

Access to information on infringement procedures in light of the EU legislation and case law

Access to Information

Legal Analysis

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1. Situation and legal background

Public access to information held by EU bodies is granted by Regulation (EC) No 1049/2001. Besides, Regulation (EC) No 1367/2006 contains specific provisions concerning access to environmental information.

Generally speaking, Regulation (EC) No 1367/2006 gives in its Article 6 preferential treatment to information relating to emissions into the environment, in situations where Regulation (EC) No 1049/2001 provides for some of the exceptions from the right to access to information.

Specifically, it states that an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. However, this privilege **is not given to information relating to infringement procedures as this information is explicitly taken out** from the benefits provided by Article 6 para 1 of Regulation No 1367/2006 to information relating to emissions into the environment (*“with the exception of investigations, in particular those concerning possible infringements of Community law”*).

Access to all types of information relating to infringement procedures is currently being refused by the Commission on the grounds of the exception stated by Article 4 para 2 of Regulation (EC) No 1049/2001: *“The institutions shall refuse access to a document where disclosure would undermine the purpose of inspections, investigations and audits”*.

Still, environmental information relating to infringement procedures shall enjoy special treatment in respect of the second part of Article 6 paragraph 1 of Regulation (EC) No 1367/2006 which generally states that the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

In any case, there is always a possibility for the applicant to prove that there is an overriding public interest in disclosure of the requested information which is guaranteed by the provision of Article 4 para 2 of Regulation (EC) No 1049/2001.

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

Article 4

Exceptions

...

2. The institutions shall refuse access to a document where disclosure would undermine the - the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies

Article 6

Application of exceptions concerning requests for access to environmental information

1. As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, **with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.** As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

According to the Court of Justice of the European Union (CJEU) jurisprudence, these exemptions cover both the pre-litigation phase and litigation phase of the infringement procedures between Commission and Member States.

The main CJEU conclusions concerning access to information in infringement matters are described below.

2. Analysis

Purpose of the “investigation” exception enacted by Article 4 para 2 of Regulation No 1049/2001

As has been acknowledged by settled CJEU case law, the purpose of the exception relating to investigation enacted by Article 4 para 2 of Regulation No 1049/2001 is to ensure the right of every person to a fair hearing. All parties, including the Commission, shall be entitled to exercise their right to defend their interests free from all external influences and particularly from influences on the part of members of the public.

During the pre-litigation procedure, the aim is also to give the Member State concerned an opportunity, on the one hand, to comply voluntarily with its obligations under EU law and, on the other hand, to avail of its right to defend itself against the objections formulated by the Commission.

Case T-36/04 (Association de la presse internationale ASBL (API) v Commission of the European Communities):

*(63) Fourth, it must be pointed out that **the purpose of the exception to the general principle of access to documents – for the protection of court proceedings – is primarily to ensure observance of the right of every person to a fair hearing by an independent tribunal, which constitutes a fundamental right under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and which forms an integral part of the general principles of Community law** which the Community judicature enforces, drawing inspiration from the constitutional principles common to the Member States and from the guidelines supplied, in particular, by the ECHR (Case C-341/04 Eurofood IFSC [2006] ECR I-3813, paragraph 65, and Case C-411/04 P Salzgitter Mannesmann v Commission [2007] ECR I-0000, paragraphs 40 and 41), and to ensure the proper course of justice. That exception therefore covers not only the interests of the parties in the context of court proceedings, but more generally the proper conduct of those proceedings.*

*(80) Furthermore, as the Court of First Instance held in Svenska Journalistförbundet v Council, cited at paragraph 15 above (paragraphs 136 to 138), **parties have the right to defend their interests free from all external influences and particularly from influences on the part of members of the public.** Although that point was made by the Court in order to find that the use that a party had made of the defence of the other party to the proceedings was improper, **it must none the less be understood as meaning that, until the hearing has been held, the proceedings must be protected from all external influences.***

Joined Cases C-514/11 P and C-605/11 P (Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission and Others):

(62) What is more, it is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission (see, inter alia, Case C-147/03 Commission v Austria [2005] ECR I-5969, paragraph 22, and Case C-522/09 Commission v Romania [2011] ECR I-2963, paragraph 15).

