Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 19 October 2016[1]

**Case C-60/15 P**

**Saint-Gobain Glass Deutschland GmbH**
**v**

**European Commission**

(Appeal — Access to environmental information — Aarhus Convention — Article 4(4)(a) — Grounds for refusal of access — Confidentiality of the proceedings of public authorities — Regulation (EC) No 1367/2006 — Article 6(1) — Regulation (EC) No 1049/2001 — Article 4(3) and (5) — Protection of the decision-making process of an institution — Objection by the Member State — Information on installations affected by the procedure for the allocation of greenhouse gas emission allowances — Partial refusal of access)

## Introduction

1. By the present appeal, Saint-Gobain Glass Deutschland GmbH ('Saint-Gobain Glass Deutschland') seeks to have set aside the judgment of the General Court of the European Union of 11 December 2014 in *Saint-Gobain Glass Deutschland* v *Commission* (T-476/12, not published, 'the judgment under appeal', EU:T:2014:1059), by which the General Court dismissed its action for annulment of the decision of the European Commission of 17 January 2013 (GestDem 3273/2012), partially refusing a request for access to a document communicated to the Commission by the Federal Republic of Germany in the course of the procedure for the allocation of greenhouse gas emission allowances under Article 10a of Directive 2003/87/EC,[2] (the contested decision).

2. The point of law raised by this appeal will lead the Court to examine the principle that grounds for refusal of access to environmental information should be interpreted in a restrictive way,[3] as laid down in Article 6(1) of Regulation (EC) No 1367/2006,[4] and to interpret the ground for refusal relating to the confidentiality of the proceedings of public authorities under Article 4(4)(a) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters ('the Aarhus Convention').[5]

1 — Original language: French.

2 — Directive of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32).

3 — I note that this is one of the points raised in another appeal pending before the Court (*ClientEarth* v *Commission*, C-57/16 P).

4 — Regulation of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

5 — Convention signed at Aarhus (Denmark) on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

## Legislative framework

3. Article 4 of the Aarhus Convention provides:

‘1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation …:

(a) Without an interest having to be stated;

…

4. A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under 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.’

…’

4. Article 4 of Regulation (EC) No 1049/2001,[6] entitled ‘Exceptions’, provides, in paragraphs 3 and 5:

‘3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

…

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.’

5. Article 6 of Regulation No 1367/2006, entitled ‘Application of exceptions concerning requests for access to environmental information’, provides, in paragraph 1:

‘As regards Article 4(2), first and third indents, of [Regulation No 1049/2001], with the exception of investigations, in particular those concerning possible infringements of [EU] law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of [Regulation No 1049/2001], the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.’

6 — Regulation 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).

## Background to the dispute

6. The background to the dispute, as set out in the judgment under appeal, may be described as follows.

7. Saint-Gobain Glass Deutschland is a company active on the global glass market which operates installations falling within the scope of Directive 2003/87.

8. By letter of 3 July 2012, the applicant requested that the European Commission disclose the document communicated by the Federal Republic of Germany in the course of the procedure for the free allocation of emission allowances under Article 10a of Directive 2003/87. That document contains information on certain of the applicant's installations located in Germany, in particular data relating to 'initial installed capacities' and the provisional number of emission allowances allocated for the period between 2013 and 2020.

9. Following the refusal of its initial request, the applicant submitted, by letter of 7 August 2012, a confirmatory application for access to the documents.

10. Some of the information concerned has been made public by the German authorities.

11. By the contested decision, the Commission granted partial access to the requested information, namely the information made public by the German authorities, and to certain other non-essential information and refused access to the remainder of that information.

12. The Commission based its decision refusing access on the first subparagraph of Article 4(3) of Regulation No 1049/2001, as it took the view that full disclosure of the requested information would seriously undermine its decision-making process, which was still in progress and related to almost 12 000 installations in 27 Member States at the time. According to the Commission, full communication of that information would permit the public, and in particular the undertakings concerned, to raise questions or make criticisms in respect of the information communicated by the Member States, which would be likely to interfere in the decision-making process both before the Commission and before the Member States. Those interferences would, in turn, be likely seriously to delay the decision-making process and to prejudice the dialogue between the Commission and the Member States.

