

CJEU Adopts Broad Interpretation of Emissions Information That Authorities Must Disclose

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Last week the Court of Justice of the European Union (“CJEU”) upheld a broad interpretation of the concept of “information that relates to emissions into the environment” that EU and Member State authorities (e.g., ECHA, EFSA, Commission, national environmental agencies) must disclose to the public.

According to the CJEU, the information that must be disclosed does not only relate to emissions from industrial installations, and must also include data allowing the public to:

- i) know what is, or may be foreseen to be, released into the environment under normal or reasonable conditions of use of a product or substance;
- (ii) check the correctness of the assessment of the actual or foreseeable emissions on the basis of which product or substance is authorized; and
- (iii) understand the effect of those emissions on the environment.

This information must be disclosed to the public, upon request, even if it may affect the commercial interests of companies.

The CJEU’s decisions will have a significant impact on all companies that are required to submit regulatory filings to access the EU market under different EU legislation (e.g., REACH, Biocides, Plant Protection Products, Fertilizers, GMOs). These companies must now assume that much of the data they submit may not be kept confidential.

Background

Article 4(2) of [Regulation 1049/2001](#) on Public Access to European Parliament, Council and Commission Documents (“Access to Documents Regulation”), Article 339 of the Treaty on the Functioning of the European Union (“TFEU”) and Articles 7, 16, and 17 of the Charter of Fundamental Rights of the EU establish the general rule that the commercial interests of a person may prevent the disclosure of information to the public unless there is an overriding public interest in disclosure. However, [Regulation 1367/2006](#) on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community

Institutions and Bodies (“Aarhus Regulation”), and [Directive 2003/4/EC](#) on Public Access to Environmental Information make clear that an overriding public interest in disclosure exists where the “information relates to emissions into the environment.”¹ Thus, EU and Member State authorities are required to disclose to the public, upon request, information that relates to emissions into the environment, even if such disclosure may undermine the commercial interests of companies. Both the Regulation and the Directive are intended to implement the [Aarhus Convention](#).

The CJEU decided last week on two cases concerning the interpretation of information that “relates to emissions into the environment.” In the first case, [C-673/13P](#), the CJEU decided on an appeal of the European Commission against the decision of the General Court in case [T-541/11](#). That case concerned a dispute between the NGOs Stichting Greenpeace Nederland and Pesticide Action Network Europe and the Commission concerning the access to several documents that companies had submitted to obtain the approval of glyphosate as an active substance in plant protection products. The NGOs requested information on the content of the product, including its impurities, which the Commission refused to disclose on the basis of one of the exceptions included in Article 4(2) of the Access to Documents Regulation, namely that for the protection of the commercial interests (including intellectual property rights) of a natural or legal person.

The General Court held that when an EU institution or body receives an application for access to a document “it must disclose it where the information requested relates to emissions into the environment, even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person.” The General Court also interpreted broadly the concept of information relating to emissions into the environment so as to include any information that “relates in a sufficiently direct manner to emissions into the environment.” The Court held that the information concerning the identification and the quantity of the impurities in glyphosate should be disclosed because it related in a sufficiently direct manner to emissions into the environment as the impurities are released into the environment together with the plant protection product itself. The European Commission appealed the decision on the single ground that the General Court erred in its interpretation of the concept of information that “relates to emissions into the environment.”

In the second case, [C-442/14](#), the CJEU responded to a reference for a preliminary ruling from a Dutch court concerning a dispute between Bayer CropScience and the NGO Stichting De Bijenstichting relating to the latter’s request to access documents that several companies submitted to the Dutch competent authority (“CTB”) to obtain the marketing authorization of phytopharmaceutical and biocidal products containing the active substance imidaclopride. Both Bayer and the NGO appealed the decision of the CTB, which only granted access to documents that it considered to contain information on “actual” emissions into the environment of the products in question.

In the context of the appeal, the Dutch court decided to request the CJEU to interpret the notion of “information that relates to emissions into the environment.” The national court asked the

¹ In contrast to the Aarhus Regulation, Directive 2003/4/EC allows Member States to refuse access to information related to emissions into the environment if it affects the intellectual property rights of a person (but not the confidentiality of its commercial or industrial information).

CJEU whether such concept: (i) also covers information on discharges of phytopharmaceutical and biocidal products, including those that do not derive from industrial installations; and (ii) only covers information on emissions as such or also information on the impact of the emissions on the environment. The Dutch court also asked whether documents that contain “information that relates to emissions into the environment” must be disclosed in their entirety or only their relevant passages should be disclosed.