(63) The disclosure of the documents concerning an infringement procedure during its pre-litigation stage would, in addition, be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings.

Pre-litigation and the EU Pilot procedure

It was constantly held by the CJEU that investigation leading potentially to the opening of a proceeding under Article 226 EC (pre-litigation procedure) is covered by the exception stated by Article 4 para 2 of Regulation No 1049/2001. The same applies, according to the CJEU, to the EU Pilot procedure.

Case T-191/99 (Petrie and Others v Commission of the European Communities)

(68) *In the present case, the documents requested are letters of formal notice and reasoned opinions drawn up in connection with investigations and inspections carried out by the Commission. As the Court pointed out in paragraph 63 of its judgment in WWF (cited above in paragraph 59), the **Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure.** This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC proceedings on the ground of protection of the public interest relating to inspections, investigations and court proceedings, which comes within the first category of exceptions in Decision 94/90.*

(69) *The Commission was thus justified in refusing to disclose the documents in question on the ground that such disclosure might adversely affect the public interest.*

(70) *So far as concerns the applicants' argument that proceedings under Article 226 EC seeking to establish the facts relating to the infringements of Community law complained of must respect the audi alteram partem principle, it must be noted that individuals are not party to proceedings concerning failure to fulfil obligations and for that reason cannot invoke rights to a fair hearing involving application of the audi alteram partem principle.*

(71) *With regard to the applicants' assertion that any infringement by a Member State of its obligation of genuine cooperation in the course of infringement proceedings removes the requirement of confidentiality, it must first of all be noted that the applicants have not established that the Member State in question has acted in bad faith. Further, as the Commission has stressed in its written pleadings, it is the Commission which bears the obligation of confidentiality and that obligation cannot be affected by the alleged conduct of a Member State.*

Case T-36/04 (Association de la presse internationale ASBL (API) v Commission of the European Communities)

(120) *According to the related case-law, established under the 1993 Code of Conduct, that exception was deemed to have been validly relied on by the Commission in order to refuse access to documents relating to investigations into a possible breach of Community law, leading potentially to the opening of a proceeding under Article 226 EC (WWF UK v Commission, cited at paragraph 67 above, and Bavarian Lager v Commission, cited at paragraph 53 above) or having actually led to the opening of such a proceeding (Petrie and Others v Commission, cited at paragraph 17 above). In those cases, the refusal of access was considered justified because of the fact that the **Member States are entitled to expect the Commission to observe confidentiality as regards investigations which may lead to an infringement proceeding,** even where a period of time has elapsed since the closure of those investigations (WWF UK v Commission, cited at paragraph 67 above, paragraph 63) and even after the matter has been brought before the Court of Justice (Petrie and Others v Commission, cited at paragraph 17 above, paragraph 68).*

(121) Thus, it follows from the case-law that the disclosure of documents relating to the investigation stage, during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement proceeding inasmuch as its purpose, which is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position (Case C-191/95 Commission v Germany [1998] ECR I-5449, paragraph 44) could be jeopardised (Bavarian Lager v Commission, cited at paragraph 53 above, paragraph 46).

Case T-306/12 (Darius Nicolai Spirlea and Mihaela Spirlea v European Commission)

(10) The EU Pilot procedure is a procedure for cooperation between the European Commission and the Member States aimed at establishing whether EU law is being complied with and correctly applied in the Member States. Its objective is the effective resolution of possible infringements of EU law, as far as possible without having recourse to the formal initiation of infringement proceedings under Article 258 TFEU.

*(45) ... **All of those circumstances justify the treatment of the EU Pilot procedure in question in this case as an ‘investigation’ within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.***

(56) The Court considers that the arguments put forward by the applicants and the Member States intervening in support of them in this case regarding both the informal nature of the EU Pilot procedure and the differences between that procedure and infringement procedures are not sufficient for the Court to find any error in the premiss of the Commission’s reasoning in the contested decision according to which, having regard to the purpose of the EU Pilot procedure, the general presumption of refusal of access which the case-law recognises in the case of infringement procedures, including in the pre-litigation stage thereof, should also apply in EU Pilot procedures. The ratio decidendi adopted by the Court in LPN v Commission, cited in paragraph 28 above, and the similarities between the EU Pilot procedure and infringement procedures under Article 258 TFEU militate in favour of the recognition of that presumption.