13. The Commission did not establish the existence of an overriding public interest within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001, justifying the disclosure of the requested information, whilst stating that the interests invoked by the applicant in its request were purely private in nature. In the circumstances, the priority interests were to ensure that decisions were taken without any external interference and to preserve the climate of trust between the Commission and the German authorities. Furthermore, the Commission noted that a substantial proportion of the requested information had already been made public by the German authorities and stated that the public therefore had access to the main elements of the proposed harmonised free allocation of emission allowances.

14. The Commission further stated that, even assuming that the information requested by the applicant constituted environmental information, Article 6 of Regulation No 1367/2006 did not contain any provision under which the application of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 could be excluded.

15. In addition, for the purposes of Article 4(5) of Regulation No 1049/2001, once the requested information had been produced by the Federal Republic of Germany, the Commission consulted that Member State, which objected to its disclosure. The Member State justified its objection by reference to the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001. In particular, the Federal Republic of Germany asserted that the Commission had not yet taken a decision on the information in question and that there was considerable pressure to take a timely decision. The Commission submitted that these grounds were prima facie relevant.

## The procedure before the General Court and the judgment under appeal

16. By application of 31 October 2012, the applicant brought an action before the General Court against the Commission's implicit decision refusing access.

17. Following the adoption of the contested decision, the applicant modified the form of order which it sought in the application at first instance in so far as it seeks the annulment of that decision.

18. In support of its action, the applicant relied, in essence, on two pleas in law alleging, first, infringement of Article 4(3) of Regulation No 1049/2001, read in conjunction with Article 6(1) of Regulation No 1367/2006, and, second, infringement of Article 4(5) of Regulation No 1049/2001.

19. In the judgment under appeal, the General Court dismissed the action as unfounded and ordered the applicant to pay the costs.

## Forms of order sought

20. By its appeal, the applicant claims that the Court should set aside the judgment under appeal, annul the contested decision or, in the alternative, refer the case back to the General Court and order the Commission to pay the costs.

21. The Commission contends that the Court should dismiss the appeal and order the applicant to pay the costs.

## Analysis of the appeal

22. In support of its appeal, the applicant relies on two grounds of appeal, alleging, first, a misinterpretation of the first subparagraph of Article 4(3) of Regulation No 1049/2001, read in conjunction with Article 6(1) of Regulation No 1367/2006, and, second, a misapplication of Article 4(5) of Regulation No 1049/2001.

### *The first ground of appeal*

#### *Arguments of the parties*

23. The applicant claims that the General Court erred in law by giving too broad an interpretation to the ground for refusal of access laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, read in conjunction with Article 6(1) of Regulation No 1367/2006.

24. It asserts that the General Court wrongly ruled that an institution may rely on that ground for refusal for a document 'which relates to a matter where the decision has not been taken by the institution' and that its application is not therefore limited to documents drawn up in the course of the decision-making process of a public authority but also extends to 'documents directly connected with matters addressed in that decision-making process' (paragraphs 87 and 88 of the judgment under appeal).

25. The applicant maintains that this interpretation, which is based on case-law not relating to access to environmental information, runs counter to the objective pursued by the Aarhus Convention, which is to make decision-making by public authorities in the field of the environment transparent and to permit public participation in decision-making. In the view of the applicant, the ground of the judgment under appeal according to which it must be ensured that administrative procedures are able to take place in an atmosphere of total serenity and are protected from external pressure (paragraph 81 of the judgment under appeal) cannot be reconciled with that objective.

26. According to the applicant, the relevant provision of the Aarhus Convention, namely Article 4(4)(a), does not protect the entire administrative procedure but only the confidentiality of the proceedings. The concept of 'proceedings' covers only the internal consultation and decision-making process within that authority in relation to the substantive decision, to the exclusion of the facts on the basis of which that process takes place, which are not protected. The mere possibility that disclosure of information may give rise to questions and criticisms cannot justify the refusal of access to documents, since those questions and criticisms are inherent in the objective of transparency.

27. The Commission questions the admissibility of the first ground of appeal. First, it asserts that the applicant is not entitled, at this stage, to raise an alleged incompatibility of Regulation No 1367/2006 with the Aarhus Convention. Second, it maintains that if the applicant wishes to rely on the requirement of interpretation in conformity with the Aarhus Convention, this would be a new plea in law on which the applicant did not rely before the General Court.

