Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 7 April 2016 [1]

Case C-673/13 P

European Commission
v

Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe)

(Appeal — Regulation (EC) No 1049/2001 — Access to the documents of the institutions — Regulation (EC) No 1367/2006 — Access to environmental information — Information relating to emissions into the environment — Documents relating to the first authorisation of the placing on the market of the active substance glyphosate — Partial refusal of access — Risk of an adverse effect on the commercial interests of a natural or legal person — Overriding public interest)

I – Introduction

1. Glyphosate is one of the most widely used active substances for plant protection. Traces of it can thus be found in the food chain, and ultimately in German beer. At the same time it is disputed whether this active substance is carcinogenic. It is not surprising, therefore, that Greenpeace and Pesticide Action Network Europe (PAN Europe) have been attempting for some time to gain access to the records concerning the authorisation of this active substance for use in plant protection products.

2. The Commission disclosed some of the documents in question, but withheld others on grounds of protection of the commercial interests of the undertakings concerned. The General Court, on the other hand, ruled that the withheld documents also relate to emissions into the environment and an overriding interest in their disclosure must therefore be presumed to exist.

3. Consequently, in the present appeal proceedings it is necessary to clarify the meaning of information relating to emissions into the environment.

1 — Original language: German.

II – Legislative framework

A – International law

4. The right of access to environmental information is established in the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2] ('the Aarhus Convention'), which was signed by the Community on 25 June 1998 in Aarhus (Denmark). [3]

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

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

(a)-(c) …

(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;

…'

6. The protection of the confidentiality of commercial information which is communicated to the national authorities is also the subject of Article 39(3) of the TRIPS Agreement: [4]

'Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilise new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.'

B – EU law

1. Regulation (EC) No 1049/2001

7. Regulation No 1049/2001 [5] defines the principles, conditions and limits for the right of access to the documents of those institutions laid down by Article 255 EC.

2 — OJ 2005 L 124, p. 4.

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

4 — Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Agreement Establishing the World Trade Organization (WTO), which was signed in Marrakesh on 15 April 1994 and approved on behalf of the European Community by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

5 — 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).

8. Article 4(2) of Regulation No 1049/2001 lays down the limits for that right:

‘2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

— commercial interests of a natural or legal person, including intellectual property,

— …

— …

unless there is an overriding public interest in disclosure.’

2. The Aarhus Regulation

1. The Aarhus Regulation [6] implements the Aarhus Convention in respect of the EU institutions. For that purpose Article 6(1) of the Aarhus Regulation modifies the exceptions laid down in Regulation No 1049/2001 to the right of access to documents with regard to information relating to emissions into the environment:

‘As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community 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 (EC) 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.’

3. The Plant Protection Directive

2. The Plant Protection Directive [7] initially regulated the authorisation, placing on the market, use and control of plant protection products and the placing on the market and control of active substances for such products. In particular, plant protection products require authorisation by the Member States. This means that a study of their effects must be carried out.

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

‘Member States and the Commission shall, without prejudice to [the Environmental Information Directive [8]], ensure that information submitted by applicants involving industrial and commercial secrets is treated as confidential if the applicant wishing to have an active substance included in Annex I or the applicant for authorisation of a plant protection product so requests, and if the Member State or the Commission accepts that the applicant’s request is warranted.

Confidentiality shall not apply to:

…’

6 — Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

7 — Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1).

8 — 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 (OJ 2003 L 41, p. 26).

4. By Directive 2001/99/EC[9] the Commission authorised the active substance glyphosate on the basis of the Plant Protection Directive.

4. The Plant Protection Regulation

5. The Plant Protection Regulation[10] has applied since 14 June 2011 pursuant to Article 84 thereof and has replaced the Plant Protection Directive.

6. Recital 39 of the Plant Protection Regulation states:

'Studies represent a major investment. This investment should be protected in order to stimulate research. For this reason, tests and studies, other than those involving vertebrate animals, which will be subject to obligatory data sharing, lodged by one applicant with a Member State should be protected against use by another applicant. This protection should, however, be limited in time in order to allow competition. It should also be limited to studies which are genuinely necessary for regulatory purposes, to avoid applicants artificially extending the period of protection by submitting new studies which are not necessary. Business operators, in particular small and medium-sized enterprises, should have the same opportunities in respect of market access.'

7. Recital 41 of the Plant Protection Regulation concerns requests for information. It states:

'As different rules are applied by Member States, the Commission and the Authority in relation to access to and confidentiality of documents, it is appropriate to clarify the provisions concerning access to information contained in the documents in the possession of these authorities and the confidentiality of these documents.'

