Case Note

The Case Notes section will identify and analyse important judgements of courts around the world that shape the interpretation and application of chemical law and regulation.

T-545/11: Understanding the Aarhus Emissions Rule

T-545/11 RENV, Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v Commission [2018] ECLI:EU:T:2018:817.

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The judgment issued by the General Court of the European Union (GC) in *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v Commission* [2018] ECLI:EU:T:2018:817, T-545/11 RENV, marks the end of proceedings at EU level that were already initiated in 2011. *Stichting Greenpeace Nederland* and *PAN Europe* sought access to certain information submitted by glyphosate manufacturers in the regulatory procedure for the initial EU approval of that herbicidal active substance. Following appeal proceedings and a reference back for a new assessment, the GC finds that documents set up in the active substance approval procedure do not contain information related to emissions into the environment. The GC confirms that the European Commission correctly rejected the access to information request as this was needed to protect the confidentiality of commercial and industrial information.

1. Introduction

Access to information held by EU institutions is set forth in Regulation (EC) No 1049/2001¹ (Transparency Regulation) and, in case access to environmental information is sought, in Regulation (EC) No 1367/2006² implementing the Aarhus Convention³ into EU law (Aarhus Regulation). Under the Aarhus regime, environmental information is understood in a broad sense, covering not only information on the state of the elements of the environment but also information on releases into the environment.⁴ For reasons of consistency of the EU legislation, the Aarhus Regulation refers to the provisions of the Transparency Regulation dealing with access to information requests.⁵ The Transparency Regulation gives Union citizens and residents a general right of access to documents of the EU institutions, with certain exceptions according to its Article 4. One of the most rele-

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1 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 [2001] OJ L145/43.

2 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 [2006] OJ L264/13.

3 United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in

Decision-making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998, accessible via <https://www.unece.org/env/pp/treatytext.html>.

4 The definition of environmental information is set forth in art 2(1)(d) Aarhus Regulation. Among the six categories of environmental information are factors, such as substances, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment (art 2(1)(d)(ii) Aarhus Regulation). The European Court of Justice confirmed the broad interpretation of the term 'environmental information' in Case C-266/09, *Stichting Natuur en Milieu, Vereniging Milieudefensie and Vereniging Goede Waar & Co. v College voor de toelating van gewasbeschermingsmiddelen en biociden* [2010] ECR I-13119, paras 37-43. See also Gérardine Garçon, 'Access to Environmental Information versus Protection of Confidential Business Information' (2013) 2 EurUP 100, 108.

5 According to art 3 Aarhus Regulation, the Transparency Regulation shall apply to any request by an applicant for access to environmental information held by Union institutions or bodies.

vant exceptions is Article 4(2), first indent, Transparency Regulation, stating that access to a document shall be refused where the disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure. However, being *lex specialis* in relation to the Transparency Regulation, the Aarhus Regulation provides for certain modifications to the general transparency rules if access to environmental information is sought. Amongst them is an exceptional provision that applies in case the requested environmental information concerns information relating to emissions into the environment (Emissions Rule). The Emissions Rule establishes a legal presumption that as regards the protection of commercial interests of a natural or legal person, including intellectual property, an overriding public interest in disclosure of the information relating to emissions into the environment shall be deemed to exist.⁶

The Aarhus legislation does not contain a definition of the term 'information relating to emissions into the environment'. Hence, it is not a big surprise that the interpretation of this term triggered legal disputes.

II. The Facts of the Case

In December 2010, the non-governmental organizations (NGOs) Stichting Greenpeace Nederland and PAN Europe requested the European Commission to

grant access to the draft assessment report generated by Germany in the procedure regarding the initial EU approval of the herbicidal active substance glyphosate for use in plant protection products.⁷ The NGOs based their request on the Transparency Regulation and the Aarhus Regulation. Following consultation with the German authorities that were involved in the drafting of the report, the Commission decided to disclose the draft to the NGOs, except for that particular part where Germany objected to disclosure due to the confidential nature of the information contained therein, such as manufacturing information or the detailed specification and composition profile of the active substance and the plant protection products, respectively. The Commission explained the reasons for Germany's opposition in its refusal decision.