28. In substance, the Commission claims that the interpretation adopted by the General Court in the judgment under appeal of the first subparagraph of Article 4(3) of Regulation No 1049/2001, read in conjunction with Article 6(1) of Regulation No 1367/2006, is correct. The Commission takes the view that the concept of 'proceedings of public authorities' in Article 4(4)(a) of the Aarhus Convention is not limited to the authorities' deliberation process. According to the Commission, even if a document like the one which is the subject of the contested decision does not relate to the internal proceedings of a public authority but only the elements used as their basis, access to the document may be refused under Article 4(4)(a) of the Aarhus Convention.

### *Admissibility*

29. The Commission disputes the admissibility of the first ground of appeal, claiming that the argument concerning Article 4(4)(a) of the Aarhus Convention constitutes a new plea in law relied on for the first time at the appeal stage.

30. I would point out that, in accordance with settled case-law, a party may not put forward for the first time before the Court of Justice a plea in law which it did not raise before the General Court. In an appeal, the Court's jurisdiction is, as a general rule, confined to a review of the General Court's assessment of the pleas argued before it. However, that limitation does not apply to arguments which are simply an amplification of an argument already developed at the first instance.[7]

7 — Judgment in *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 113 and 114 and the case-law cited'.

31. In the present case the applicant alleged before the General Court an infringement of the first subparagraph of Article 4(3) of Regulation No 1049/2001, read in conjunction with Article 6(1) of Regulation No 1367/2006, claiming that the grounds for refusal of access must be interpreted in a restrictive way. The applicant referred to the purpose of Regulation No 1367/2006, which is to implement the Aarhus Convention. It asserted that the ground relied on by the Commission did not permit a refusal of access to factual information which does not relate to the decision-making process strictly speaking, but only to the factual basis for that process (see, in particular, paragraphs 41 and 86 of the judgment under appeal).

32. In first ground of appeal, the applicant has raised similar arguments, stating, in addition, that its advocated interpretation also follows from Article 4(4)(a) of the Aarhus Convention.

33. I note that, as is clear from the arguments it put forward at the hearing, the applicant does not invoke the Aarhus Convention in order to challenge the validity of Regulation No 1367/2006, which would effectively modify the scope of the dispute, but relies only on the requirement that that regulation be interpreted in conformity with the Aarhus Convention.

34. Since at first instance the applicant had alleged infringement of Article 6(1) of Regulation No 1367/2006, which implements Article 4 of the Aarhus Convention, the General Court had to interpret the provision of the regulation relied on having regard to the relevant provisions of that Convention in accordance with the principle of interpretation consistent with international law. [8]

35. In these circumstances, I consider that the argument concerning Article 4(4)(a) of the Aarhus Convention is simply an amplification of an argument already developed by the applicant at first instance concerning infringement of Article 6(1) of Regulation No 1367/2006.

36. Accordingly, the first ground of appeal is admissible.

## *Substance*

### *– The obligation of an interpretation in conformity with the Aarhus Convention*

37. The Aarhus Convention, which was approved by Decision 2005/370 forms an integral part of the EU legal order. By becoming a party to the Aarhus Convention, the European Union undertook, inter alia, to ensure, within the scope of EU law, access to environmental information in accordance with the provisions of that Convention. [9]

38. In response to that undertaking, the EU legislature has adopted two acts, Directive 2003/4/EC, [10] which is addressed to the Member States, and Regulation No 1367/2006, which applies to EU institutions and other bodies.

39. Because the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention in adopting those two acts, account is to be taken of the wording and aim of that Convention for the purposes of their interpretation. [11]

8 — Judgment in *Commission* v *Germany*, C-61/94, EU:C:1996:313, paragraph 52. See point 39 of this Opinion.

9 — Judgment in *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 35. See also, to that effect, judgments in *Ville de Lyon*, C-524/09, EU:C:2010:822, paragraph 36, and *Flachglas Torgau*, C-204/09, EU:C:2012:71, paragraph 30.

10 — Directive 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 (OJ 2003 L 41, p. 26).

11 — See, to that effect, with regard to Directive 2003/4, judgments in *Flachglas Torgau*, C-204/09, EU:C:2012:71, paragraph 40, and *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 37.

