I — Introduction


II — Legislative framework

A — International law

2. The right of access to environmental information is established in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'), which was signed by the Community on 25 June 1998 in Aarhus (Denmark).

3. Article 4(4)(d) of the Convention governs the refusal to disclose environmental information on grounds of industrial and commercial confidentiality:

‘A request for environmental information may be refused if the disclosure would adversely affect

...
(d) the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

...’

4. The protection of commercial confidentiality is also the subject of Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C of the Agreement Establishing the World Trade Organisation (WTO), which was signed in Marrakech on 15 April 1994 and was approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (‘the TRIPS Agreement’): 6

1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices... so long as such information:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products

which utilise new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.’

6. The definitions contained in Article 2 include environmental information:

‘For the purposes of this Directive:

1. “Environmental information” shall mean any information in written, visual, aural, electronic or any other material form on:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the...
environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

7. The right of access to environmental information is laid down in Article 3(1):

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

8. Exceptions are laid down in Article 4. In the present case, Article 4(2)(d), (e) and (g) are of particular interest:

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

(d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;
(e) intellectual property rights; and control of plant protection products and the placing on the market and control of their active substances. In particular, plant protection products require authorisation by the Member States. Such authorisation is subject to an impact study.

(g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.

10. Article 14 governs the protection of information submitted in the authorisation procedure:

‘Member States and the Commission shall, without prejudice to Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, ensure that information submitted by applicants involving industrial and commercial secrets is treated as confidential if the applicant wishing to have an active substance included in Annex I or the applicant for authorisation of a plant protection product so requests, and if the Member State or the Commission accepts that the applicant’s request is warranted.

Confidentiality shall not apply to:

2. The Plant Protection Directive

9. The Plant Protection Directive regulates the authorisation, placing on the market, use — the names and content of the active substance or substances and the name of the plant protection product,
— the name of other substances which are regarded as dangerous under Directives 67/548/EEC and 78/631/EEC,
— decontamination procedures to be followed in the case of accidental spillage or leakage,

— physico-chemical data concerning the active substance and plant protection product,
— first aid and medical treatment to be given in the case of injury to persons.

— any ways of rendering the active substance or plant protection product harmless,

— a summary of the results of the tests to establish the substance’s or product’s efficacy and harmlessness to humans, animals, plants and the environment,

— recommended methods and precautions to reduce handling, storage, transport, fire or other hazards,

— methods of analysis referred to in Articles 4(1)(c) and (d) and 5(1),

— methods of disposal of the product and of its packaging,

If the applicant subsequently discloses previously confidential information, he shall be required to inform the competent authority accordingly.

11. The active substance propamocarb has been authorised as a fungicide in the Union since 1 October 2007.\(^8\) The reference for a preliminary ruling concerns measures based on the previously applicable Netherlands national authorisation.

3. The directive on the fixing of maximum residue levels

12. Furthermore, Council Directive 90/642/EEC of 27 November 1990 on the fixing of maximum levels for pesticide residues in and on certain products of plant origin,

including fruit and vegetables is relevant to the present case. Under Article 5b(2), the Member States establish their own maximum residue levels in cases where no Union-wide levels have been established.

13. The twelfth recital in the preamble to that directive states:

‘Whereas, moreover, observance of the maximum levels will ensure that products can move freely and that the health of consumers and of animals is properly protected.’

C — Netherlands law

14. The Netherlands has implemented the Environmental Information Directive, but those provisions were not applicable in the main proceedings. Instead, the contested decision was based on Article 22(2) of the Netherlands Law on pesticides:

‘If a document submitted, in accordance with provisions of this law or provisions enacted under this law to Our Minister concerned or to the College or to another person or institution contains information, or if information can be deduced from such a document, whose confidentiality is justified from the point of view of commercial secrets, Our Minister concerned or the College shall decide, on written request to that end from the person who submitted the document, that the information shall be treated confidentially. Such a request must be provided with reasons.’

III — Main proceedings and questions referred for a preliminary ruling

15. In 1999 the competent Netherlands authorities amended the maximum permissible residue level for the active substance propamocarb on or in lettuce. That level was set at 15 mg/kg. This figure was fixed following a request for extension of the authorisation for the product ‘Previcur N’. Bayer CropScience B.V. (‘Bayer’) is the legal successor to the holder of that authorisation.