8. Article 63(2) of the Plant Protection Regulation specifies the information whose disclosure would, as a rule, adversely affect certain legitimate interests:

'Disclosure of the following information shall normally be deemed to undermine the protection of the commercial interests or of privacy and the integrity of the individuals concerned:

(a) the method of manufacture;

(b) the specification of impurity of the active substance except for the impurities that are considered to be toxicologically, ecotoxicologically or environmentally relevant;

(c) results of production batches of the active substance including impurities;

(d) methods of analysis for impurities in the active substance as manufactured except for methods for impurities that are considered to be toxicologically, ecotoxicologically or environmentally relevant;

(e) links between a producer or importer and the applicant or the authorisation holder;

(f) information on the complete composition of a plant protection product;

(g) names and addresses of persons involved in testing on vertebrate animals.'

9 — Commission Directive of 20 November 2001 amending Annex I to Directive 91/414 to include, inter alia, glyphosate (OJ 2001 L 304, p. 14).

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

9. Under Article 63(3) of the Plant Protection Regulation, however, Article 63 is without prejudice to the Environmental Information Directive.

10. Article 80 of Regulation (EC) No 1107/2009 contains various transitional rules, including the following paragraph 5:

‘Applications for authorisations of plant protection products:

(a) under Article 4 of Directive 91/414/EEC which are pending in the Member States; or

(b) which are due to be amended or withdrawn following an inclusion in Annex I to Directive 91/414/EEC or following an approval in accordance with paragraph 1 of this Article;

on 14 June 2011 shall be decided on the basis of national law in force before that date.

After that decision, this Regulation shall apply.’

11. Under Article 84(1) of the Plant Protection Regulation, that regulation entered into force on the 20th day following its publication in the *Official Journal of the European Union*, that is on 14 December 2009. It is also provided there, however, that the regulation is to apply from 14 June 2011.

III – Facts and administrative procedure

12. On 20 December 2010, Stichting Greenpeace Nederland and PAN Europe made a request to the Commission for access to several documents relating to the first authorisation of the placing of glyphosate on the market as an active substance, granted under Directive 91/414 in 2001.

13. After consulting Germany, the Member State whose authorities had prepared the first authorisation by the Commission, the Commission partially refused that request on 10 August 2011. It stated that the disclosure of the refused documents would adversely affect the commercial interests of the undertakings which had submitted them in order to obtain the first authorisation. The Commission explained that, while the method of manufacture for glyphosate was generally known, the specific methods of each manufacturer were not. They could, however, be extrapolated in particular from impurities in the product and from its precise composition. An overriding public interest in the disclosure of the documents was not evident. In particular, the information contained did not relate to emissions into the environment.

IV – The judgment under appeal by the General Court

14. Stichting Greenpeace Nederland and PAN Europe brought an action against that decision at the General Court.

15. The General Court annulled the contested decision by the Commission in so far as it refused access to documents relating to, first, the ‘identity’ and quantity of all the impurities in the active substance notified by each operator, second, the impurities present in the various batches and the minimum, median and maximum quantities of each of those impurities and, third, the composition of the plant protection products developed by the operators. [11]

11 — Judgment in *Stichting Greenpeace Nederland and PAN Europe* v *Commission* (T-545/11, EU:T:2013:523).

16. It found, first of all, that Article 6(1) of Regulation (EC) No 1367/2006 established a legal presumption that the public interest in the disclosure of information relating to emissions into the environment is superior to commercial interests in its confidential treatment. The General Court further ruled that the abovementioned information related to emissions into the environment.

V – Forms of order sought

17. On 17 December 2013, the Commission brought an appeal against the judgment of the General Court. It claims that the Court should:

(1) set aside the judgment of the General Court;

(2) pursuant to Article 61 of the Statute of the Court of Justice, either give a final ruling on the first and third pleas itself or refer the case back to the General Court for a decision on those pleas, and;

(3) order the respondents to pay the costs.

18. Stichting Greenpeace Nederland and PAN Europe contend that the Court should:

(1) dismiss the appeal;

(2) order the Commission to pay the costs.

19. The President of the Court of Justice granted Germany and, by orders of 3 March 2015, the European Crop Protection Association, CropLife International, CropLife America, Inc., the National Association of Manufacturers of the United States of America and the American Chemistry Council, Inc., the European Chemical Industry Council and the European Crop Care Association leave to intervene in support of the Commission. They submitted written observations and, except for Germany, presented oral argument.