40. In addition, I note that it is desirable to ensure consistency in the interpretation of those two acts — Directive 2003/4 and Regulation No 1367/2006 — in so far as they implement the same provisions of the Aarhus Convention. In the absence of explicit indication to the contrary, it can be reasonably assumed that the EU legislature intended to implement the Aarhus Convention uniformly in EU law, both for Member States and for the EU institutions.

41. I would observe that these considerations have been accepted by the parties. In particular, in its response the Commission acknowledged that the ground for refusal relied on must be interpreted in the light of Article 4(4)(a) of the Aarhus Convention and consistently with Article 4(2)(a) of Directive 2003/4.

### – *The concept of 'proceedings of public authorities'*

42. Under Article 4(4)(a) of the Aarhus Convention, access to environmental information may be refused if it would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law. The same [12] ground for refusal is laid down in Article 4(2)(a) of Directive 2003/4.

43. It must be stated that there are certain linguistic divergences in the wording of these two provisions. In the authentic text of the Aarhus Convention, the French text refers to '*délibérations des autorités publiques*', whereas the English text uses the term 'proceedings [of public authorities]', which can be understood more broadly.

44. Similarly, in Directive 2003/4 some language versions use a term corresponding to 'deliberations', or even 'internal deliberations', [13] while others refer more broadly to the confidentiality of the proceedings or of procedural acts of a public authority. [14]

45. In order to give a uniform interpretation to the provision in question, contained in the Aarhus Convention and in the acts transposing that Convention into EU law, account must be taken of the context and the purpose of those acts. [15]

46. The Aarhus Convention and Directive 2003/4 seek to ensure greater public access to environmental information by establishing the right of access as a general rule and by confining the possibility of refusal to a few clearly defined, specific cases. [16] Those acts establish the principle that grounds for refusal of access must be interpreted in a restrictive way. [17]

47. In the light of this objective, the concept of 'proceedings of public authorities' cannot, in my view, be interpreted as relating to the entire procedure before a public authority. An excessively broad interpretation like this would not allow the scope of the ground for refusal concerned to be delimited and to be interpreted in a restrictive way.

48. It seems that the choice of a more narrow interpretation of the concept of 'proceedings', as would follow in particular from the French version of the Aarhus Convention, is corroborated by the *travaux préparatoires*.

12 — Article 4(2)(a) of [the French version of] Directive 2003/4 uses a similar term, namely '*confidentialité*' ['confidentiality'] of the proceedings.

13 — In particular the French, German (*Beratungen von Behörden*) and Italian (*deliberazioni interne delle autorità pubbliche*) versions.

14 — In particular the English, Dutch (*handelingen van overheidsinstanties*), Lithuanian ([*valdžios institucijų*]*procesinių veiksmų konfidencialumas*) and Polish (*poufność działań organów władzy publicznej*) versions. The Spanish text of Directive 2003/4 (*procedimientos de las autoridades públicas*) departs from the official translation of the Convention (*deliberaciones de las autoridades públicas*).

15 — In EU law, where there is a divergence between various language versions, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules concerned. See, inter alia, judgment in *GSV*, C-74/13, EU:C:2014:243, paragraph 27.

16 — Recital 16 of Directive 2003/4.

17 — Second subparagraph of Article 4(4) of the Aarhus Convention and second subparagraph of Article 4(2) of Directive 2003/4.

49. A similar provision already appeared in the first indent of the first subparagraph of Article 3(2) of Directive 90/313/EEC,[18] which served as a model in the drafting of the Aarhus Convention. The French version of Directive 90/313 referred to '*délibérations*' and that same term was taken up in the Aarhus Convention. The authors of the Convention thus opted not to replace that term with a more general term.

50. In my view, a narrow reading of the ground for refusal concerned, as being confined to an authority's 'internal' proceedings, can also be based on the analysis given in the Aarhus Convention Implementation Guide,[19] which is an explanatory document relevant to the interpretation of that Convention, even though it has no binding force.[20]

51. I thus consider that the concept of 'proceedings' must be understood as covering only the deliberation stage of decision-making procedures, as is suggested by the terms used in the French version of the Aarhus Convention and in the German, French and Italian versions of Directive 2003/4.

