TO THE PRESIDENT AND THE MEMBERS

OF THE GENERAL COURT OF THE EUROPEAN UNION

CASE T-545/11 RENV

between

STICHTING GREENPEACE NEDERLAND AND PAN EUROPE

Applicants

and

EUROPEAN COMMISSION

Defendant

OBSERVATIONS

pursuant to Article 40, second paragraph of the Protocol on the Statute of the Court of Justice of the European Union and Article 217(1) of the Rules of Procedure of the General Court

on behalf of

CROPLIFE AMERICA, INC. ('CROPLIFE AMERICA'),

and

THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA ('THE NAM'),

Interveners

represented by Ms Kristina Nordlander, advokat, member of the Swedish Bar, Mr Marc Abenhaïm, avocat, member of the Paris Bar and Mr Yohan Benizri, avocat, member of the Brussels Bar, all of Sidley Austin LLP, NEO Building, rue Montoyer 51, 1000 Brussels, Belgium. Pursuant to Article 57 of the Rules of Procedure of the General Court, Ms Kristina Nordlander, Mr Marc Abenhaïm and Mr Yohan Benizri agree that service is to be effected on them by e-Curia.

I. FORMS OF ORDER SOUGHT

1. For all the reasons stated below, the Interveners respectfully ask the Court to:

   - grant the forms of order sought by the European Commission; and
   - order Stichting Greenpeace Nederland and Pesticide Action Network Europe to pay the Interveners' costs incurred in these proceedings.

II. INTRODUCTION

2. On 23 November 2016, the Court of Justice rendered its judgment in Case C-673/13 P. The judgment set aside the judgment of the General Court of 8 October 2013 in Case T-545/11. By communication from the Registry of the General Court dated 1 December 2016,[1] the Interveners were invited to submit written observations on the conclusions to be drawn for the outcome of the present proceedings, in accordance with Article 217 of the Rules of Procedure of the General Court. The Interveners thus submit the following observations, in support of the forms of order sought by the European Commission.

3. This case is important because it touches on a significant incentive for innovation globally. Intellectual property rights in general, and the protection of confidential business information ('CBI') in particular, are designed to offer an incentive to innovative companies by protecting certain intangible assets against misappropriation.[2]

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1 Ref. T-545/11 RENV-8 (750129).

2 See e.g. Defense of Trade Secrets Act, 18 U.S.C. § 1831 et. seq. (2016) (provide for a private right of action for theft of trade secrets); Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ 2016 L 157/1, Recital (1):

'*Businesses and non-commercial research institutions* ***invest in acquiring, developing and applying know-how and information*** *which is the currency of the knowledge economy and provides a competitive advantage. This investment in generating and applying intellectual capital is a* ***determining factor as regards their competitiveness and innovation-related performance in the market*** *and therefore their returns on investment, which is the* ***underlying motivation for business research and development****. Businesses have recourse to different means to appropriate the results of their innovation-related activities when openness does not allow for the full exploitation of their investment in research and innovation. Use of intellectual property rights, such as patents, design rights or copyright, is one such means. Another means of appropriating the results of innovation is to protect access to, and exploit, knowledge that is valuable to the entity and not widely known.[...]'*

4. Unless the decision of the European Court of Justice ('Court of Justice') in Case C-673/13 P is interpreted and applied in line with higher norms of EU law, international obligations and the longstanding case law of the EU courts, this incentive to innovate may be severely and adversely affected, including for United States ('US') companies.

5. The consequences of an overbroad interpretation of the Court of Justice's ruling in Case C-673/13 P would extend beyond the plant protection sector – the chemicals, cosmetics or pharmaceutical sectors all involve similar marketing authorization procedures and potential environmental considerations.[3]

6. CropLife America represents the interests of over 90% of the manufacturers operating in the plant protection products sector in the US.[4] The NAM represents a large part of US manufacturers from various sectors in which companies are required to submit CBI to public authorities in order to obtain product approvals.[5] The Interveners thus together represent a significant part of the 81 US IP-intensive industries that in 2014 contributed about $6.6 trillion (or 38.2%) of the US gross domestic product (GDP) and $842 billion (or 52%) of total US merchandise exports, and that accounted for about 27.9 million American jobs, or 29.8% of all employment in the US economy.[6]

7. The Interveners' members routinely have to register their products or substances with various authorities in the US, the EU, and elsewhere, in order to get market access. In doing so, they expect certain kinds of proprietary and commercially valuable information to be protected against unnecessary disclosure.