The NGOs disagreed, claiming that the Emissions Rule applied to their access to information request, and brought an action for annulment of the Commission's refusal decision. By judgment of 8 October 2013 (Initial Judgment),⁸ the General Court annulled the contested decision in so far as the identity and quantity of all impurities present in the active substance, the analytical profile of the batches tested and the composition of the plant protection products developed by the various operators was concerned. In the GC's view, this was information relating to emissions into the environment within the meaning of the Aarhus Regulation. The GC stated that for the application of the Emissions Rule it would suffice that the information relates in a sufficiently direct manner to emissions into the environment.⁹

The Initial Judgment was appealed by the European Commission, supported by Germany and various European, American and international industry associations. On 23 November 2016, the Court of Justice of the European Union (CJEU) released its judgment (Judgment on Appeal),¹⁰ holding that there was no basis in law for an interpretation that the Emissions Rule would include information containing any kind of link to emissions into the environment.¹¹ The CJEU further clarified that, as opposed to information on actual emissions, information on purely hypothetical emissions is excluded from the scope of the Emissions Rule,¹² whereas information concerning or relating to foreseeable emissions under normal or realistic conditions of use would fall within its scope.¹³ Consequently, the CJEU set aside the Initial Judgment and referred the case back to the General Court for a new assessment.

⁶ See art 6(1), first sentence, Aarhus Regulation, referring to art 4(2), first indent, Transparency Regulation.

⁷ The EU legal framework for the authorization of plant protection products provides for a two stage procedure: First, the active substance(s) contained in a plant protection product need to be approved at EU level, thereafter authorizations for the product can be applied for and will be assessed at national level. See also III.2.c.

⁸ Case T-545/11, *Stichting Greenpeace Nederland and PAN Europe v Commission* [2013] ECLI:EU:T:2013:523.

⁹ *ibid* para 53; see also Horst von Holleben, 'Judgment of the General Court of the EU on Access to Information under Substance Law' (2013) 4 EJRR, 565; and Bernhard Wegener, 'Umweltinformationsfreiheit – erst genommen: Der Fall Glyphosat' (2014) 4 ZUR, 32.

¹⁰ Case C-673/13 P, *Commission v Stichting Greenpeace Nederland and PAN Europe* [2016] ECLI:EU:C:2016:889.

¹¹ *ibid* para 77.

¹² *ibid* para 72.

¹³ *ibid* para 73; see also Gérardine Garçon, 'Public Access to Information in the Area of Product Legislation – All in Balance Now?' (2017) 1 EurUP, 31, 41-43 and 45-54, and Volker Kaus, 'Zugang Dritter zu Registrierungsunterlagen' (2017) 2 StoffR, 72.

III. The Judgment of the General Court

On 21 November 2018, the General Court released its judgment after referral (Judgment after Referral)¹⁴. All three pleas in law forwarded by the NGOs were rejected by the GC.

1. First Plea: Alleged Breach of Article 4(5) Transparency Regulation

The first plea submitted by the NGOs concerns the Commission's reference to Germany's objection to the disclosure of that particular part of the draft assessment report which contains confidential business information. By their first plea, the NGOs claimed that Article 4(5) Transparency Regulation would not constitute a right of veto for a Member State and that the Commission may not rely on the Member State's opinion regarding the application of an exception provided for by Article 4(2) Transparency Regulation. Article 4(5) Transparency Regulation states that a Member State may request a Union institution not to disclose a document originating from that Member State without its prior agreement.