52. I note in this regard that the Court has already had occasion to interpret Article 4(2)(a) of Directive 2003/4, albeit from a different perspective, in *Flachglas Torgau*.[21]

53. In interpreting the condition that the confidentiality of the proceedings of a public authority must be 'provided for by law', the Court ruled that this condition requires in particular that national law must clearly establish the scope of the concept of 'proceedings' referred to in Article 4(2)(a) of Directive 2003/4, which 'refers to the final stages of the decision-making process of public authorities'.[22]

54. Even though the Court did not rule expressly on the scope of the concept of 'proceedings' in that judgment, it can, in my view, be inferred that this concept must be clearly delimited and cannot cover the entire procedure before an authority.

55. In her Opinion in that case, whilst underlining the divergences between the language versions, Advocate General Sharpston took the view that the concept of 'proceedings of public authorities' should be confined to expressions of view and discussions of policy options in the context of decision-taking procedures.[23] She thus followed the restrictive approach adopted by the Commission in that case, based on the French and German versions of Directive 2003/4.[24]

18 — Council Directive of 7 June 1990 on the freedom of access to information on the environment (OJ 1990 L 158, p. 56).

19 — See Stec, et al., *The Aarhus Convention: An Implementation Guide*, United Nations, New York, Geneva, 2000, p. 81. According to the Guide, 'la convention d'Aarhus ne donne pas de définition des "délibérations des autorités publiques", mais l'une des interprétations est qu'il peut s'agir de délibérations concernant les opérations internes d'une autorité publique et non de délibération des autorités publiques sur des questions de fond relevant de leur domaine de compétence' (p. 74 of the French version) ('The Convention does not define "proceedings of public authorities" but one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence'). The same position is expressed in the second edition of the Guide (p. 86 of the English version). See document available on the website at http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/key-guidance-material.html.

20 — Judgment in *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 38.

21 — C-204/09, EU:C:2012:71.

22 — Judgment in *Flachglas Torgau*, C-204/09, EU:C:2012:71, paragraph 63.

23 — Opinion of Advocate General Sharpston in *Flachglas Torgau*, C-204/09, EU:C:2011:413, point 83.

24 — Opinion of Advocate General Sharpston in *Flachglas Torgau*, C-204/09, EU:C:2011:413, point 81. In that case the German Government asserted that the term 'proceedings' included inter-service discussions but not data or statistics forming the basis of such discussions and of the resulting decisions.

56. In a ruling given following the judgment in *Flachglas Torgau*,[25] cited by the applicant, the Bundesverwaltungsgericht (Federal Administrative Court, Germany) interpreted the ground for refusal at issue as being confined to the deliberation process as such, namely the actual reflection process, to the exclusion of information forming the factual basis for the decisions taken, which is protected only if it allows clear conclusions to be drawn regarding the deliberation process.[26]

57. I propose that the Court adopt essentially the same interpretation in the present case. This approach will make it possible to ensure consistency in the application of the same ground for refusal which is applicable, under the Aarhus Convention, both to Member States and to EU institutions.

58. It is true that it cannot be ruled out that, in implementing a legal concept in respect of an international undertaking, the EU legislature will take account of specific features of the operation of the European Union, which may be different from the operation of a Member State.[27] However, in the present case, I cannot see how such specific features could justify a different interpretation of the concept of 'proceedings' from that based on Directive 2003/4.

59. As I have already stated, the first subparagraph of Article 4(3) of Regulation No 1049/2001, read in conjunction with Article 6(1) of Regulation No 1367/2006, must be interpreted in conformity with Article 4(4)(a) of the Aarhus Convention.

60. The exception relating to requests for access to information under those provisions of EU law must thus be understood as referring to the confidentiality of the 'proceedings of public authorities' and covering information whose disclosure could adversely affect the confidentiality of the deliberation process in decision-making procedures. As the applicant claims, such a narrow interpretation excludes a priori information which simply forms the factual basis for the decision-making process.

