The democratic principle and the exceptions to the right of access to information held by EU bodies in the environmental matter

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I. Introduction

The European Union (hereinafter EU) is a legal order funded by an association of States, with an atypical constitutional structure, grounded on the devolution of national sovereign powers and in constant need of democratic legitimation. The 1992 Treaty on the European Union (TEU) – signed in Maastricht in February 1992, which came into force on 1 November 1993 – represented the shift from an economic Community towards a Union and marked «[…] a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen» (Barth and Bijsmans 2018). Participation, accessibility and transparency in the decision-making process thus became priorities to strengthen «the democratic nature of the institutions and the public's confidence in the administration» (see the Declaration No 17 on the right of access to information, in OJ 1992, C 191. For an analysis on the evolution of participation and transparency in the European Community/European Union see respectively Bignami (2004) and Bradley (1999). On how the principle of transparency is used by the Court of Justice of the European Union – hereinafter CJEU – to enhance the democratic legitimacy of the EU, see Lenaerts 2013).

The democratisation of the EU had a boost fifteen years later, when the Lisbon Treaty enhanced democracy and better protection of fundamental rights, both mentioned among the values upon which the European Union is founded (see Article 2 TEU). The Treaty on European Union now includes relevant provisions on democratic principles as Articles 10(3) and 11(2), which respectively state that citizens have the right to participate in the democratic life of the Union, that decisions shall be taken as openly and as closely as possible to the citizen and that EU institutions shall dialogue, openly, transparently and regularly, with representative associations and civil society.

Therefore, it is no surprise that the EU primary and secondary law (see par. 2) has recognised that citizens have a fundamental right of access to documents held by all EU institutions, offices, bodies and agencies (Rossi and Vinagre e Silva 2017) and that this is necessary for the democratic functioning of the EU, including (*rectius*: notably) in the environmental matter.

The 'environmental democracy' (Mason 1999 and Parola 2013. See also principle no. 10 of the 1992 Rio de Janeiro Declaration on environment and development, available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf) of a legal order depends on the citizen's right to freely access information on environmental quality and problems and the right to meaningfully participate in decision-making process. This paper aims to analyse how the EU legal order protects these rights to promote equity and fairness in the field of sustainable development. Without effective rights grounded on a strong legal foundation, the exchange of information between governments and the public is stifled and decisions that harm communities and the environment cannot be challenged or remedied. Therefore, this paper will measure the extent to which EU law establishes and recognises environmental democracy rights, notably determining the breadth of the right of access to environmental information. An analysis of the CJEU and General Court (GC) case-law will help in tracing the enforcement of the democratic principle in the matter.

2. The (fundamental) right of access to documents held by the EU

Notwithstanding the 'democratic revolution' brought about by the Treaty of Maastricht, prior to 1997 the Treaties did not contain any provision conferring on the Community (or the Union) competence to adopt general rules on access to documents. The only reference was the above-mentioned Declaration No 17 on the right of access to information. Therefore, just after the entry into force of the Maastricht treaty and notably in 1993 and 1995, the EC Commission and the

Council adopted a common self-regulation document on public access to documents (a Code of conduct, published in the OJ 1993, L 340/41) and specific decisions that implemented it (Decision of the Council of 20 December 1993, no. 93/731 and Decision of the Commission of 8 February 1994, no. 94/90). Because of the very nature of those documents, at this stage we cannot mention a proper "right" of access. Instead, we should refer to a sort of concession to citizens, purely discretionary, freely amendable or revocable by the EU institutions (Salvadori 2010: 1).

A legal basis for the adoption of binding rules granting a right of access was only created by the Treaty of Amsterdam, which introduced Article 255 in the EC Treaty. Here, "access" qualifies as the right for any «natural or legal person residing or having its registered office in a Member State» to access European Parliament, Council and Commission documents. Article 255 EC then refers to secondary EC law the determination of general principles and limits (on the grounds of public or private interest) governing the right of access.

Article 255 EC marked the transition from a system of completely discretional internal regulation and – possibly – of absolute secrecy to a system «where the general and fundamental principle is of the "greatest possible" level of openness» (Curtin 2000: 37; see also Harden 2009: 193). However, only Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001, L 141/43, hereinafter the Access Regulation. See S. Peers 2002: 385 ff.) translates this right into an obligation that now applies to all institutions, bodies, offices and agencies of the EU (the Regulation directly applies only to institutions mentioned in Article 225 EC. However, specific provisions in their respective founding acts extended its application to EU agencies. Other institutions and bodies have adopted voluntary acts laying down rules on access to their documents on the basis of the Access Regulation). The same regulation defines what a "document" is, namely (Article 3) «any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility». The right to access must concern (Article 2) any documents held by the EU, either drawn up or received by it and in its possession (e.g. official documents, historical archives, meeting minutes and agendas, etcetera), "in all areas of activity of the European Union."

