TO THE PRESIDENT AND THE MEMBERS
OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-673/13 P

between

THE EUROPEAN COMMISSION

The Appellant

and

STICHTING GREENPEACE NEDERLAND AND
PESTICIDE ACTION NETWORK EUROPE

The Respondents and Applicants at First Instance

STATEMENT IN INTERVENTION

pursuant to Article 40, second paragraph, of the Protocol on the Statute of the Court of Justice of the European Union and Articles 190(1) and 132 of the Rules of Procedure of the Court of Justice of the European Union

by

CROPLIFE INTERNATIONAL

represented by Mr Darren Abrahams, *Barrister*, member of the Bar of England and Wales, Ms Ruxandra Cana, *Avocat*, member of the Bucharest Bar and Ms Agapi Patsa, *Dikigoros*, member of the Thessaloniki Bar, all of Steptoe & Johnson, L.L.P., 489 Avenue Louise, 1050 Brussels, Belgium. Pursuant to Articles 190(1), 130(4) and 121(2), and 48(4) of the Rules of Procedure of the Court of Justice, Mr Abrahams, Ms Cana and Ms Patsa agree that service is to be effected on them by **e-Curia**.

I. INTRODUCTION

1. By its Statement in Intervention, CropLife International ("CLI") supports the forms of order sought by the Appellant.[1] CLI's Statement in Intervention does not address all pleas and arguments submitted by the Appellant. It rather focuses on certain key questions of principle which will determine the extent to which the plant science industry will be able to continue marketing plant science products in the European Union ("EU") as well as in non-EU markets, both today and in the future.[2] CLI's Statement in Intervention is silent as regards aspects of this case which may be more appropriately addressed by other interveners, by reason of the interests which they represent.

II. OBSERVATIONS

2. CLI's observations relate to the first and second branches of the Appellant's plea.[3]

A. First Branch of the Appellant's Plea: Internal Consistency

3. CLI supports the Appellant's positions that the concept of "information relating to emissions into the environment": (i) "…*must be read narrowly*…";[4] (ii) "…*refers to*

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1 The Appellant seeks that the Court of Justice: "*(i) quash the judgment of the General Court; (ii) pursuant to Article 61 of the Statute of the Court, either give a final ruling on the first and third pleas itself or refer the case back to the General Court for a ruling on those pleas; and (iii) order the respondents to pay the costs*" (paragraph 70 of the Appeal).

2 CLI refers to paragraphs 28 to 42 of its Application for Leave to Intervene dated 17 April 2014, where it explains in detail why this is so.

3 The Appeal consists of the single plea that "…*the General Court misconstrued the concept of information which "relates to emissions into the environment" in the first sentence of Article 6(1) of the Aarhus Regulation, dismissing the Commission's view that this concept must be interpreted in a consistent and harmonious way in the light of the other provisions at issue*" (paragraph 34 of the Appeal). The plea has three branches: "*(i) The Court erred in disregarding the need to ensure the "internal" consistency of Regulation 1049/2001 read with Article 6(1) of the Aarhus Regulation, as understood in the light of Article 4(4) of the Aarhus Convention; (ii) The Court failed to take due account of the sector-specific legislation on plant protection products; and (iii) The Court erred in disregarding the need to construe Article 6(1) in so far as possible in conformity with the Charter of Fundamental Rights and with TRIPS*" (paragraph 34 of the Appeal).

4 Paragraph 36 of the Appeal.

information about emissions which…emanate from installations such as factories and power stations";[5] and (iii) "…*concern*[s] *actual, not hypothetical emission*[s]…".[6]

(i) The Need for a Narrow Reading of "Information Relating to Emissions into the Environment"

4. "Information relating to emissions into the environment" is a sub-set of "environmental information".[7] This is evident by the way that "environmental information" is defined in Article 2(1)(d) of the Aarhus Regulation:[8] "environmental information" includes information on "…*factors, such as…emissions…into the environment*…". Notwithstanding that "information relating to emissions into the environment" is defined neither in the Aarhus Regulation nor in the Aarhus Convention,[9] the fact that it is a sub-set of "environmental information" indicates that it must be read narrowly – and, in any event, more narrowly than "environmental information". As a result, it cannot cover information relating to any presence or exposure (or the possibility thereof) in the environment (or parts thereof).

5. In this regard, the General Court erred in finding that "…*neither the logic of the right of access to documents of the EU institutions, as it emerges from Regulation No 1049/2001 and Regulation No 1367/2006 and their application, nor the wording of the latter*

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5 Paragraph 39 of the Appeal.

6 *Idem*.

7 "Information relating to emissions into the environment" may be illustrated as the smallest of three concentric circles: (i) "information"; (ii) "environmental information"; and (iii) "information relating to emissions into the environment" (from the biggest to the smallest).