16. By letter of 31 January 2005, the appellants in the main proceedings, Stichting Natuur en Milieu, Vereniging Milieudefensie and Vereniging Goede Waar & Co., requested the respondent, the College voor de toelating van bestrijdingsmiddelen (Plant Protection Products and Biocides Approval Board, ‘the College’), to disclose to them all the information on which the decision-making relating to
the fixing of the aforementioned maximum residue level was based.

17. On the basis of Article 22 of the Netherlands Law on pesticides, the College refused the appellants’ request by decision of 8 March 2005. It stated that that provision takes precedence over the rules on access to environmental information.

18. By letter of 14 April 2005, the appellants lodged an objection to that decision. After the College had given Bayer an opportunity to comment, on 22 June 2007 it took the decision contested in the main proceedings, which was corrected on 17 July 2007.

19. By that decision, the College refused access to studies on residues and reports on field trials which had been submitted in the procedure to fix the maximum residue level and, in the view of Bayer, contained commercial secrets.

20. On 6 August 2007, the appellants lodged an appeal against that decision at the referring court.

21. In those proceedings, the College van beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) referred the following questions to the Court:

‘1. Must the term “environmental information” in Article 2 of the Environmental Information Directive be interpreted as meaning that it includes information submitted within the framework of a national procedure for the authorisation, or the extension of the authorisation, of a plant protection product with a view to setting the maximum quantity of a pesticide, a component thereof or reaction products which may be present in food or beverages?

2. If Question 1 is answered in the affirmative, what is the relationship between Article 14 of the Plant Protection Directive and the Environmental Information Directive in so far as it is relevant to application to information as defined in the previous question, and specifically, is that relationship such that Article 14 of the Plant Protection Directive may be applied only if that does not detract from the obligations laid down in Article 4(2) of the Environmental Information Directive?

3. If it follows from the answers to Questions 1 and 2 above that the defendant is bound in the present case to apply Article 4 of the Environmental Information Directive, does Article 4 of that directive mean that the weighing prescribed in that provision of the general interest served by disclosure against the specific interest...
served by the refusal to disclose should take place at application level or that it may be effected in national legislation?

22. In addition to the appellant in the main proceedings, Stichting Natuur en Milieu, the intervener in the main proceedings, Bayer CropScience B.V., the Hellenic Republic, the Kingdom of the Netherlands and the European Commission took part in the written procedure. At the hearing on 9 September 2010, Vereniging Milieudefensie, Bayer, the Netherlands, Greece and the Commission presented oral argument.

IV — Legal assessment

A — The applicability ratione temporis of the new Environmental Information Directive

23. It must be clarified, first of all, whether the new or the old Environmental Information Directive is applicable. I will therefore begin by discussing the general principles relating to the applicability ratione temporis of European Union legislation (see section 1) and then examine the reference in Article 14 of the Plant Protection Directive to the old

1. The general principles relating to applicability ratione temporis

24. The referring court raises the question whether the new Environmental Information Directive may be applied to information which, as in the present case, had been submitted to the competent authorities before the expiry of the implementation period.

25. According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force. As a general rule, the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication. Further, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community law must

be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them.  

However, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule. The principle of legitimate expectations cannot be extended to the point of altogether preventing a new rule from applying to the future effects of situations which arose under the earlier rule.

Access to information received by an authority in the past, in accordance with the Environmental Information Directive, is not a matter of procedural law, but falls under substantive law. Information requirements under procedural law serve a different aim, for example to enable a consultation on a detrimental measure, whilst the right of access to environmental information is formally granted irrespective of any other purpose. A retroactive application of the Environmental Information Directive is therefore ruled out in principle.

26. However, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule. The principle of legitimate expectations cannot be extended to the point of altogether preventing a new rule from applying to the future effects of situations which arose under the earlier rule.

28. The decision on access to information which has previously been obtained by an authority is a matter of the future effect of a situation which arose previously. Only when the decision on the request for access is taken does the question actually arise whether the information should be disclosed.

27. Access to information received by an authority in the past, in accordance with the Environmental Information Directive, is not a matter of procedural law, but falls under substantive law. Information requirements under procedural law serve a different aim,

29. This particular time-dependence of the right of access is expressly laid down in the first sentence of Article 4(7) of Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents. Under that provision, exceptions to the right of access only apply for the period during which protection is justified on the basis of the content of the document. This must follow from the principle, which also applies to the Environmental Information Directive, that access may be refused in principle only if the adverse effects on an interest protected by law outweigh the public

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interest served by disclosure of the information. Both the adverse effects and the public interest may change over time and produce a different result of the balancing exercise.

