OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 14 October 2010[1]

I — Introduction

1. This reference for a preliminary ruling concerns access to information on the sale of emission allowances. The contested data are stored in registries which form part of the scheme for greenhouse gas emission allowance trading under Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community in accordance with the project-based mechanisms under the Kyoto Protocol.[2]

2. It must be clarified, first of all, whether such information is environmental information within the meaning of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC[3] ('the Environmental Information Directive').

3. It is also necessary to examine the relationship between the Environmental Information Directive and Regulation (EC) No 2216/2004 of 21 December 2004 for a standardised and secured system of registries.[4] It is uncertain whether the restrictive provisions of the regulation on the publication of the information in question prevail over the directive as *lex specialis* and *lex posterior* or whether they at least influence the application of the directive.

II — Legal context

A — *Access to environmental information*

4. The European Union has undertaken at international level to guarantee access to

1 — Original language: English.

2 — OJ 2003 L 275, p. 32, as amended by Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 (OJ 2004 L 338, p. 18).

3 — OJ 1990 L 41, p. 26.

4 — OJ 2004 L 386, p. 1.

environmental information under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [5] ('the Aarhus Convention'), which was signed by the Community on 25 June 1998 in Århus (Denmark). [6]

5. Possible restrictions of the right of access are to be found, in particular, in Article 4(4) of the Convention:

'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;

(e) intellectual property rights;

(f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

…

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.'

6. The Environmental Information Directive implements the Aarhus Convention for the Union. 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

5 — OJ 2005 L 124, p. 4.

6 — Approved by Council Decision 2005/370/EC of 17 February 2005, OJ 2005 L 124, p. 1.

areas, biological diversity and its components, including genetically modified organisms, 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 particular, in Article 4(2):

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

(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;

(b) international relations, public security or national defence;

(c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(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;

(f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;

(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;

(h) the protection of the environment to which such information relates, such as the location of rare species.

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.

...'

B — *The rules on emission trading*

9. The European Union is party to the United Nations Framework Convention on Climate Change, [7] signed at Rio de Janeiro in June 1992, and to the related Kyoto Protocol. [8] The objective of the Kyoto Protocol is to reduce overall emissions of greenhouse gases by at least 5 % below 1990 levels in the period 2008 to 2012. The overall commitment entered into by the European Union and its Member States under the Kyoto Protocol relates to a total reduction of greenhouse gas emissions by 8 % compared with their 1990 levels during the period of commitment mentioned above.

10. One element of the strategy to implement those commitments is Directive 2003/87. The scheme established by that directive is based on granting economic operators in certain sectors limited greenhouse gas emission allowances. They may use those allowances or transfer them to other economic operators who intend to emit larger quantities of greenhouse gases than they are entitled to.

11. Article 19 of Directive 2003/87 contains the basic provisions governing the emission allowance registry:

'1. Member States shall provide for the establishment and maintenance of a registry in order to ensure the accurate accounting of the issue, holding, transfer and cancellation of allowances. Member States may maintain their registries in a consolidated system, together with one or more other Member States.

2. Any person may hold allowances. The registry shall be accessible to the public and shall contain separate accounts to record the allowances held by each person to whom and from whom allowances are issued or transferred.

3. In order to implement this Directive, the Commission shall adopt a Regulation in accordance with the procedure referred to in Article 23(2) for a standardised and secured system of registries in the form of standardised electronic databases containing common data elements to track the issue, holding, transfer and cancellation of allowances, to provide for public access and confidentiality as appropriate and to ensure that there are

7 — OJ 1994 L 33, p. 13, approved by Council Decision of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (OJ 1994 L 33, p. 11).

8 — OJ 2002 L 130, p. 4, approved by Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1).

no transfers incompatible with obligations resulting from the Kyoto Protocol.'

12. In addition, Article 20 provides for Community-wide monitoring of transactions:

'1. The Commission shall designate a Central Administrator to maintain an independent transaction log recording the issue, transfer and cancellation of allowances.

2. The Central Administrator shall conduct an automated check on each transaction in registries through the independent transaction log to ensure there are no irregularities in the issue, transfer and cancellation of allowances.

3. If irregularities are identified through the automated check, the Central Administrator shall inform the Member State or Member States concerned who shall not register the transactions in question or any further transactions relating to the allowances concerned until the irregularities have been resolved.'

13. Recital 13 in the preamble to the directive and Article 17 deal with access to information:

'(13) In order to ensure transparency, the public should have access to information relating to the allocation of allowances and to the results of monitoring of emissions, subject only to restrictions provided for in Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.'

'*Article 17*

Access to information

Decisions relating to the allocation of allowances and the reports of emissions required under the greenhouse gas emissions permit and held by the competent authority shall be made available to the public by that authority subject to the restrictions laid down in Article 3(3) and Article 4 of Directive 2003/4/EC.'