8 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, L 264/13, 25.9.2006.

9 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (reproduced as Annex 1 to this Statement in Intervention).

regulation…implies that the notion of emission into the environment should be interpreted restrictively"[10]:

- As regards the logic of the right of access to documents of the EU institutions, the General Court noted that "[w]*here the institutions intend to refuse a request for access to documents on the basis of an exception, that exception must be interpreted and applied strictly…, so as not to frustrate application of the general principle of giving the public the widest possible access to documents…*".[11] The general principle of giving the public the widest possible access to documents is safeguarded by the restrictive interpretation and application of the grounds for refusal as regards access to environmental information. However, it does not follow from the general principle of giving the public the widest possible access to documents that "information relating to emissions into the environment" (a sub-set of environmental information, as explained in paragraph 4 above) should not be read narrowly. The General Court provided no basis for this inference.

- As regards the wording of the Aarhus Regulation, contrary to the finding made by the General Court, Recital 15 of the Preamble does not state that "…*only the grounds for refusal as regards access to environmental information should be interpreted in a restrictive way…*" (emphasis added).[12] The word "only" was inaccurately added by the General Court. There is nothing in Recital 15 (or elsewhere in the body of the Aarhus Regulation) that indicates that the concept of "information relating to emissions into the environment" should not be read narrowly.

6. Fundamentally, the very rationale underpinning the right of access to documents of EU institutions requires that the concept of "information relating to emissions into the environment" be read narrowly. The right of access to documents of EU institutions is protected by primary EU law,[13] alongside the freedom to conduct a business, the right to

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10 Case T-545/11 – *Stichting Greenpeace Nederland and Pesticide Action Network Europe v European Commission* (not yet published), paragraph 53.

11 *Idem*, paragraph 50.

12 *Idem*, paragraph 52.

13 Article 42 of the EU Charter of Fundamental Rights.

property and the right to good administration.[14] This illustrates that, in the EU legal order, the right of access to documents is not given precedence over the protection of business secrets. Rather, a balancing exercise needs to be undertaken: (i) the aims that disclosure seeks to serve need to be balanced against (ii) the need to protect commercial interests.[15] If the second outweighs the first, EU institutions will turn down the request of access on the basis of Article 4(2), first indent, of the Access to Documents ("ATD") Regulation.[16] In this context, Article 6(1), first indent, of the Aarhus Regulation provides that where the information requested relates to "emissions into the environment", "*…an overriding public interest in disclosure shall be deemed to exist…*". In essence, Article 6(1), first indent, of the Aarhus Regulation tilts the balance: the aims that disclosure seeks to serve are presumed to prevail over the need to protect the commercial interests of the natural or legal person who submitted the information. Given that this constitutes a departure from the balancing exercise that normally needs to be undertaken, the concept of "information relating to emissions into the environment" must be read narrowly. This is confirmed by the declaration included in the Council Decision approving the Aarhus Convention, which states 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*".[17]

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14 *Idem*, Articles 16, 17 and 41, respectively. See also Article 339 of the Treaty on the Functioning of the EU as regards the obligation of professional secrecy.

15 As regards the Respondents' allegations in paragraph 10 of the Response, even if parts of the manufacturing process for an active substance are in the public domain, comprehensive and precise information on the manufacturing process is only described in the registration dossier for the active substance. In particular: (i) The chemical structure of an impurity may be the result of a specific reaction taking place in the context of manufacturing the active substance. Based on such structure, an experienced engineer may reverse-engineer part of the "pathway" to arrive at the active substance. (ii) Similarly, an experienced engineer may identify a raw material used in the manufacturing of the active substance by having access to the identity of an impurity.

16 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, L 145/43, 31.5.2001.

17 *Supra* footnote 9. See also the Report on the Tenth Session of the Working Group for the preparation of the Aarhus Convention (reproduced as Annex 2 to this Statement in Intervention), which states that "*…in view of…*[t]*he specific nature of the Community's legal order…it may be necessary…to make a declaration on the way in which the convention will apply to its institutions*" (paragraph 8).