30. The provisions of the Environmental Information Directive accordingly do not show that the time at which the information has reached the authorities is relevant to the application of the right of access. Article 3(1) extends without distinction to all existing information and there are no special provisions for old information. In so far as, where information was submitted before the entry into force of provisions on access to environmental information, there was a legitimate expectation of permanent confidential treatment, that would have to be taken into account not in determining the application of the Environmental Information Directive but in applying the exceptions.

31. The time when the information in question was received by the competent authorities is therefore irrelevant.  

32. The Commission and the Netherlands nevertheless take the view that the old Environmental Information Directive is applicable in the main proceedings since the first request for access was submitted before the expiry of the implementation period for the new directive.  

33. Sometimes it may actually be necessary to assess a request on the basis of the law which applied at the time it was made or perhaps even to have regard to earlier events. This may follow from the applicable legislation, possibly in conjunction with the above-mentioned principles of legal certainty and the protection of legitimate expectations.  

34. In the case of the Environmental Information Directive, however, the event relevant for the application of the rule is the decision  

15 — The judgments in Joined Cases C-174/98 P and C-189/98 P Netherlands and van der Wal v Commission [2000] ECR I-1 and Case C-139/07 P Commission v Technische Glaswerke Ilmenau [2010] ECR I-1000 also concerned documents which came into the Commission’s possession before the entry into force of the access provisions that were applied.  

16 — The Opinion of Advocate General Sharpston in Case C-552/07 Azelvandre [2009] ECR I-987, point 6 et seq., is also to that effect. The Court left the question open in its judgment, paragraph 52 et seq.  


18 — See Falck and Acciaierie di Bolzano v Commission, cited in footnote 11, paragraph 115 et seq.
on access to the information. This is apparent simply from the fact that the applicant could have submitted a new request at any time after the expiry of the implementation period for the new Environmental Information Directive, without it normally being able to be opposed on the basis of a final decision on an earlier application.

In addition, in the present case the request was received only two weeks before the expiry of the implementation period for the new Environmental Information Directive and the first decision was taken after that period had expired. The final administrative decision, which is contested in the main proceedings, was not even adopted until more than two years later. Against this background, reliance on the stricter old Environmental Information Directive appears almost improper.

Consequently, in accordance with the general principles relating to the applicability ratione temporis of European Union law, the new Environmental Information Directive is applicable in the main proceedings.

2. The applicability of the new Environmental Information Directive in conjunction with Article 14 of the Plant Protection Directive

However, the present case concerns information which was submitted in a procedure for the extension of the authorisation of a plant protection product. Its confidential treatment is the subject of Article 14 of the Plant Protection Directive. That provision expressly applies without prejudice to the old Environmental Information Directive. It must therefore be examined whether that provision refers mandatorily to the old directive (static reference) or whether the new Environmental Information Directive replaced it within the scope of that provision (dynamic reference).

An argument which could be cited against applying the new Environmental Information Directive is that when it adopted the Plant Protection Directive the legislature had in view the provisions of the old Environmental Information Directive. With regard to the protection of commercial and industrial confidentiality, a conflict between the Plant Protection Directive and the old Environmental Information Directive would appear to be largely ruled out because the fourth indent of Article 3(2) of the old directive...
permitted the Member States to refuse access to information where commercial and industrial confidentiality are affected.

39. The new Environmental Information Directive, on the other hand, restricts the protection of commercial and industrial confidentiality. Under Article 4(2)(d), refusal is only possible, firstly, if disclosure of the information would adversely affect the confidentiality of commercial or industrial information protected by law, secondly if the interest in protecting confidentiality outweighs the public interest served by disclosure and, thirdly, if the information does not concern emissions into the environment. It is therefore perfectly conceivable that the new Environmental Information Directive permits access to information which would be treated confidentially under the old directive.

40. Nevertheless, Article 11 of the new Environmental Information Directive repeals the old directive and provides that references to the old directive are to be construed as referring to the new directive. The actual wording of the new Environmental Information Directive therefore precludes the continued application of the old directive in isolation as regards the protection of commercial confidentiality in the field of plant protection.

41. Furthermore, international agreements concluded by the Union prevail over provisions of secondary Community legislation. For that reason, secondary Community legislation is to be interpreted as far as possible consistently with the Union's obligations under international law. However, the provisions of the new Environmental Information Directive on the protection of commercial and industrial confidentiality are consistent with Article 4(4)(d) of the Aarhus Convention, which also applies to plant protection, whilst the provisions of the old Environmental Information Directive would not adequately implement the Convention in this regard.