20. At the hearing on 4 February 2016, Sweden was joined to the proceedings as an intervener in support of Stichting Greenpeace Nederland and PAN Europe.

VI – Assessment

21. In its appeal the Commission challenges the General Court's interpretation of the first sentence of Article 6(1) of Regulation (EC) No 1367/2006. Under this 'emissions clause', an overriding public interest in disclosure, which in particular outweighs the protection of commercial secrets, is deemed to exist where the information requested relates to emissions into the environment.

22. The General Court, however, largely concurs with the view which I have already put forward in the Opinion in *Stichting Natuur en Milieu and Others* regarding the interpretation of the fourth sentence of Article 4(2) of the Environmental Information Directive. That provision contains an emissions clause which is similar to the first sentence of Article 6(1) of the Aarhus Regulation. According to the view I stated at the time, both information on the release of substances as such and information on the consequences of such a release are to be regarded as information on emissions into the environment. [12] The Court, on the other hand, has not yet taken a position on this point.

12 — My Opinion in *Stichting Natuur en Milieu and Others* (C-266/09, EU:C:2010:546, points 93 to 95).

23. I would therefore like to make clear here that I am not convinced by the objections raised by the Commission in the first and third limbs of the ground of appeal. The first limb relates to the schematic context of the various rules governing the right of access to documents based on Regulation No 1049/2001, the Aarhus Regulation and Article 4(4) of the Aarhus Convention (see section A). The third limb concerns the weighing between the different fundamental rights and the TRIPS Agreement (see section B).

24. By contrast, the second limb of the appeal, which concerns the sector-specific rules of plant protection legislation, requires me to reconsider my position, as the Commission relies on provisions of the Plant Protection Regulation which were not applicable *ratione temporis* in *Stichting Natuur en Milieu and Others* (see section C).

A – The schematic context of the rules on access

25. Contrary to Article 169(2) of the Rules of Procedure, the Commission does not state precisely which paragraphs of the judgment under appeal it contests with the first limb of its ground of appeal. Towards the end of its observations it does mention a few paragraphs, namely paragraphs 53, 57, 69 and 71, but that reference is made merely to illustrate the purported shortcomings of the approach taken by the General Court. Nevertheless, with a careful reading of the Commission's submissions and the judgment under appeal it is possible to identify what the Commission has in view. Consequently, the Court should not reject this limb of the ground of appeal as inadmissible.

1. The effectiveness of the protection of the confidentiality of commercial information

26. The Commission claims that any substance is released into the environment at some time. It thus asserts that the presumption of an overriding public interest in the disclosure of information relating to emissions into the environment must be given a strict interpretation, otherwise the exceptions to the right of access to information which must come second to that overriding interest would be deprived of their effectiveness. The Commission therefore wishes to restrict that presumption to information on actual emissions released by certain installations.

27. This view is correct in that not every connection between information and the release of substances into the environment can result in the application of the emissions clause. What is concerned, is rather, information on the release as such.[13] Nevertheless, this includes information relating to the consequences of the release, such as studies on the residues of a plant protection product,[14] as such information concerns the properties of the released substances.

28. If the emissions clause is construed in this way, the exception applying to the confidentiality of commercial information is not rendered meaningless, contrary to the view taken by the Commission. It can in principle still be applied to information relating to the handling of substances before they are released. The emissions clause may be applied only where such information casts light on the properties of the released substance.

2. The application of the emissions clause to 'hypothetical' emissions

29. The Commission continues to argue, on the basis of my Opinion in *Ville de Lyon*, that the emissions clause covers only actual emissions, but not hypothetical emissions. The information at issue does not relate to actual emissions.

13 — My Opinion in *Stichting Natuur en Milieu and Others* (C-266/09, EU:C:2010:546, point 93). See also my Opinion in *Ville de Lyon* (C-524/09, EU:C:2010:613, points 73 and 74)

14 — My Opinion in *Stichting Natuur en Milieu* (C-266/09, EU:C:2010:546, point 93).

30. It is true that in that Opinion I took the view that the protection of commercial confidentiality ends only when the substances to which the confidential information relates are released. [15]

31. The notion of environmental information in the case of emissions also requires that they affect or are likely to affect the elements of the environment referred to in Article 2(d)(ii) of the Aarhus Regulation. If an effect is at most hypothetically possible, the directive is not applicable at all.