(ii) The Condition that the Information Refer to Emissions from Installations

7. As the Appellant explains,[18] this condition transpires from both versions of the Aarhus Convention Implementation Guide. Notwithstanding that the latter is not legally binding, the Appellant correctly notes that "*…it by no means follows that every statement in the Implementation Guide can be dismissed out of hand*".[19] The General Court's disregard of the interpretative value of the Aarhus Convention Implementation Guide is somewhat arbitrary: at another part of its judgment, the General Court uses excerpts of the (equally non-legally binding) preparatory documents of the Aarhus Regulation in order to support its conclusion that "information relating to emissions into the environment" should not be interpreted restrictively.[20]

8. Moreover, a reading of the concept of "information relating to emissions into the environment" according to which the information must refer to emissions which emanate from installations finds support in Article 2(1)(d)(ii) of the Aarhus Regulation. Article 2(1)(d)(ii) of the Aarhus Regulation distinguishes between "*…emissions, discharges and other releases into the environment…*". This indicates that "emissions" and "discharges" are sub-sets of "releases" into the environment and must refer to different factual circumstances.

9. It is for the "emissions" sub-set alone that an overriding public interest in disclosure may be presumed to exist. This is because there is a qualitative difference between "emissions" on the one hand, and "discharges" and "other releases" on the other: the EU legislature deemed that the public interest in having access to information relating to emissions from installations is more pressing than the public interest in having access to information relating to discharges and other releases from other activities. Contrary to what the Respondents imply,[21] such interpretation does not result in the non-disclosure of information relating to discharges and other releases from other activities. It merely

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18 Paragraph 41 of the Appeal.

19 Paragraph 43 of the Appeal.

20 Case T-545/11, *supra* footnote 10, paragraph 52.

21 Paragraph 17 of the Response. In this regard, CLI stresses that none of the relevant provisions in the Aarhus Regulation or its implementing measures in the EU incorporate the notion that their subject-matter deals with "*polluting human activities*" (emphasis added).

means that for this kind of information a balancing exercise needs to be undertaken by the Appellant, as explained in paragraph 6 above.

(iii) The Condition that the Information Refer to Actual Emissions

10. The need to interpret the concept of "information relating to emissions into the environment" as referring only to actual (and not hypothetical) emissions goes hand in hand with the need to read the concept narrowly, for the reasons explained in paragraphs 4 to 6 above.

11. Moreover, the Appellant is right to note that "…*the emissions depend on the quantities of the* [plant protection] *product actually used…and on whether the plant protection products contain exactly the same substances as were subject to the assessment in the DAR of their slightly improved formulas…*":[22] At the stage of the active ingredient review ("AIR") – which is at issue in this case – the Appellant is only required to conduct a risk assessment. No information on volumes is provided whatsoever.

12. This interpretation is supported by the Aarhus Convention Implementation Guide, which notes that the provision on "information on emissions" in the Aarhus Convention[23] is "…*broadly consistent with the principle that information about emissions would lose its proprietary character once the emissions enter the public domain*",[24] *i.e.* for emissions that are actually released.

13. In this context, the Respondents' statement that "…*the requested information is necessary to verify if the assessment of environmental effects of an active substance that is released in the environment as a component of a plant protection product has been carried out properly*"[25] is misleading. There is no pressing public interest in such verification. The EU legislature has designated independent and scientifically well-equipped regulatory authorities to carry-out the assessment of environmental effects of active substances. The EU legislature has done so precisely because it wants to ensure that the environmental

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22 Paragraph 40 of the Appeal.

23 Article 4(4)(d) of the Aarhus Convention, *supra* footnote 9.

24 Page 60 of the Aarhus Convention Implementation Guide (reproduced as Annex 3 to this Statement in Intervention).

25 Paragraph 21 of the Response.

effects are properly assessed, without however irremediably undermining industry's commercial interests. This confirms that "information relating to emissions into the environment" must be interpreted restrictively.

B. Second Branch of the Appellant's Plea: Sector-Specific Legislation

14. CLI supports the Appellant's position that "…*when interpreting and applying the exceptions to the right of access provided for under Regulations 1049/2001 and 1367/2006, due account must be taken of the specific disclosure regime provided for in the sector-specific legislation*".[26]

15. In this regard, CLI notes that Article 14 Directive 91/414[27] and Article 63 of Regulation 1107/2009[28] clearly reflect the EU legislature's intent to protect certain information from disclosure in the plant protection sector. In particular, the presumption of non-disclosure introduced by Article 63(2) of Regulation 1107/2009 indicates that the EU legislature has already struck a balance between the right to access documents of EU institutions and the protection of business secrets. The Court of Justice has recognised that secondary legislation may introduce a specific, exhaustive confidentiality scheme that ousts (by inference) the application of both: (i) the Aarhus Convention;[29] and (ii) secondary EU law implementing it.[30]

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26 Paragraph 49 of the Appeal.

27 Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market, OJ L 230/1, 19.8.1991.

28 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 L 309/1, 24.11.2009.