After some twenty years of evolution within the EU legal order and since the entry into force of the Lisbon Treaty, a «right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium», is enshrined in both the Treaty on the Functioning of the European Union (TFEU) and the EU Charter of Fundamental Rights. Both the norms have contributed to

further extending the scope of the right of access. On the one hand, Article 15 (3) TFEU slightly amended Article 255 EC, notably stating that also the Court of Justice of the European Union (Amalfitano 2013), the European Central Bank and the European Investment Bank shall be subject to the right of access, even though this only applies when exercising their administrative tasks. On the other hand, Article 42 of the EU Charter – which is legally binding anytime the EU or its Member States operate within the scope of EU law – has given the fundamental right of access a universal dimension, as it belongs to EU citizens, to Third Country nationals (if resident in a Member State) and to any legal person having its registered office in a Member State. In accordance with Article 52(2) of the Charter, the right of access to documents is exercised under the conditions and within the limits for which provision is made in Article 15(3) TFEU. However, as Article 15 (3) TFEU in turn refers to the general principles and limitations applicable to the right of access established by EU secondary legislation, in order to determine the specific scope of the right of access, reference should then be made to the Access Regulation and to a lex specialis (Regulation no. 1367/2006. See par. 3) adopted in the environmental matter.

That right now benefits from a twofold status: that of fundamental right and that of general principle of EU law (see Prechal and de Leeuw 2008; Broberg 2002).

3. The right of access to *information* held by the EU in environmental matters

Undoubtedly, this may seem like a broad right. However, such a right of access to *documents* may look narrower than a right of access to *information*, which is something including, for example, the right to ask open questions as opposed to simply obtaining access to pre-existing documents. Access to information is provided for by the EU in the environmental matter, thanks to pieces of legislation devoted to implement environmental democracy in the shape of an *erga omnes* right of access. The rules implementing the right of access to documents held by the Union are therefore not limited to Regulation No 1049/2001 alone. The international obligations assumed by the EU – together with its Member States – have in fact imposed the adoption of ad hoc legislation in the environmental matter.

The Access Regulation implemented Article 255 EC in 2001. In the same year, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention), which was adopted by the then European Community, its Member States and 19 other States on 25 June 1998, entered into force.

The Aarhus Convention rests on three "pillars": citizens must have access to information (not only to documents!), be entitled to participate in decision-making processes and have access to justice in environmental matters. According to the first pillar rules, the general public should be entitled to access information related to the state of the environment, public health and other factors affecting the environment in the possession of administrative authorities and (in certain circumstances) of private entities that exercise public responsibility falling within the scope of the very broad definition of "authority". The EU implemented the first pillar of the Aarhus Convention by way of Directive 2003/4 on public access to environmental information in EU Member States (OJ 2003, L 41/26), but only with a view to harmonising national legislation to guarantee the right of access to environmental information held by Member States' authorities (and not therefore by the EU). However, by ratifying the Aarhus Convention in 2005 (Council Decision 2005/370/EC of 17 Feb. 2005, OJ 2005, L 124/1), the European Union explicitly also committed itself to guaranteeing the right to access in environmental matters. The EU had to apply the Aarhus Convention to its own institutions and administrative bodies too, as far as they are considered "public authorities". The Access Regulation lays down rules for EU institutions that already complied to a great extent with the rules laid down in the Aarhus Convention, but not fully. Therefore, where the Aarhus Convention contains provisions that were not, in whole or in part, to be found also in the Access Regulation, it was necessary to address those, in particular with regard to the collection and dissemination of environmental information. Thus, the Aarhus Convention was further implemented in EU law by EC Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention to Community institutions and bodies (OJ 2006, L 264/13), known as the "Aarhus Regulation".

The two regulations perfectly coexist and complement each other. They share a common core of rules that the Aarhus Regulation, depending on the case, broadens or specifies. First, the Aarhus Regulation (Articles 2 and 3) extends the scope *ratione personae* of the Access Regulation, applying it to any request by an applicant for access to environmental information held, received or processed by any public institution, body, office or agency established by, or on the basis of, the Treaty (except when acting in a judicial or legislative capacity) without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities. As stated by the General Court (judgment of 27 February 2018, *CEE Bankwatch Network v Commission*, T-307/16, EU:T:2018:97, para 48-50), the Aarhus Regulation, which is purported to apply the Aarhus Convention to the

institutions and bodies of the European Union, does not apply in the framework of the European Atomic Energy Community.