32. The Commission is therefore correct to state that information on hypothetical emissions does not fall under the emissions clause.

33. However, authorised plant protection products are generally released in accordance with the intended use. Consequently, information on their authorisation cannot be considered to concern hypothetical emissions.

3. The limitation to emissions from installations

34. Lastly, the Commission wishes to exclude the release of plant protection products entirely from the emissions clause by limiting it to emissions from installations.

35. This view has no basis in the wording of the Aarhus Regulation, as that regulation neither limits the notion of emission to installations nor refers to other directives where this occurs.

36. The Commission nevertheless bases the limitation of the emissions clause to emissions from installations on the Implementation Guide for the Aarhus Convention. It originally proposed using the definition in Article 2(5) of the IPPC Directive [16] for the purposes of the application of the emissions clause in the Aarhus Convention. [17] In the second edition [18] it refers instead to the identical definition of emissions in Article 3(4) of the Industrial Emissions Directive. [19] Both definitions limit the notion of emissions to releases from installations.

37. While the Guide may be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention, the observations in the Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention. [20]

38. As far as the question at issue is concerned, it should be stated that the Guide does not give any reason why the definition contained in the IPPC Directive and the Industrial Emissions Directive in particular should apply. Regard could also be had, for example, to the definition in Article 2(8) of the Environmental Liability Directive, [21] which does not focus on an installation as the origin of the emission, but only on whether it is a result of human activities.

15 — My Opinion in *Ville de Lyon* (C-524/09, EU:C:2010:613, points 73 and 74).

16 — Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26).

17 — Stec/Casey-Lefkowitz/Jendrośka, *The Aarhus Convention: An Implementation Guide*, New York 2000, p. 60.

18 — Ebbesson/Gaugitsch/Miklau/Jendrośka/Stec/Marshall, *The Aarhus Convention: An Implementation Guide*, Second Edition 2014, p. 88.

19 — Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

20 — Judgments in *Flachglas Torgau* (C-204/09, EU:C:2012:71, paragraph 36) and *Solvay and Others* (C-182/10, EU:C:2012:82, paragraph 27).

21 — Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56).

39. There is also no particular connection between the Industrial Emissions Directive and the right of access to environmental information that could justify applying the installation-based definition of emissions. It is true that the IPPC Directive and the relevant sections of the Industrial Emissions Directive contribute to the implementation of the Aarhus Convention.[22] Nevertheless, the provisions of the Aarhus Convention which relate to installations have a much narrower scope than the right of access to environmental information.

40. In addition, on closer examination of the emissions clause in Article 4(4)(d) of the Aarhus Convention it is clear that it is even inappropriate to restrict it to emissions from installations, as under that provision information on emissions which is relevant for the protection of the environment is to be disclosed. Yet the question whether emissions originate from installations is immaterial to their effects on the environment. One need only think of transport emissions.[23] Accordingly, the Guide also states, immediately before referring to the definition of emissions in the Industrial Emissions Directive, that in principle any information on emissions should fall under the emissions clause of the Convention.[24]

41. That argument is also therefore ineffective.

B – Fundamental rights and the TRIPS Agreement

42. By the third limb of the ground of appeal, the Commission complains that insufficient consideration was given to the fundamental rights of the undertakings concerned and to the TRIPS Agreements in paragraphs 44 and 45 of the judgment under appeal. In those paragraphs the General Court rejected an interpretation of the emissions clause in accordance with fundamental rights and the TRIPS Agreement that was not consistent with its content. The wording of that passage, which seems abrupt at first sight, follows the model adopted by the Court in *Interseroh Scrap and Metals Trading*, which concerned the question whether information requirements relating to the transport of waste should be limited in respect of business secrets.[25]

43. The Commission's criticism of this paragraph is based on a misreading of the judgment under appeal, as in those statements the General Court is merely explaining why the emissions clause justifies the legal presumption of an overriding interest in the disclosure of information relating to emissions into the environment. The Commission does not, however, call that presumption into question, but objects to the scope which the General Court attributes to the emissions clause.[26] In this connection, in paragraphs 47 to 76 of the judgment under appeal the General Court does not consider either an interpretation in conformity with fundamental rights or the TRIPS Agreement. This might constitute an error in law about which the Commission complains at most implicitly.

44. In substance, however, this (implicit) complaint is also ineffective since the public's interest in finding out how it may be affected by emissions and, in particular, what are the risks to human health and the environment generally outweighs the commercial interest of undertakings benefitting from the release.

