

To the President and Members of the General Court  
of the European Union

**Application for Annulment**

under Article 263 of the Treaty on the Functioning of the European Union

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**(1) ClientEarth**

**(2) Friends of the Earth Europe**

**(3) Stichting FERN**

**(4) Corporate Europe Observatory**

**Applicants**

**v.**

**Commission**

**Defendant**

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**Date of Lodgement:**

25 May 2011

**Addressee:**

Registrar of the Registry  
Rue du Fort Niedergrünwald  
L-2925 Luxembourg  
t: (352) 4303-1  
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## **Preliminary Information**

### **Representation by Lawyers**

Applicants: ClientEarth, Friends of the Earth Europe, Stichting FERN, and Corporate European Observatory

Names of Participating Lawyers/Agents: Pierre Kirch, Avocat, Partner at Paul Hastings, Janofsky & Walker (Europe) LLP.  
James Thornton, Solicitor of England & Wales  
Katy Ayres, Barrister of England & Wales  
Janet Meissner Pritchard, Senior Lawyer  
Anaïs Berthier, Environmental Justice Lawyer

In accordance with Article 44(3) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the lawyer representing ClientEarth, Friends of the Earth Europe, Stichting FERN and Corporate European Observatory is Pierre Kirch, member of the Paris and Brussels bars, having his address at Avenue Louise, 480, 1050 Brussels, Belgium, and whose certificate of authorisation to practise before the Court is included with this application.

For purposes of these proceedings, in accordance with Article 44(2) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the Applicants agree to accept service through their designated agents for service of process via electronic mail.

Designated Agent for Service of Process: Pierre Kirch, pierrekirch@paulhastings.com

**Information on Applicants**

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In accordance with Article 44(5) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the required proof of existence in law for ClientEarth, as a legal person, and proof of the authority granted to the Applicant's lawyer is included with this application.

Name of Applicant Organisation: Corporate Europe Observatory

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In accordance with Article 44(5) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the required proof of existence in law for Corporate Europe Observatory, as a legal person, and proof of the authority granted to the Applicant's lawyer is included with this application.

Name of Applicant Organisation: Stichting FERN  
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In accordance with Article 44(5) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the required proof of existence in law for FERN, as a legal person, and proof of the authority granted to the Applicant's lawyer is included with this application.

Name of Applicant Organisation: Friends of the Earth, Europe  
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In accordance with Article 44(5) of the Rules of Procedure of the European Communities of 2 May 1991, as amended, the required proof of existence in law for Friends of the Earth Europe, as a legal person, and proof of the authority granted to the Applicant's lawyer is included with this application.

### **Information on Defendant**

Name of Defendant: European Commission

## I. INTRODUCTION

1. This case raises fundamental issues concerning the right of public access to information on environmental matters, and the related ability of the public to participate in decision making processes of the European Commission (hereinafter “**the Commission**”) which have broad and far-reaching consequences both inside and outside of Europe.
2. Specifically, the case concerns Directive 2009/28/EC on the promotion of the use of energy from renewable sources (hereinafter “**Directive 2009/28/EC**” and the “**Directive**”), which, among other things, requires Member States to use renewable energy sources to meet 10% of their transport needs by 2020<sup>1</sup>, promoting an increased use of biofuels<sup>2</sup> to meet this target<sup>3</sup>.
3. When biofuel consumption is increased in this way due to public policy, a demand is created where little previously existed—creating a policy-induced market for biofuels worth billions of euros. The impact of such a policy is already being felt: the time-span between the sowing of seeds and the final consumption of biofuels (taking into account growth, transport, manufacturing, etc.) is such that an increasing amount of land is already being devoted to future consumption in Europe.
4. With such a policy comes the responsibility to ensure that its environmental objectives are achieved, and to safeguard against unintended, detrimental effects. In recognition of potentially serious implications of EU biofuels policy on climate, forests and natural

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<sup>1</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the use of Energy from Renewable Sources, OJ L 140, 5.6.2009, p.16-62, Article 3(4).

<sup>2</sup> The Directive defines “biofuels” as “liquid or gaseous fuel for transport produced from biomass” (Article 2(i)). “Biomass” is, in turn, defined as “the biodegradable fraction of products, waste and residues from biological origin from agriculture (including vegetal and animal substances), forestry and related industries including fisheries and aquaculture, as well as the biodegradable fraction of industrial and municipal waste” (Article 2(e)).

<sup>3</sup> This was also the legislative background of cases *ClientEarth and others v Commission* (T-120/10, 8 March 2010 and T-449/10 [TBC], 20 September 2010 currently pending before the Court) and much of the argument found therein in relation to the procedural issues in those cases is equally applicable here. The underlying substantive issues in this case, however, are entirely different.

areas, Directive 2009/28/EC sets out ‘*sustainability criteria*’<sup>4</sup> which must be met before biofuels can count towards the 10% target<sup>5</sup>.

5. The harms (both social and environmental) that can be expected following the implementation of the biofuels target, are significant and wide-ranging.
6. Firstly, as is specifically recognised by Directive 2009/28/EC, there is a danger that an increased use of biofuels can in fact have a negative greenhouse gas impact, where land with high stocks of carbon is converted for cultivation of biofuels<sup>6</sup>. Article 17(4) therefore excludes biofuels produced on land that had high carbon stocks (including wetlands and continuously forested areas) as of January 2008<sup>7</sup>. In addition, Article 17(2) sets out minimum greenhouse gas savings obligations ranging from 35% in 2009 and up to 60% for biofuels and bioliquids produced on or after January 2017<sup>8</sup>.
7. Secondly, Directive 2009/28/EC also recognises the potential harms to biodiversity resulting from an increased use of biofuels<sup>9</sup>. Article 17(3) of the Directive defines land with high biodiversity value. Biofuels produced from such land are therefore ineligible for financial support under the Directive<sup>10</sup>.

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<sup>4</sup> Directive 2009/28/EC, Article 17(2)-(6).

<sup>5</sup> Directive 2009/28/EC, Article 17(1).

<sup>6</sup> Directive 2009/28/EC, Recital 70: “*If land with high stocks of carbon in its soil or vegetation is converted for the cultivation of raw materials for biofuels or bioliquids, some of the stored carbon will generally be released into the atmosphere, leading to the formation of carbon dioxide. The resulting greenhouse gas impact can offset the positive greenhouse gas impact of the biofuels or bioliquids, in some cases by a wide margin. The full carbon effects of such conversion should therefore be accounted for in calculating the greenhouse gas emission saving of particular biofuels and bioliquids. This is necessary to ensure that the greenhouse gas saving calculation takes into account the totality of the carbon effects of the use of biofuels and bioliquids.*”

<sup>7</sup> *Ibid.*, Article 17(4) (but note that this provision does not exclude biofuels produced on land converted prior to January 2008); see also Article 19(1) (containing rules for calculating total emissions from biofuel use).