Then, the Aarhus Regulation extends what it can be the object of the access request, as the it takes into consideration access to *information* rather than a mere right of access to *documents*. The General Court (then Court of First Instance) in case *WWF European Policy Programme v Council* (judgment of 25 April 2007, T-264/04, EU:T:2007:114) held (par. 76) that «case-law provides that the concept of a document must be distinguished from that of information» and that «[t]he public's right of access to the documents of the institutions covers only documents and not information in the wider meaning of the word». However, Article 3(a) of the Access Regulation defines "documents" extremely widely, as «any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility»), so that the notions of document and information (the latter is defined under Article 2(1)(d) of the Aarhus regulation as «any information in written, visual, aural, electronic or any other *material form* (the emphasis is mine)») almost coincide. Therefore, access to information in non-environmental matters may be granted *de facto* only if that information is contained within documents.

Finally, the Aarhus Regulation extends the application of the derogatory rules provided for by the Access Regulation to the environmental matter, whilst it specifies those rules by narrowing the scope of the existing one.

4. Exceptions to the right of access to documents

In principle, indeed, all information held in any recorded form by the EU institutions, bodies, offices and agencies should be accessible, irrespectively of a justified interest of the applicant to access that specific information (i.e., the motive is irrelevant). Nonetheless, EU institutions can answer in several ways to an access request of this sort: they can answer positively, negatively or partially.

An answer can represent a pathologic response even where there is no formal unjustified refusal. Institutions can provide an "incomplete answer" or a "wrong answer", respectively when they give the applicant only part of the documents he/she asked for or when the documents the applicant is given do not quite correspond to his/her request. A legitimate fully negative response could occur where that EU institution or body does not hold the requested document or refuses access to it. You might also not get any reply at all, which is called "administrative silence" and is equivalent to a (mute) refusal.

Despite the right of access enshrined in EU law, under certain circumstances EU institutions and bodies can withhold some information; however, they are obliged to ground any total or partial refusals to provide access to documents on the exceptions to the right of access provided for in the EU law. Therefore, when an access to documents request results in a (full or partial) denial, the burden falls on the EU official to give a reasoned and detailed explanation. Rules on derogation result from the combination of the general rule (the Access Regulation) and, in the environmental matter, the *lex specialis* (the Aarhus Regulation). The key notion around which the discipline in question is built is that of public interest. In fact, depending on the case, public interest operates as a limit to the right of access or as a counter-limit to the right of institutions to deny access to interested applicants. Nonetheless, EU law has also placed specific private interests at the basis of similar exceptions.

An analysis of the various relevant provisions will allow to better understand the concept and to assess how the balance between the democratic principle of full access to information and the interest in withholding some kind of information is struck. However, before examining the content of the derogatory rules, it must be highlighted that as such exceptions derogate from the principle of the widest possible public access to documents, they must be interpreted and applied strictly (see CJEU, 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, par. 63; 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, par. 36; 17 October 2013, *Council v Access Info Europe*, C-280/11 P, EU:C:2013:671, par. 30), with the result that the mere fact that a document concerns an interest protected by an exception is not in itself sufficient to justify application of the exception (see CJEU, 27 February 2014, *Commission v EnBW*, C-365/12 P, EU:C:2014:112, par. 64; GC, 13 April 2005, *Verein für Konsumenteninformation v Commission*, T-2/03, EU:T:2005:125, par. 69, and 7 June 2011, *Toland v Parliament*, T-471/08, EU:T:2011:252, par. 29).

5. The general regime established under Regulation No 1049/2001

First, we must take into consideration Article 4 of the Access Regulation, which establishes a general regime providing for exceptions to the right of access to any kind of documents held by EU bodies. That rule limits the right of access on the grounds of either general or private interests. At par. 1(a), on the one hand, it allows institutions to refuse access to a document where disclosure would undermine the protection of a *public* interest as regards public security, defence and military matters, international relations, the financial, monetary or economic

policy of the Community or a Member State. On the other hand, private and specific interests can justify a derogation only:

a) Where disclosure would undermine the protection of fundamental aspects (*rectius*: rights) of someone's life, as privacy and integrity (par. 1(b)) or;

b) Where it would undermine the protection of commercial interests of a natural or legal person, including intellectual property, court proceedings (to be interpreted as meaning that it may precludes disclosure only of documents drawn up solely for the purposes of specific court proceedings, in order to avoid the risk of upsetting the vital balance between the parties to a dispute. See GC, 6 July 2006, *Franchet and Byk v Commission*, T-391/03 and T-70/04, EU:T:2006:190, para 88-90) and legal advice («to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice». See General Court, 7 February 2018, T-852/16, *Access Info Europe v European commission*, EU:T:2018:71, par. 82), the purpose of inspections, investigations and audits (par. 2), such as the functions of political control exercised by the European parliament or inspections and investigation carried out by the European Commission before or during an infringement procedure.