The General Court did not elaborate on this plea in its Initial Judgment because it had found that the second plea was already sufficient to annul the contested Commission decision. Hence, it deals with this plea for the first time in the Judgment after Referral. In its findings, the GC largely refers to existing case-law related to Article 4(5) Transparency Regulation.¹⁵ It points out that it has already been held that where a Member State has made use of the option under Article 4(5) Transparency Regulation to request its prior agreement to disclosure, the Union institution is not entitled to disclose the document at issue without such prior agreement.¹⁶ The GC, however, reiterates that Article 4(5) does not confer on the Member State a general and unconditional right of veto and a right to oppose in a discretionary manner and without giving reasons for its objection.¹⁷ A Member State may only object to the disclosure on the basis of the substantive exceptions set forth in Article 4(1) to (3) Transparency Regulation, together with a proper reasoning for its view.¹⁸

Following this, the GC notes that it is apparent from the contested Commission decision that the refusal of the access to information request is based on the exception relating to the protection of commer-

cial interests as set forth in Article 4(2), first indent, Transparency Regulation,¹⁹ and that the Commission verified the existence of the reasons referring to that exception, concluding that they were, *prima facie*, well founded.²⁰ In that regard, the GC again cites existing case-law regarding Article 4(5) Transparency Regulation, according to which the Union institution is not required to carry out an exhaustive assessment of the Member State's decision going beyond a verification of the mere existence of reasons and of explanations which are, *prima facie*, well founded.²¹

The NGOs had also argued that the Commission was not entitled to rely on Article 4(5) Transparency Regulation as this provision was not consistent with the Aarhus Convention and the Aarhus Regulation and had to be interpreted in accordance with the Aarhus regime. In this regard, the GC only briefly noted that the basis for the Commission's refusal to grant access to the information at stake was not Article 4(5) Transparency Regulation but Article 4(2), first indent, Transparency Regulation.²²

Consequently, the General Court rejected the first plea.

2. Second Plea: Alleged Overriding Public Interest in Disclosure based on the Emissions Rule

Before examining whether the Emissions Rule applies to the document at issue, the General Court provides more general observations on the scope of the

14 Case T-545/11 RENV, *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v Commission* [2018] ECLI:EU:T:2018:817.

15 *ibid* para 36-44.

16 Case C-64/05 P, *Sweden v Commission* [2007] ECLI:EU:C:2007:802, para 44.

17 *ibid* para 58.

18 *ibid* para 83.

19 Judgment after Referral (n 14), para 42.

20 *ibid* para 45.

21 *ibid* para 44, with references to Case C-135/11 P, *IFAW Internationaler Tierschutz-Fonds v Commission* [2012] ECLI:EU:C:2012:376, para 63; Case T-603/11, *Ecologistas en Acción v Commission* [2014] ECLI:EU:T:2014:182, para 44; Case T-669/11, *Spirlea v Commission* [2014] ECLI:EU:T:2014:814, para 54; Case T-344/15, *France v Commission* [2017] ECLI:EU:T:2017:250, para 54.

22 Judgment after Referral (n 14), paras 46-47.

access right arising from Article 6(1), first sentence, Aarhus Regulation and on the concept of the Emissions Rule.

a. The Scope of the Right of Access arising from Article 6(1), first sentence, Aarhus Regulation

The General Court, however, does not elaborate in detail on the scope of the right of access to information under Article 6(1), first sentence, Aarhus Regulation. It merely states that this provision ‘requires the disclosure of a document where the information requested relates to emissions into the environment, even if there is a risk of undermining the interests protected by Article 4(2), first indent, of Regulation No 1049/2001.’²³ The GC further finds that this applies even in the light of an interpretation that is consistent or in conformity with the fundamental rights enshrined in Article 16 and 17 of the Charter of Fundamental Rights of the European Union, with Article 39(2) and (3) of the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)²⁴ and with the sector-specific provisions of the plant protection products legislation set forth in Council Directive 91/414²⁵ and Regulation (EC) No