<sup>8</sup> Directive 2009/28/EC, Article 17(2).

<sup>9</sup> *Ibid.*, Recital 69: “*The increasing worldwide demand for biofuels and bioliquids, and the incentives for their use provided for in this directive, should not have the effect of encouraging the destruction of biodiverse lands. Those finite resources recognised in various international instruments to be of value to mankind, should be preserved. Consumers in the Community would, in addition, find it morally unacceptable that their increased use of biofuels and bioliquids could have the effect of destroying biodiverse lands[ ...].*”

<sup>10</sup> *Ibid.*, see Article 17(1).

8. Thirdly, the potential social harms of increased biofuel use in Europe, particularly in third countries, are significant. These potential social consequences are recognised to some extent in the preamble to Directive 2009/28/EC<sup>11</sup> although the sustainability criteria set out in the Directive do not currently cover social issues<sup>12</sup>. In addition to obvious effects on land and the environment upon which local communities depend, it is clear that increased biofuel cultivation will have an impact on the availability of foodstuffs at affordable prices, particularly for people who are most vulnerable to such price rises.
9. In addition, the existing sustainability criteria in the Directive have been the subject of criticism<sup>13</sup> and may soon be modified<sup>14</sup>. Although an in-depth analysis of the sustainability criteria themselves is beyond the scope of this case, recognition of these issues highlights the importance of public participation in the verification of voluntary certification schemes expected to be relied upon to ensure compliance with the Directive's sustainability criteria.
10. The following case study illustrates the reality of the potential harms outlined above (and shows also the high level of public interest in these issues). An Italian company (Kenya Jatropha Energy Ltd, wholly owned by the Italian firm Nuove Iniziative Industriali) has submitted an application to plant 50,000 hectares of jatropha in Dakatcha, a large area of natural forest and scrubland on the North Eastern coast of Kenya, to make bioliquids principally destined for European markets. Dakatcha is home to 20,000 people mostly subsisting off the land, and a diverse selection of wildlife including globally endangered birds.

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<sup>11</sup> *Ibid*, Recitals 4, 9, 16, 85.

<sup>12</sup> See ClientEarth's briefing '*Legal Analysis: Sustainability Criteria Compliance Review for Jatropha curcas Biofuels from the Dakatcha Woodland in Kenya*', March 2011, at p.3, a copy of which is attached at **Annex A.1**.

<sup>13</sup> See, for example, ClientEarth et al., *Joint Submission for Public Consultation on Indirect Land-Use Change*, 29 October 2010, available at: [http://www.clientearth.org/reports/2010\\_10\\_te\\_ce\\_eeb\\_bl\\_joint\\_iluc\\_submission\\_final.pdf](http://www.clientearth.org/reports/2010_10_te_ce_eeb_bl_joint_iluc_submission_final.pdf) (linked checked 23 May 2011).

<sup>14</sup> See COM(2010) 811 final, *Report from the Commission on indirect land-use change relate to biofuels and bioliquids*, 22 December 2010, at p.15 (noting that the Commission will, in July 2011, present an impact assessment and, possibly, a legislative proposal for amending the Renewable Energy Directive with regard to the sustainability criteria to take account of emissions resulting from indirect land use change).

11. It has been shown that the Dakatcha proposal breaches the sustainability criteria in relation to greenhouse gas savings, once the direct land-use change consequences of the plantation are taken into account<sup>15</sup>. In addition the area qualifies as land with high carbon stock, and therefore conversion to a jatropha plantation would violate Article 17(4) of Directive 2009/28/EC<sup>16</sup>. It has also been shown that the Dakatcha proposal would breach the biodiversity criteria in Article 17(3)(b) of the Directive, as the area is home to a number of globally threatened birds and has been designated by the relevant competent authorities in Kenya as an ‘*Important Bird Area*’, and a ‘*Key Biodiversity Area*’, reflecting the fact that it is a rare ecosystem hosting a number of threatened species<sup>17</sup>. Finally, the negative social impact of the proposed plantation is clear. The majority of people living in the area make their living from small scale farming of crops such as cassava and maize to feed their families and sell in the local market. The community is also reliant on the woodlands for drinking water, firewood, and herbal medicines. These people now face eviction to make way for the proposed biofuels plantation, a situation which has attracted much media attention both nationally and internationally<sup>18</sup>.
12. The Dakatcha case study illustrates the need for a clear, transparent, accountable, and effective compliance framework for biofuels sustainability criteria, to ensure that the increased demand for biofuels to meet the Renewable Energy Directive’s 10% target for renewable energy in transport does not, in fact, result in greater greenhouse gas emissions or have other negative effects.

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<sup>15</sup> See ClientEarth’s briefing ‘*Legal Analysis: Sustainability Criteria Compliance Review for Jatropha curcas Biofuels from the Dakatcha Woodland in Kenya*’, March 2011, at pp.5-6, a copy of which is attached at **Annex A.1**. See also a report produced by Action Aid, Birdlife International, Nature Kenya and RSPB ‘*Jatropha Biofuels in Dakatcha, Kenya – The Climate Consequences*’ at paragraphs 3-6, a copy of which is attached at **Annex A.2**.

<sup>16</sup> ClientEarth’s briefing ‘*Legal Analysis: Sustainability Criteria Compliance Review for Jatropha curcas Biofuels from the Dakatcha Woodland in Kenya*’, March 2011, at p.11 (**Annex A.1**).

<sup>17</sup> *Ibid*, p.7-9, and Action Aid, Birdlife International, Nature Kenya and RSPB Report ‘*Jatropha Biofuels in Dakatcha, Kenya – The Climate Consequences*’ (**Annex A.2**), paragraph 2.

<sup>18</sup> See Action Aid, Birdlife International, Nature Kenya and RSPB Report ‘*Jatropha Biofuels in Dakatcha, Kenya – The Climate Consequences*’ (**Annex A.2**), paragraphs 1-2, and BBC News article ‘*Kenyans fear Dakatcha Woodlands biofuel expansion*’, 23 March 2011, available at: <http://www.bbc.co.uk/news/world-africa-12819035> (link checked 23 May 2011), a copy of which is attached at **Annex A.3**.