*(59) In the second place, **EU Pilot procedures and infringement procedures under Article 258 TFEU, and particularly the pre-litigation phase thereof, present similarities which justify the adoption of a common approach to both.** Those similarities outweigh the differences referred to by the applicants and by the Member States intervening in support of them.*

*(62) Thirdly, even though the EU Pilot procedure is not in all respects equivalent to the infringement procedure, it may nevertheless lead to it, since the Commission may, at the conclusion of an EU Pilot procedure, formally commence an infringement investigation by sending a letter of formal notice and may, possibly, apply to the Court for a declaration that the breach of obligations alleged against the Member State concerned has occurred. That being so, the disclosure of documents in the context of an EU Pilot procedure would be prejudicial to the subsequent phase, that is to say, the infringement procedure. Moreover, **if the Commission were required to grant access to sensitive information provided by the Member States and to reveal the arguments which they put forward in their defence during an EU Pilot procedure, the Member States might be reticent to make those arguments known initially. Since the preservation of confidentiality during the pre-litigation phase of an infringement procedure has been recognised in the case-law, that same confidential treatment is justified, a fortiori, in EU Pilot procedures, the sole purpose of which is to avoid the***

lengthier and more complex infringement procedure and, where appropriate, the necessity of bringing an action for failure to fulfil obligations.

Limits of the “investigation” exception

It was repeatedly held by CJEU that application of the exception stated by Article 4 para 2 of Regulation No 1049/2001 may be justified only when the EU institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, whether there was no overriding public interest in the disclosure.

Concrete and individual examination

Generally speaking, the examination required for the purpose of processing a request for access to documents must be specific in its nature. Such concrete examination must, moreover, be carried out in respect to each document covered by the request.

There is however a number of exceptions to the Commission’s obligation to examine specifically and individually the documents to which access has been requested.

Such an examination is not necessary where, owing to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted.

Further, it is in principle possible for the institution requested for information to base its decisions in that regard, including in the statement of reasons for the decision refusing access, on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature, provided that it establishes in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose.

Case T-36/04 (Association de la presse internationale ASBL (API) v Commission of the European Communities)

*(54) It should also be recalled that, according to settled case-law, **the examination required for the purpose of processing a request for access to documents must be specific in nature.** First, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 75, and *Franchet and Byk v Commission*, cited at paragraph 53 above, paragraph 105). **Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure.** Further, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons given*

for the decision (Case T-2/03 Verein für Konsumenteninformation v Commission [2005] ECR II-1121, 'VKI', paragraph 69, and Franchet and Byk v Commission, cited at paragraph 53 above, paragraph 115).

(55) That concrete examination must, moreover, be carried out in respect of each document covered by the request. It is apparent from Regulation No 1049/2001 that all the exceptions mentioned in paragraphs 1 to 3 of Article 4 thereof are specified as being applicable to 'a document' (VKI, cited at paragraph 54 above, paragraph 70, and Franchet and Byk v Commission, paragraph 53 above, paragraph 116). Furthermore, as regards the scope *ratione temporis* of those exceptions, Article 4(7) of that regulation provides that they are to apply only for the period during which protection is justified on the basis of 'the content of the document'.

(58) However, the application of that approach as a matter of principle does not mean that such an examination is required in all circumstances. Since the purpose of the concrete, individual examination which the institution must in principle undertake in response to a request for access under Regulation No 1049/2001 is to enable that institution to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, **such an examination may not be necessary where, owing to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted.** Such a situation could arise, for example, if certain documents were (i) manifestly covered in their entirety by an exception to the right of access or, conversely, (ii) manifestly accessible in their entirety, or, finally, (iii) had already been the subject of a concrete, individual assessment by the Commission in similar circumstances (VKI, paragraph 54 above, paragraph 75).

