raised by the referring court, is that of what is meant by the 'proceedings' of public authorities. It appears from the order for reference that the information to which the national court's second question relates is embodied in internal memoranda and written comments produced by the Ministry and in correspondence, including emails, with the Emissions Trading Agency. To what extent do such items fall within the concept of 'proceedings'?

81. At the hearing, the German Government considered the term to include inter-service discussions, whether written or oral, but not, for example, data or statistics forming the basis of such discussions and of the resulting decisions, or the decisions themselves. The Commission, however, considered its scope to be confined to the 'deliberations of collegiate bodies'.

82. I note here that the wording of the Directive (and of the Convention) may give rise to some hesitation when different language versions are compared. On the one hand, the authentic French of the Convention speaks of '*délibérations*', the expression also used in the Directive, where it is mirrored by, for example, the German '*Beratungen*' and the even more specific '*deliberazioni interne*' in Italian. Those versions seem more supportive of the Commission's view. On the other hand, the equally authentic English version of the Convention speaks of 'proceedings', again the expression found in the Directive, where it is mirrored, for example, in Spanish and Portuguese by '*procedim(i)entos*' and in Dutch by '*handelingen*' – all terms which might be read as having a broader meaning and thus as more supportive of the German Government's interpretation.

83. In the spirit of restrictive interpretation applicable to the Directive as a whole, and to Article 4(1) and (2) in particular, it seems to me that the concept of 'proceedings of public authorities' should be confined, at the broadest, to expressions of view and discussions of policy options in the context of decision-taking procedures within each such authority. The concept should, of course, not be dependent on the form of the proceedings (written or oral), and it should be remembered that Article 4(4) of the Directive requires, wherever possible, information not covered by a ground for refusal to be separated out from information which is covered. Finally, in my view, *communications between* public authorities, whatever their nature, cannot be regarded as *proceedings of* such authorities.

84. Those considerations may be of some assistance when determining whether information is capable of being covered by the ground for refusal permitted by Article 4(2)(a) of the Directive, even before considering whether confidentiality is 'provided for by law' within the meaning of that provision.

85. I turn now to consider the two parts of the second question.

(a) Whether confidentiality is 'provided for by law' in the event of a non-specific reference to confidentiality of proceedings

86. The referring court asks whether the criterion in Article 4(2)(a) of the Directive – that the confidentiality of the proceedings of public authorities must be 'provided for by law' in order for any adverse effect on that confidentiality to be capable of justifying a refusal to make information available – is met by a general provision that a request for access to environmental information is to be refused if disclosure would adversely affect the confidentiality of the proceedings of the authorities concerned, or whether it is necessary for such confidentiality to be specifically and separately provided for.

87. Bearing in mind that the ground in Article 4(2)(a) is one of those which must be interpreted 'in a restrictive way' in accordance with the second subparagraph of Article 4(2), I agree with Flachglas Torgau and the Commission that the provision requires some form of legal duty to keep the proceedings in question confidential, and that the clause 'where such confidentiality is provided for by law' means that the existence of the duty must be independent of the ground for refusal.

88. Although it is for the national court to assess national law, it seems to me that a provision such as Paragraph 8(1)(2) of the UIG – which appears simply to provide that a request is to be refused *if* disclosure would adversely affect the confidentiality of proceedings – does not itself independently establish a duty of confidentiality for any proceedings. Rather, it seems merely to make provision for refusal in cases where there is already a duty of confidentiality.

89. However, if the national court finds that – as the German Government appears to argue before this Court – Paragraph 8(1)(2) of the UIG, in addition to setting out a ground for refusal of a request for information, also and independently imposes a duty of confidentiality in regard to the proceedings of the public authorities concerned, then that must in my view be seen as meeting the criterion in Article 4(2)(a) of the Directive. It does not seem to me necessary that the duty of confidentiality should be set out formally in a separate provision from that which provides the ground for refusal (although that would be desirable). It is merely necessary that, as a matter of law, the one should be independent of the other. The same criterion, I would add, would also be met by any other national provision imposing such a duty in respect of any or all proceedings of public authorities – although it may be thought likely, from the absence of any reference to such other provision, either in the order for reference or in the submissions to the Court, that none exists.

90. In addition to the implication of legal independence as between the duty of confidentiality and the ground for refusal, it seems to me that what lies at the heart of the phrase 'provided for by law' is the concept of legal certainty in so far as it rules out any scope for arbitrary decisions. If a public authority has any discretion to decide whether its proceedings are confidential or not, then their confidentiality cannot be regarded as being 'provided for by law'.

91. Finally, it must be borne in mind that if, even on a restrictive interpretation, it is clear that the confidentiality of the proceedings of a particular public authority is provided for by law within the meaning of Article 4(2)(a), the second subparagraph of Article 4(2) also requires, in every particular case, that the public interest served by disclosure be taken into account and weighed against the interest served by refusal, and precludes any refusal on the ground of confidentiality where the request relates to information on emissions into the environment. The national court must therefore verify both whether the competing interests have been weighed up and whether refusal is precluded because of the nature of the information requested.