- 13.** The sustainability criteria set out in Directive 2009/28/EC are not mandatory for all biofuels marketed in the EU. Instead, the Directive requires Member States to show that the sustainability criteria are met when biofuels or bioliquids **(i)** are counted towards their renewable energy targets under the Directive<sup>19</sup>; **(ii)** are used for compliance with national support schemes promoting the production of renewable energy<sup>20</sup>; **(iii)** receive financial support for their consumption<sup>21</sup>; **(iv)** are counted towards the target of the Fuel Quality Directive for reducing greenhouse gas emissions<sup>22</sup>; **(v)** receive investment and/or operating aid in accordance with the Community guidelines on State aid for environmental protection<sup>23</sup>; or **(vi)** are taken into account under the provisions for alternative-fuel vehicles of the Regulation on CO<sub>2</sub> from passenger cars<sup>24</sup>. In other words, the sustainability criteria apply for biofuels counted towards national renewable energy targets or eligible for support from various incentive policies for promoting renewable energy.
- 14.** The need for enforceable sustainability criteria and a strict compliance framework to enforce them is particularly important where, as here, the increased demand for biofuels is the result of public policy without which the demand would not exist and, indeed, where public subsidies are used to foster this demand.
- 15.** Article 18 of Directive 2009/28/EC provides that ‘*voluntary certification schemes*’ will play a role within the compliance framework for the biofuels sustainability criteria<sup>25</sup>. As explained in greater detail below, Article 18 authorises the European Commission,

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<sup>19</sup> Directive 2009/28/EC, Article 17(1)(a).

<sup>20</sup> Directive 2009/28/EC, Articles 2(1) and 17(1)(b).

<sup>21</sup> Directive 2009/28/EC, Article 17(1)(c).

<sup>22</sup> Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC, OJ L 350, 28.12.1998, p. 58–68, Article 7a.

<sup>23</sup> Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p. 1–33, p.1.

<sup>24</sup> Regulation (EC) No 443/2009, Article 6.

<sup>25</sup> Directive 2009/28/EC Article 18(4) and Recitals 74, 79.

following a consultative procedure with representatives of the Member States<sup>26</sup>, to decide that voluntary schemes “contain accurate data” for the purposes of demonstrating compliance with the sustainability criteria<sup>27</sup>, but only for schemes that meet “adequate standards of reliability, transparency and independent auditing”<sup>28</sup>.

**16.** In June 2010, the Commission announced its intention to select voluntary certification schemes under Article 18 of Directive 2009/28/EC, noting that the assessment process would start “upon receipt of a request for recognition”<sup>29</sup>. The process specified by the Commission for selecting and deselecting voluntary certification schemes for the purposes of Article 18 is vague. Notably, it does not specify any procedure by which stakeholders or concerned members of the public can make a complaint against a decision to select a voluntary certification scheme or the process or standards by which schemes are to be assessed. Indeed, there are no clear provisions to allow for public scrutiny of applicant schemes or for NGOs or other stakeholders to provide meaningful inputs to decision making regarding the selection of voluntary certification schemes that will be relied on as part of the compliance framework for the biofuels sustainability criteria set out in the Directive<sup>30</sup>.

**17.** The Directive assumes that voluntary certification schemes can potentially play a constructive role in monitoring whether biofuels consumed in the EU comply with the Directive’s sustainability criteria. It is a likely possibility that certification by an approved scheme will be relied on as evidence that the consignment complies with the statutory sustainability criteria. If this becomes the case, it will be essential that appropriate checks are in place to ensure that compliance with the sustainability criteria is assessed by schemes in accordance with appropriate indicators, and that the evidence provided by the schemes is reliable. If the selection of schemes is not strictly and thoroughly scrutinised

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<sup>26</sup> Directive 2009/28/EC, Article 18(6).

<sup>27</sup> Directive 2009/28/EC, Article 18(4).

<sup>28</sup> Directive 2009/28/EC, Article 18(5).

<sup>29</sup> Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability scheme, OJ C 160, 19.6.2010, p. 1–7, p.2.

<sup>30</sup> See, generally, *ibid.*

and the role of voluntary certification schemes is not carefully defined and regulated, there is a clear risk that the Member States' and the Commission's responsibility to enforce the Directive's sustainability criteria will be inappropriately delegated to private, voluntary certification schemes.

18. In light of the climate, biodiversity, and social impacts of EU biofuels policy noted above, ClientEarth, Corporate Europe Observatory, Stichting FERN, and Friends of the Earth Europe (hereinafter "**the Applicants**") are keenly interested in the role such schemes will play within the framework for ensuring compliance with the sustainability criteria set out in the Directive, as well as which schemes play this role. They are also keenly interested in the standards against which schemes will be assessed, the process for their assessment, and opportunities to challenge the verification of any specific scheme where they dispute the Commission's decision to verify the scheme.
19. In order to participate in the verification of voluntary certification schemes that will be relied on as part of the compliance framework for the biofuels sustainability criteria set out in Directive 2009/28/EC, and thereby attempt to safeguard against the potential social and environmental harms referred to above, the Applicants requested information concerning schemes submitted to the Commission. Their request was refused and the Applicants submitted a confirmatory application in response. To date, this confirmatory application has not been the subject of a written response by the Commission, whereas the deadline for a response has expired, which means that it has been implicitly denied.
20. The public interest in important decisions regarding proposed voluntary certification schemes is irrefutable. **The public has the right to be fully informed about and involved in decisions to ensure that biofuels consumed in the EU fully comply with sustainability criteria to ensure that activities undertaken in order to meet the increased demand for biofuel feedstocks induced by Directive 2009/28/EC do not have detrimental climate and biodiversity consequences.**
21. The Applicants therefore apply to the General Court to annul the decision of the Commission to refuse access to the requested documents, as further explained in Section V below.

## II. PARTIES

- 22. ClientEarth** is a non-profit organisation dedicated to safeguarding the planet, its flora, fauna, ecosystems and people, for the benefit of current and future generations. Its mission is to usher in a new era of environmental protection in Europe and beyond, pioneering innovative ways to protect the environment through the power of law. With offices in London, Brussels and Warsaw, ClientEarth provides legal and technical capacity to the environmental movement. Its activities focus on transformational changes to the European legal and legislative landscape, including increasing citizens' access to justice, advocating for effective environmental legislation with binding and enforceable provisions, bringing transparency to European policy-making, and empowering non-governmental organisations.
- 23. Corporate Europe Observatory** (hereinafter “CEO”) is a research and campaign group working to expose and challenge the privileged access and influence enjoyed by corporations and their lobby groups in EU policy making, which can lead to policies that exacerbate social injustice and accelerate environmental destruction across the world. CEO believes that rolling back corporate power and exposing greenwash are crucial in order to truly address global problems including poverty, climate change, social injustice, hunger and environmental degradation. CEO works in close alliance with public interest groups and social movements in and outside Europe to develop alternatives to the dominance of corporate power.
- 24. FERN** is a non-governmental organisation and a Dutch Stichting created in 1995 to monitor the European Union's forest-related policies and to coordinate NGO activities directed at these policies at the European level. FERN's work centres on forests and forest peoples' rights and the issues that affect them such as trade and investment and climate change, and is carried out in close collaboration with social and environmental organisations and movements across the world. FERN's mission is to achieve greater environmental and social justice, focusing on the effects of the policies and practices of the European Union.