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3 *See*: H. Von Holleben, Judgment of the General Court of the EU on Access to Information under Substance Law, *European Journal of Risk Regulation*, 04|2013, pp. 565-578, spec. p. 568; G. Garçon, Aarhus and Agrochemicals: The Scope and Limitations of Access Rights in Europe, *EurUP*, 02|2012, pp. 72-85, spec. p. 72.

4 Case C-673/13 P *Commission v Stichting Greenpeace Nederland and PAN Europe* (order of 3 March 2015), ECLI:EU:C:2015:181, para. 6.

5 *Ibid*., para. 7.

6 *See* US Patent and Trademark Office, Intellectual Property and the US Economy: 2016 update, pp. ii-iii and 1. This document may be consulted on the Internet, at the following address: https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf (last consulted on February 2, 2017).

8. The EU legislature considers that the protection of the public interest mandates the disclosure of '*information [which] relates to emissions*' ('emissions rule').[7] At the same time, the Court of Justice found that '*the EU legislature intended to maintain [the balance] between the objective of transparency and the protection of [commercial] interests.*'[8]

9. The Interveners submit that the interpretation and application of the emissions rule should not lead to the unnecessary disclosure of CBI.

10. In order to maintain the balance mandated by the Court of Justice, there must be scope for EU and Member States' competent authorities to make the necessary case-by-case weighing of whether the particular technical information that is requested under the emissions rule really meets the threshold for disclosure.

11. By contrast, if this Court were to find that broad categories of information will always qualify as '*information [which] relates to emissions,*' competent authorities will be deprived of the opportunity to assess whether disclosure is necessary, in violation of higher norms of EU law as well as the EU's international obligations.

12. The unnecessary disclosure of CBI would have devastating consequences on innovation, trade and competition for international companies, not only in the European Union, but in other markets as well.

13. First, innovation would be stifled.

14. The very reason why protection is afforded to intangible assets is to allow innovative companies to recoup their heavy investments in research and development. Putting a plant protection product on the market, for example, costs hundreds of millions of US dollars and takes 11 years on average. The Interveners submit that, if CBI are subject to wider disclosure requirements than necessary, the protection of such assets is

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7 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 264/13 ('Aarhus Regulation').

8 Case C-673/13 P, *European Commission v Stichting Greenpeace Nederland and PAN Europe*, ECLI:EU:C:2016:889, para. 81.

unduly reduced, making investments in research and development difficult, if not impossible, to recoup.

15. Second, competition would be distorted.

16. If this Court effectively reduces the protection of intangible assets by giving a general interpretation of the concept of '*information [which] relates to emissions*', despite clear guidance from the Court of Justice that the emissions rule must leave room for an individual assessment in each case,[9] CBI already submitted to national and EU authorities in the framework of various marketing authorization procedures could be exploited by competitors in a very short timeframe.

17. Importantly, even though the legal protection of CBI might be lost only in the EU, any CBI disclosed by EU authorities will immediately be accessible for use in world-wide markets, including in the US. In other words, copycats will get access to CBI and will compete unfairly with innovative US and EU companies, hijacking years of investment. In the future, global competition would also be affected, in favor of companies operating entirely outside the EU.

18. Third, trade would be disrupted.

19. It is likely that the Interveners' member companies will seriously consider delaying or abandoning altogether entry into European markets for CBI sensitive products. This may have a real and serious negative impact on their future business, and would seriously and unduly affect trade in goods.

20. For all these reasons, the Interveners have taken the unprecedented step to appear in these proceedings.

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9 *Ibid.* The Court of Justice found that an interpretation of that concept that "*deprive[s] of any practical effect the possibility, laid down in the first indent of Article 4(2) of Regulation No 1049/2001, for the institutions to refuse to disclose environmental information on the ground, inter alia, that such disclosure would have an adverse effect on the protection of the commercial interests of a particular natural or legal person*" is vitiated by an error of law.

III. OBSERVATIONS

21. From the Interveners' perspective, this case raises a fundamental question about the protection of certain intangible assets, which are protected under the Charter of Fundamental Rights,[10] the European Convention on Human Rights (ECHR),[11] and the World Trade Organization ('WTO') Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS'), and the settled case-law of the EU Courts.[12]

22. The outcome of this case must not create the conditions for the unnecessary and unlawful disclosure of CBI.

23. The Interveners submit that this Court, in interpreting Article 6(1) of the Aarhus Regulation, must allow Member States and EU authorities to carry out a case-by-case analysis of any individual pieces of scientific and technical information requested under the emissions rule.