42. Article 14 of the Plant Protection Directive is therefore to be construed as applying without prejudice to the new Environmental Information Directive, and the reference for a preliminary ruling must be assessed having regard to the new Environmental Information Directive.

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B — The first question

43. The first question is intended to clarify whether information submitted within the framework of a national procedure for the extension of the authorisation of a plant protection product with a view to fixing the maximum quantity of a pesticide which may be present in food or beverages constitutes environmental information.

44. The Court has held, even with regard to the old Environmental Information Directive, that the legislature’s intention was to make the concept of ‘information relating to the environment’ a broad one, and it avoided giving that concept a definition which could have had the effect of excluding from the scope of that directive any of the activities engaged in by the public authorities. The new Environmental Information Directive contains a definition which is wider and more detailed. Neither the old nor the new Environmental Information Directive is intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with an environmental factor. To be covered by the right of access, such information must fall within one or more of the categories set out in the directive. It must therefore be examined whether the contested information can be classified in one of those categories.

45. According to the referring court, the contested studies include, on the one hand, the determination of the acceptable quantity of propamocarb which may be present (at most) on and in lettuces from the viewpoint of good agricultural practice and public health and, on the other, the conclusion that the product Previcur N satisfies that standard when used in accordance with the legislation on use and the statutory directions for use.

46. Bayer argues that the studies and reports largely contain information on field trials with the plant protection product and a statistical evaluation. Those documents therefore show only the quantities of the product which remain on the plants when properly used. On the other hand, the effects of the product as well as potential health risks of the active substance are examined in other studies.


23 — Glawischnig, cited in footnote 22, paragraph 5.

24 — See Glawischnig, cited in footnote 22, paragraph 25.
I.

1. Article 2(1)(f) of the Environmental Information Directive — Health-related information

47. Because the information in question is used to fix a maximum residue level, which is (also) intended to protect human health, the parties argue above all whether the information is health-related environmental information which is covered by Article 2(1)(f) of the Environmental Information Directive. Under that provision, environmental information means any information on the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in Article 2(1)(a) or, through those elements, by any of the matters referred to in (b) and (c).

48. This definition is very broad as regards the relevant aspects of human life. However, it only covers information on effects caused by elements of the environment, environmental factors or environment-related measures and activities. The aim is to prevent a large amount of non-environmental information being covered.25

2. Article 2(1)(a) of the Environmental Information Directive — State of the elements of the environment

49. Information on residues from a plant protection product on foodstuffs evidently relates to the contamination of the food chain and thus also to human health and safety. However, Bayer and the Netherlands dispute that the contested information relates to the transmission of effects through elements of the environment. It is therefore reasonable, before taking a final decision on the application of Article 2(1)(f) of the Environmental Information Directive, first to examine letters (a), (b) and (c) of that provision.

50. Under Article 2(1)(a) of the Environmental Information Directive, environmental information means any information on the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands,

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51. The contested information relates to the state of treated lettuces, namely the residues remaining on those plants from a pesticide where it is properly used. If those plants constitute elements of the environment, the information is environmental information.

52. The list of elements of the environment is not exhaustive, but only illustrative. Conceptually, everything occurring in the environment could be regarded as an element of the environment. The lettuces treated with plant protection products would therefore also be elements of the environment.

53. However, the elements of the environment listed do not describe individual objects or specimens, but rather abstract environmental matrices: air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components. They are structural features of the environment or certain environmental areas.

54. Lettuces as such do not appear on that list, but come under the generic heading of agricultural crops. They are a feature of substantial areas of our environment and should therefore be recognised as an element of the environment. Information on treated lettuces would then concern the state of a part of that element of the environment.

55. It could be argued, however, that agricultural crops are not part of the natural environment, but belong to a production process created by humans. They do not therefore form part of the natural environment, but are to be classified as part of the human environment.

56. An indication that the notion of environment in European Union law includes only natural or semi-natural elements is the expression ‘natural sites’ which is mentioned as one of the elements of the environment in Article 2(1)(a) of the Environmental Information Directive, as well as in various other measures. In particular, Article 2(12) of the

Plant Protection Directive does not extend the concept of the environment to agricultural crops but restricts it to wild species of flora and fauna. Correspondingly, only wild animals and plants are specially protected by Union environmental law, whilst agricultural crops come under agricultural law.