1107/2009²⁶ (PPP Regulation), in particular Article 63 PPP Regulation concerning confidentiality of information submitted by operators.²⁷

b. The Concept of the Emissions Rule

As regards the concept of the Emissions Rule, the GC largely reiterates the CJEU’s findings in the Judgment on Appeal.²⁸ The GC notes that its own interpretation in the Initial Judgment has been confirmed by the CJEU insofar as it has been confirmed that the Emissions Rule may not be interpreted restrictively²⁹ and that the concept of the Emissions Rule is not limited to information concerning emissions emanating from certain industrial installations.³⁰ Further, the General Court points out that according to the CJEU’s findings the Emissions Rule cannot be limited to information concerning emissions actually released into the environment when a plant protection product or active substance in question is used on plants or soil. It also covers information on foreseeable emissions from the plant protection product or active substance under normal or realistic conditions of use, namely the conditions under which the authorization to place the product or substance on the market was granted and which prevail in the area of its application.³¹ In this regard, the GC also refers to the CJEU’s findings on the purpose of the Aarhus regime and in particular the Emissions Rule, namely to allow the public to know what is actually or foreseeably released into the environment under normal or realistic conditions and to check whether the assessment made by the competent authorities in regulatory authorization procedures is correct.³² However, the GC acknowledges that it is not sufficient for information to just have a direct or indirect link to emissions. The Court points out that this would deprive the general requirement to balance the interests in confidential treatment and in disclosure of any practical effect, and would constitute a disproportionate interference with the protection of business secrecy ensured by Art 339 TFEU.³³

c. Application of the Concept of the Emissions Rule to the Document at Issue

Before examining the application of the concept of the Emissions Rule, the General Court first identifies which elements of information in the draft re-

²³ *ibid* para 49.

²⁴ Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 [1994] OJ L336/214, forming Annex 1C of the Agreement Establishing the World Trade Organization (WTO) signed in Marrakesh, Morocco on 15 April 1994 [1994] OJ L336/3.

²⁵ Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market [1991] OJ L 230/1.

²⁶ Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414 EEC [2009] OJ L 309/1.

²⁷ To that effect, the CG refers in its Judgment after Referral (n 14) to its findings in the Initial Judgment, Case T-545/11, *Stichting Greenpeace Nederland and PAN Europe v Commission*, (n 8), paras 27-46, and, by analogy, to Case C-422/14, *Bayer Crop Science and Stichting De Bijenstichting* [2016] ECLI:EU:C:2016:890, paras 96-102.

²⁸ Judgment after Referral (n 14), paras 52-58.

²⁹ Judgment on Appeal (n 10), paras 51-55.

³⁰ *ibid* para 70, rejecting the Commission’s argument that reference should be made to the definition of the term emissions as provided for in the Implementation Guide to the Aarhus Convention, published by the United National Economic Commission for Europe (UNECE) in 2000.

³¹ *ibid* para 74.

³² *ibid* paras 79-80.

³³ Judgment after Referral (n 14), para 58, with reference to the Judgment on Appeal (n 10), para 81.

port remained at issue in the proceedings, namely the purity of the active substance glyphosate, its impurity profile and the analytical profile of the batches tested, as well as the complete composition of the plant protection products. The GC then elaborates on the relevant provisions of the PPP Regulation.³⁴ It points out that under the regime of the PPP Regulation, an active substance such as glyphosate must first be approved at EU level before being included in plant protection products which are then subject to authorizations granted by the Member States. The Court highlights that ‘there is still, in principle, no link between the assessment and approval of the active substance ‘glyphosate’ at EU level and the actual subsequent use that will be made of that substance. Approval of the active substance ‘glyphosate’ does not in any way include authorization for the isolated use of that substance. Use will be made of that substance only once it is included in a plant protection product authorised for placement on the market by a Member State. Therefore, while it is true that an active substance such as glyphosate is inevitably released into the environment at some stage of its life cycle, that is the case only via a plant protection product subject to the authorisation procedure.’³⁵