(110) As has been acknowledged by settled case-law, in view of the **need to interpret and apply any exception to the right of access strictly**, the fact that a document concerns an investigation within the meaning of Article 4(2), third indent, of Regulation No 1049/2001 **cannot in itself justify application of that exception**, since the latter applies only if disclosure of the documents concerned is actually likely to undermine the protection of the purpose of the Commission's investigations concerning the infringements in question (see, to that effect, Franchet and Byk, cited in paragraph 101 above, paragraphs 105 and 109, and API v Commission, cited in paragraph 101 above, paragraph 127). Indeed, **that risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical** (Sweden and Turco v Council, paragraphs 43 and 63). Moreover, as is clear from its wording, **the aim of that exception is not to protect the investigations as such, but rather their purpose**, which, in the context of an infringement procedure, is to induce the Member State concerned to comply with Community law (see, to that effect, API v Commission, cited in paragraph 101 above, paragraphs 127 and 133 and the case-law cited; see also, to that effect, Opinion of Advocate General Kokott in Commission v Technische Glaswerke Ilmenau, cited in paragraph 44 above, points 109 to 115).

Case T-29/08 (Liga para Protecção da Natureza (LPN) v European Commission)

(102) **When it refuses access to the documents concerned on the basis of that exception, the Commission must** nevertheless, firstly, satisfy its obligation to examine whether those documents were in fact covered, in their entirety, by that exception and, secondly, **correctly balance the possible overriding public interests in their disclosure and the interest in the protection of their confidentiality** (see, to that effect, Joined Cases C-39/05 P and C-52/05 P Sweden and Turco v Council

[2008] ECR I-4723, paragraph 33 and seq., and Case T-2/03 Verein für Konsumenteninformation v Commission [2005] ECR II-1121, paragraph 69 and seq.).

(112) Moreover, as has been acknowledged in the case-law, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of access set out in Article 4 of Regulation No 1049/2001 (Sweden and Turco v Council, cited in paragraph 102 above, paragraph 35). In that regard, it has been stated, on the one hand, that **the examination of a request for access to documents must be specific and individual in nature and relate to the content of each document referred to in that request** and, on the other, that **that examination must be apparent from the reasons for the institution's decision**, as regards all the exceptions mentioned in Article 4(1) to (3) of that regulation, on which that decision is based (see, to that effect, Verein für Konsumenteninformation v Commission, cited in paragraph 102 above, paragraphs 69 to 74; see also, to that effect, Opinion of Advocate General Kokott in Commission v Technische Glaswerke Ilmenau, cited in paragraph 44 above, points 73 to 80).

(113) There are however a number of exceptions to the Commission's obligation to examine specifically and individually the documents to which access has been requested.

(114) It has repeatedly been held that, since the purpose of the concrete, individual examination which the institution must in principle undertake in response to a request for access made under Regulation No 1049/2001 is to enable the institution in question to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, **such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted**. Such could be the case, *inter alia*, if certain documents were either, first, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances (Verein für Konsumenteninformation v Commission, cited in paragraph 102 above, paragraph 75, and API v Commission, cited in paragraph 101 above, paragraph 58).

(115) In addition, it has been ruled that **it was, in principle, open to the institution concerned to base its decisions in that regard, including in the statement of reasons for the decision refusing access, on general presumptions which apply to certain categories of documents**, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature, provided that it establishes in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose (see, to that effect, Sweden and Turco v Council, cited in paragraph 102 above, paragraph 50).

(117) Indeed, under those principles enshrined in case-law ... all the documents arising from such an infringement procedure are capable of being protected as a category.

(125) The fact nevertheless remains that, according to the Court, in that regard, the interested parties retain the right to demonstrate that a given document is not covered by that general presumption, or that there is a higher public interest justifying its disclosure (see, to that effect, Commission v Technische Glaswerke Ilmenau, cited in paragraph 44 above, paragraphs 60 to 62).

Case T-306/12 (Darius Nicolai Spirlea and Mihaela Spirlea v European Commission)

(50) With particular regard to the exception laid down in the third indent of Article 4(2) of Regulation No 1049, which relates to investigations, the Court of Justice has acknowledged the existence of such general presumptions in three specific cases, namely as regards the documents in the administrative file concerning procedures for reviewing State aid (Commission v Technische Glaswerke Ilmenau, paragraph 61), the documents exchanged between the Commission and the notifying parties or third parties in the context of merger control procedures (Commission v Éditions Odile Jacob, paragraph 123, and Commission v Agrofert Holding, paragraph 64), and the pleadings lodged by an institution in proceedings pending before the courts (Sweden and Others v API and Commission, paragraph 94). Very recently, the Court of Justice extended the possibility of applying a general presumption to include the documents relating to the pre-litigation stage of infringement procedures under Article 258 TFEU (LPN v Commission, cited in paragraph 28 above, paragraph 65).