**25. Friends of the Earth Europe** (hereinafter “**FOEE**”) is the largest grassroots environmental network in Europe and campaigns for sustainable solutions to benefit the planet, people and our common future. FOEE unites 30 national organisations with thousands of local groups and is part of the world's largest grassroots environmental network, Friends of the Earth International. FOEE works to promote environmentally sustainable societies on the local, national, regional and global levels, protect the earth against further deterioration and repair damage inflicted upon the environment by increasing public participation and democratic decision making, and by working to achieve environmental, social, economic and political justice at all levels.

### **III. FACTUAL BACKGROUND**

**26. In February 2010** the Applicants learned in a conversation with Commission officials that the Commission did not intend to disclose details of the various voluntary certification schemes that had been submitted to it seeking recognition for the purposes described under Article 18 of Directive 2009/28/EC<sup>31</sup>. This included withholding the names of the parties submitting the schemes. It is the Applicants’ understanding that there are approximately 17 such schemes to date, but there may well be more.

**27. On 22 October 2010** a formal request for access to information under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereinafter “**Regulation 1049/2001**”), and Regulation (EC) No 1367/2006 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 (hereinafter “**Regulation 1367/2006**”), was sent to the Commission’s Directorate-General for Energy (hereinafter “**DG Energy**”) in the following terms:

*“We hereby request all documents related to the voluntary certification schemes seeking recognition from the Commission under Article 18 of the Renewable Energy Directive [...] it is our understanding that several voluntary certification schemes already applied for accreditation from the Commission and have submitted the associated paperwork. This request seeks those submissions and any related communications and documents. In*

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<sup>31</sup> Directive 2009/28/EC Article 18(4). See also paragraphs 4-7, *supra*.

*addition, we call upon the Commission to make all future applications available in a public register, including the full details and criteria of the scheme.*

*We also request a list of all meetings, including full minutes, held between the Commission and representatives of voluntary schemes or companies intending to develop them, including meetings and conferences organised by those organisations and/or companies, to which Commission staff has been invited.”* (This formal request is hereinafter referred to as the “**Initial Application**” and is attached hereto as **Annex A.4**).

**28. On 12 November 2010**, DG Energy responded with a brief electronic mail registering the request for access and stating that it would be granting itself an additional 15 days to respond:

*“Your application will be dealt with as soon as possible. However, as the matter requires further internal consultation, we have to extend the prescribed period by another 15 working days before you receive a reply. We apologise for this delay.”* (This document is hereinafter referred to as the “**12 November 2010 Extension Letter**” and is attached as hereto as **Annex A.5**)

**29. On 7 December 2010**, two days after the extension deadline expired, DG Energy responded with an effective denial of the request. Although technically a partial denial, DG Energy substantially denied the application by withholding all consequential information, releasing only one document, the basic ‘Assessment Framework for Voluntary Schemes’<sup>32</sup>. For all other categories of document, including the submitted schemes or even provision of the names of those submitting the schemes, DG Energy denied the request outright, stating that the relevant third parties had objected to disclosure of their schemes at this stage in the process and that, having taken its own assessment, the documents were covered by an exception laid down in Article 4 of Regulation 1049/2001 and could not therefore be disclosed:

*“Based on the reply of the third parties the Commission undertook its own assessment whether the disclosure of the requested was justified by the exceptions listed in Art. 4 paragraphs 2 and 3 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents... After a careful assessment of each document with*

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<sup>32</sup> This document is attached hereto as **Annex A.6**.

*regard to the criteria listed in Art.4 paragraphs 2 and 3, we came to the following conclusion:*

*[...] No information about the content of the schemes or the Commission's interaction with the owners or developers of schemes can be disclosed at this stage. A disclosure would inevitably affect commercial secrets and the internal decision making procedure of the Commission.*

*The voluntary schemes themselves are the result of a design process from the scheme developers which encloses specific design features that upon disclosure could harm their commercial interests. Also disclosure of specific discussions between the Commission and schemes on key parts of the schemes would be problematic in this sense.*

*The Commission has to do a technical review under Article 18(4) of Directive 2009/28/EC. At this point in time we are performing a technical review of draft documents of voluntary schemes. We do not consider there is an overriding public interest to make these documents public at this time. Finally, the Commission intends to publish the final versions of voluntary schemes that seek recognition after the reviewing process is completed. Before doing so, the Commission intends to give the owners of the schemes the possibility to indicate what parts of the scheme cannot be disclosed for reasons of confidentiality and/or commercial sensitivity. The Commission will then assess such claims, decide whether they are justified and publish the schemes on its website. You will be informed of this in due course. By doing so the Commission ensures the maximum transparency possible in this process.” (This Commission response is hereinafter referred to as the “**7 December 2010 Refusal letter**” and is attached as **Annex A.7**).*

**30.** On **15 December 2010** the Applicants submitted a detailed confirmatory application to the Secretary-General of the Commission in accordance with Article 7(2) of Regulation 1049/2001, asking the Commission to reconsider its position. This document is hereinafter referred to as the “**Applicants’ Confirmatory Application**” and is attached at **Annex A.8**.

**31.** On **12 January 2011** the Commission responded via electronic mail informing the Applicants that their confirmatory application of 15 December 2010 was registered on the same day, and granting itself an additional 15 working days to comply under Article 8(2) of Regulation 1049/2001, stating:

*“Your application is currently being handled. However, due to the great number of documents covered by your request, the technical nature of the data contained in them and the need to re-consult third parties, we are not in a position to reply to your confirmatory request within the prescribed time limit expiring 14 January 2011.”* (This electronic mail is hereinafter referred to as the “**12 January 2011 Extension Letter**” and is attached at **Annex A.9**).

**32.** On **3 February 2011** (the day before the expiration of the 15 day extension), the Commission wrote to the Applicants stating that it was unable to provide a final reply within the extended time limit as *“the required analysis of the documents as well as consultations with the services concerned within the Commission have taken more time than usual. However, we aim to send you a reply within the shortest possible time limit”*. (This document is hereinafter referred to as the “**3 February 2011 Commission Communication**” and is attached as **Annex A.10**).