14. On the basis of Directive 2003/87 and Decision 280/2004/EC,[9] the Commission adopted Regulation No 2216/2004. Under Article 3 of the regulation, all Member States and the Commission must establish registries within the meaning of Article 19 of Directive 2003/87. The French registry is operated by a deposit fund (*Caisse des dépôts et consignations*).

15. Article 8(3) governs responsibility for each of the registries:

'The Member States and the Commission shall retain ultimate responsibility and authority for the operation and maintenance of their registries.'

16. Article 9 regulates the publication of certain information:

'1. Each registry administrator shall make available the information listed in Annex XVI at the frequencies and to the recipients set out in Annex XVI in a transparent and organised manner via his registry web site. Registry administrators shall not release additional information held in the registry.

2. The Central Administrator shall make available the information listed in Annex XVI at the frequencies and to the recipients set out in Annex XVI in a transparent and organised manner via the Community independent transaction log web site. The Central Administrator shall not release additional information held in the Community independent transaction log.

3 Each web site shall allow the recipients of the reports listed in Annex XVI to query those reports using search facilities.

4. Each registry administrator is responsible for the accuracy of the information that originates from his registry and is made available via the Community independent transaction log website.

5. Neither the Community independent transaction log nor registries shall require account holders to submit price information concerning allowances or Kyoto units.'

17. Article 10 governs the confidentiality of information held in the registries:

'1. All information, including the holdings of all accounts and all transactions made, held in the registries and the Community

9 — Decision 280/2004/EC of the European Parliament and of the Council of 11 February 2004 concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol (OJ 2004 L 49, p. 1).

independent transaction log shall be considered confidential for any purpose other than the implementation of the requirements of this Regulation, Directive 2003/87/EC or national law.

2. Information held in the registries may not be used without the prior consent of the relevant account holder except to operate and maintain those registries in accordance with the provisions of this Regulation.

3. Each competent authority and registry administrator shall only perform processes concerning allowances, verified emissions, accounts or Kyoto units where necessary to carry out their functions as competent authority or registry administrator.'

18. With regard to information on emission allowance transactions, points 11 and 12 of Annex XVI provide:

'11. The Central Administrator shall display and update the information in paragraph 12 in respect of the registry system on the public area of the Community independent transaction log's web site, in accordance with the specified timing.

12. The following information for each completed transaction relevant for the registries system for year X shall be displayed from 15 January onwards of year (X+5):

(a) account identification code of the transferring account: the code assigned to the account comprising the elements set out in Annex VI;

(b) account identification code of the acquiring account: the code assigned to the account comprising the elements set out in Annex VI;

(c) account holder name of the transferring account: the holder of the account (person, operator, Commission, Member State);

(d) account holder name of the acquiring account: the holder of the account (person, operator, Commission, Member State);

(e) allowances or Kyoto units involved in the transaction by unit identification code comprising the elements set out in Annex VI;

(f) transaction identification code: the code assigned to the transaction comprising the elements set out in Annex VI;

(g) date and time at which the transaction was completed (in Greenwich Mean Time);

(h) process type: the categorisation of a process comprising the elements set out in Annex VII.'

III — Facts, main proceedings and questions referred for a preliminary ruling

19. By letter of 7 February 2006, Ville de Lyon (the City of Lyon) requested the administrator of the national registry of greenhouse gas emission allowances, the Caisse des dépôts et consignations, to communicate to it the volumes of allowances sold in 2005 by the operators of each of the 209 urban heating sites to which emission allowances were allocated, the date of the transactions and their recipients.

20. By decision of 6 March 2006, the Caisse des dépôts et consignations refused to supply that information, on the ground that points 11 and 12 of Annex XVI to and Article 10 of Regulation No 2216/2004 precluded its supply.

21. The City of Lyon referred the matter to the Committee on Access to Administrative Documents (Commission d'accès aux documents administratifs) by letter of 29 March 2006. On 9 October 2006, the Committee issued an opinion in favour of the supply of the information. It considered that the French rules on the confidentiality of commercial and industrial information were not applicable.

22. By decision dated 10 November 2006, the Caisse des dépôts et consignations confirmed its refusal to supply the information.

23. The City of Lyon therefore brought proceedings requesting the annulment of the refusal to supply the information and that the Caisse des dépôts et consignations be ordered to make available the requested documents.

24. In those proceedings, the Administrative Court has referred the following questions to the Court for a preliminary ruling:

'(1) Is the supply or refusal to supply the information provided for in point 12 of Annex XVI to Regulation No 2216/2004 the responsibility of the Central Administrator alone or the responsibility also of the administrator of the national registry?

(2) If it is the responsibility of the administrator of the national registry, must that information be considered to be "information on emissions into the environment" within the meaning of Article 4 of Directive 2003/4, against whose supply "the confidentiality of commercial or industrial information" could not be invoked, or is the supply of that information governed by specific rules on confidentiality?