(70) However, it must first of all be recalled that, as the Court has already held, where access is refused on the basis of a general presumption, interested parties may, if they wish, demonstrate that a given document disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001 (Commission v Technische Glaswerke Ilmenau, paragraph 62; Sweden and Others v API and Commission, paragraph 103; Commission v Éditions Odile Jacob, paragraph 126; and Commission v Agrofert Holding, paragraph 68).

Overriding public interest justifying the disclosure of the documents

The CJEU confirmed that it is up to the party requesting access to documents to claim and demonstrate the existence of an overriding public interest, despite the fact that the institution concerned is the only party which is aware of the exact content of the documents of which disclosure is requested (Joined Cases C-514/11 P and C-605/11 P LPN v Commission).

While the burden of proof, when applying the exception in the third indent of Article 4(2) of Regulation No 1049/2001, rests on the institution invoking that exception, it is, by contrast, for the party alleging an overriding public interest, within the meaning of that clause, to prove that interest.

It follows from the CJEU case law that the fact that a party requesting access to information does not invoke any public interest distinct from principles such as transparency and right of the public concerned to participate in environmental related procedures does not automatically imply that it is unnecessary to weigh up the competing interests. However, the overriding public interest should be distinct from these principles.

Case T-29/08 (Liga para Protecção da Natureza (LPN) v European Commission)

(138) Moreover, at the hearing, in reply to questions put by the Court, LPN and the interveners were neither able to identify any overriding public interest other than that of the supposedly increased transparency in environmental matters, of which the Commission should have taken account for the purposes of applying the last phrase of Article 4(2) of Regulation No 1049/2001 to this case, nor

capable of explaining whether and to what extent the information requested related to emissions into the environment within the meaning of Article 6(1) of Regulation No 1367/2006.

Joined Cases C-514/11 P and C-605/11 P (Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission and Others)

(92) It is true that **the overriding public interest capable of justifying the disclosure of a document must not necessarily be distinct from the principles which underlie Regulation No 1049/2001** (see, to that effect, *Sweden and Turco v Council*, paragraphs 74 and 75).

(93) **Nevertheless, such general considerations cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency was in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question** (see, by analogy, *Sweden and Others v API and Commission*, paragraph 158).

(94) The requirement that an applicant rely on specific circumstances to show that there is an overriding public interest to justify the disclosure of the documents concerned is in accordance with the case-law of the Court of Justice (see, to that effect, *Commission v Technische Glaswerke Ilmenau*, paragraph 62; *Sweden and Others v API and Commission*, paragraph 103; *Commission v Éditions Odile Jacob*, paragraph 126; and *Commission v Agrofert Holding*, paragraph 68).

(95) In so far as LPN has requested access to those documents in order that it may be in a position to supplement the information held by the Commission concerning the dam construction project which is the subject-matter of the infringement procedure in question and, in consequence, may take an active part in that procedure, that fact does not show that there is an 'overriding public interest' within the meaning of Article 4(2) of Regulation No 1049/2001 (see, to that effect, *Commission v Technische Glaswerke Ilmenau*, paragraph 70; *Commission v Éditions Odile Jacob*, paragraphs 145 and 146; and *Commission v Agrofert Holding*, paragraphs 85 and 86), even though LPN, as a non-governmental organisation, is acting in accordance with its statutory aims, which consist in the protection of the environment.

Case T-111/11 (ClientEarth v European Commission)

(105) It must be observed that **the fact that citizens have the opportunity to obtain appropriate environmental information and genuine opportunities to participate in the decision-making process in relation to the environment plays an essential role in a democratic society**. As is indicated in the preamble to the Aarhus Convention, improved access to information and increased 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.

(106) The public's right to receive that information constitutes the expression of the principle of transparency, to which the provisions of Regulation No 1049/2001, as a body, give effect, as is apparent from recital 2 in the preamble to that regulation, according to which openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to them, and contributes to strengthening the principle of democracy.