57. However, the notion of environment in Union law is not always restricted to the natural environment. For example, the assessment of environment effects includes the effects on population and material assets, including the architectural and archaeological heritage. The Water Framework Directive also provides for environmental quality standards for artificial bodies of water. And finally, as the Commission submits, the old Environmental Information Directive regarded information on the state of fauna and flora as environmental information, regardless of whether this concerned the natural fauna and flora environment.

58. Thus any restriction of the concept of the environment to the natural environment is not an expression of a general principle but follows from the specific normative purpose of the definition. The Environmental Information Directive contains no indication of such a restricted purpose. On the contrary, it may be presumed that the new directive was not intended to restrict the concept of environmental information as against the old directive. The mention of natural sites in the merely illustrative list of elements of the environment should not therefore be given a strict interpretation. Indeed, the other examples are not qualified by the term ‘natural’.

59. It would also not really make sense in practice to draw a distinction between the natural and artificial environment, since there are hardly any areas left in Europe which are not, to a greater or lesser extent, influenced by humans. Thus, information on commercial forests, for example on forest die-back,

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30 — See Glawischnig, cited in footnote 22, paragraph 5.
would not constitute environmental information according to this logic.

60. As far as agricultural crops are concerned, they should be classified as part of the environment at least where they interact with the natural elements of the environment. This is the case with the outdoor cultivation of lettuces, since they come into contact with the soil and wild animals in particular, but may also affect waters, especially ground water.

61. The contested information on residues on lettuces is therefore environmental information in the form of information on elements of the environment in accordance with Article 2(1)(a) of the Environmental Information Directive.

62. Consideration must also be given to Article 2(1)(b) of the Environmental Information Directive. This category covers information on factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a).

63. Stichting Natuur en Milieu and, it would appear, the Commission argue that the studies and reports contained information on factors affecting or likely to affect elements of the environment.

64. This is correct, since the active substance propamocarb and the plant protection product Previcur N are substances which, when released in accordance with the instructions, affect elements of the environment. Those effects relate not only to the lettuces treated, but also to other elements of the environment, in particular plants, animals and fungi, but also water, the soil and the ambient air.

65. Even if, contrary to my view, agricultural crops were not regarded as elements of the environment, the information would still be information on environmental factors. Information on residues on lettuces is also information on releases affecting the elements of the environment. The residues themselves
may affect elements of the environment if, for example, they are absorbed by wild animals.

66. The contested information on the treatment of lettuces is therefore also environmental information in the form of information on environmental factors within the meaning of Article 2(1)(b) of the Environmental Information Directive.

4. Article 2(1)(c) of the Environmental Information Directive — Information on administrative measures

67. The information could also be environmental information within the meaning of Article 2(1)(c) of the Environmental Information Directive. This category covers information on measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in Article 2(1)(a) and (b), as well as measures or activities designed to protect those elements.

68. However, information on administrative measures which are not intended to protect the environment is not environmental information. There could be doubts as to the existence of environmental information within the meaning of Article 2(1)(c) of the Environmental Information Directive because the studies and reports were used to fix a maximum residue level. Bayer and the Netherlands claim that this primarily serves consumer protection and the marketability of the goods in question, and not, first and foremost, environmental protection. This view is confirmed by the twelfth recital in the preamble to Directive 90/642 and recital 2 in the preamble to Regulation No 396/2005, which is not applicable ratione temporis.

69. However, Greece rightly pointed out in the written procedure that, according to the order for reference, the information in question was submitted in the procedure for the extension of the authorisation of a plant protection product. In addition, the Commission points out that such studies must be submitted in the authorisation procedure in accordance with Article 13(1)(b) and Annex II, part A, point 6.3 of the Plant Protection Directive. It must therefore be assumed that the studies and reports are not only important for the fixing of the maximum residue level, but also form part of the basis for any authorisation.

31 — Glawischnig, cited in footnote 22, paragraph 29 et seq.
The decision on the authorisation of plant protection products is an administrative measure within the meaning of Article 2(1)(c) of the Environmental Information Directive which may affect the state of the elements of the environment.

5. Conclusion

72. On the basis of the considerations put forward on Article 2(1)(a), (b) and (c) of the Environmental Information Directive, the contested studies and reports are also environmental information in the form of information on the contamination of the food chain within the meaning of Article 2(1)(f) of the Environmental Information Directive.

73. In summary, the term ‘environmental information’ in Article 2 of the Environmental Information Directive must be interpreted as meaning that it includes information submitted within the framework of a national procedure for the authorisation, or the extension of the authorisation, of a plant protection product with a view to fixing the maximum quantity of a pesticide, a component thereof or reaction products which may be present in food or beverages.