(3) In the event that specific rules on confidentiality apply, is that information not to be supplied before a period of five years has elapsed or does that time-limit concern only the five-year allowance allocation period under Directive 2003/87?

(4) In the event that that five-year time-limit does apply, does Article 10 of Regulation No 2216/2004 allow a derogation from it and can a refusal to derogate from it be invoked, on the basis of that article, against a local authority requesting the supply of that information in order to negotiate an agreement on public service delegation in respect of urban heating?'

25. The City of Lyon, as the applicant in the main proceedings, the Caisse des dépôts et consignations, as the defendant in the main proceedings, the French Republic, the Republic of Austria and the European Commission took part in the written procedure. With the exception of Austria, they also presented oral argument at the hearing on 7 October 2010.

IV — Legal assessment

26. If access to information on the sale of emission allowances were to be assessed solely on the basis of the rules contained in the legislation on emission allowances, the outcome would be relatively clear: such information is disclosed after the expiry of a five-year period. Before then it is in principle confidential. If, on the other hand, the rules on access to environmental information were applicable, it would have to be examined whether exceptions to the right of access were relevant. I will therefore begin by examining whether the information is environmental information (see section A below), then consider the responsibility of the French registry administrator for deciding on a request for access to the contested information (see section B) and the relationship between the Environmental Information Directive and Regulation No 2216/2004 (see section C) and, for the sake of completeness, answer the questions regarding Regulation No 2216/2004 (see sections D and E).

A — *The concept of environmental information*

27. Although the referring court implicitly assumes that the present case concerns access to environmental information within the meaning of the Environmental Information Directive, this should first be examined in order to ensure that it is actually necessary to consider the Environmental Information Directive.

28. The Court has held, with regard to the old Environmental Information Directive, Directive 90/313/EEC, [10] that the legislature's intention was to make the concept of 'information relating to the environment' a broad one. [11] The Court considers the definition in Article 2(1) of the new Environmental Information Directive to be even wider and more detailed. [12] Furthermore, the Treaty of Amsterdam has in the meantime given expression, in the second paragraph of Article 1 EU, to the intention to create an ever closer union among the peoples of Europe in which decisions are taken as openly as possible and as closely as possible to the citizen. For that purpose Article 15 TFEU (formerly Article 255 EC) requires the institutions to observe the principle of transparency and — together with Article 42 of the Charter of Fundamental Rights — provides for a right of access to documents.

29. 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. [13]

30. The City of Lyon is seeking information on the sale of emission allowances by the operators of 209 urban heating sites in France. That information appears to be transaction data published five years after the completion of the transaction pursuant to point 12 of Annex XVI to Regulation (EC) No 2216/2004.

31. The City of Lyon takes the view that this could be information on measures or activities designed to protect the environment within the meaning of Article 2(1)(c) of the Environmental Information Directive. It considers that transaction data show whether

10 — Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56).

11 — Case C-321/96 *Mecklenburg* [1998] ECR I-3809, paragraph 19, and Case C-316/01 *Glawischnig* [2003] ECR I-5995, paragraph 24.

12 — *Glawischnig*, cited in footnote 11, paragraph 5.

13 — See *Glawischnig*, cited in footnote 11, paragraph 25.

emission trading is an appropriate means of climate protection.

32. France and the Caisse des dépôts et consignations, however, counter that view by arguing, correctly, that transaction data can only show whether the emission allowance market is functioning. That market is indeed part of a system which as a whole serves climate protection, but to what extent the market contributes to achieving that aim cannot be seen from the transaction data. Article 2(1)(c) of the Environmental Information Directive does not therefore apply.

33. Information on emission allowance trading could, however, be information within the meaning of Article 2(1)(b) of the Environmental Information Directive, that is to say, information on factors likely to affect the atmosphere, one of the elements of the environment within the meaning of Article 2(1)(a).

34. That provision only gives examples of specific factors which may interact directly with the elements of the environment. However, information on the right to create such a factor, namely greenhouse gas emissions, is indirectly also information about that factor.

35. Consequently, the European Union legislature took the view that at least certain information on emission allowances constitutes environmental information, as recital 13 in the preamble to and Article 17 of Directive 2003/87 provide for access in accordance with the Environmental Information Directive. The allocation of emission allowances in particular thus constitutes environmental information.

36. However, France and the Caisse des dépôts et consignations take the view that transaction data are not environmental information. They claim that the holding of emission allowances gives no indication of whether the holder actually releases greenhouse gases.

37. It is not important, however, whether emission allowances are actually used, because under Article 2(1)(b) of the Environmental Information Directive likely effects are sufficient. As a rule, a transaction, that is, the transfer of emission allowances, will mean that the seller produces fewer emissions than envisaged upon allocation, while the buyer may increase his emissions.