24. As a corollary to this principle, this Court may not mandate, in the abstract, the potential disclosure of broad categories of information.

25. This view is supported by:

- the need to ensure a consistent interpretation of Article 6(1) of the Aarhus Regulation with higher norms of EU law and with the EU's international obligations;
- clear guidance from the Court of Justice in a related case; and
- the applicable standard of review in the present case.

26. We examine these arguments in turn.

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10 Charter of Fundamental Rights, Article 52(1).

11 *See* F. Sudre, *Droit européen et international des droits de l'homme*, 10th edition, *PUF* (2011), pp. 218-227 and pp. 651-652 (right to property); L. Helfer, The New Innovation Frontier? Intellectual Property and the European Court of Human Rights, *Harvard International Law Journal*, (2008) 49(1), pp. 1-52.

12 Case C-450/06, *Varec SA v Etat belge*, ECLI:EU:C:2008:91, para 49: '*the protection of business secrets is a general principle of EU law*.'

Article 6(1) Aarhus Regulation must be interpreted consistently with Charter of Fundamental Rights, ECHR and TRIPS

27. Since the Lisbon Treaty, fundamental rights occupy the highest rank in the EU legal order. Article 6(1) of the TEU grants the Charter of Fundamental Rights the same legal value as the Treaties themselves and Articles 6(1) and (3) TEU respectively oblige the EU to accede to the ECHR and recall that the fundamental rights guaranteed by that Convention '*shall constitute general principles of the Union's law*'. Article 53 of the Charter of Fundamental Rights also provides that '*[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized [by] the European Convention for the Protection of Human Rights and Fundamental Freedoms […]*'.

28. Furthermore, the primacy of international agreements concluded by the EU over provisions of secondary legislation means that such provisions must, in so far as possible, be interpreted in a manner that is consistent with those international agreements.[13]

29. The Interveners do not call into question the validity of Article 6(1) of the Aarhus Regulation but submit that this Court must interpret that provision in light of the Charter of Fundamental Rights and the ECHR, as well as Article 39(3) TRIPS.

30. Both the Charter of Fundamental Rights and the ECHR protect intangible assets[14] and strictly regulate any interference with the peaceful enjoyment of those possessions.

31. Under the Charter of Fundamental Rights,[15] any interference with the exercise of fundamental rights, including the protection of intangible assets, must (i) be provided for by law, (ii) pursue an objective of general interest, and (iii) be necessary and

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13 Case C-61/94 *Commission v Germany*, ECLI:EU:C:1996:313, para. 52; Case C-511/13 P, *Philips Lighting Poland SA v Council*, ECLI:EU:C:2015:553, para. 61.

14 Article 17(2) of the Charter of Fundamental Rights clarifies that '*[i]ntellectual property shall be protected*' (emphasis added). Article 1 of Protocol No. 1 to the ECHR, which protects every person's fundamental right '*to the peaceful enjoyment of his possessions*', including '*intellectual property as such*'. See: European Court of European Rights ('ECtHR') *Anheuser-Busch v. Portugal* [2007], application no. 73049/01 [GC], para. 72. The ECtHR reached that conclusion on the ground that the '*concept of "possessions"[…] has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law*' (para. 63).

15 Charter of Fundamental Rights, Article 52(1).

genuinely meet that objective. Such interference is always subject to the principle of proportionality.

32. Similarly, under the ECHR,[16] any interference with the peaceful enjoyment of possessions must be (i) provided for by law and (ii) in the public interest. It must also '*achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights […]: there must be a reasonable relationship of proportionality between the means employed and the aim pursued.*'[17] Importantly, the fair balance test is not based on the interference considered in the abstract. The European Court of Human Rights clarified that it was necessary to '*assess all the relevant elements of the case against a specific background.*'[18]

33. Under Article 39(3) TRIPS, any disclosure of confidential information is prohibited '*except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.*'

34. The term '*necessary to protect the public*' must be interpreted in light of the interpretation developed by the WTO Appellate Body for the term '*necessary*' under the exception clauses of Article XX of the General Agreement on Tariffs and Trade ('GATT 1994').[19] As Article 39(3) TRIPS, the exceptions under Article XX of the GATT 1994 strike '*a balance … between the* right *of a Member to invoke an exception and the* duty *of that same Member to respect the treaty rights of the other Members*'.[20] The weighing of competing rights requires a case-by-case basis to assess

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16 *See* F. Sudre, *Droit européen et international des droits de l'homme*, 10th edition, *PUF* (2011), pp. 218-227 and pp. 651-652 (right to property); L. Helfer, The New Innovation Frontier? Intellectual Property and the European Court of Human Rights, *Harvard International Law Journal*, (2008) 49(1), pp. 1-52.