29 A sector-specific approach to disclosure is further bolstered by the findings made in Case T‑111/11 – *ClientEarth v European Commission*, where the General Court held that the Aarhus Convention is not unconditional and sufficiently precise in order to form a basis for questioning the legality of grounds for refusal (in secondary legislation) of a request for access to environmental information (paragraph 92). Such lack of precision has been confirmed in Joined Cases C-404/12 P and C-401/12 P – *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe* (paragraph 47).

30 Case C-542/09 – *Ville de Lyon v Caisse des dépôts et consignations*, ECR [2010] I-14115, paragraph 40. At issue in this case was the relationship between the (specific) EU regime on Emissions Trading and the (general) Directive 2003/4/EC on public access to environmental information.

16. The General Court erroneously concluded that "…*the existence of such* [sector-specific] *rules cannot rebut the irrebuttable presumption arising from Article 6(1) of Regulation No 1367/2006*…".[31] The General Court's use of Article 6(1), first indent, of the Aarhus Regulation as a "trump card" emanates from the fact that the General Court incorrectly found that Article 6(1), first indent, of the Aarhus Regulation introduces an irrebuttable presumption.

17. Article 6(1), first indent, of the Aarhus Regulation states that: "[a]*s regards Article 4(2), first…[indent], of Regulation (EC) No 1049/2001…, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment*" (emphasis added). This wording merely indicates the existence of a presumption – and not that of an irrebuttable presumption. In this regard, CLI draws the Court of Justice's attention to prior case-law on Article 6(1), first indent, of the Aarhus Regulation which merely talks about a presumption.[32]

18. A harmonious and coherent interpretation of Article 6(1), first indent, of the Aarhus Regulation with EU (primary and secondary) law requires that:

- Where a party requests access to "information relating to emissions into the environment", recourse to the exception laid down in Article 4(2), first indent, of the ATD Regulation is restricted. The starting point of the EU institution's analysis is that an overriding public interest in the information's disclosure is presumed to exist – *i.e.* that disclosure prevails over the protection of the commercial interests of the natural or legal person who submitted the information. It is up to the natural or legal person who submitted the information to reverse the presumption, through the third-party consultation provided for in Article 4(4) of the ATD Regulation.

- Where a party requests access to other (environmental) information (*i.e.* not relating to "emissions into the environment"), recourse to Article 4(2), first indent, of the ATD Regulation may be had, provided that the EU institution conducts a balancing test between: (i) the aims that the disclosure seeks to serve;

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31 Case T-545/11, *supra* footnote 10, paragraph 40.

32 Case T-29/08 – *Liga para Protecção da Natureza (LPN) v European Commission*, ECR [2011] II-6021, paragraph 108.

and (ii) the commercial interests that are at play. In this context, the EU institution is required to examine whether there is an overriding public interest in the information's disclosure.

19. In essence, the presumption introduces a shift in the burden of proof. Normally, the EU institution needs to engage in a balancing exercise in order to assess whether disclosure should prevail over the commercial interests at play. Whereas, where "information relating to emissions into the environment" is requested, the burden to prove that disclosure does not prevail over the protection of the commercial interests at play shifts to the natural or legal person who submitted the information.

20. The abovementioned interpretation is supported by Article 4(4)(d) of the Aarhus Convention. This states that "*…information on emissions which is relevant for the protection of the environment shall be disclosed*" (emphasis added). The fact that the Aarhus Regulation did not use the same imperative language ("shall be disclosed"), but rather introduced a presumption ("shall be deemed to exist") indicates that the EU legislature did not intent to allow for unrestrained disclosure on the basis of an irrebuttable presumption. Indeed, it could not do so. The EU legislature's more "open" stance is explained by the rationale underpinning the right of access to documents of EU institutions which requires a balancing of interests, as outlined in paragraph 6 above.

III. CONCLUSION

21. For all the reasons mentioned herein, CLI respectfully asks the Court of Justice to:

(i) grant the forms of order sought by the Appellant; and

(ii) order Stichting Greenpeace Nederland and Pesticide Action Network Europe to pay CLI's costs incurred in these proceedings.

Darren ABRAHAMS | Ruxandra CANA | Agapi PATSA

Brussels, 13 April 2015

SCHEDULE OF ANNEXES

ANNEX	DESCRIPTION	DATED	PAGES	PAGE AND PARAGRAPH WHERE MENTIONED
A.1	Council Decision 2005/370/EC approving on behalf of the European Community the Aarhus Convention (in particular, page 3)	17 February 2005	3	Page 3-5, paragraphs 4 and 6
A.2	Report on the Tenth Session of the Working Group for the preparation of the Aarhus Convention (in particular, paragraph 8)	19 March 1998	9	Page 5, paragraph 6, footnote 17
A.3	Aarhus Convention Implementation Guide (in particular, page 60)	2000	198	Page 6, paragraph 7 Page 7, paragraph 12