70. In order to be able fully to assess this measure, it is reasonable in principle to regard all information relating to the procedure as environmental information. In practice, it would often be possible to assess whether the information in question is important in terms of the environment only on the basis of the relevant context. The studies contested in the present case might, for example, provide clarification on whether or under what conditions especially high residue levels which may be important not only for consumer protection but also for the environment may be present on the crops when the product is used.

71. Information which is submitted in the authorisation procedure is therefore information on that administrative measure, that is to say also environmental information within the meaning of Article 2(1)(c) of the Environmental Information Directive.  

33 See Mecklenburg, cited in footnote 22, paragraph 21.


74. By the second question, the referring court seeks to ascertain what is the relationship between the Environmental Information Directive and Article 14 of the Plant
STICHTING NATUUR EN MILIEU AND OTHERS

Protection Directive and specifically whether Article 14 of the Plant Protection Directive may be applied only if such application does not detract from the obligations laid down in Article 4(2) of the Environmental Information Directive.

75. Although the fixing of maximum residue levels is subject to specific rules of European Union law — at the time of the Netherlands decision on propamocarb Article 5b(2) of Directive 90/642 — which do not make any provision regarding the treatment of industrial and commercial secrets, Article 14 of the Plant Protection Directive is applicable in principle because the contested information was submitted within the framework of a procedure for the authorisation of a plant protection product.


76. Because Article 14 of the Plant Protection Directive applies without prejudice to the Environmental Information Directive, a request for environmental information which was submitted in a procedure for the authorisation of plant protection products must in principle be assessed on the basis of the Environmental Information Directive. If they wish to refuse access to environmental information, the competent authorities must therefore examine, first of all, in particular whether disclosure of the information would adversely affect the confidentiality of commercial or industrial information protected by law and whether the information concerns emissions into the environment and, if necessary, conclude by weighing the public interest served by disclosure against the interest in refusing disclosure.

77. The legal protection of commercial and industrial secrets has already been recognised as a general principle in competition law and in public procurement, and even as part of the fundamental right to respect for private life; it is also an international-law obligation


36 — Varec, cited in footnote 10, paragraph 48.
entered into by the Union under Article 39 of the TRIPS Agreement and, in the present case, also follows from the Plant Protection Directive and from Netherlands law.

78. Article 14 of the Plant Protection Directive is helpful in identifying the confidential information to be protected. First, that provision mentions a variety of information which is not covered by industrial and commercial confidentiality. The present case is not concerned by this, however. Secondly, Article 14 of the Plant Protection Directive provides for a procedure in which the competent authorities, together with affected undertakings, determine what information that has been submitted contains industrial and commercial secrets. Confidential treatment requires a request which the authorities must have accepted as warranted.

80. I am not entirely convinced by this view. There is much to suggest that the assessment whether commercial and industrial secrets deserve protection should be based on Article 14 of the Plant Protection Directive, but this cannot preclude the application of the additional elements of the Environmental Information Directive. Specifically:

79. Bayer and the Netherlands take the view that the decision by the competent authorities on the recognition of secrets provided for in Article 14 of the Plant Protection Directive must have an effect on the decision on a request for access under the Environmental Information Directive. Bayer argues in this connection that the authorities would weigh the interests sufficiently when the undertaking makes the request. This effectively means that the protection of commercial and industrial confidentiality would have to be assessed solely on the basis of Article 14 of the Plant Protection Directive.

81. Where the procedure laid down in Article 14 of the Plant Protection Directive is properly implemented, it must be assumed in principle that the information whose disclosure would adversely affect confidentiality of commercial and industrial information is identified. The protection of those interests as a fundamental right must be taken into account in particular, but so must the permitted restriction of that right on the basis of other

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superior interests, especially by the provisions on access to environmental information.

82. A proper decision under Article 14 of the Plant Protection Directive accordingly requires not only the wording of that provision to be taken into consideration, but also the requirements of the Environmental Information Directive. Thus, the fourth sentence of Article 4(2) of the Environmental Information Directive prohibits information on emissions into the environment being classified as commercial or industrial secrets to be treated confidentially. The competent authorities may not therefore accept a request for the confidential treatment of such information.

83. However, even on a proper application of Article 14 of the Plant Protection Directive it cannot be ruled out that the information no longer deserves protection when the decision on a request for access is taken. In that case, confidentiality would no longer be justified and the decision under Article 14 of the Plant Protection Directive could no longer be imposed on the applicant.