(107) Nonetheless, it follows from the case-law that **the overriding public interest**, referred to in Article 4(2) in fine and the first subparagraph of Article 4(3) in fine of Regulation No 1049/2001,

which is capable of justifying the disclosure of a document which undermines or seriously undermines the legal interests protected by the exceptions provided for in those provisions must, as a rule, be distinct from the abovementioned principles which underlie that regulation (API v Commission, paragraph 52 above, paragraph 97).

(108) Admittedly, the fact that, as is the case here, a party requesting access does not invoke any public interest distinct from the abovementioned principles does not automatically imply that it is unnecessary to weigh up the competing interests. The invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it outweighs the need to protect the documents in question (API v Commission, paragraph 52 above, paragraph 97).

(109) However, that is not the case here. The applicant has not presented any argument capable of demonstrating that, in relation to the studies at issue, the invocation of those principles raises, having regard to the particular circumstances of this case, any issue of particularly pressing concern. The applicant has done no more than refer to non-specific considerations unrelated to the particular circumstances of this case, namely that citizens have a right to be informed of the extent to which the Member States are complying with European Union environmental law and to participate in the procedure for making decisions. Yet non-specific considerations cannot provide an appropriate basis for establishing that the principle of transparency represents in a specific case an issue of particularly pressing concern which prevails over the reasons justifying the refusal to disclose the documents requested (see, to that effect, 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-8533, paragraph 158).

Case T-306/12 (Darius Nicolai Spirlea and Mihaela Spirlea v European Commission)

(90) However, according to the case-law, it is for the person alleging the existence of an overriding public interest to state the specific circumstances which justify the disclosure of the documents concerned (see, to that effect, Technische Glaswerke Ilmenau, paragraph 62; Sweden and Others v API and Commission, paragraph 103; Commission v Agrofert Holding, paragraph 68; and LPN v Commission, cited in paragraph 28 above, paragraph 94).

(92) Moreover, a statement of purely general considerations is not sufficient to establish that an overriding public interest outweighs the reasons justifying a refusal to disclose the documents in question (see, to that effect, LPN v Commission, cited in paragraph 28 above, paragraph 93).

*(97) Secondly, it must be observed that, other than their general arguments concerning the gravity of the alleged infringement and the need to protect public health and their assertion that treatments at the private clinic have led to the death of a number of patients in Germany, the applicants do not put forward any specific, substantiated reasons which would justify the disclosure of the documents at issue in this case. **In particular, they have not explained in what way the disclosure to them of the documents at issue, that is to say, the two requests for information sent by the Commission to the Federal Republic of Germany, would serve the interest of protecting public health.** It must be emphasised in this connection that, as is clear from the case-law cited in paragraphs 91 and 92 above, while the burden of proof, when applying the exception in the third indent of Article 4(2) of Regulation No 1049/2001, rests on the institution invoking that exception, in so far as concerns the last clause of Article 4(2) of the regulation, it is, by contrast, for the party alleging an overriding public interest, within the meaning of that clause, to prove that interest.*

Right of the parties to disclose their own written submissions

As stated by the CJEU, the parties themselves may disclose their pleadings and written submissions. This may be helpful when asking for information from Member States whose legislature enables providing information concerning infringement cases, especially environmental information. It can be argued that if a national law of a Member State, regulating access to documents (or specifically, access to environmental information) does not provide for a reason for refusing such information, that the Member State not only may, but from the national legal perspective, even has to provide its own submissions, as the EU law does not prevent it and the national law so requires.

Case C-376/98 (Federal Republic of Germany v European Parliament and Council of the European Union; Order of the Court of 3 April 2000)

(10) So far as infringement of the principle of confidentiality is concerned, there is no rule or provision under which parties to proceedings are authorised to or prevented from disclosing their own written submissions to third parties. Apart from exceptional cases where disclosure of a document might adversely affect the proper administration of justice, which is not the case here, the principle is that parties are free to disclose their own written submissions.