The interests mentioned at par. 1 (a) and (b) are considered to be of such importance that there is no need to balance them against the interest of public disclosure and the Court has repeatedly held that no consideration of a possible public interest in disclosure is needed (see Adamski 2009). However, it is worth highlighting that quite recently the EU Legislator itself has ruled in a completely different way as regards privacy. Article 86 of the GDPR (Regulation (EU) No 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016, L 119/1) allows disclosure of «[p]ersonal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest […] in order to reconcile public access to official documents with the right to the protection of personal data […]».

Unlike those ruled at par. 1, derogations grounded on private interest ruled by par. 2, even when founded and justifiable, may be counter-limited by the existence of an overriding public interest in a disclosure that must prevail. Proof of an overriding public interest can be hard to demonstrate for the applicant, restricting the right of access. Indeed, general considerations such as «an interest in building the confidence of citizens in their governmental institutions», or «the right of the public to be informed about the work of the institutions» cannot, by themselves, substantiate the existence of an overriding public interest (see GC,

judgment of 11 December 2018, *Arca Capital Bohemia a.s. v Commission*, T-440/17, EU:T:2018:898, par. 76; of 5 December 2018, *Liam Campbell v Commission*, T-312/17, EU:T:2018:876, par. 64 and *Sumner v Commission*, T-152/17, EU:T:2018:875, par. 64). Nevertheless, the General Court acknowledged that applicants could rely upon the principle of transparency to substantiate the existence of an overriding public interest, provided that they demonstrate how "especially pressing" it is in the cases at stake (judgment of 9 October 2018, *Éva Erdősi Galcsikné v Commission*, T-632/17, EU:T:2018:664, par. 44).

Thus, the applicant has to prove a) the existence of a public interest in disclosing the document, b) how disclosure of the requested documents would contribute to the protection of such an interest in the case at hand and c) the prevalence of that interest on the opposing private ones.

Instead, it is for the institution to weigh the particular interest to be protected through the non-disclosure of the concerned document against the interest in the document being made accessible. Equally, the burden of proving how access to that document could actually and effectively undermine the interest protected by Article 4 (2) rests instead on the institution that refuses access on that ground. Indeed, the mere fact that a document concerns an interest protected by an exception set by Article 4 is not enough in itself. It is rather necessary «that the institution in question must explain how disclosure of the document in question could […] specifically and actually compromise the interest protected by the exception» (Opinion of Advocate General Hogan delivered on 11 September 2019 in Case C-175/18 P, *PTC Therapeutics International Ltd v European Medicines Agency (EMA)*, EU:C:2019:709, par. 39. The AG here cites CJEU judgments in *Commission v EnBW*, cit., par. 64, and of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU:C:2015:486, par. 68).

In striking that balance, the institution must have regard to the advantages of increased openness, as described in recital 2 of the Access Regulation, in that it 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 the citizen in a democratic system (see again the landmark ruling in *Sweden and Turco v Council*, par. 45 and judgment of 3 July 2014, *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, par. 53).

According to Article 4 (1), (2), the risk of the "non-disclosure interest" being undermined must not, in order to be capable of being relied on, be necessarily «serious» nor «actually found to exist», as was instead proposed during the legislative procedure that led to the adoption of the Regulation. Nonetheless, the GC recently held that the commercial confidentiality exception would only come into play if it could be shown that the disclosure of the specific document could "seriously" compromise the commercial interests of the appellant

(Judgment of 5 February 2018, *PTC Therapeutics International* v *EMA*, T-718/15, EU:T:2018:66, par. 80 to 85). Besides that, both the GC and the CJEU held that such risk must be reasonably foreseeable and not purely hypothetical (CJEU, *Sweden and Turco v Council*, cit., par. 43, and GC, *PTC Therapeutics International* v *EMA*, cit.).

The same goes for derogations provided for by Article 4 (3), which are meant to protect the institution's decision-making process, except that here derogations expressly only operate where the disclosure of a document would *seriously* undermine the process (see GC, judgment of 22 March 2018, *Emilio De Capitani v European Parliament*, T-540/15, EU:T:2018:167, para 61-64) and that the document relates to a matter where the decision has not been taken by the institution or contains opinions for internal use as part of deliberations and preliminary consultations within the institution concerned (the so-called "space to think exception". See Hillebrandt and Novak 2016). The institution must ground its decision taking into consideration all of the circumstances of the case including, *inter alia*, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question (GC, 9 September 2014, *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, par. 62). However, the institution is not required to submit evidence to establish the existence of such a risk, being sufficient in that regard the existence of "tangible elements" and "objective reasons" on the basis of which it can be inferred that the risk of the decision-making process being undermined if the documents were disclosed was, on the date on which that decision was adopted, reasonably foreseeable and not purely hypothetical (see GC, 7 June 2011, *Toland v Parliament*, cit., para 78 and 79).