84. It could also be possible that the request for access to environmental information relates to additional public interests in the disclosure of information which the competent authority did not take into consideration in the original decision on the protection of confidentiality. The decision under Article 14 of the Plant Protection Directive would then not have definitively balanced the protection of confidentiality against the public interest served by disclosure. Rather, the balancing would have to be carried out again.

85. A properly taken decision under Article 14 of the Plant Protection Directive on the protection of confidential commercial and industrial information is therefore relevant to the decision on the disclosure of environmental information pursuant to Article 4(2)(d) of the Environmental Information Directive (only) subject to possible new developments and additional information on the public interest served by disclosure.

2. Information on emissions into the environment

86. Under the fourth sentence of Article 4(2) of the Environmental Information Directive, the disclosure of environmental information may not be refused on grounds of the confidentiality of commercial or industrial

38 — See above, point 27 et seq.
information where the request relates to information on emissions into the environment. Whilst the order for reference does not include a question on the definition of such information, this is manifestly of central importance to the main proceedings and is therefore also addressed by the parties. 

87. The Implementation Guide for the Aarhus Convention\textsuperscript{39} refers, as regards the notion of emissions, to the definition contained in the IPPC directive.\textsuperscript{40} Under Article 2(5) of that directive, emission means the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land. The Netherlands and the Commission therefore suggest restricting the notion of emissions to emissions from installations in accordance with the IPPC directive, with the result that the release of plant production products in the context of farming would not be emissions.

88. In principle, the Implementation Guide is a suitable aid for interpreting imprecise legal concepts in the Environmental Information Directive.\textsuperscript{41} It cannot give a binding interpretation of the Aarhus Convention, but it was at least drafted with the knowledge and support of the parties to the Convention.\textsuperscript{42} It must also be assumed that the legislature was aware of the Guide when it adopted the Environmental Information Directive.

89. It is doubtful, however, whether by reference to the IPPC directive the Guide intended to restrict the definition of emissions to installations. The notion of installation is used in that definition of emissions only because the IPPC directive relates to installations. On the other hand, such a restriction of the definition of emissions cannot be found either in the Environmental Information Directive or in the Aarhus Convention.

90. On the contrary, under Article 4(4)(d) of the Aarhus Convention, information on emissions which is relevant for the protection of the environment is to be disclosed. Yet the question whether emissions originate from installations is immaterial to whether they

\textsuperscript{39} — Stec and Others, cited in footnote 25, p. 60 (p. 76 of the French version).


\textsuperscript{41} — This is clearly also assumed by Advocate General Sharpston in her Opinion in Case C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening [2009] ECR I-9967, footnotes 17, 18 and 32.

\textsuperscript{42} — See the reports on the first meeting of the Signatories to the Aarhus Convention in Chisinau, Moldova from 19 to 21 April 1999 (CEP/WG.5/1999/2, paragraph 40) and on the second meeting in Dubrovnik, Croatia from 3 to 5 July 2000 (CEP/WG.5/2000/2, paragraph 43).
are relevant for the protection of the environment. One need only think of transport emissions.

91. Aside from the restriction to installations, the definition of emissions under the IPPC directive is perfectly reasonable, however. Consequently, it can be adopted without the reference to installations for the application of the Environmental Information Directive. The fourth sentence of Article 4(2) of the Environmental Information Directive therefore concerns information on the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources into the air, water or land.

92. So understood, the concept of emissions also largely corresponds to the definition in Article 2(8) of Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, which the Vereniging Milieudefensie emphasises. Under that definition, emissions are to be understood as the release in the environment, as a result of human activities, of substances, preparations, organisms or microorganisms. That directive, which was not yet in existence when the Implementation Guide was drawn up, corresponds in scope more to the Environmental Information Directive than to the IPPC directive, as it is not limited to installations.

93. However, even under this definition, information on emissions does not extend to information on substances which are released at any time. As the Commission rightly argues, any substance is generally released into the environment at some time during its life cycle. What is concerned is, rather, information on the release as such.

94. As far as can be seen, the present case concerns information on the release of substances as such only incidentally. It must be assumed that the field trial reports indicate what quantities of the plant protection product were applied. However, they are primarily of interest because of the information on the residues left on the lettuces, which are specific consequences of the release.