Case T-36/04 (Association de la presse internationale ASBL (API) v Commission of the European Communities)

*(88) Those provisions do not, however, prohibit parties from disclosing their own pleadings, since the Court of Justice has stated that no rule or provision authorises or prevents parties to proceedings from disclosing their own written submissions to third parties and that, apart from exceptional cases where disclosure of a document might adversely affect the proper administration of justice, which was not the position in the case before it, the principle is that parties are free to disclose their own written submissions (Order in Germany v Parliament and Council, cited at paragraph 42 above, paragraph 10). **Not only does such a statement by the Court rule out the existence of an absolute principle of confidentiality, it also implies that the disclosure of written submissions concerning pending cases does not necessarily undermine the principle of the proper administration of justice.***

European Court of Human Rights – Article 10 of the European Convention on Human Rights on freedom of expression and information

To complete the picture, we must mention one of the ECHR judgments dealing with freedom of expression and information. While the European Human Rights Convention guarantees the freedom of expression, it is – as the Court itself states – difficult to derive only from the Convention itself a general right of access to administrative data and documents. However, the Court started to tend to the broader interpretation towards the recognition of a right of access to information. At the same time, the Court consistently and on a long-term basis recognises that the public has a right to receive information of general interest.

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26. The Court has consistently recognised that the public has a right to receive information of general interest.

27. In view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom (see *Dammann v. Switzerland* (no. [77551/01](#), § 52, 25 April 2006). The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. **In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate. The Court has repeatedly recognised civil society's important contribution to the discussion of public affairs (see, for example, *Steel and Morris v. the United Kingdom* (no. [68416/01](#), § 89, ECHR 2005-II). The applicant is an association involved in human rights litigation with various objectives, including the protection of freedom of information. It may therefore be characterised, like the press, as a social "watchdog" (see *Riolo v. Italy*, no. [42211/07](#), § 63, 17 July 2008; *Vides Aizsardzības Klubs v. Latvia*, no. [57829/00](#), § 42, 27 May 2004). In these circumstances, the Court is satisfied that its activities warrant similar Convention protection to that afforded to the press.**

35. The Court recalls at the outset that "Article 10 does not ... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" (*Leander v. Sweden*, 26 March 1987, § 74 in fine, Series A no. 116) and that "it is difficult to derive from the Convention a general right of access to administrative data and documents" (*Loiseau v. France* (dec.), no. [46809/99](#), ECHR 2003-XII (extracts)). **Nevertheless, the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" (see *Sdružení Jihočeské Matky c. la République tchèque* (dec.), no. [19101/03](#), 10 July 2006) and thereby towards the recognition of a right of access to information.**

36. In any event, the Court notes that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him" (*Leander*, op. cit., § 74). **It considers that the present case essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents. In this connection, a comparison can be drawn with the Court's previous concerns that preliminary obstacles created by the authorities in the way of press functions call for the most careful scrutiny (see *Chauvy and Others v. France*, no. [64915/01](#), § 66, ECHR 2004-VI). Moreover, the State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities. The Court notes at this juncture that the information sought by the applicant in the present case was ready and available (see, a contrario, *Guerra and Others v. Italy*, 19 February 1998, § 53 in fine, Reports of Judgments and Decisions 1998-I) and did not require the collection of any data by the Government. Therefore, the Court considers that the State had an obligation not to impede the flow of information sought by the applicant.**

Summary

Access to information relating to infringement procedures is being constantly refused by the Commission on the grounds of the exception stated by Article 4 para 2 of Regulation (EC) No 1049/2001: *“The institutions shall refuse access to a document where disclosure would undermine the purpose of inspections, investigations and audits”*.

Specifically, in case of environmental information, Article 6 para 1 of Regulation (EC) No 1367/2006 states that the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

In cases of all type of information relating to infringement procedures Article 4 para 2 of Regulation (EC) No 1049/2001 guarantees the possibility to prove that there is an overriding public interest in disclosure of information relating to infringement procedures.

The CJEU provided in its case law the broad interpretation of these provisions.

It was constantly held by the CJEU that investigation leading potentially to the opening of a proceeding under Article 226 EC (pre-litigation procedure) is covered by the exception stated by Art 4 para 2 of Regulation (EC) No 1049/2001. Further, the CJEU confirmed that the same applies, according to the CJEU, to the EU Pilot procedure.

The CJEU has acknowledged the **existence of a “general presumption” favouring non-disclosure relating to both the litigation and the pre-litigation stage of infringement procedures** under Article 258 TFEU (including the EU Pilot procedures).