61. I am aware that this interpretation departs from the wording of the first subparagraph of Article 4(3) of Regulation No 1049/2001, which refers to any document 'drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution'.[28]

62. This is because, in implementing the Aarhus Convention in respect of the EU institutions, through Regulation No 1367/2006, the EU legislature opted not to transpose the grounds of refusal contained in the Convention but to refer to Regulation No 1049/2001, which does not use the same terminology.[29]

### *– Analysis of the findings of the General Court*

63. The criticisms made by the applicant concern, first, paragraphs 80 to 82 and, second, paragraphs 87 to 89 of the judgment under appeal.

25 — C-204/09, EU:C:2012:71.

26 — Ruling of 2 August 2012, 7 C 7.12, paragraphs 26 and 27 (ECLI:DE:BVerwG:2012:020812U7C7.12.0).

27 — It was inter alia in the light of these specific features that, in a declaration lodged in accordance with Article 19 of the Aarhus Convention, the Union stated that 'the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention'. See also judgment in *ClientEarth* v *Commission*, C-612/13 P, EU:C:2015:486, paragraphs 40 and 41.

28 — The second subparagraph of that paragraph, which is not relied on in this case, concerns access to a 'document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned'.

29 — Certain authors noted, at the time of the transposition of the Aarhus Convention, that Regulation No 1049/2001 contained elements which are not consistent with the Convention. See Krämer, L., 'Access to Environmental Information in an Open European Society — Directive 2003/4', *College of Europe Research Papers*, 5/2003, p. 28.

64. In paragraphs 79 to 85 of the judgment under appeal, the General Court examined the applicant's argument that transparency and public participation implies the opportunity to raise criticisms and questions regarding the accuracy of data and held that the risk from such criticisms cannot constitute a ground for refusal of access to information (paragraph 79 of the judgment under appeal).

65. In this regard, the General Court ruled, on the basis of case-law relating to Article 4(2) and (3) of Regulation No 1049/2001,[30] that the administrative procedure in question merits greater protection because access to information relating to it would permit interested parties to attempt to exert influence on the procedure and that such administrative procedures should therefore be protected from external pressure which would disturb the serenity of the proceedings (paragraphs 80 to 81 of the judgment under appeal).

66. I would observe that whilst this legal argument is perfectly valid in the area of the control of concentrations, which was the subject of the judgment in *Sweden* v *MyTravel and Commission*[31] cited by the General Court, it cannot be applied unreservedly in the field of access to environmental information.

67. As the applicant rightly states, the very objective of the Aarhus Convention and the legislative acts implementing that Convention in EU law is to ensure greater transparency in administration and to grant public access to information in the field of the environment in order to give the public the opportunity to express its concerns.[32]

68. In the field covered by the Aarhus Convention, the opportunity to make criticisms and to attempt to exert influence on the decision-making process cannot therefore be relied on by the administration as a ground for refusal of access to information.

69. Accordingly, in so far as the General Court found that the requested information falls within the field covered by the Aarhus Convention and Regulation No 1367/2006, it could not, without erring in law, rely on the consideration, derived from another field of EU activity, that the Commission's administrative activity must, like court proceedings,[33] be protected in order to ensure the serenity of the proceedings (paragraph 81 of the judgment under appeal).

70. Furthermore, the ground relied on by the General Court in paragraph 82 of the judgment under appeal to the effect that administrative activity does not require as extensive access to information as legislative activity is also inapplicable in the field covered by the Aarhus Convention. The Convention seeks to increase transparency mainly in the context of administrative activity, the exercise of legislative powers being excluded from its scope.[34]

71. The grounds in paragraphs 80 to 82 of the judgment under appeal are therefore incompatible with the objectives of the Aarhus Convention and of Regulation No 1367/2006 and breach the principle laid down in the second subparagraph of Article 4(4) of the Aarhus Convention and Article 6(1) of Regulation No 1367/2006 that grounds for refusal of access to information should be interpreted in a restrictive way.

30 — Judgment in *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:496, paragraphs 86 and 87, and Opinion of Advocate General Kokott in that case, EU:C:2011:107, points 65 to 67.

31 — C-506/08 P, EU:C:2011:496.

32 — See the ninth recital of the Aarhus Convention, recital 1 of Directive 2003/4 and recital 2 of Regulation No 1367/2006.