38. However, France rightly argues that transactions possibly do not have a direct link to the release of greenhouse gases. They may be purely speculative measures with a view subsequently to selling on the allowances at a profit.

39. This consideration may apply to some of the transaction data requested, namely to information on the recipients of the emission allowances. As regards the urban heating sites which transfer emission allowances in the main proceedings, regard must be had to the actual effects of the transaction, as they must generally reduce their emissions accordingly.

40. However, information on the recipients of allowances should likewise not be ruled out. The final purchaser will generally produce more emissions than envisaged upon the allocation of the allowances, and a speculative interim acquisition contributes to that outcome. For that reason alone there is an environmental interest in the transparency of the emission allowance transfer. Furthermore, it is not always easy in practice, before the final exploitation of an allowance, to establish whether a transaction was a mere interim acquisition or was intended for the holder's own use. Transaction data are therefore to be regarded in principle as environmental information.

41. The City of Lyon's specific interest in that information cannot, contrary to the view taken by Austria, call into question its classification as environmental information. Rather, it follows from Article 3(1) of the Environmental Information Directive, which provides that an interest for the request need not be stated, that the nature of the applicant's personal interest in the information is irrelevant. [14]

42. Information on emission allowance transactions is therefore environmental information within the meaning of Article 2(1)(b) of the Environmental Information Directive.

14 — See, with regard to 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 (OJ 2001 L 145, p. 43), Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 43 et seq. The view taken by the German Bundesverwaltungsgericht in the judgment of 24 September 2009 (7 C 2/09, *Neue Zeitschrift für Verwaltungsrecht* 2009, 189, point 36) that the intended purpose of the information might make a request under Article 4(1)(b) of the Environmental Information Directive appear to be an abuse is therefore also doubtful.

B — *Question 1 — Responsibility for deciding on the disclosure of the information*

43. By Question 1 the referring court is seeking to ascertain whether the Caisse des dépôts et consignations is actually responsible for deciding on the disclosure of information on transactions.

44. Regulation No 2216/2004 essentially provides for a form of disclosure of such information: the display of information on completed transactions by the Central Administrator under points 11 and 12 of Annex XVI on 15 January of the fifth year after the transaction. Apart from that, such information is to be considered confidential in principle in accordance with Article 10(1). Article 10(2) prohibits such information being used without the prior consent of the relevant account holder unless it is used to operate and maintain registries in accordance with the provisions of the regulation. In addition, Article 10(3) provides that each competent authority and registry administrator may only perform processes concerning allowances, verified emissions, accounts or Kyoto units where necessary to carry out their functions as competent authority or registry administrator.

45. The Caisse des dépôts et consignations, Austria and the Commission conclude from these considerations that the Central Administrator alone may decide on the disclosure of the information in question. They argue that the Caisse des dépôts et consignations is not responsible as the national registry administrator.

46. However, the City of Lyon and France rightly differentiate between the publication of the information in question, which is the responsibility of the Central Administrator under Regulation No 2216/2004, and the decision on a request for access to environmental information. That request must be decided by the authority to which it is addressed.

47. This follows from Article 3(1) of the Environmental Information Directive. Under that provision, public authorities are required to make environmental information held by or for them available to any applicant at his request. It is not disputed that the information in question is held by the national registry.

48. Regulation No 2216/2004 does not make any provision at all within the scope of that rule. It does regulate the confidentiality and the publication of the information in question, but not responsibility to decide on requests for access to environmental information. Contrary to the submissions made by Austria and the Commission, the regulation cannot therefore be regarded as a *lex specialis*

in relation to the Environmental Information Directive on this point. [15]

49. The national registry administrator also cannot be considered to form a single authority together with the Central Administrator, on behalf of which the Central Administrator alone may act. As the French Government rightly observes, under Article 8(3) of Regulation No 2216/2004 the Member States and the Commission retain responsibility for the operation and maintenance of their respective registries. Furthermore, points 5 to 10 of Annex XVI contain various information obligations for the national registry administrator.

50. The Commission's submissions indirectly confirm this conclusion. Their starting-point is admittedly that the Central Administrator has exclusive responsibility, but as soon as he has published the information pursuant to point 12 of Annex XVI of Regulation No 2216/2004, the national registry administrators may also pass it on. The Commission fails to explain how publication could change the responsibilities.

15 — On the status of the regulation as a *lex specialis* with regard to a decision on a request for access, see point 54 et seq. below.

51. The answer to Question 1 must therefore be that the national registry administrator is responsible for deciding on a request under the Environmental Information Directive for access to information coming under point 12 of Annex XVI to Regulation No 2216/2004, provided that information is held by or for him.