**33.** On **4 February 2011**, which was the deadline for a reply, the Commission failed to grant access to the requested documents and to state the reasons for its total or partial refusal in a written reply, thus unilaterally breaching the applicable rules.

**34.** On **23 February 2011**, having heard nothing further from the Commission following the 3 February 2011 Commission Communication referred to above, the CEO, on behalf of the Applicants, wrote to the Secretary-General of the Commission via electronic mail, expressing concern regarding the Commission’s significant delay in responding to the Confirmatory Application, and requesting that an exact date for the Commission’s response be provided by the Commission. (This document is hereinafter referred to as the “**Applicants’ Letter of 23 February 2011**” and is attached as **Annex A.11**)

**35.** The Commission responded on **28 February 2011**, in an electronic mail very similar in substance and form to its two previous communications, and stating:

*“As explained in my letter of 3 February 2011, we are currently handling your application and the internal consultations on this subject are ongoing. I can assure you that we will do our utmost to provide you with the final reply on your application by end of March 2011.”* (A copy of this letter is attached as **Annex A.12**).

**36.** On **7 April 2011**, having heard nothing further from the Commission, the Applicants wrote to the Secretariat General of the Commission, pointing out that the end of March 2011 had passed and yet no response had been received. The ongoing breaches by the Commission of Regulation 1049/2001 were emphasised, and the Commission was requested to respond within 10 working days of receipt of the letter (by 22 April 2011), failing which the Applicants would challenge the implied decision refusing Applicants' Confirmatory Application before the General Court. This document hereinafter referred to as the "**Applicants' Letter of 7 April 2011**" is attached at **Annex A.13**.

**37.** On **14 April 2011** the Commission responded, noting the Applicants' Letter of 7 April 2011, and stating:

*"I regret that it has not been possible to provide you with a final reply to your request within this extended time limit and I apologise for any inconvenience this may have caused. Since there have been new developments in the case at stake, the consultation process of the respective Commission Services has taken more time than initially predicted. **However, a draft decision will shortly be submitted for final approval. Therefore, you can expect the decision to be sent to you in the near future. Please note however, that it will not be possible to meet your desired deadline of 22 April, as the Commission's offices will be closed for Easter from 21 to 25 April. In any case, you can expect the decision to be sent to you shortly after this date.**"* (A copy of this letter is attached as **Annex A.14**).

**38.** On **18 April 2011**, the Applicants responded stating that the intervention of the Easter holidays was immaterial given that the Confirmatory Application was submitted and registered on 15 December 2010. The Applicants noted that the deadline date of 22 April 2011 was some 53 working days after the expiry of any potentially lawful extension period for replying to the confirmatory application would have already expired. The Applicants stated their sincere hope that the Commission would indeed respond prior to an application being made to the General Court, but that the Applicants maintained their existing right to challenge the position of the Commission before the Court should a response not be received by 22 April 2011. (A copy of this letter is attached as **Annex A.15**).

**39.** As of the **22 April 2011 deadline**, the Applicants had received no response from the Commission. This means that the Commission issued an implied decision of refusal of the Confirmatory Application.

**40.** On **21 May 2011**, the Commission announced on its on-line Comitology Register<sup>33</sup> that it would convene a meeting of the Committee on the Sustainability of Biofuels and Bioliquids, a committee comprised of representatives of the EU Member States. According to the agenda linked to the on-line Comitology Register<sup>34</sup>, the Commission intends to request the opinion of the Committee, in accordance with the advisory procedure provided for in Article 25(3) of Directive 2009/28/EC, on draft Commission Decisions to recognise seven voluntary certification schemes for the purposes of Article 18 of the Directive. The names of the voluntary certification schemes being considered were published on the on-line Comitology Register<sup>35</sup>. The register also listed several documents relevant to the issues to be discussed at the 27 May 2011 meeting, including the Commission's assessment of each of the voluntary certification schemes being recommended and a Commission Draft Implementing Decision on the recognition of each scheme recommended<sup>36</sup>. However, these documents could not be accessed through the on-line Comitology Register as of 23 May 2011<sup>37</sup>.

**41.** At the time of lodging this Application, the Applicants have received no further correspondence from the Commission after 18 April 2011.

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<sup>33</sup> See European Commission Comitology Register, available at:

<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=search.dossierdetail&xos4hSzFhgpL8X0wMph8FfyZBS7xKeJ7SvEeVVh88beZQcZMUON7LOAUWjcmvspE> (link checked 23 May 2011).

<sup>34</sup> Available at:

<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=search.documentdetail&QO11NKr3jIx/kHvZJVJdaT0Ou8cDOvmvWE+G0BgXTbcxdbQ+AI/X9VTTMRqv00VG> (link checked 23 May 2011).

<sup>35</sup> See

<http://ec.europa.eu/transparency/regcomitology/index.cfm?do=search.dossierdetail&xos4hSzFhgpL8X0wMph8FfyZBS7xKeJ7SvEeVVh88beZQcZMUON7LOAUWjcmvspE> (link checked 23 May 2011).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

42. The Applicants contest the implied negative response of the Commission to the Confirmatory Application, said implied decision of refusal being set as from the 22 April 2011 deadline which the Commission chose to ignore. This implied decision follows upon the decision set out in the Commission's 7 December 2010 Refusal Letter. The Applicants contest the negative decision of the Commission in its totality, both the reasons set out in the 7 December 2010 Letter and the implied decision of refusal as of 22 April 2011 (the reasons set out in the 7 December 2010 Refusal Letter and the implied decision of refusal as from 22 April 2011 are hereinafter collectively referred to as the "Contested Decision").

#### IV. LEGAL BACKGROUND

##### 4.1 The Renewable Energy Directive (Directive 2009/28/EC)

43. As referred to above, Directive 2009/28/EC set out a 10% target for renewables in transportation which is expected to be met through the increased use of biofuels. It also outlines sustainability criteria that any biofuel scheme receiving financial support and counting towards the 10% target must meet. The sustainability criteria are set out in Article 17 (sustainability criteria for biofuels and bioliquids). So-called 'voluntary certification schemes' are expected to play a prominent role within the sustainability criteria.