33 — In the Opinion cited by the General Court, Advocate General Kokott took the view that administrative procedures, especially in the area of the control of concentrations, merit protection from external pressure, in a similar way to court proceedings. See Opinion of Advocate General Kokott in *Sweden* v *MyTravel and Commission*, C-506/08 P, EU:C:2011:107, points 65 to 67.

34 — Even though the EU legislature opted to extend the arrangements under the Convention to the Union's legislative activity. See the second subparagraph of Article 2(2) of the Aarhus Convention and recital 7 of Regulation No 1367/2006.

72. Second, in paragraphs 86 to 89 of the judgment under appeal, the General Court examined the applicant's argument that the requested information does not fall within the scope of the ground for refusal relied on, since it cannot be considered to relate to the decision-making process itself, but concerns only the factual basis for that process (paragraph 86 of the judgment under appeal).

73. The General Court noted in this regard that, with reference to the first subparagraph of Article 4(3) of Regulation No 1049/2001, an institution may refuse access to a document 'relating to a matter where the decision has not been taken by the institution'; in its view, the use of this expression makes it possible to apply the provision to documents directly connected with matters addressed in the decision-making process (paragraphs 87 and 88 of the judgment under appeal).

74. The General Court held that this was the case with the information at issue, as it was data which the Member States must communicate to the Commission in order to calculate free greenhouse gas emission allowances pursuant to Article 11 of Directive 2003/87 and Article 15 of Decision 2011/278/EU.[35] That information was thus 'directly connected with the matter addressed in the decision-making process' and 'relates to a matter where the decision has not been taken by the institution' (paragraphs 89 and 90 of the judgment under appeal).

75. I note that the General Court's reasoning does not take account of the fact that the exception for requests for access to documents under the first subparagraph of Article 4(3) of Regulation No 1049/2001 must, in the field covered by the Aarhus Convention and by Regulation No 1367/2006, be interpreted strictly and in the light of the exhaustive list of grounds for refusal provided by the Convention.

76. Under Article 4(4)(a) of the Aarhus Convention, a request for environmental information may be refused if it adversely affects the 'confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law'. In my view, this ground for refusal must be understood as relating to the deliberation process in decision-making procedures and does not cover an entire administrative procedure.[36]

77. In the light of this ground for refusal under the Aarhus Convention, the General Court's interpretation of the first subparagraph of Article 4(3) of Regulation No 1049/2001 in paragraphs 87 to 90 of the judgment under appeal is too broad as it potentially covers any document relating to a matter where the decision has not been taken by the institution.[37]

78. The General Court thus infringed the principle laid down in Article 6(1) of Regulation No 1367/2006 that grounds for refusal should be interpreted in a restrictive way and the obligation to give an interpretation in conformity with the Aarhus Convention.[38]

### *Preliminary conclusion*

79. For all the reasons set out, I consider that in paragraphs 80 to 90 of the judgment under appeal the General Court relied on a misinterpretation of the first subparagraph of Article 4(3) of Regulation No 1049/2001, read in conjunction with Article 6(1) of Regulation No 1367/2006.

35 — Commission Decision of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011, L 130, p. 1).

36 — See point 60 of this Opinion.

37 — I note that in more recent rulings on access to environmental information the General Court has adopted a much stricter interpretation of this provision of Regulation No 1049/2001. See judgment in *PAN Europe* v *Commission*, T-51/15, not published, EU:T:2016:519, paragraphs 30 to 37.

38 — See point 39 of this Opinion.

80. In my view, the judgment under appeal should therefore be set aside, without it being necessary to examine the second ground of appeal.

### *The consequences of the setting aside of the judgment under appeal*

81. Under Article 61(1) of the Statute of the Court of Justice of the European Union, where it quashes the judgment under appeal, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

82. I consider this condition to be met in the present case.

83. Before the General Court, the applicant based its application for annulment of the contested decision, in essence, on two pleas in law, the first of which alleged infringement of Article 4(3) of Regulation No 1049/2001, read in conjunction with Article 6(1) of Regulation No 1367/2006.

84. In the light of points 76 to 78 of this Opinion, that plea in law must be upheld.

85. As the applicant rightly notes in its application and its application modifying the form of order sought, lodged at first instance, the Commission infringed Article 4(3) of Regulation No 1049/2001, read in conjunction with Article 6(1) of Regulation No 1367/2006 by taking the view that the requested information was covered by the ground for refusal relating to the risk of seriously undermining the Commission's decision-making process.