The complex and delicate nature of such assessment, weighing and balancing required by Article 4, together with the particularly sensitive and essential nature of the interests protected, calls for the exercise of particular care and requires a margin of appreciation in favour of the institutions. A potential review by the GC of the legality of a decision either granting or refusing the access to a document is limited to "verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers" (CJEU, in *Jose Maria Sison v Council*, cit., par. 35 and 64). Nonetheless, in making their decisions, EU bodies benefit from two presumptive regimes, one provided for by the combination of the Access and the Aarhus Regulations (see § 6) and the other one developed in the case-law of the CJEU and the GC (see § 7).

6. Exceptions to the right of access in environmental matters (or How does the Aarhus Regulation interact with the Access Regulation?)

Article 3 of the Aarhus Regulation universalises the Access regulation when its application concerns environmental matters. Regulation No 1049/2001 shall apply to *any* request by *any* applicant (without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities) for access to environmental *information* (not document) held by Community institutions *and bodies*.

The extension also concerns the application to the right of access to environmental information of the two mandatory exceptions set in Article 4(1) and the several discretionary exceptions set in articles 4(2) and 4(3). However, Article 6 of the Aarhus Regulation complements the general regime of exemption.

First, where the information requested relates to emissions into the environment, Article 6(1) first sentence establishes a presumption of prevalence of a public interest in disclosure over commercial interests (of a natural or legal person, including intellectual property) and the purpose of inspections and audits, respectively mentioned at Article 4(2), first and third indents, of the Access Regulation. The purpose of investigation, which Article 4(2) mentions as well, is not affected by this legal presumption, therefore the EU body can always demonstrate the prevalence of the interests protected against disclosure. The presumption set by Article 6(1) first sentence is irrebuttable. This meant that the relevant institution to which an application for access to a document was submitted would disclose the document even if such disclosure were liable to undermine the protection of interests otherwise protected by EU law (GC, 8 October 2013, *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v Commission*, T-545/11, EU:T:2013:523, par. 38).

Secondly, as regards the other exceptions set out in Article 4 of the Access Regulation, Article 6(1) second sentence states that the grounds for refusal shall be interpreted in a restrictive way (which is nothing new under EU case-law), *taking into account* the public interest served by disclosure and whether the information requested relates to emissions into the environment. There isn't thus a presumption anymore, but a hermeneutical weighing factor that qualifies that kind of information as of peculiar public interest.

Finally, Article 6(2) sets a specific exception in addition to those set out in Article 4 of the Access Regulation, as it provides that «[EU] institutions and bodies may refuse access to environmental information where disclosure of the information would adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species».

6.1. *When does an information relate to emissions into the environment?*

A pivotal role in the application of Article 6 is played by the notion of «information which relates to emissions into the environment». The broader the notion, the wider the scope of the public interest clause. The notion of «emissions into the environment» within the meaning of Art. 6(1) sentence 1 Aarhus Regulation is neither defined in the Aarhus Regulation nor in the Aarhus Convention. Thus, the main features of the issue are to define the link that relates the information to the emissions and to define the concept of emissions itself.

The term emission has been defined in EU law by the Industrial Emissions Directive (directive 2010/75/EU) as a «direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land» (Article 3(4)). However, despite what the other EU institutions have submitted, the CJEU and GC case-law denied that the notion of emissions was to be interpreted restrictively and pointed out that only exceptions to the access to documents had to be interpreted restrictively. Presumption of an overriding public interest in disclosure provided for by Article 6(1) sentence 1 is not an exception, but a specific implementation of the general principle of the widest possible access to documents. Therefore, according to recital 15 of the Aarhus Regulation (only the grounds for refusal as regards access to environmental information should be interpreted in a restrictive way), the notion of emissions relevant for the Aarhus Regulation is not equivalent to pollution and it is not restricted to emissions emanating from industrial installations, being the source irrelevant. Furthermore, it also embeds (not purely) hypothetical emissions insofar as they are foreseeable under normal or realistic conditions of use of the product in question (CJEU, 23 November 2016, *Commission v Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe)*, C-673/13 P, EU:C:2016:889).

As concerns what is the link that relates an information to emissions in the environment, the GC applied the non-restrictive interpretation principle and stated that «in order for the disclosure to be lawful, it suffices that the information requested relate in *a sufficiently direct manner* to emissions into the environment». However, the CJEU handed down the GC's judgment in appeal (in the above-cited case C-673/13 P), where it refused the criterion of a "sufficiently direct link" between the information and the emissions into the environment, as it has no basis in law (par. 78). The Court held that a notion which is so broad to include information containing any kind of link, even direct, to emissions into the environment «would deprive of any practical effect the possibility […] for the institutions to refuse to disclose environmental information» when disclosure would have an adverse effect on the protection of the mentioned interest.