95. Such consequences are the precise reason why information on emissions into the environment is generally disclosed. The public has an increased interest in finding out how they may be affected by an emission. Before the emission, effects on humans and the environment were rather unlikely or at least restricted to the sphere of the possessor of the commercial secrets. Released substances, on

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43 — Cited in footnote 26.
the other hand, necessarily interact with the environment and perhaps also with humans. The Implementation Guide for the Aarhus Convention therefore emphasises that the protection of commercial confidentiality should end when the substances to which the confidential information relates are released. Possible environmental effects are not to be construed as commercial secrets.  

96. Consequently, information on residues from emissions into the environment should also be regarded as part of the information on emissions within the meaning of the Aarhus Convention.

97. This holds all the more for the provision on emissions in the Environmental Information Directive, which is much more generous than the provision on emissions in the Aarhus Convention.

98. Article 4(4)(d) of the Convention merely provides that the confidentiality of commercial and industrial information should not preclude the disclosure of information on emissions which is relevant for the protection of the environment. The reference to such relevance could be construed as a restriction of the provision on emissions.

100. This scope was extended as a result of heated debates in the course of the legislative procedure. In its original proposal, the Commission did not require relevance for the protection of the environment, but only excluded the application of commercial or industrial secrets in the case of information on emissions. On the other hand, the Council's common position returned to the wording of

44 — Stec and Others, cited in footnote 25, p. 60 (p. 76 of the French version).

45 — But see Stec and Others, cited in footnote 25, p. 60 (p. 76 of the French version).

of the Environmental Information Directive of the general interest served by disclosure against the specific interest served by the refusal to disclose should take place at application level or whether it may be effected at the level of national legislation.

103. Under that provision, in every particular case the public interest served by disclosure is to be weighed against the interest served by the refusal.

104. Bayer stresses that the Aarhus Convention does not require any weighing of interests in a particular case. Similarly, Finland also issued a statement when the directive was adopted to the effect that comparisons of interests in individual cases could lead to indiscriminate restriction of access. 49

D — The third question — Weighing of interests by the legislature

102. By its third question, the referring court is seeking to ascertain whether the weighing prescribed in the third sentence of Article 4(2) of the Environmental Information Directive to replace the weighing of interests in the particular case by a general weighing by the national legislature. In addition, contrary to the statement made by Finland, this does not constitute a restriction

105. As Greece and the Commission argue, however, it is incompatible with the wording of Article 4(2) of the Environmental Information Directive to replace the weighing of interests in the particular case by a general weighing by the national legislature. In addition, contrary to the statement made by Finland, this does not constitute a restriction

49 — Council document 14917/02 ADD 1 REV 1, 13 December 2002.
of access compared with the Aarhus Convention, because such weighing makes it possible, despite interests protected by law being adversely affected, to disclose information where the public interest served by disclosure prevails.

106. In the view of the Netherlands and Bayer, such weighing is already carried out with the application of Article 14 of the Plant Protection Directive. The recognition of commercial and industrial secrets requires such weighing. The limits imposed by that provision and the national implementation of the weighing serve the purpose of legal certainty and are therefore necessary.

107. As has already been explained, however, such weighing under Article 14 of the Plant Protection Directive may be incomplete. It cannot therefore fully replace the weighing under the third sentence of Article 4(2) of the Environmental Information Directive.

108. The third sentence of Article 4(2) of the Environmental Information Directive accordingly means that the weighing prescribed in that provision of the general interest served by disclosure against the specific interest served by the refusal to disclose should take place at application level in every particular case.

V — Conclusion

109. I therefore propose that the Court answer the questions referred for a preliminary ruling as follows:

1. The term 'environmental information' in Article 2 of Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC must be interpreted as meaning that it includes information submitted within the framework of a national procedure for the authorisation, or the extension of the authorisation, of a
plant protection product with a view to fixing the maximum quantity of a pesticide, a component thereof or reaction products which may be present in food or beverages.

2. Subject to possible new developments and additional information on the public interest served by disclosure, a properly taken decision under Article 14 of Council Directive 91/414/EEC concerning the placing of plant protection products on the market on the protection of confidential commercial and industrial information is relevant to the decision on the disclosure of environmental information pursuant to Article 4(2)(d) of Directive 2003/4. However, the contested studies and field trial reports are information on emissions into the environment whose disclosure may not be refused on grounds of commercial or industrial confidentiality.

3. The third sentence of Article 4(2) of Directive 2003/4 means that the weighing prescribed in that provision of the general interest served by disclosure against the specific interest served by the refusal to disclose should take place at application level in every particular case.