C — *Question 2 — Information on emissions into the environment*

52. Question 2 goes to the heart of the dispute. The Court wishes to know whether the information requested must be regarded as 'information on emissions into the environment' within the meaning of Article 4 of the Environmental Information Directive, against whose supply 'the confidentiality of commercial or industrial information' cannot be relied on, or whether the supply of that information is governed by specific rules on confidentiality.

53. In this respect, I will examine, first of all, whether the Environmental Information Directive is actually applicable (see section 1), then whether the information is 'information

on emissions into the environment' within the meaning of Article 4 of the Environmental Information Directive (see section 2), and finally the extent to which the provisions of Regulation No 2216/2004 on the confidentiality of the registries influence the exceptions to the right to information under Article 4(2)(d) of the Environmental Information Directive (see section 3).

1. The applicability of the Environmental Information Directive

54. The Caisse des dépôts et consignations, France, Austria and the Commission all agree that Regulation No 2216/2004 is an exhaustive *lex specialis* which was adopted subsequent to the Environmental Information Directive and which governs the confidentiality of information in the registries to be created under the regulation. It therefore takes precedence over the general rules of the Environmental Information Directive.

55. When the wordings of the respective provisions are examined in isolation, it seems reasonable to regard Regulation No 2216/2004 as a *lex specialis*. It contains specific rules governing the publication and the confidential treatment of information stored in the registries, whereas the Environmental Information Directive applies to all environmental information. The regulation departs from Article 4(2) of the Environmental Information Directive in so far as it neither expressly provides that in every particular case the interest served by confidentiality must be weighed against the public interest served by disclosure, nor does it mention the particularly extensive access to information on emissions into the environment.

56. In addition, the chronology of the rules suggests that Regulation No 2216/2004 should be regarded as a *lex posterior* to the Environmental Information Directive.

57. However, Regulation No 2216/2004 can be recognised as a *lex specialis* and/or a *lex posterior* in relation to the Environmental Information Directive only if the Commission was actually permitted to adopt rules which depart from the Environmental Information Directive.

58. In this regard it would seem reasonable, at first sight, to assume a hierarchical relationship between the Environmental Information Directive and Regulation No 2216/2004. After

all, the Council and the Parliament based the directive as classic secondary law directly on a legal basis in the EC Treaty, while the regulation is merely a Commission measure to implement another directive, that is to say, tertiary law as it were.

59. However, up to now the Court has refrained from putting forward such a far-reaching hierarchical ranking of Union law, and in the present case too there is ultimately no need to take this step. Rather, a careful examination of the regulation's legal basis leads to the conclusion that it cannot result in a departure from the Environmental Information Directive.

60. Regulation No 2216/2004 is based on Article 19(3) of Directive 2003/87. Under that provision, the Commission is to adopt a regulation for a system of registries to provide in particular for public access to the registry and confidentiality as appropriate. Furthermore, Article 17 of and recital 13 in the preamble to Directive 2003/87 provide for the disclosure of certain information under the Environmental Information Directive. Emission allowance trading does not come under those provisions. It would therefore appear that the provisions of Regulation No 2216/2004 on the confidentiality of information on the sale of emission allowances are essentially compatible with their legal basis.

61. It cannot be assumed, however, that the Commission may adopt implementing measures which depart from other rules of secondary law, in particular where it does not have the power to adopt implementing measures for those other rules.[16] The Environmental Information Directive makes no provision for any Commission implementing measures.

62. A *lex specialis* departing from the Environmental Information Directive would therefore require the legislature to have intended, when it adopted Directive 2003/87, to confer on the Commission the power to depart from the Environmental Information Directive. This could at best be inferred indirectly from the fact that the application of the Environmental Information Directive is mentioned only with regard to certain information.

63. However, the explanatory memorandum for those provisions in the Commission proposal for Directive 2003/87 militates against an implicitly sought restriction of the Environmental Information Directive. It states that, in accordance with Directive 90/313/EEC on the freedom of access to information on the environment (the old Environmental Information Directive), the public should have access to information concerning the

16 — Case 22/88 *Vreugdenhil and van der Kolk* [1989] ECR 2049, paragraph 17.

results of the monitoring, reporting and verification obligations, information on holdings in national registries and any actions concerning breaches of the directive. [17] The present case relates to information on holdings in national registries.

64. Furthermore, the explanatory memorandum for the Commission proposal expressly states that Directive 2003/87 is intended to be consistent with the Aarhus Convention. This is mandatory in any case, since international agreements concluded by the Union prevail over provisions of secondary Community legislation. [18] For that reason, secondary European Union legislation is to be interpreted as far as possible consistently with the Union's obligations under international law. [19]

65. In so far as it is relevant in the present case, Article 4(4) of the Aarhus Convention corresponds to Article 4(2) of the Environmental Information Directive. To regard Regulation No 2216/2004 as a *lex specialis* in relation to the Environmental Information Directive would therefore lead to a departure from the Aarhus Convention.