In the light of this, the GC recognizes that ‘the plant protection product for which authorisation is requested from a Member State may differ in several respects from the product presented and evaluated at EU level for the purposes of approving the active substance’.³⁶ It concludes that the assessment of the representative use of a plant protection product in the active substance approval procedure at EU level is not more than just a theoretical assessment. The Court further acknowledges that plant protection products can be formulated and applied in many ways and that also for the production of the active substances contained therein, different manufacturing processes may be used even by the same undertaking, leading to differences in the specifications of those active substances.³⁷ This is, as the GC points out, the reason why in the authorisation procedure for plant protection products a Member State has to examine whether the active substance in the product is manufactured by a different source, or by the same source with a change in the manufacturing process or location, and if that is the case, whether the specification of the active substance is equivalent to that assessed at EU level, as established by of-

ficial or officially recognized tests and analyses.³⁸ The GC therefore concludes ‘that it is only at the stage of the national authorisation procedure to place a specific plant protection product on the market that the Member State assesses any emissions into the environment and that specific information emerges concerning the nature, composition, quantity, date and place of the actual or foreseeable emissions, under such conditions, from the active substance and the specific plant protection product containing it’.³⁹

Accordingly, the GC finds that the information in the draft assessment report at issue which had been drawn up at the stage of the approval procedure at EU level does not relate to emissions whose release into the environment is foreseeable, and that it is excluded from the concept of the Emissions Rule.⁴⁰ The Court adds that this conclusion cannot be called into question by claiming that access to the information in the draft assessment report for the active substance approval was essential, because no reassessment of the active substance would be made by a Member State in the authorisation procedure for a plant protection product.

The GC follows the argument brought by the Commission, supported by intervening industry associations, that during the product authorisation procedure the plant protection product as a whole, with all its components, is analysed and subsequently only authorised if it can be concluded from the tests and analyses that the authorisation requirements of the PPP Regulation are met and that the product has no harmful health effect or unacceptable effect on the environment.⁴¹

As, in any event, the active substance glyphosate is not intended for release into the environment as such, but only once integrated in a plant protection product after authorisation of the same, the GC establishes that the information in the draft assessment report for glyphosate does not fall within the

³⁴ Judgment after Referral (n 14), para 72.

³⁵ *ibid* para 82.

³⁶ *ibid* para 83.

³⁷ *ibid* para 85.

³⁸ *ibid* paras 86-87, and referring to art 29(1)b) and 29(3) PPP Regulation.

³⁹ *ibid* para 88.

⁴⁰ *ibid* paras 89-90.

⁴¹ *ibid* para 92.

scope of the Emissions Rule and rejects the second plea.

3. Third plea: Alleged breach of Article 4(2) Transparency Regulation and Article 4 Aarhus Convention

Like for the first plea, the General Court did not elaborate on the third plea in its Initial Judgment because it had found that the second plea was already sufficient to annul the contested Commission decision. It hence deals with the NGOs' third plea for the first time.

That plea essentially concerns the alleged failure of the Commission to balance the opposing interests in a fair and correct manner. The requirement to balance the protection of commercial interests against the public interest in disclosure is laid down in the provisions of the general Transparency Regulation, namely in Article 4(2) first indent Transparency Regulation. Further, Article 4(4)(d) Aarhus Convention states that the exception to disclosure of environmental information for reasons of confidentiality of commercial and industrial information shall only apply where such confidentiality is protected by law in order to protect a legitimate economic interest, and be interpreted restrictively.

As regards the application of provisions of international treaties like the Aarhus Convention, the General Court reiterates case-law that even if a provision of an international agreement does not have direct effect, this does not preclude it being relied upon for the purposes of an interpretation of secondary law in conformity with and in the light of that provision.⁴² However, the GC points out that the commercial interests of seeking an active substance approval

are protected by the provisions of the plant protection legislation,⁴³ and that case-law of the Courts of the Union has already recognized that the exceptions to the right of access to information must be interpreted strictly.⁴⁴

In the General Court's view, the Commission presented in detail in the contested decision the information which needs to be protected and the reasons why. The GC highlights that the Commission precisely examined the particular risk of undermining the commercial interests of the operators seeking the active substance approval, namely the risk of considerable losses in market shares, should details of their production methods and the technical specifications of glyphosate be copied by their competitors, including information on non-relevant impurities of an active substance that makes it possible to reconstitute the manufacturing process.⁴⁵ The GC further notes that the Commission sufficiently took into consideration the public interest in disclosure since the NGOs were given access to the other parts of the draft assessment report that did not contain that commercially sensitive information and that still allowed them, together with the publicly available information on glyphosate, to know the potential effects of releasing glyphosate into the environment.