Therefore, in case C-673/13, the CJEU set aside the judgment of the GC and refer the case back to it. Nonetheless, it gave some empirical hints for a correct assessment of when an information «relates to emissions into the environment». Notably, it holds that the concept must be understood to include, *inter alia*, «data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use of the product or substance in question» (par. 79) and «information enabling the public to check whether the assessment of actual or foreseeable emissions, on the basis of which the competent authority authorised the product or substance in question, is correct, and the data relating to the effects of those emissions on the environment» (par. 80). On the contrary, information on carbon efficiency of manufactured products, whilst having a link with emissions into the environment, has not been deemed as information relating to emissions into the environment as it does not enable the public to actually know the total amount of emissions released (or sufficiently foreseeable) by a specific installation, nor their chemical composition and geographic location (GC, 11 July 2018, *Rogesa v Commission*, T-643/17, EU:T:2018:423, para 102-106. See also GC, 21 November 2018, *Stichting Greenpeace Nederland e Pesticide Action Network Europe (PAN Europe) v Commission*, T-545/11 RENV, EU:T:2018:817, par. 90, on information pertaining to the approval of an active substance in products whose conditions of use and composition may be very different in each Member State, and GC, 12 December 2018, *Deutsche Umwelthilfe eV v Commission*, T-498/14, EU:T:2018:913, par. 111, on documents reflecting opinions, appreciations and proposals from car manufacturers in relation to the availability of a given substance without detailing the extent and the period of time of the use of the substance, or how the latter would contribute to an increased risk of environmental emissions).

7. General presumptions in the assessing of an application and their compatibility with the democratic principle

Since derogations set by EU regulations affect the principle of the widest possible access, it has been stated that for each requested document (and information as well) there should be a specific, concrete and individual examination (GC, 13 April 2005, *Verein fur Konsumenteninformation v Commission*, cit., par. 69). Nonetheless, according to the case-law of the CJEU, it is the EU institution concerned that bases its decision on an application for access to a document on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for access relating

to documents belonging to the same category of documents or to documents of the same nature (CJEU, judgments in *Sweden and Turco v Council*, cit., par. 50, and in *Council v Access Info Europe*, cit., par. 72). The documents must belong to a set of documents which was clearly defined by the fact that they all belonged to a file relating to ongoing administrative or judicial proceedings (CJEU, 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, para 12 to 22; 27 February 2014, *Commission v EnBW*, cit., para 69 and 70). The aim is to allow the Commission to reply to a global request for access in a manner which is just as global (CJEU, 14 November 2013, joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, EU:C:2013:738).

So far, five categories were progressively set out in the CJEU case-law. They are: (i) documents on the Commission's administrative file with regard to State aid (see judgment in *Commission v Technische Glaswerke Ilmenau,* cit.), (ii) documents lodged in proceedings before the Courts of the European Union while they are still pending, (judgment of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541), (iii) documents exchanged between the Commission and notifying parties or third parties in the course of merger control proceedings (judgment of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393), (iv) documents relating to an infringement procedure during its pre-litigation stage (see judgment in *LPN and Finland v Commission*, cit.) including the documents produced during an EU Pilot procedure (until the procedure is closed and there is a definitive decision not to open a formal infringement procedure against the Member State. See judgment of 11 May 2017, *Sweden v Commission*, C-562/14 P, EU:C:2017:356), and (v) documents relating to proceedings under Article 101 TFEU (judgment of 27 February 2014, *Commission v EnBW*, cit.).

It must be stressed that these five categories do not constitute a closed group. In its judgment of 4 September 2018 (*ClientEarth v Commission*, C-57/16, EU:C:2018:660, par. 80), the Court articulated the governing considerations regarding whether a new general presumption should be recognised for a category of documents, stating that recognition of a new general presumption «presupposes that it has first been shown that it is reasonably foreseeable that disclosure of the type of document falling within that category would be liable actually to undermine the interest protected by the exception in question».

The general presumption doctrine freed the institutions from examining the requested documents individually and shifts the burden of proof to the applicant, who must demonstrate that there will be no harm to the interest protected by EU law in giving access to that specific document (CJEU, 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, par. 128). As noted by Curtin and Leino-Sandberg (2016, 10), this is difficult in practice given that the appli-

cant has not seen the document. In case *Daimler AG v Commission* (judgment of 4 October 2018, T-128/14, EU:T:2018:643), the applicant argued that the strict interpretation clause imposed by Article 6(1) of the Aarhus Regulation requires that each relevant document concerning emissions be the subject of an individual examination in order to ascertain whether the public interest in its disclosure prevails over the interest of the confidentiality of the investigation. However, the GC stated that that clause «has no bearing on the question whether the institution concerned is or is not required to carry out a specific and individual examination of the documents or information requested»; thus, the clause does not impose in any case a precise obligation to carry out an individual examination of each document (see para 96-105).