66. The circumstance that Directive 2003/87 and Regulation No 2216/2004 likewise transpose obligations under international law cannot justify that departure. Neither the Framework Convention on Climate Change nor the Kyoto Protocol contains provisions that might require such a departure.

67. Article 19 of Directive 2003/87 cannot therefore be considered to give the Commission the power to adopt a *lex specialis* departing from the Environmental Information Directive and the Aarhus Convention. Regulation No 2216/2004 may not therefore be given such an interpretation. In so far as the Environmental Information Directive provides appropriate scope, however, the regulation can provide clarification.

68. As an interim conclusion, it must be stated that a request for access to information coming under point 12 of Annex XVI to Regulation No 2216/2004 must be decided in

17 — Proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM(2001) 581 final, p. 16, point 18.

18 — Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52; Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 33; and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 35.

19 — *Commission* v *Germany*, cited in footnote 18, paragraph 52; Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20; *Bellio F.lli*, cited in footnote 18, paragraph 33; Case C-306/05 *SGAE* [2006] ECR I-11519, paragraph 35; and Case C-161/08 *Internationaal Verhuis- en Transportbedrijf Jan de Lely* [2009] ECR I-4075, paragraph 38.

accordance with the Environmental Information Directive.

2. The concept of information on emissions into the environment

69. The first sentence of Article 4(2) of the Environmental Information Directive permits a request for environmental information to be refused if disclosure of the information would adversely affect certain interests which are listed in that provision. However, the fourth sentence of Article 4(2) restricts the possible interests in the case that a request relates to information on emissions into the environment. Such a request may be refused only on the grounds for confidentiality set out in points (b), (c) and (e) of the first sentence of Article 4(2). It is not evident, however, that any of those grounds might be relevant in the present case. As a result, it must be clarified whether the request made by the City of Lyon relates to information on emissions into the environment.

70. Emission allowance trading has a link with emissions into the environment, since such allowances permit their holders to release substances. The information on transactions makes it possible to ascertain who has the right to produce emissions. It is therefore certainly environmental information.

71. It is doubtful, however, whether the restriction of the exceptions to the right of access under the fourth sentence of Article 4(2) of the Environmental Information Directive is intended to encompass indirect information on emissions in exactly the same way as the definition of environmental information. The two provisions have different functions which preclude a uniform interpretation. [20]

72. The definition makes the Environmental Information Directive applicable and thus permits opposing interests to be properly weighed in order to ascertain whether or not certain information should be disclosed.

73. The restriction of the exceptions to the right of access is, on the other hand, based on an irrefutable presumption: certain grounds, in particular the protection of the confidentiality of commercial or industrial information, never justify the confidential treatment of information on emissions into the environment. If the fourth sentence of Article 4(2) of the Environmental Information Directive covered indirect information on emissions

20 — See, with regard to the interpretation of the concept of waste disposal with reference to the aims of the relevant provisions, Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 39 et seq.

into the environment, the scope of exceptions excluded thereunder, and in particular confidentiality of commercial or industrial information, would be very severely restricted. Most environmental information can be linked indirectly with emissions.

74. The arguments made in the Implementation Guide for the Aarhus Convention are therefore more persuasive. It states that the protection of commercial confidentiality should end when the substances to which the confidential information relates are released. [21] Emission allowance trading, on the other hand, takes place *before* substances are released. Information on such trading consequently does not constitute information on emissions.

3. Confidentiality of transaction data

75. The refusal to disclose information by reason of adverse effects on the confidentiality of commercial and industrial information is therefore a possibility in the present case. These interests protected by law are covered by Article 4(2)(d) of the Environmental Information Directive 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.

76. The provisions of Regulation No 2216/2004 on the disclosure of information held in registries give grounds for such legal protection. Article 10(2) of the regulation, which makes the use of such information subject to the consent of the relevant account holder, shows that the rules are aimed at the protection of his legitimate economic interests.

77. If the account holder is a natural person, the confidentiality of personal data under Article 4(2)(f) of the Environmental Information Directive is also a possibility. [22]

21 — Stec/Casey-Lefkowitz/Jendroska, *The Aarhus Convention: An Implementation Guide*, New York 2000, p. 60 (p. 76 of the French version). On the significance of this work for the interpretation of the Environmental Information Directive, see my Opinion of 23 September 2010 in Case C-266/09 *Stichting Natuur en Milieu*, pending before the Court, point 88.

22 — With regard to the differently structured exception under Article 4(1)(b) of Regulation No 1049/2001, see Case C-28/08 P *Commission* v *Bavarian Lager* [2010] ECR I-6055, paragraph 48 et seq.

78. However, that does not yet decide the point whether the information held in the registry is to be considered confidential up to the expiry of the five-year period under point 12 of Annex XVI to Regulation No 2216/2004. The third sentence of Article 4(2) of the Environmental Information Directive requires, in every particular case, the public interest served by disclosure to be weighed against the interest served by refusal.