The GC concludes that the Commission correctly weighted up the commercial interests of the producers of glyphosate jeopardized by the disclosure of the information at issue and the public interest in disclosure. Hence, also the third plea is rejected and the action dismissed in its entirety.

4. Costs

In the Judgment on Appeal, the CJEU reserved the costs and the General Court therefore had to decide on all the costs relating to various proceedings. As the NGOs have been unsuccessful, the General Court orders them to pay the costs of the Commission and of the industry associations that supported the Commission. Sweden and Germany, as intervening Member States, are to bear their own costs.⁴⁶

IV. Conclusion

The General Court's Judgment after Referral constitutes a very clear reverse of its Initial Judgment. It

⁴² *ibid* para 106, with reference to Case C-240/09, *Lesoochránárske zoskupenie* [2011] ECLI:EU:C:2011:125, para 51.

⁴³ More precisely, the GC refers to art 14 Directive 91/414, (n 25), replaced by art 63(2) PPP Regulation as from 14 June 2011. In para 108 of the Judgment after Referral (n 14), the GC also provides a short clarification regarding the distinction between the data protection provisions of art 13 Directive 91/414, (n 25), and art 59 PPP Regulation on the one hand, and art 14 Directive 91/414 and art 63(2) PPP Regulation on the other hand.

⁴⁴ In paras 97 and 107 of the Judgment after Referral (n 14), the GC refers in particular to Case C-506/08 P, *Sweden v MyTravel and Commission* [2011] ECLI:EU:C:2011:496, para 75.

⁴⁵ Judgment after Referral (n 14), paras 111-112.

⁴⁶ *ibid* paras 118-119.

provides certain clarification on the scope and application of the Emissions Rule that was established under the regime of the Aarhus Convention and its implementing legislation.

Industry engaged in plant protection research and development welcomes the Court's unambiguous conclusion that the information contained in the documents set up in the approval procedure for an active substance do not fall within the scope of the Emissions Rule.⁴⁷ Indeed, this information does not meet the requirements for the application of the Emissions Rule defined by the CJEU in its Judgment on Appeal, as it relates neither to actual nor to foreseeable releases into the environment under normal or realistic conditions of use. The General Court correctly emphasizes that the EU authorisation procedure for plant protection products is split into two stages – the active substance approval at EU level and the subsequent grant of plant protection product authorizations at Member State level.

An active substance developed for use in plant protection products is not intended to be released into the environment as such. Intended use of such active substance will only be made at a later stage, namely after it has been included in a plant protection product authorized for being placed on the market. Following this, all information contained in the documents set up at the stage of the EU approval procedure of a new active substance does not fall within the scope of the Emissions Rule (such as the applicant's dossier and the assessment by the competent authorities). This also includes the information on the representative use(s) of a plant protection product containing such active substance.

At that stage of the process, this is only a 'suggested' use, as the GC underlines.⁴⁸ The formulated product for which operators might seek authorisation for application on or in plants or soil may still differ in many ways from that product, for example due to a change of the identity of the producer, of the manufacturing process or of the manufacturing location. Consequently, for information contained in the documents set up in the approval procedure for a new active substance, an overriding public interest in disclosure is not inevitably deemed to exist and the interests in disclosure and in confidential treatment need to be weighed.

In the case at issue, the confidential information was limited to very specific items like the complete impurity profile of the active substance, the analyti-

cal profile of the batches tested and the complete composition of the plant protection product. The Commission is held to have sufficiently considered the interests involved. In this regard, it is essential that the risk of a reconstitution of the manufacturing process of each product by competitors getting access to that information is expressly acknowledged by the GC (so-called reverse engineering). The information on the complete impurity profile thus continues to benefit from protection against disclosure, in line with the sector-specific confidentiality rules of Article 63(2) PPP Regulation. The Court does not base its findings on said Article 63(2), but the conclusion eventually is the same. Hence, the necessary consistency of the EU legal framework is maintained. Further, it is clear now that confidentiality can be upheld even if the information has been – like in the case of Glyphosate – already submitted 20 years ago. To conclude, this means that core confidential business information generated by industry for the development and approval of active substances remains protected in a sustainable manner.