22 — See recital 27 of the Industrial Emissions Directive.

23 — See my Opinion in *Stichting Natuur en Milieu* (C-266/09, EU:C:2010:546, point 90).

24 — Ebbesson et al., cited in footnote 18, p. 88.

25 — Judgment in *Interseroh Scrap and Metals Trading* (C-1/11, EU:C:2012:194, paragraph 44).

26 — See paragraphs 29 and 30 and 34 of the appeal.

45. This situation is not affected by any protection of those interests by fundamental rights [27] or Article 39 of the TRIPS Agreement, as such legal interests may be restricted in favour of overriding interests. [28]

46. If the necessary weighing of interests had to be carried out for each individual request for access, the undertakings concerned could be expected to defend their interests fiercely. This could create a considerable workload for the responsible authorities and there would be reason to fear that such information could be disclosed only after protracted and expensive legal disputes. That risk would probably deter most interested parties. In order to avoid these disadvantages, the legislature could legitimately anticipate this weighing in adopting the emissions clause.

47. It is true that this means that it is no longer possible to weigh the conflicting interests in each individual case. Such an approach is not unfamiliar in respect of the EU right of access to documents, however. The Court has repeatedly refrained from examining the individual case and recognised general presumptions. [29] While those presumptions concerned refusal of access in each case, presumptions in support of access should be equally possible.

C – Plant protection legislation

48. By the second limb of the ground of appeal, the Commission challenges paragraphs 38, 40 and 41 of the judgment under appeal. It alleges that in those paragraphs the General Court did not take sufficient account of the connection between the right of access to documents, in particular the emissions clause, and the special provisions of plant protection legislation.

49. This claim is also vitiated by the abovementioned misreading of the judgment under appeal. The Commission actually complains that the General Court did not take account of the connection between the emissions clause and the special provisions of plant protection legislation when it determined the scope of the emissions clause in paragraphs 47 to 76 of the judgment under appeal.

50. In so far as the special provisions of plant protection legislation were considered in *Stichting Natuur en Milieu and Others*, that is to say with particular reference to Article 14 of the Plant Protection Directive, I still take the view that they do not call into question the application of the emissions clause. Rather, the emissions clause must also be taken into consideration in the context of Article 14 of the Plant Protection Directive. [30]

51. That provision protects commercial secrets only without prejudice to the Environmental Information Directive, which contains a comparable emissions clause with which Member States must comply. It is not possible, however, to give a different interpretation to the emissions clause which applies to the EU institutions. It should also be noted that both emissions clauses were adopted long after the Plant Protection Directive.

27 — See judgments in *Varec* (C-450/06, EU:C:2008:91, paragraph 49), *Interseroh Scrap and Metals Trading* (C-1/11, EU:C:2012:194, paragraph 43), and, with regard to the protection of intellectual property rights, the judgment of the European Court of Human Rights of 11 January 2007, *Anheuser-Busch Inc. v. Portugal*, no. 73049/01, § 72, ECHR 2007-I.

28 — See judgments in *Nelson and Others* (C-581/10 and C-629/10, EU:C:2012:657, paragraph 81) and *Križan and Others* (C-416/10, ECR, EU:C:2013:8, paragraphs 113 to 115), and also my Opinion in *Stichting Natuur en Milieu* (C-266/09, EU:C:2010:546, point 95).

29 — Judgments in *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376, paragraph 61); *Sweden* v *API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 94); *Commission* v *Agrofert Holding* (C-477/10 P, EU:C:2012:394, paragraph 64); *Commission* v *Éditions Odile Jacob* (C-553/10 P and C-554/10 P, EU:C:2012:682, paragraph 123), and *LPN* v *Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 49).

30 — See my Opinion in *Stichting Natuur en Milieu and Others* (C-266/09, EU:C:2010:546, points 81 and 82).

52. The Plant Protection Regulation, which was adopted *subsequent to* the emissions clause, nevertheless changes the legal situation, as Article 63(2) catalogues information the disclosure of which would undermine the protection of commercial interests. This includes the specification of the full composition of a plant protection product and of impurity of the active substance except for the impurities that are considered to be toxicologically, ecotoxicologically or environmentally relevant, and results of production batches of the active substance including impurities (points (b), (c) and (f)). This is precisely the contested information.