17 ECtHR, *Chassagnou and others v France* [1999], application no. 28443/95 [GC], para. 75.

18 ECtHR, *Stefanetti and others v Italy* [2014], application no. 21838/10 [Court (Second Section)], para. 59.

19 Article XX(b) of GATT 1994 allows for the exceptional implementation of measures that would otherwise be incompatible with WTO disciplines if such measures are '*necessary to protect human, animal or plant life or health*'.

20 WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, para. 156.

whether the allegedly '*necessary*' disclosure of specific pieces of information make a quantifiable contribution to the EU's stated policy objective.[21]

35. In sum, under the Charter of Fundamental Rights, the ECHR and TRIPS, the EU is bound to interpret and apply Article 6(1) of the Aarhus Regulation in a manner that allows EU institutions to disclose CBI only where there is a genuine necessity to protect the public in the case at hand. Furthermore, the EU may only disclose CBI while striking a fair balance, considering all relevant elements of a case, between the legitimate transparency aim pursued on the one hand, and the fundamental rights and the protection of CBI on the other hand.

36. In this case, the potential disclosure of CBI is to be measured against '*the importance of providing adequate environmental information and effective opportunities for public participation in environmental decision-making.*'[22]

37. The Court of Justice acknowledged the necessary weighing of those competing considerations in a case involving similar provisions of EU law.[23]

38. In that case, the Court of Justice clarified that a request for access concerning '*information [which] relates to emission*s' cannot be rejected on the ground that its disclosure would adversely affect the confidentiality of commercial or industrial information.[24]

39. As such, the Court of Justice considered that the principle of disclosure of '*information [which] relates to emissions*' did not in itself lead to a disproportionate interference with the protection of commercial interests.

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21 WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, para. 172.

22 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 264/13 ('Aarhus Regulation'), Recital 2; Case C-673/13 P, *European Commission v Stichting Greenpeace Nederland and PAN Europe*, ECLI:EU:C:2016:889, para. 80.

23 Case C-442/14, *Bayer CropScience SA-NV v College voor de toelating van gewasbeschermingsmiddelen en biociden*, ECLI:EU:C:2016:890.

24 *Ibid.*, para. 99.

40. In other words, as soon as a piece of information qualifies as '*information [which] relates to emissions*,' the protection that would otherwise apply to such intangible asset is overridden through the legal presumption set out in the emissions rule.

41. It then becomes very important to carefully assess whether or not a piece of information actually constitutes '*information [which] relates to emissions*' and thereby falls within the scope of the emissions rule.[25] EU legislation has not defined precisely what information '*relates to emissions*'.

42. The Court of Justice confirmed that an overbroad interpretation of the scope of the emissions rule was unlawful and contrary to the legal protection afforded to CBI in setting aside the judgment of the General Court in the instant proceedings.

43. The General Court's error in law in this case consisted precisely in an overly broad interpretation of the notion of '*information [which] relates to emissions*.'[26]

44. The Court of Justice considered that such an interpretation '*would deprive of any practical effect the possibility, laid down in the first indent of Article 4(2) of Regulation No 1049/2001, for the institutions to refuse to disclose environmental information on the ground, inter alia, that such disclosure would have an adverse effect on the protection of the commercial interests of a particular natural or legal person and would jeopardize the balance which the EU legislature intended to maintain between the objective of transparency and the protection of those interests. It would also constitute a disproportionate interference with the protection of business secrecy ensured by Article 339 TFEU.*'[27]

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25 See *European Commission Rejoinder*, para. 24 '*[T]he very fact that the emissions rule contains an* irrebuttable *presumption makes it necessary to give to the notion of emissions a clearly demarcated interpretation.*'

26 Case C-673/13 P, *European Commission v Stichting Greenpeace Nederland and PAN Europe*, ECLI:EU:C:2016:889, para. 82:

'It follows from the above that, by holding, in paragraph 53 of the judgment under appeal, that it is sufficient that information relates, in a sufficiently direct manner, to emissions into the environment, in order for that information to fall within the scope of 'information [which] relates to emissions into the environment' […], the judgment under appeal is vitiated by an error of law.'