That means that the Commission **does not have to carry out the concrete and individual examination** in respect to each document covered by the request, examining whether access to the document would specifically and actually undermine the protected interest or not. The Commission may – on the grounds of the CJEU jurisprudence – base its refusal on the general presumption applying to the whole category of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. The CJEU held that all the documents arising from an infringement procedure are capable of being protected as a category.

On the other hand, the CJEU also held that where access is refused on the basis of a general presumption, **interested parties may demonstrate that a given document disclosure of which has been requested is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned.**

As mentioned above, Article 4 para 2 of Regulation (EC) No 1049/2001 states that the institutions shall refuse access to a document where disclosure would undermine the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure. In this regard, the CJEU held that **it is up to the party requesting access to documents to claim and demonstrate the**

existence of an overriding public interest – i.e. to state the specific circumstances and put forward specific, substantiated reasons which indeed justify the disclosure of the documents concerned.

Thus, it is theoretically possible to prove that there is an overriding public interest substantiating the disclosure of the documents relating to infringement procedures. However, as far as we know, this has not happened so far.

From cases where the CJEU already dealt with arguments of applicants relating to an overriding public interest, we can gather which arguments and claims are not sufficient according to the CJEU:

- to claim the supposedly increased transparency, without being able to demonstrate that the principle of transparency was in that case in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents;
- to refer to non-specific considerations unrelated to the particular circumstances of the case, e.g. that citizens have a right to be informed of the extent to which the Member States are complying with European Union environmental law and to participate in the procedure for making decisions;
- to claim that on the grounds of the information held by the Commission, the applicant as an NGO protecting the environment will be able to take an active part in the environmental procedures connected with the information requested;
- not to be capable of explaining whether and to what extent the information requested relates to emissions into the environment within the meaning of Article 6(1) of Regulation (EC) No 1367/2006;
- not to explain in what way the disclosure of the documents to the applicant would serve the interest of protecting public health / protection of the environment etc.

Besides, the CJEU held in one case that the parties themselves may disclose their pleadings and written submissions. This may be helpful when asking for information from Member States whose legislature enables (does not prevent) providing information concerning infringement cases, especially environmental information.

The constant non-disclosure of any information relating to infringement procedures may hypothetically be in breach with Article 10 of the European Convention on Human Rights. First, the European Court of Human Rights consistently recognises that the public has a right to receive information of general interest. Second, while the Convention guarantees the freedom of expression, it is difficult to derive from the Convention a general right of access to administrative data and documents. However, the Court started to apply the broader interpretation towards the recognition of a right of access to information.

List of the judgments mentioned above

Pre-litigation phase and PILOT procedures

Case T-191/99 (Petrie and Others v Commission of the European Communities; judgement of 11 December 2001)

Case T-36/04 (Association de la presse internationale ASBL (API) v Commission of the European Communities; judgement of 12 September 2007)

Case T-306/12 (Darius Nicolai Spirlea and Mihaela Spirlea v European Commission, judgment of 25 September 2014)

Purpose of the investigation / Limits to the exception

Case T-36/04 (Association de la presse internationale ASBL (API) v Commission of the European Communities; judgement of 12 September 2007)

Joined Cases C-514/07 P, C-528/07 P and C-532/07 P (Kingdom of Sweden and Others v Association de la presse internationale ASBL (API) and European Commission; judgement of 21 September 2010) - appellate judgement in case T-36/04

Case T-29/08 (Liga para Protecção da Natureza (LPN) v European Commission; judgement of 9 September 2011)

Joined Cases C-514/11 P and C-605/11 P (Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission and Others; judgement of **14 November 2013**) - appellate judgement in case T-29/08

Case T-111/11 (ClientEarth v European Commission; judgement of 13 September 2013)

Case T-306/12 (Darius Nicolai Spirlea and Mihaela Spirlea v European Commission, judgment of 25 September 2014)

Possibility of the parties to disclose their own written submissions

Case C-376/98 (Federal Republic of Germany v European Parliament and Council of the European Union; Order of the Court of 3 April 2000)

Case T-36/04 (Association de la presse internationale ASBL (API) v Commission of the European Communities; judgement of 12 September 2007)

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