44. The purpose and importance of these voluntary certification schemes is set out in Recital 79 of Directive 2009/28/EC :

*"It is in the interests of the Community to encourage [...] voluntary international or national schemes that set standards for the production of sustainable biofuels and bioliquids, and that certify that the production of biofuels and bioliquids meets those standards. For that reason, provision should be made for such [...] schemes to be recognised as providing reliable evidence and data, provided that they meet adequate standards of reliability, transparency and independent auditing."*

45. The system for verifying voluntary certification schemes' compliance with the sustainability criteria is outlined in Article 18 of Directive 2009/28/EC:

*“Article 18 - verification of compliance with the sustainability criteria for biofuels and bioliquids:*

*4. The Commission may decide that voluntary national or international schemes setting standards for the production of biomass products contain accurate data for the purposes of Article 17(2) or demonstrate that consignments of biofuels comply with the sustainability criteria set out in Article 17(3) to (5). The Commission may decide that those schemes contain accurate data for the purposes of information on measures taken for conservation of areas that provide, in critical situations, basic ecosystem services (such as watershed protection and erosion control), for soil, water and air protection, the restoration of degraded land, the avoidance of excessive water consumption in areas where water is scarce and on the issues referred to in the second subparagraph of Article 17(7) [...].*

*The Commission may decide that voluntary national or international schemes to measure greenhouse gas emission savings contain accurate data for the purposes of Article 17(2) [...].*

*5. The Commission shall adopt decisions under paragraph 4 only if the agreement or scheme in question meets adequate standards of reliability, transparency and independent auditing. In the case of schemes to measure greenhouse gas emission saving, such schemes shall also comply with the methodological requirements in Annex V[...].*

***6. Decisions under paragraph 4 shall be adopted in accordance with the advisory procedure referred to in Article 25(3). Such decisions shall be valid for a period of no more than five years.”***  
(emphasis added).

**46.** The ‘advisory procedure’ referred to at the above-cited Article 18(6) is detailed at Article 25(3), and states as follows:

*“3. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.”*

**47.** The relevant provisions of Decision 1999/468/EC<sup>38</sup> (known as “**the Comitology Decision**”) referred to by Article 25(3) of Directive 2009/28/EC, provide:

*“Article 3 – Advisory procedure*

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<sup>38</sup> Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p.23.

1. *The Commission shall be assisted by an advisory committee composed of the representatives of the Member States and chaired by the representative of the Commission.*
2. *The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary taking a vote.*
3. *The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.*
4. *The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which the opinion has been taken into account.”*

**48.** As a result of changes made to the comitology procedures by the Lisbon Treaty<sup>39</sup>, Decision 1999/468/EC has since been repealed by Regulation (EU) No 182/2011<sup>40</sup>. However, the advisory procedure as set out in the corresponding provisions of Regulation 182/2011 remains the same (the relevant changes are to the old management and regulatory procedures). In any event, Regulation 182/2011 only applies to acts adopted after the entry into force of the Lisbon Treaty. Therefore, as pre-existing legislation, Directive 2009/28/EC is not affected by the new rules.

**49.** Article 18(5) of Directive 2009/28/EC allows the Commission to adopt decisions as to whether or not a voluntary national or international scheme setting standards for the production of biomass products contains accurate data for the purposes of Article 17(2) or demonstrates that consignments of biofuels comply with the sustainability criteria set out in Articles 17(3) to 17(5) “*only if the scheme [...] in question meets adequate standards of reliability, transparency and independent auditing*” and where, in the case of schemes to measure greenhouse gas emission savings, such schemes also comply with the methodological requirements in Annex V. However, the Directive does not detail either

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<sup>39</sup> Treaty of Lisbon amending the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), signed at Lisbon, 13 December 2007.

<sup>40</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18, which came into force on 1 March 2011.

the process or standards by which the Commission is to assess voluntary certification schemes. Nor does it suggest indicators for assessing whether a proposed scheme is sufficiently reliable, transparent, or independently audited.

## 4.2 The Public Access Regulation (Regulation 1049/2001)

### *(a) The evolution and affirmation of the fundamental right of public access to documents of the EU institutions*

50. Regulation 1049/2001 establishes the right of public access to EU documents. It has ushered in a new era of accessibility to and legitimacy of EU institutions, codifying the principles of openness, transparency and democracy to promote legitimacy, accountability and effectiveness in EU decision-making<sup>41</sup>.

51. The evolution of the concept of a right of public access to documents as a fundamental right – and the rationale thereof – was summarised by Advocate General Poiares Maduro in his opinion provided to the Court in the case of *Sweden v Commission*<sup>42</sup>:

*“38. A right of public access to documents of the institutions was, for a long time, a concept foreign to Community law. Its evolution was one of “progressive affirmation”, to use the words of the Court of Justice itself in Kingdom of the Netherlands v Council of the European Union (Case C-58/94) [1996] ECR I-2169, para 36; and Interporc Im-und Export GmbH v Commission of the European Communities (Case C-41/00P) [2003] ECR I-2125, para 38, of the right of public access to documents held by public authorities, the principal milestones of which I will discuss only briefly. [...]*

*42. It should be borne in mind that, even when the principle of the widest possible access to documents held by the institutions was still only laid down in measures of internal organisation, the case law had already inferred that the exceptions and limitations imposed by those measures were to be interpreted and applied restrictively, so as not to undermine the application of the principle<sup>43</sup>: **Since the right of access***

<sup>41</sup> See Regulation (EC) No 1049/2001, Recitals 1-4.

<sup>42</sup> *Kingdom of Sweden v Commission of the European Communities and Others*, Case C-64/05 P, [2007] ECR I-11389, on appeal from the decision of the Court of First Instance in Case T-168/02 *Internationaler Tierschutz-Fonds g GmbH v Commission* [2004] ECR II-4135.

<sup>43</sup> See, *inter alia*, *WWF UK (World Wide Fund for Nature) v Commission of the European Communities* (Case T-105/95) [1997] ECR II-313, para 56; *Interporc Im-und Export GmbH v Commission of the European Communities* (Case T-124/96) [1998] ECR II-231, para 49; *Svenska Journalistförbundet* [1998] ECR II-2289,

*to documents of the institutions has become a fundamental right of constitutional import linked to the principles of democracy and openness, any piece of secondary legislation regulating the exercise of that right must be interpreted by reference to it, and limits placed on it by that legislation must be interpreted even more restrictively.*

[...]

43. *It follows, moreover, from the link established in the European Union between the principle of transparency and the democratic system that access to a document must be determined not so much by the identity of the author as by the importance of the document for knowledge and accountability of the Community decision-making process.*" (emphasis added).