This is also very relevant for the assessment whether this information can still benefit from confidential treatment after the potential adoption of the proposed revision of the General Food Law Regulation (EC) No 178/2002⁴⁹ and the sectorial legislative acts covering the food chain.⁵⁰ Applicants claiming confidential treatment of the complete impurity profile may rely on the findings in the Judgment after Referral.

It has already been highlighted that the case concerns information provided in the active substance approval procedure. By contrast and depending on

47 See Volker Kaus, 'Was lange währt wird endlich gut? – Das (erneute) Glyphosaturteil des EuG über den Zugang zu Genehmigungsunterlagen' (2019) 1 *StoffR*.

48 See the Judgment after Referral (n 14), paras 78 and 89.

49 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Agency and laying down procedures in matters of food safety [2002] OJ L31/1.

50 Proposal for a Regulation of the European Parliament and of the Council on the transparency and sustainability of the EU risk assessment in the food chain amending Regulation (EC) No 178/2002, Directive 2001/18/EC, Regulation (EC) No 1829/2003, Regulation (EC) No 1831/2003, Regulation (EC) No 2065/2003, Regulation (EC) No 1935/2004, Regulation (EC) No 1331/2008, Regulation (EC) No 1107/2009 and Regulation (EC) No 2015/2283, COM (2018) 179; more information can be found under https://ec.europa.eu/food/safety/general_food_law/transparency-and-sustainability-eu-risk-assessment-food-chain_en accessed 14 February 2019.

the specific case, information emerging in the national authorisation procedure may qualify for information on emissions into the environment. In that regard, the CJEU already provided certain clarification in connection with an access request for documents at the stage of an amendment procedure for national authorizations of plant protection products containing the active substance imidacloprid.⁵¹ The CJEU found that (semi)field and laboratory studies measuring the effects of the products in the environment, in particular information on residues and drift after the use of plant protection products, fall within the scope of the Emissions Rule.⁵² However, this does not mean that information contained in the documents set up at the stage of the EU approval for a new active substance would not change its nature and become information relating to emissions into the environment as soon as the regulatory process reaches the stage of the national product authorization procedure. The active substance is still not intended to be released as such into the environment. Further, as the GC also highlights, the conditions of use and the composition of the plant protection product for which an authorisation might be applied for, may continue to be very different from those evaluated during the approval procedure for the new active substance. Nevertheless, it can be expected that the discussion on the application of the Emissions Rule will now continue at Member State product authorization level.

This does, however, not mean that all information at that stage of the process will necessarily fall within the scope of the Emissions Rule. Since the Judgment on Appeal was released, it is clear that it is not sufficient for information to just have a direct or indirect link to emissions, as this would dilute the difference between environmental information and information covered by the Emissions Rule, and would furthermore constitute a disproportionate interference with the obligation according to Art. 339 TFEU to protect business secrecy. The GC's explicit reference to the protection of business secrecy in this context can be interpreted in such way as to imply, depending on the case, certain limitations to the scope of the Emissions Rule. Consequently, the Emissions Rule would still constitute legal presumption, but not an irrebuttable one. The language used in Article 6(1), first sentence Aarhus Regulation ('shall be deemed to exist') can be interpreted in that direction. Following this, information in dossiers for end-use plant protection products such as the complete product composition may still qualify for protection from disclosure if access to that information would enable competitors to reconstitute the manufacturing and formulation process of the product.

Even though the case concerns the plant protection sector, it is also indicative for other areas of chemical law. The decisive criterion will be whether the requested information concerns a substance at a stage where its release into the environment under normal or realistic conditions of use is at least foreseeable, or whether it is as such still too far away from any foreseeable use. The latter should apply to almost all information submitted under REACH.

51 Case C-442/14, *BayerCrop Science and Stichting De Bijenstichting* (n 27).

52 *ibid* para 96.