The CJEU’s Interpretation

Broad Interpretation of the Concept of Information That Relates to Emissions into the Environment

In its two decisions, the CJEU took the view that the concept of “information that relates to emissions into the environment” should be interpreted broadly. The Court seemed to base this interpretation on its view that the Aarhus Regulation and the Directive have the general objective of allowing the disclosure of environmental information as widely as possible. Nevertheless, the CJEU did nuance the interpretation of the General Court in case T-541/11 by indicating that the concept should also be interpreted taking into account the obligation of professional secrecy of EU institutions and its officials of Article 339 of the Treaty on the Functioning of the European Union (“TFEU”) and the Charter of Fundamental Rights.

The Concept Does Not Include Information That Has Any Direct Link to Emissions into Environment

However, the CJEU disagreed with the General Court’s view that authorities must disclose any information that relates in a sufficiently direct manner to emissions into the environment. According to the CJEU, such interpretation would constitute a disproportionate interference with the protection of business secrecy of Article 339 of the TFEU. The CJEU held that information that relates to emissions into the environment, which authorities must disclose, “may not, in any event, include information containing any kind of link, even direct, to emissions into the environment” (emphasis added). Thus, authorities must disclose information that concerns or relates to emissions into the environment, and not simply information with a direct or indirect link to such emissions.

The Concept of Emissions into the Environment Is Not Limited to Emissions from Industrial Installations

The CJEU also held that the Aarhus Regulation, the Directive, and the Aarhus Convention do not support the view that the concept of emissions into the environment must be limited to emissions emanating from certain industrial installations, such as factories and power plants. According to the CJEU, “information concerning emissions emanating from sources other than industrial installations, such as those resulting from the use of plant protection products on plants or soil, are just as relevant to environmental protection as information relating to emissions of industrial origin.” Limiting the concept to emissions of industrial origin “would be contrary to the objective to disclosing environmental information as widely as possible.”

The Emissions Must Be Actual or Foreseeable Emissions under Normal or Realistic Conditions of Use of the Product

While the CJEU agreed with the Commission that the information on emissions that relates to the environment cannot refer to hypothetical emissions, it also rejected the argument that such information must be limited to emissions actually released. According to the Court, the information that must be disclosed also includes foreseeable emissions under normal or realistic

conditions of use of the product or substance, in particular, the conditions under which the authorization to market the product was granted and that prevail in the area where it is intended to be used.

Thus, the CJEU held that “the placing on the market of a product or substance is not sufficient in general for it to be concluded that that product or substance will necessarily be released into the environment and that information concerning the product or substance relates to emissions into the environment.”

The Notion of Information that Relates to the Emissions into the Environment Also Covers Information on the Impact of the Emissions on the Environment

The CJEU found that the public must have access to information not only on emissions as such but also on their potential impact on the environment.

Examples of the Content of Information that Relates to Emissions into the Environment

The CJEU even illustrated different aspects of information that relates to emissions into the environment that must be disclosed. First, it includes data that allows the public to know what is actually released into the environment or what may be foreseen to be released under normal or realistic conditions of use taking into account the marketing authorization of the product and the conditions of the area where it will be used. This includes information on the nature, composition, quantity, and place of the actual or foreseeable emissions.

Second, authorities must disclose information that allows the public to check the correctness of the assessment of the actual or foreseeable emissions on the basis of which the authorities granted the authorization. Studies on the effects on use of doses of the products that are much higher than that authorized must not be disclosed as they do not concern foreseeable environmental emissions under the normal or realistic conditions of use of the products. In contrast, studies on the emissions of the products under the “worst realistic conditions that may occur” must be disclosed.

Third, authorities must disclose data relating to the effects of those emissions on the environment.

The CJEU also clarified that if a dossier submitted to the authorities contains information that relates to emissions into the environment, the authorities must not disclose the entire dossier but only the relevant parts concerning environmental emissions.

Possible Impact

The two decisions of the CJEU make it easier for individuals, NGOs and competitors to access data submitted by companies to access the EU market. While the CJEU was careful to always limit itself to the facts of the cases and to refer only to plant protection products and phytopharmaceutical and biocidal products, which by virtue of their very function are intended to be released into the environment, its reasoning suggests that the information that must be disclosed may also refer to emissions from other marketed products.

Nevertheless, the CJEU’s emphasis that the information must refer to emissions into the environment, and not simply to information containing any kind of link to such emissions, suggests that authorities must apply some restraint when disclosing information. Where the products are not necessarily intended to be released into the environment, authorities must be

Environmental

particularly careful to disclose only that information on the products that refers to their actual or foreseeable environmental emissions under their normal or realistic conditions of use.

As the CJEU did not agree with the General Court's very broad interpretation that authorities are required to disclose information that relates in a sufficiently direct manner to emissions into the environment, it set aside the judgment in case [T-541/11](#) and referred the case back to the General Court. The General Court will now be able to assess whether the information requested by the NGOs Stichting Greenpeace Nederland and Pesticide Action Network Europe (including information on the impurities of glyphosate) refers to actual or foreseeable emissions into the environment when glyphosate is used.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Environmental practice:

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