52. The Court of Justice concurred with Advocate General Maduro's understanding that any exceptions to the democratic right of public access laid down in secondary legislation must be interpreted and applied restrictively. The Court set aside the judgment of the General Court and annulled the decision of the Commission to refuse access, stating:

*"66. [...] It should be recalled, first, that in view of the objectives pursued by Regulation No 1049/2001, in particular the fact noted in recital 2 in the Preamble that the public right of access to the documents of the institutions is connected with the democratic nature of those institutions and the fact that, as stated in recital 4 in the Preamble and in article 1, the purpose of the Regulation is to give the public the widest possible right of access, the exceptions to that right set out in article 4 of the Regulation must be interpreted and applied strictly."* (emphasis added)

*(b) The presumption of disclosure and the two-stage procedure*

53. Regulation 1049/2001 sets out a two-stage administrative procedure intended to allow the public wide and timely access to documents by promoting good administrative practice using prescribed time limits, secured by the possibility of court proceedings or complaints to the Ombudsman<sup>44</sup>.

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para 110; *Bavarian Lager* [1999] ECR II-3217, para 39; *Kuijjer* [2002] 1 WLR 1941, para 55; *WWF European Policy Programme v Council of the European Union* (Case T-264/04) [2007] ECR II-911, para 39; *Kingdom of the Netherlands and van der Wal v Commission of the European Communities* (Joined Cases C-174/98P and C-189/98P) [2000] ECR I-1, para 27; *Hautala v Council of the European Union* (Case C-353/99P) [2002] 1 WLR 1930, para 25; and *Interporc Im-und Export GmbH v Commission of the European Communities* (Case C-41/00P) [2003] ECR I-2125, para 48.

<sup>44</sup> See Regulation (EC) No 1049/2001, Article 1(a)-(c), Recitals 4 and 13.

**54.** Underlying the two-stage administrative procedure is a presumption clearly in favour of disclosure: “[i]n principle, all documents of the institutions should be accessible to the public.”<sup>45</sup>

**55.** Following the submission of an application for access to a document under the provisions of Article 6 of Regulation 1049/2001<sup>46</sup>, the first stage of the two-stage procedure (the original request stage) is set out in Article 7:

*“Article 7 – Processing of initial applications*

*1. An application for access to a document shall be handled promptly. An acknowledgment of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the documents requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.*

*2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution’s reply, make a confirmatory application asking the institution to reconsider its position.*

*3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.*

*4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.”*

**56.** The second stage of the procedure (the confirmatory application stage) is then set out in Article 8 of Regulation 1049/2001 and largely mirrors the first stage, procedurally:

*“Article 8 – Processing of confirmatory applications*

*1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the documents requested and provide access*

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<sup>45</sup> Regulation (EC) No 1367/2006, Recital 11.

<sup>46</sup> Regulation (EC) No 1049/2001, Article 6.

*in accordance with Article 10<sup>47</sup> within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.*

*2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.*

*3. Failure by the institution to reply within the prescribed time-limit shall be considered a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.”*

**(c) Exceptions to the presumption of disclosure**

**57.** Regulation 1049/2001 provides a limited number of exceptions to the general presumption in favour of disclosure that is referred to above. These are set out at Article 4. The exceptions relied upon by the Commission in this case are Articles 4(2) (first indent only) and 4(3) (first paragraph only):

*“Article 4 – Exceptions*

*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.*

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

**58.** In addition to the above, Article 4(6) of Regulation 1049/2001 states:

*“6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.”*

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<sup>47</sup> Article 10, as referred to by Articles 7 and 8, is entitled ‘access following an application’ and details the procedure by which the documents should be provided i.e. the format of the documents and costs of production etc.

### 4.3 The Aarhus Convention

- 59.** The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters<sup>48</sup> (hereinafter “**the Aarhus Convention**”) was signed by the European Community in 1998 and subsequently approved by Decision 2005/370/EC<sup>49</sup>. The Aarhus Convention must therefore be treated as an integral part of EU law and be complied with by the EU institutions and the Member States by Member States (See Case C-181/73 *Haegeman v Belgium* [1974] ECR 449 and Case T-115/94 *Opel Austria v Council* [1997] ECR II 39) and Article 216(2) TFEU).
- 60.** Article 4 of the Aarhus Convention sets out a detailed procedure by which a party can seek access to environmental information, which largely mirrors the provisions of Regulation 1049/2001 set out above. However, the Aarhus Convention also sets out a number of key differences relating to requests for environmental information specifically. These differences underscore (i) the presumption in favour of disclosure, in that applicants do not need to state or justify their interest in the requested information to be entitled to it and (ii) that the information requested is to be provided as soon as possible absent exceptional circumstances which must be justified, and, in any case, the information must be provided within two months. In addition, as explained in more detail below, the Aarhus Convention states that exceptions to disclosure based upon the alleged confidentiality of commercial and industrial information are not available where the information requested relates to emissions into the environment:

*“Article 4 - Access to environmental information*

***1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public [...]***

*(a) Without an interest having to be stated; [...]*

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<sup>48</sup> UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25 June 1998.

<sup>49</sup> Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (2005/370/EC), OJ L 124, 17.5.2005, p. 1–3.

*2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.*

*3. A request for environmental information may be refused if:*

*(a) The public authority to which the request is addressed does not hold the environmental information requested;*

*(b) The request is manifestly unreasonable or formulated in too general a manner; or*

*(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.*

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

*(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;*

*(b) International relations, national defence or public security;*

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

*(d) **The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;***

*(e) Intellectual property rights;*

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

*(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or*

*(h) The environment to which the information relates, such as the breeding sites of rare species.*

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

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.” (emphasis added).

#### 4.4 The Aarhus Regulation (Regulation 1367/2006)

61. Regulation 1367/2006 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 (hereinafter “**Regulation 1367/2006**”) gives fuller effect to the public’s right to environmental information which is in the possession of EU institutions. Adopted five years after Regulation 1049/2001, Regulation 1367/2006 reaffirms and strengthens the right to information under its first pillar, “Access to Environmental Information”<sup>50</sup>. The right to have access to environmental information also serves as an essential condition to give full effect to Regulation 1367/2006’s second pillar, “Public Participation in Decision-making”<sup>51</sup>.

62. Article 6(1) of Regulation 1367/2006 provides an overriding rule of interpretation for review of grounds for refusal of access to environmental information. It insists on a restrictive interpretation of exceptions to the assumption of disclosure, particularly where the information requested relates to emissions into the environment and, indeed, even makes some claims to exception unavailable in relation to information relating to emissions into the environment:

*“Article 6 – Applications*

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<sup>50</sup> Regulation (EC) No 1367/2006, Recital 5 and Article 1.

<sup>51</sup> Regulation (EC) No 1367/2006, Recital 5 and Article 9.