79. The competent authorities must therefore establish first of all, if necessary after consultation with the relevant undertakings, whether the interest in confidentiality presumed by Regulation No 2216/2004 actually exists. If the information in question has already been published in some other way or the undertakings do not have any interest in confidentiality, the information may not be withheld on grounds of confidentiality of commercial or industrial information or personal data.

80. If there is still an interest in confidentiality, it must be weighed against any public interests served by the disclosure of the information.

81. At first glance it seems reasonable to regard the City of Lyon's interest in using the information for contract negotiations as a public interest if the City of Lyon is performing a public function. However, such an impression is misleading since the weighing under the third sentence of Article 4(2) of the Environmental Information Directive must apply irrespective of the specific interest of the applicant. The purpose of the directive is to give everyone a right of access to environmental information, not to lay down rules to protect the particular interest which this or that person may have in gaining access to such information. [23]

82. The requirements of European Union law relating to public procurement also do not justify any particular public interest served by the disclosure of registry information on emission allowance trading. Rather, the confidentiality of commercial and industrial information must also be ensured in public procurement. [24]

83. Lastly, I consider that it is not possible to assume a public interest in the transparency of the market in emission allowances. An argument in favour of transparency is that the market relates to emission allowances and the fourth sentence of Article 4(2) of the Environmental Information Directive indicates an increased public interest in the publication of emission-related information. However, the

23 — See, with regard to Regulation No 1049/2001, *Sison* v *Council*, cited in footnote 14, paragraph 43 et seq.

24 — See Case C-450/06 *Varec* [2008] ECR I-581, paragraphs 35 and 36.

transparency of the market in emission allowances is explicitly regulated in Regulation No 2216/2004. It does not appear that the regulatory powers have been exceeded, since the legal basis for the regulation, Article 19(3) of Directive 2003/87, makes express provision for the regulation of public access to the registry and confidentiality as appropriate. The assessment made by the Commission as the legislator must therefore be accepted in principle.

84. The reference for a preliminary ruling does not therefore indicate any overriding public interest served by the disclosure of information within the meaning of point 12 of Annex XVI of Regulation No 2216/2004 if the confidentiality interests presumed by the regulation actually exist in the case at issue.

4. Interim conclusion

85. A request for access to information coming under point 12 of Annex XVI to Regulation No 2216/2004 must be decided in accordance with the Environmental Information Directive. However, it does not concern information on emissions into the environment within the meaning of the fourth sentence of Article 4(2) of the directive, to which only a few of the envisaged grounds for confidentiality apply. Until the expiry of the five-year period under point 12 of Annex XVI to the regulation, its disclosure would adversely affect the confidentiality of commercial or industrial information within the meaning of Article 4(2)(d) and/or the confidentiality of personal data within the meaning of Article 4(2)(f) of the directive. The reference for a preliminary ruling has not disclosed any overriding public interest served by the disclosure of such information which would outweigh the confidentiality of commercial or industrial information and/or the confidentiality of personal data if the confidentiality interests presumed by the regulation actually exist in the case at issue.

D — *Question 3 — Calculation of the five-year period under point 12 of Annex XVI to Regulation No 2216/2004*

86. By Question 3 the referring court is seeking to ascertain whether the information in question is to be considered confidential for

five years after it has been entered in the registry or whether it should be disclosed after the expiry of the first five-year allowance allocation period under Directive 2003/87. This question is also of interest with regard to the application of the Environmental Information Directive, since the duration of the confidential treatment under Regulation No 2216/2004 may have an impact on the exceptions to the right of access to the transaction data under Article 4(2)(d) and (f) of the directive.

87. Article 11 of Directive 2003/87 provides for two allocation periods for the allocation of emission allowances: a period of three years between 1 January 2005 and 1 January 2008 and a subsequent five-year period. It is unclear whether the referring court considers that the information in question is to be treated as confidential only during the relevant allocation period. This is ultimately irrelevant, however, since Regulation No 2216/2004 is clear on this point.

88. Under Article 9 of Regulation No 2216/2004, the national registry administrator and the Central Administrator must make available the information listed in Annex XVI at the frequencies and to the recipients set out in Annex XVI. They are not to release additional information. Point 11 of Annex XVI provides that the Central Administrator must display and update the information in paragraph 12 in respect of the registry system on the public area of the Community independent transaction log's web site, in accordance with the specified timing. Under point 12 of Annex XVI, information for each completed transaction relevant for the registries system for year X is to be displayed from 15 January onwards of year (X+5).

89. As the Caisse des dépôts et consignations, France, Austria and the Commission rightly argue, it is clear from those provisions that the expiry of an allocation period is irrelevant. Rather, the information in question is to be disclosed only from 15 January onwards of the fifth year after the year in which the transaction was executed.