It is of all evidence that the general presumptions doctrine derogates from the two key principles of the right of access to information held by the EU, namely that of individual examination and that of the widest access. Therefore, the use of such presumptions must be founded on reasonable and convincing grounds (GC, 25 September 2014, T-306/12, *Spirlea v Commission*, EU:T:2014:816, par. 52). This is why, for example, a presumption does not cover any documents lodged in court proceedings but has been acknowledged only in respect of the pleadings lodged, and only so long as those proceedings remain pending. Disclosure of pleadings lodged in pending court proceedings was presumed to undermine the protection of those proceedings, because an obligation of transparency imposed only on the institutions concerned would lead «the procedural position of those institutions to be undermined vis-à-vis the principle of equality of arms» – which is «no more than a corollary of the very concept of a fair hearing» – «since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure» (CJEU, 21 September 2010, *Sweden and Others v API and Commission*, cit., para 87-88).

8. Access to environmental impact assessments and similar documents

Access to documents relating to legislative procedures and administrative documents – notably documents relating to infringement and EU Pilot procedures – diverges significantly, as if there were less public interest in openness when it comes to administrative activities. Indeed, on the one hand, the CJEU expressly stated (in cited judgment *Sweden and Turco v Council*) that access to legislative documents can only be denied in exceptional cases, that the refusal needs to be reasoned in detail and that it can only be applied «for the period during which protection is justified on the basis of the content of the document» (para 69-70),

while, on the other hand, its case-law on general presumptions of confidentiality in EU administrative procedures gives its contribution in re-enforcing what some considered "a questionable distinction" (Curtin and Leino-Sandberg 2016: 6).

Access to legislative documents is a precondition for an effective democracy, as it enforces the possibility for citizens to control all the information forming the basis for EU legislative action and partake to the decisions made by the EU institutions within the framework of the legislative process. The European Commission's impact assessment reports are important elements that form part of the basis for of the EU legislative process, as the Commission has a key role in the legislative process due to its right of initiative. This is particularly true in environmental matters. So, must impact assessment reports and similar documents always be accessible under EU law?

In the above-mentioned case *ClientEarth v Commission* (C-57/16 P), the CJEU delivered a key judgment on this issue. In the 2000's, the Commission had conducted impact assessments for two environmental regulatory projects that were to significantly strengthen environmental protection in Europe. Both these regulatory initiatives were abandoned by the Commission and eventually resulted in soft law guidelines that were adopted by the Commission in 2017 and 2018. In 2014, the environmental organisation ClientEarth asked the Commission to have access to two environmental impact assessment reports and an opinion of the Impact Assessment Board relating to both the projects, in order to shed light on the Commission's decision to abandon them.

The Commission refused to grant ClientEarth access to these documents and invoked the "ongoing decision-making process" exception set by article 4(3) first subparagraph of the Access Regulation. It argued that, under Article 17 TEU, it has the specific role to act in an independent manner and exclusively in the general interest, and that disclosure would restrict its room for maneuver and affect its independence and role in pursuing the general interest, thus undermining the decision-making process. Therefore, it would allow the Commission to rely on a general presumption of confidentiality.

In its first-degree judgment, the General Court applied a general presumption of confidentiality to documents drafted in the context of legislative initiatives, thus extending the case-law on general presumptions in favour of the Commission. ClientEarth appealed and the Grand Chamber of the CJEU came to the conclusion that the exception relied upon by the Commission «must be interpreted and applied all the more strictly» in light of the specific context and content, i.e. a still ongoing decision-making process concerning environmental information where citizens can effectively make their views known regarding those choices before they have been definitively adopted. Therefore, not only the

Court stated that the requested documents were drafted when the Commission was acting in a legislative capacity, but it also stated that the Commission's special role under the Treaties cannot add any additional privileges under Regulation 1049/2001 as a general presumption of confidentiality to documents drafted in the context of its right of initiative. To the contrary, this context made gaining wider access even more necessary (see judgment of 4 September, para. 104-109), as to say that an institution does not protect its decision-making process isolating itself from the social fabric, but through dialogue and confrontation.

9. Protection for documents originating from a Member State

Article 4(5) of the Access Regulation reads «A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement». This exception has already been at the centre of several disputes, (starting from CJEU, judgment of 18 December 2007, *Kingdom of Sweden v Commission*, C-64/05 P, EU:C:2007:802 and following with case *IFAW v Commission*, concerning the refusal to grant an NGO access to environmental information supplied by a Member State (GC, judgment of 13 January 2011, T-362/08, and CJEU, judgment of 21 June 2012, C-135/11 P).