(b) Whether confidentiality is 'provided for by law' if it takes the form of a general unwritten rule that proceedings are not public

92. The referring court also asks whether – if Paragraph 8(1)(2) of the UIG does not itself meet the criterion in Article 4(2)(a) of the Directive – a general unwritten legal principle that the administrative proceedings of public authorities are not public would meet that criterion.

93. I note that the German version of Article 4(2)(a) uses a term ('*gesetzlich*') from which it might be inferred that confidentiality must be provided for in *statute* law. A similar inference might be drawn from several other language versions (for example, Dutch, Portuguese and Spanish). The English and French versions, however, follow the Convention (of which they are themselves authentic languages) by using a more general term, requiring that it be provided for simply 'in law', and at least the Italian version of the Directive does the same. In such circumstances, it seems to me preferable to take the broader approach, unless there is a clear and specific reason to confine the condition to a statutory provision.

94. Following on from the considerations I have set out with regard to part (a) of this question, moreover, it seems to me that what matters is not the form taken by the rule in question but whether it is established, as a matter of law, independently of the ground for refusal of a request for information, and whether it complies with the principle of legal certainty by leaving the public authority concerned no scope for discretion as to the confidential nature of the proceedings (rather than as to whether to accede to the request).

95. Thus, an unwritten rule of law is, in principle, capable of meeting the criterion in Article 4(2)(a) of the Directive. The referring court infers the existence of such a rule from Paragraphs 28(1) and 68(1) of the VwVfG which, by providing for certain specific rights of access to administrative proceedings of public authorities, appear to presuppose the absence of any general right, and thus the existence of a general principle of confidentiality; the German Government has cited Paragraph 29(1) and (2) of the same law as also capable of justifying the same inference.

96. Whether there is an unwritten rule imposing a general duty of confidentiality with regard to the proceedings of public authorities, and leaving no scope for discretion as to the confidential nature of those proceedings, is something which only the national court can determine.

97. It seems to me that the provisions cited may be capable of supporting the inference of a general duty of confidentiality, but that it is neither the only possible inference nor indeed necessarily the most obvious inference to draw. For example, where it is provided that proceedings are not to be public, one logical assumption may be that their content is thereby intended to be protected from disclosure; but if persons concerned are entitled to be present without any specific duty of confidentiality being imposed upon them, it might equally reasonably be assumed that no general duty of confidentiality is intended.

98. I would suggest that in its determination the national court should also take account of the number of provisions concerned (in this case, four subparagraphs have been cited in a law comprising over 100 paragraphs) and of (again, in this case) the essentially negative or *a contrario* nature of the inference drawn,[29] and should consider whether the unwritten rule in question is generally recognised, having regard, in particular, to its own case-law and to that of other administrative courts.

99. I therefore take the view that the criterion in Article 4(2)(a) is met only where a general unwritten legal principle that the administrative proceedings of public authorities are not public clearly and unambiguously implies a duty of confidentiality with regard to those proceedings and leaves the public authority concerned no scope for discretion as to their confidential nature. When determining whether such a principle can be inferred from legislation, national courts should carry out a thorough examination, having regard in particular to the requirement that the ground for refusal contained in that provision should be interpreted in a restrictive way.

Conclusion

100. I therefore suggest that, in answer to the questions referred by the Bundesverwaltungsgericht, the Court should rule as follows:

1 (a) Under the second sentence of Article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, executive bodies which, in the legal and constitutional context of their Member State, perform a role in the legislative process which is limited to submitting or commenting on legislative proposals may be excluded from the definition of 'public authority' when they are performing such a role.

(b) Member States are not precluded from excluding bodies and institutions acting in a judicial or legislative capacity from the definition of 'public authority' within the meaning of Directive 2003/4 by the fact that their constitutional provisions at the date of the adoption of that directive made provision for a review procedure within the meaning of Article 6 thereof.

(c) On a proper interpretation of the second sentence of Article 2(2) and Article 3(1) of Directive 2004/3, if executive bodies whose role in the legislative process is limited to submitting or commenting on legislative proposals are excluded from the definition of 'public authority' when they are performing such a role, that exclusion must be limited to the period between the beginning and the end of the legislative procedure concerned.

29 — In that regard, I note that Paragraph 30 of the VwVfG specifically gives parties to proceedings the right to insist that their own confidential data should not be made public by the authorities without their authorisation. If a specific duty of confidentiality is imposed in those circumstances, it might plausibly be inferred, *a contrario*, that there is no general duty of confidentiality.

2 (a) The confidentiality of proceedings of public authorities is provided for by law within the meaning of Article 4(2)(a) of Directive 2003/4 where national law imposes a general or specific duty of confidentiality with regard to such proceedings which is independent of the ground for refusal of a request for environmental information and which leaves the public authority concerned no scope for discretion as to their confidential nature.

(b) Subject to those conditions, and provided that it is clearly established in law, such a duty may be imposed by an unwritten rule.