90. As the Commission claims, it would also be incomprehensible to protect a transaction

at the beginning of an allocation period longer than a transaction near the end. It must be assumed that the confidentiality interest also exists similarly during subsequent allocation periods.

91. Information under point 12 of Annex XVI to Regulation No 2216/2004 may therefore be supplied only after the expiry of a five-year period.

E — *Question 4 — Possible derogations*

92. By Question 4 the referring court is seeking to ascertain whether Article 10 of Regulation No 2216/2004 allows a derogation from the five-year period, in particular where a local authority requests the supply of that information in order to negotiate an agreement on public service delegation in respect of urban heating. Such derogations could also be significant with regard to the application of the Environmental Information Directive.

93. Article 10(1) of Regulation No 2216/2004 provides in principle that all information held in the registries is to be considered confidential, but it does contain exceptions for the implementation of the requirements of the regulation, Directive 2003/87 or national law.

94. The City of Lyon takes the view that it serves the purpose of the implementation of Directive 2003/87 if it obtains the information in question. It intends to use the information to assess and, if necessary, improve the reduction in greenhouse gas emissions by the operator of its thermal power station.

95. Article 10(1) of Regulation No 2216/2004 does not permit the disclosure of information simply where it serves the aims of Directive 2003/87, but with a view to the implementation of the *requirements* of that directive. Directive 2003/87 does contain requirements relating to the disclosure of certain information held in registries, but no requirements which specifically stipulate the disclosure of the contested information.

96. The same applies with regard to Regulation No 2216/2004: the regulation is also aimed at reducing greenhouse gas emissions, but provision is made only for disclosure of information pursuant to point 12 of Annex XVI after the expiry of five years.

97. It cannot be ruled out that national law requires the disclosure of the information in question to the City of Lyon. However, no arguments have been put forward in support of this view, with the result that there is no need for the Court to examine that possibility.

98. For the sake of completeness, however, it should be noted that the argument put forward by the Commission and France that this exception relates solely to national provisions for the implementation of Directive 2003/87 and Regulation No 2216/2004 is not convincing. There may be rules of national law which require such information to be passed on but have no link with climate protection. One need think only of investigations of criminal offences. In applying such provisions within the scope of European Union law, namely the regulation, the Member States must nevertheless ensure that the principles of Union law are respected. [25] Thus, the confidentiality of commercial information [26] and personal information [27] may be outweighed only by overriding interests deserving protection. The abovementioned application of the provisions of the Environmental Information Directive illustrates the examination to be conducted in each case.

99. Nor does Article 10(2) of Regulation No 2216/2004 lead to any earlier disclosure of the information. That provision in principle prevents information held in the registries being used without the prior consent of the relevant account holder. It may be used to operate and maintain those registries in accordance with the provisions of the regulation. However, it is not necessary for that purpose to pass on the information in question to the City of Lyon.

100. The reference for a preliminary ruling has not therefore indicated any fact in accordance with Article 10 of Regulation No 2216/2004 to justify a derogation from the five-year period under point 12 of Annex XVI.

25 — Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 42; Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 31; and Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 34.

26 — See Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 28; Case C-36/92 P *SEP* v *Commission* [1994] ECR I-1911, paragraph 37; and *Varec*, cited in footnote 24, paragraph 49 and the case-law cited.

27 — See Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, paragraph 70 et seq., and Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, paragraph 52.

V — Conclusion

101. I therefore suggest that the questions referred for a preliminary ruling be answered as follows:

(1) The national registry administrator is responsible for deciding on a request under Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC for access to information coming under point 12 of Annex XVI to Regulation (EC) No 2216/2004 of 21 December 2004 for a standardised and secured system of registries, provided that information is held by or for him.

(2) A request for access to that information must be decided in accordance with Directive 2003/4. However, it does not concern information on emissions into the environment within the meaning of the fourth sentence of Article 4(2) of the directive, to which only a few of the envisaged grounds for confidentiality apply. Until the expiry of the five-year period under point 12 of Annex XVI to Regulation No 2216/2004, its disclosure may adversely affect the confidentiality of commercial or industrial information within the meaning of Article 4(2)(d) of Directive 2003/4 and/or the confidentiality of personal data within the meaning of Article 4(2)(f). The reference for a preliminary ruling has not disclosed any overriding public interest served by the disclosure of such information which would outweigh the confidentiality of commercial or industrial information and/or the confidentiality of personal data if the confidentiality interests presumed by the regulation actually exist in the case at issue.

(3) Under point 12 of Annex XVI to Regulation No 2216/2004, that information may in principle be supplied only after the expiry of a five-year period.

(4) The reference for a preliminary ruling has not indicated any fact in accordance with Article 10 of Regulation No 2216/2004 to justify a derogation from the five-year period under point 12 of Annex XVI.