86. In the case of a request for access concerning environmental information within the meaning of Article 2(1)(d) of Regulation No 1367/2006, which is common ground between the parties, this ground for refusal must be understood, in the light of Article 4(4)(a) of the Aarhus Convention, as seeking to protect the confidentiality of the proceedings of a public authority.

87. In the present case, the Commission has not shown how access to information which simply forms the factual basis for its future decision, namely data communicated by the Federal Republic of Germany which is necessary for calculating free greenhouse gas emission allowances pursuant to Article 11 of Directive 2003/87 and Article 15 of Decision 2011/278, could undermine the deliberation process relating to the adoption of that decision.

88. The reasoning adopted by the Commission in the contested decision asserting that full communication of that information would permit the public to raise questions or make criticisms in respect of the information communicated by the Member States, which would be likely to interfere in the decision-making process, delay that process and prejudice the dialogue between the Commission and the Member States, is not relevant having regard to both the purpose of Regulation No 1367/2006 and that of the Aarhus Convention, which is to increase the transparency of administrative activity in the field of the environment.

89. Furthermore, contrary to Article 6(1) of Regulation No 1367/2006, the contested decision fails to specify whether or not the information requested relates to emissions into the environment and fails to take into account the public interest served by disclosure. [39]

39 — In a similar situation concerning access to information on the sale of greenhouse gas emission allowances, see Opinion of Advocate General Kokott in *Ville de Lyon*, C-524/09, EU:C:2010:613, points 69 to 74. I note that the second subparagraph of Article 4(2) of Directive 2003/4 excludes the possibility of relying on the ground for refusal relating to the confidentiality of the proceedings of public authorities where the request for access relates to information on emissions. Even though Regulation No 1367/2006 contains no such limitation, I have doubts whether the Commission is able legitimately to rely on that ground in the same situation, as that possibility is not open to the Member States.

90. As regards the public interest, I note that one of the objectives of the right of access to environmental information is to raise public awareness of environmental matters and to permit the public to express its concerns. As the applicant rightly stated in its reply at first instance, any information provided by the public regarding possible errors in Member States' data will allow the Commission to perform its function under Article 15(1) of Decision 2011/278 more effectively.

91. Lastly, I would observe that it is not relevant that the request for access in this case comes from an undertaking which is itself a beneficiary of the free allowance scheme. The right of access to environmental information is guaranteed for any natural or legal person, without that person having to state an interest.[40] The possible presence of such an interest is thus irrelevant. In addition, even if the applicant, as a beneficiary of allowances, has a particular interest in the information used to calculate the allowances being accurate, it is not inconceivable that that interest aligns with the public interest in the Commission taking decisions on the environment on the basis of accurate and up-to-date information.

92. Consequently, the first plea in law in the action should be upheld and the contested decision should be set aside, without it being necessary to examine the second plea in law in the application at first instance, which alleges infringement of Article 4(5) of Regulation No 1049/2001.

93. In any event, this latter provision does not constitute a genuinely autonomous ground for refusal in this case which could justify upholding the contested decision. The objection by the Federal Republic of Germany under Article 4(5) of Regulation No 1049/2001 is also made on grounds of the protection of the Commission's decision-making process, as provided for in the first subparagraph of Article 4(3) of that regulation (paragraph 127 of the judgment under appeal).

## Conclusion

94. In the light of the above considerations, I propose that the Court:

— set aside the judgment of the General Court of the European Union of 11 December 2014, *Saint-Gobain Glass Deutschland* v *Commission*, (T-476/12, not published, EU:T:2014:1059);

— annul the Commission Decision of 17 January 2013 (GestDem 3273/2012) partially refusing a request for access to a document communicated to the Commission by the Federal Republic of Germany in the course of the procedure for the allocation of greenhouse gas emission allowances under Article 10a of Directive 2003/87/EC; and

— order the European Commission to pay the costs of both sets of proceedings.

40 — Recital 8 of Directive 2003/4. See judgments in *Fish Legal and Shirley*, C-279/12, EU:C:2013:853, paragraph 36, and *East Sussex County Council*, C-71/14, EU:C:2015:656, paragraph 56.