27 *Ibid.*, para. 81.

45. In order not to recreate the conditions for such disproportionate interference, the General Court must now give a narrower interpretation of the notion of '*information [which] relates to emissions*.'

46. The Interveners submit that Article 6(1) of the Aarhus Regulation must be interpreted and applied consistently with the necessity and proportionality requirements found in the Charter of Fundamental Rights, the ECHR and TRIPS.

47. The only way to ensure that CBI are not disclosed beyond what is necessary is to look at the specific pieces of information at issue and decide, on a case-by-case basis and in light of the objective pursued by the Aarhus Regulation, whether they qualify as '*information [which] relates to emissions*' and warrant a 'necessary' interference with the protection of intangible assets.

48. This Court should thus not interpret EU law in a way that would prejudge the outcome of such case-by-case assessments. For example, broad categories of information cannot be deemed to qualify as '*information [which] relates to emissions*', without any scope for a case-by-case assessment.

49. An overly broad interpretation of the notion of '*information [which] relates to emissions*' or the creation of additional presumptions of access with respect to broad categories of information would expose the EU to potential international dispute resolution proceedings at the level of the WTO. US and other international interests would be harmed by a disproportionate interference with the protection of intangible assets.

50. In addition, if this Court makes it impossible for competent authorities to weigh the potential interference with the peaceful enjoyment of possessions against the objective pursued by the transparency rules, it is liable to put Member States themselves at risk under the ECHR system.

51. The CBI at issue is often submitted to national authorities in the framework of marketing authorization procedures. EU transparency rules apply to documents which such national authorities have forwarded to the EU institutions.[28] Although

[28] Transparency Regulation, Article 2(3).

Article 4(5) of the Transparency Regulation allows a Member State to oppose disclosure by an EU institution of a document originating from that Member State, the Member State's objection can only apply '*on the basis of the substantive exceptions laid down in Article 4(1) to (3) and if it gives proper reasons for its position*'.[29]

52. If Member States are deprived of the possibility to oppose disclosure because of an overly broad interpretation of the notion of '*information [which] relates to emissions*,' they might be found in breach of their international obligations pursuant to Article 1 of Protocol No. 1 to the ECHR as a consequence of performing their obligations (to transmit CBI to the EU institutions) pursuant to EU law.[30] This exposes Member States to litigation in the European Court of Human Rights.

Court of Justice mandated individual assessments for disclosure of CBI

53. In the present proceedings and in a parallel case involving similar provisions of EU law,[31] Advocate General Kokott suggested that the necessary weighing of interests could not be carried out for each individual request for access, and that presumptions in support of access, even though nonexistent in the case law, should be possible.

54. Advocate General Kokott argued that such individual assessments would lead to a considerable workload for competent authorities and increase the likelihood of expensive legal disputes.

55. However, the Court of Justice rejected that argument implicitly, when considering the protection afforded to certain categories of information under sector-specific legislation.[32]

56. Under the Plant Protection Products Regulation,[33] certain categories of information are deemed confidential and their disclosure is deemed to undermine the protection of

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29 C-135/11 P *IFAW Internationaler Tierschutz-Fonds v Commission* ECLI:EU:C:2012:376, para. 59.

30 *Comp.*: ECtHR *Bosphorus Airways v. Ireland* [2005], application no. 45036/98 [GC]; ECtHR *Povse v. Austria* (dec.) [2013], application no. 3890/11.

31 Opinion of Advocate General Kokott in Case C-442/14, ECLI:EU:C:2016:215, para. 99-102; Opinion of Advocate General Kokott in Case C-673/13 P, para. 54-55.

32 Case C-442/14, *Bayer CropScience SA-NV v College voor de toelating van gewasbeschermingsmiddelen en biociden*, ECLI:EU:C:2016:890, para. 102.

commercial interests. The Court of Justice was asked whether the disclosure of '*information [which] relates to emissions*,' including when information included such confidential information, deprived the sector-specific legislation of its effectiveness.

57. The Court of Justice considered that the sector-specific legislation was not deprived of its effectiveness provided that:

> '*the competent authority may disclose [information that is in principle confidential] only after establishing, on an individual basis, whether that information relates to emissions into the environment or whether another overriding public interest justifies that disclosure.*'[34]

58. There is no reason to consider that CBI should be treated differently in the context of a potential disclosure pursuant to Article 6(1) of the Aarhus Regulation.