53. The Plant Protection Regulation is also applicable to the main proceedings, as under Article 84(1) it has had to be applied since 14 June 2011, as is confirmed by the transitional rule laid down in Article 80(5) for pending authorisation and amendment procedures. The contested decision was adopted, however, only on 10 August 2011.

54. In formal terms the catalogue of sensitive information under Article 63(2) of the Plant Protection Regulation does not preclude the application of the emissions clause.

55. First, the catalogue under Article 63(3) of the Plant Protection Regulation is without prejudice to the Environmental Information Directive, which also contains the emissions clause. It should therefore also be without prejudice to Regulation No 1049/2001 in conjunction with the Aarhus Regulation, which merely apply the Environmental Information Directive to the institutions.

56. Second, the catalogue only makes clear what information falls under the protection of certain exceptions to the right of access. It is thus without prejudice to the question whether information should nevertheless be disclosed on grounds of overriding public interests. The emissions clause regulates precisely this question in respect of information concerning emissions into the environment on the basis of a legal presumption of an overriding public interest.

57. However, a formal approach like this would ignore the fact that in defining the catalogue the legislature ought to have known that that information arises in connection with the approval of plant protection products. If it had assumed that information from the approval procedure falls under the emissions clause because plant protection products are intended to be released into the environment, it would have defined a catalogue of highly sensitive information which would be rendered ineffective in practice, as such information would always be subject to the presumption of an overriding public interest in disclosure. As the Commission rightly observes, however, the view cannot be taken that the legislature intended to adopt a provision which was ineffective in practice.

58. It must therefore be assumed that the legislature implicitly reassessed the anticipated weighing of the relevant fundamental rights and principles and thus defined the scope of the emissions clause strictly.

59. This reassessment found in particular that information on the full composition of the plant protection product and on residues in the active substance should be protected. As the Commission explained in connection with the refusal of access,[31] such information is sensitive above all because it makes it easier for conclusions to be drawn regarding the production process and thus for copying to take place. Consequently, this reassessment by the legislature is consistent with the appraisal by the Court in *ABNA and Others*.[32]

31 — See above, point 13

32 — Judgment in *ABNA and Others* (C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paragraphs 82 and 83).

60. The emissions clause cannot thus be applicable to the information referred to in Article 63(2) of the Plant Protection Regulation. A decision on access to such information must therefore be taken pursuant to the third sentence of Article 4(2) of Regulation No 1049/2001 and Article 6(1) of the Aarhus Regulation based on an assessment of the individual case.

61. Consequently, the General Court determined the scope of the emissions clause incorrectly when it found in paragraph 75 that the clause covers information relating to the impurities of the active substance and the composition of plant protection products developed by the operators.

62. The General Court ought instead to have excluded such information from the scope of the emissions clause and thus rejected the second plea in law. The judgment under appeal must therefore be set aside.

D – The action before the General Court

63. Under Article 61(1) of its Statute, if the appeal is well-founded, the Court of Justice must quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

64. Stichting Greenpeace and PAN Europe raised two pleas in law which were not examined by the General Court. By the first plea in law they object that the Commission adopted Germany's negative opinion regarding the disclosure of the documents in question. The third plea in law alleges that the Commission did not examine a specific risk to the commercial interests of the undertakings concerned as a result of the disclosure of the documents in question.

65. Neither issue was dealt with in the proceedings before the Court of Justice or, in particular, was addressed at the hearing. Furthermore, the General Court has inspected the contested documents, while the Court of Justice has not.

66. I therefore consider that the state of the proceedings does not permit judgment to be given.

67. In the event that the Court nevertheless does give final judgment on the action, I believe one factor which the Commission did not address in its decision refusing access to be significant in connection with the third plea in law. At the time of the contested Commission decision the relevant data were more than 20 years old. It is therefore doubtful whether they still can cast light on the currently relevant production methods of the manufacturers concerned. In addition, in the meantime competitors have been able to conduct a thorough analysis of composition and impurities on the basis of the product actually sold and to extrapolate the production methods from that analysis. Consequently, I consider that the objection raised by Stichting Greenpeace and PAN Europe in the third plea in law is perfectly plausible.

VII – Conclusion

68. I therefore propose that the Court should:

(1) set aside the judgment of the General Court of the European Union of 8 October 2013 in *Stichting Greenpeace Nederland and PAN Europe* v *Commission* (T-545/11, EU:T:2013:523);

(2) reject the second plea in law in the action for annulment brought by Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe);

(3) refer the case back to the General Court for a decision on the first and third pleas in law;

(4) reserve the costs.