In *Sweden v Commission*, the Court gave another relevant contribution to the enforcement of environmental democracy in the EU, as it pointed out (at par. 75. Confirmed in GC, *IFAW v Commission*, cit., par. 73) that Article 4(5) «does not confer on the Member State a general and unconditional right of veto, permitting it arbitrarily to oppose, and without having to give reasons for its decision, the disclosure of any document held by an institution simply because it originates from that Member State». Moreover, the CJEU added (para. 76. Confirmed in GC, *IFAW v Commission*, cit., para. 73) that Article 4(5) only resembles «a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present». Thus, before issuing a refusal, it is up to the institution concerned to examine whether this Member State duly justified its position on the basis of the exceptions laid down in the Access Regulation. Therefore, if there is no justification, the institution can override the Member State's refusal.

Article 4(5) «establishes for that purpose a decision-making process within the framework of which [a Member State and an EU institution] are obliged to cooperate in good faith», in order to not restrict the right of access without justification (GC, 14 February 2012, *Federal Republic of Germany v Commission*, T-59/09, para. 45).

Openness and citizen participation are the measure of environmental democracy and they are enforced mostly through the access to documents and information held by public bodies. So, this paper sought to define whether the EU regime on access to documents and information regarding environmental matters is genuinely democratic or not.

In the EU legal order, the implementation of the right of access to documents and information must be assessed through the praxis of EU institutions and the case-law of the CJEU and the GC. In the light of the above, the latter to some extent seems controversial.

It is undeniable that the EU Courts adopted at first (i.e. after the entry into force of the Access Regulation) an activist approach in favour of transparency (Spahiu 2015; Labayle 2013) in an effort to build the "constitutional" grounds of a democratic and widest possible right of access. The general rule of one-by-one examination, the strict interpretation and application of derogative clauses, the fact that the risk of the interests protected by EU legislation being undermined must be reasonably foreseeable and not purely hypothetical – together with the presumption of prevalence of a public interest in disclosure set by the Aarhus regulation – all contribute to limit the circumstances where EU bodies can withhold some information, notably in environmental matters. As a result, in 2018 the General Court handed down 27 judgments involving the European Commission (the addressee of the vast majority of requests for access) in relation to the right of access to documents under the Access Regulation. Out of 27 cases, only four of them involved (partial) refusals of the institution to grant access to certain documents and resulted in the (partial) annulment of the contested institution's decision (data taken from the Report from the Commission on the application in 2018 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 29.7.2019, COM(2019) 356 final).

Nevertheless, a recent increase in presumptions of non-disclosure and still existing difficulties in establishing when there is an overriding public interest (mainly a. because arguing for the existence of an overriding public interest for the purposes of justifying disclosure when the contents of the documents are not known is really hard, and b. because of the lack of clarity on what an information related to emissions in the environment is) seem to favour some secrecy rather than disclosure and openness. Notably, general presumptions now cover nearly all areas of Commission investigations, including procedures that are politically relevant as the procedure against Member States infringing EU law. This is very/quite worrying, since, in practice, such presumptions are quite impossible for

individuals to rebut. All of this affects democratic processes within the EU and is detrimental to accountability.

While admitting in the abstract the possibility of identifying other general presumptions in the future, the 2018 landmark judgment of the CJEU in *ClientEarth v Commission* must be warmly welcomed as it stopped *de facto* the extension of general presumptions of confidentiality, recognising the role of the Aarhus Regulation in doing so and highlighting the relevance of transparency and citizen participation in the EU legislative process. Hopefully, it will become a strong precedent for future EU case-law. However, the CJEU alone may not be able to protect citizens in a systematic and immediate way. Although, it can enhance transparency through clarity and intelligibility of the existing rules, the CJEU's powers are limited, as it deals with all these issues on a case by case basis and only when they are brought before it by single applicants. In a field where «both the Council and Commission share a common reservation, if not a common hostility towards an open interpretation of Regulation (EC) No 1049/2001» (Labayle 2013: 14), a global effort is thus needed within the EU.

The European Council's strategic agenda for 2019-2024 urges all the EU institutions to respect the principles of democracy, rule of law and transparency, and to act in the best way to fulfil their role under the Treaties. Arguably, this could be the right time for a reform of the Access Regulation. A first attempt of amending the Regulation 1049/2001 – a proposal by the Commission dating back to April 2008, COM(2008) 229 final (see Harden 2009) – already came to nothing and so did the Commission's proposal submitted in March 2011 and aimed at extending the institutional scope of the 2001 Regulation in order to adapt it to the Lisbon Treaty requirements (COM(2011) 137 final). The fact that the institution that holds the legislative initiative power in the EU – the Commission – is the one that benefits the most from the presumption regime makes the adoption of new and more citizen-oriented rules on the right of access quite unlikely. The new Commission has finally come into operation in December 2019, but no reference to new legislative intervention on the right of access was mentioned neither by commissioners nor by the President von der Leyen. In an era of great political crisis for the EU, this is regrettable, since the Union risks losing yet another chance to implement greater transparency, which is likely to result in greater interest in it and in more understanding by citizens, both representing conditions for democratic legitimacy within its legal order.

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