Application of Article 6(1) Aarhus Regulation is subject to limited review by this Court

59. In the context of the specific application of Article 4(2) of Regulation 1049/2001 read in combination with Article 6(1) of the Aarhus Regulation, the Interveners further submit that this Court should apply a limited standard of review.

60. It is settled case-law that, in matters involving complex assessments of facts, EU institutions must be allowed a broad discretion.

61. That principle applies here.

62. The qualification of specific pieces of information submitted in the context of market authorization procedures as '*information [which] relates to emissions*' requires a complex and careful assessment of scientific and technical evidence, which calls for the exercise of particular care.

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[33] Article 63(2) of 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, 24.11.2009, p.1.

[34] Case C-442/14, *Bayer CropScience SA-NV v College voor de toelating van gewasbeschermingsmiddelen en biociden*, ECLI:EU:C:2016:890, para. 102.

63. The Secretary General of the European Commission drew the attention of the Applicants to this complexity in her letter dated 6 May 2011 where she stated: '*[T]he dialogue between the German authorities and the Commission regarding Volume 4 of the draft assessment report (DAR) […] is still ongoing. Due to the complexity of the matter, the number of documents involved […] the Commission has not come to any conclusions in this regard.*'

64. In addition, the notion of '*information [which] relates to emissions*' used in the Aarhus Regulation is undefined. The Aarhus Regulation merely states that '*an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.*'

65. The scientific and technical nature of the assessment, the undefined nature of the criterion and the consideration of the public interest are precisely the reasons that led the Court of Justice to limit the scope of review of the EU judicature in another case involving Article 4 of Regulation 1049/2001.[35]

66. In the case at hand, the Secretary General of the European Commission, acting within her broad discretion in matters involving complex technical assessments, duly examined whether the document concerned contained information which could be qualified as relating to emissions into the environment. She concluded, after explaining that the document concerned '*information in relation to the production of the concerned substance namely the details of the manufacturing process provided by different applicants,*'[36] '[....] *firstly, that the information requested does not qualify as information relating to emissions into the environment in the sense of Article 6(1) of Regulation 1367/2006 and, secondly, that there [was] no overriding public interest in disclosure in the sense of Regulation 1049/2001.*'[37]

67. The decision of the Secretary General should not be annulled. It should be found to be consistent with Article 4(2) of Regulation 1049/2001 read in conjunction with Article

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35 Case C-266/05 P, *Sison v Council*, ECLI:EU:C:2007:75, para. 35-36.

36 See *Application,* Annex 11 - Commission decision of 10 August 2011, p. 4.

37 *Ibid.*, p. 6; See also: Case C-673/13 P, *European Commission v Stichting Greenpeace Nederland and PAN Europe*, ECLI:EU:C:2016:889, para. 21; Case T-545/11 *Stichting Greenpeace Nederland and PAN Europe v Commission*, ECLI:EU:T:2013:523, para. 11.

6(1) of the Aarhus Regulation unless it can be established that the Secretary General of the European Commission (i) failed to comply with the procedural rules; (ii) failed to comply with the duty to state reasons; (iii) failed to state the facts accurately; (iv) committed a manifest error of assessment; or (iv) misused its powers.

V. CONCLUSIONS

68. In conclusion, this Court must allow for a case-by-case analysis of whether specific information requested under the emissions rule actually qualifies as '*information [which] relates to emissions*' and refrain from substituting its own assessment in matters, such as this one, involving complex scientific and technical assessments.

69. This would ensure that, in reaching conclusions on the outcome of this case, the Court does not prejudge the outcome of a careful analysis in future cases and tip the balance that the Court of Justice and the EU legislature intended to maintain between the objective of transparency on the one hand and fundamental rights and the protection of CBI on the other hand.

70. It would be consistent with a limited standard of review and preserve the possibility of a consistent reading of the Aarhus Regulation in light of higher norms of EU law and international obligations.

71. Otherwise, the EU would be an outlier in breach of international obligations and standards. This could have serious repercussions on the EU economy and globally as innovation, competition and trade would most likely be chilled.

72. A failure to ensure that any disclosure of CBI meets the necessity and proportionality tests would also expose the EU and its Member States to potential international dispute resolution proceedings and litigation in the European Court of Human Rights, as US and other international interests would be harmed by a disproportionate interference with the protection of intangible assets.