1. *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.” (emphasis added).*

63. With regard to the inter-relationship between Regulations 1049/2001 and 1367/2006, the following recital provisions from the latter are relevant:

*“(13) Where the Aarhus Convention contains provisions that are not, in whole or in part, to be found also in Regulation (EC) No 1049/2001, it is necessary to address those, in particular with regard to the collection and dissemination of environmental information.*

*(15) Where Regulation (EC) No 1049/2001 provides for exceptions, these should apply subject to any more specific provisions in this Regulation concerning requests for environmental information. The grounds of refusal as regards access to environmental information should 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 [...]”.*

## V. GROUNDS FOR ANNULMENT

**64.** As set out below, it is the Applicants' conviction that the Commission has materially erred in law in a number of significant respects. As a result, the Contested Decision in relation to the Applicants' Confirmatory Application should be annulled in full.

**65.** This application for annulment comprises seven pleas in law:

(i) We will demonstrate in a first section that the Contested Decision violates Article 8(2) of Regulation 1049/2001.

(ii) We will demonstrate in a second section that the Contested Decision violates Articles 8(1) and 8(2) of Regulation 1049/2001.

(iii) We will demonstrate in a third section that the Contested Decision violates Articles 7 and 8 of Regulation 1049/2001.

(iv) We will demonstrate in a fourth section that the Contested Decision violates Article 6, 7 and 8 of Regulation 1049/2001.

(v) We will demonstrate in a fifth section that the Contested Decision violates Article 4(2) of Regulation 1049/2001.

(vi) We will demonstrate in a sixth section that the Contested Decision violates Article 4 of the Aarhus Convention, Article 4(3) of Regulation No 1049/2001 and Article 6 of Regulation No 1367/2006.

(vii) In a seventh and final section, we will demonstrate that the Commission failed to assess which documents could or could not be disclosed and thus violated Article 4(6) and 4(7) of Regulation 1049/2001.

**66.** For purposes of convenience, breaches of the law by the Commission can be considered to fall into two categories (albeit intrinsic links between them). The first category is made up of breaches concerning the Commission's failure to comply with procedural requirements. The second category is made up of breaches relating to the purported exceptions applied by the Commission in refusing the request which, it is submitted, were not available in law. In what follows, the seven pleas in law are organized around these two categories of breach.

## 5.1 Pleas in law resulting from procedural breaches

### *1. First plea in law: Failure to provide a reply within the prescribed time and to give detailed reasons for requesting an extension in violation of Article 8(2) of Regulation (EC) No 1049/2001*

67. Article 8(1) of Regulation 1049/2001 provides that the institution concerned (here, the Commission) shall “*either grant access to the documents requested [...] or, in a written reply, state the reasons for the total or partial refusal*” within 15 working days from registration of an application. Article 8(2) provides that “*[i]n exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.*” Notably, Article 8(2) specifically provides that it is only in exceptional cases that this time limit may be extended and, furthermore, that “detailed reasons” for doing so must be given. This is in recognition of the detrimental effect such time extensions have on public participation in the EU decision-making process.
68. However, as is clear from the 12 January 2011 Extension Letter<sup>52</sup>, the Commission granted itself an extension, stating that this was necessary “*due to the great number of documents covered by your request, the technical nature of the data contained in them and the need to re-consult third parties*”.
69. In this respect, it should first be noted that the Applicants’ Confirmatory Application was not an ‘exceptional’ case. Therefore the Commission’s decision to grant itself an extension of time was a clear breach of Article 8(2) of Regulation 1049/2001. The documents requested were clearly set out and sufficiently precise in order to be handled promptly. This is particularly so in relation to the Applicants’ request for complete drafts of the schemes already in existence and received by the Commission. Given the relatively small number of these schemes and the clearly defined information requested, the request cannot be said to have been such an ‘exceptional case’.

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<sup>52</sup> Set out at paragraph 31 above.

70. Secondly, it is submitted that the reasons given by the Commission for the extension were clearly not sufficiently ‘detailed’ and amount to another breach of Article 8(2) of Regulation 1049/2001.
71. It appears to have become a norm for the Commission to systematically and routinely extend the time limit to respond, citing vague and generic reasons for doing so, as here. ClientEarth alone has brought three cases before the General Court, in all of which the Commission abusively resorted to this unjustified extension practice<sup>53</sup>.
72. In addition, although not formally pleaded as a separate violation, it is clear from the factual background outlined above that exactly the same pattern of behaviour had already taken place in relation to the Commission’s response to the Applicants’ initial application, in breach of the mirror provisions of Article 7(1) and (3) of Regulation 1049/2001.
73. The Commission has clearly developed an unlawful and unacceptable practice, in direct conflict with the intention and purpose of Article 8(1) and (2) of Regulation 1049/2001. This practice should not be allowed to continue.

**II. Second plea in law: Failure to reply within the extended time limit in violation of Articles 8(1) and 8(2) of Regulation 1049/2001**

74. The Commission’s subsequent failure to respond within the 15 day extension period is clearly in breach of Articles 8(1) and 8(2) of Regulation 1049/2001.
75. As is clear from the factual background of this case, the Commission failed to respond to the Confirmatory Application within the 15 day extension deadline, and indeed, has still not done so expressly. Instead, the Commission has sought to continuously extend the deadline in breach of the mandatory timeframe set out in Articles 8(1) and 8(2). Such

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<sup>53</sup> *ClientEarth and Others v Commission*, Case T-120/10, OJ C 134, 22.5.2010, p.42-43 (lodged 8 March, 2010); Case No. T-449/10 *ClientEarth and Others v Commission* (lodged 20 September, 2010) and Case No T-111/11 *Client Earth v Commission* (lodged 21 February 2011).

pattern of behaviour was unequivocally condemned by the General Court in *Ryanair Ltd v Commission*<sup>54</sup>:

*“The time limit laid down by Article 8(1) of Regulation No 1049/2001 is mandatory and cannot be extended save in the circumstances provided for in Article 8(2) of Regulation No 1049/2001, without depriving that article of all practical effect, since the applicant could not know precisely the date from which he could bring the action or complaint provided for in Article 8(3) of that regulation. Therefore, the second letters extending the time limit could not validly extend the time-limits. In each case, the Commission’s failure to reply by the expiry of the extended period must therefore be held to constitute an implied decision to refuse access.”* (emphasis added).

76. A similar stance was taken by the Court of Justice in *Housieaux v Delegates du Conseil de la Region de Bruxelles-Capitale (SDRB and Others, interveners)*<sup>55</sup>, albeit in relation to the regulatory framework for access to environmental information which preceded the Public Access and Aarhus Regulations. A question was referred for a preliminary ruling by the Conseil d’État (Belgium), seeking to ascertain whether the time-limit laid down in Article 3(4) of Directive 90/313/EC on freedom of access to information on the environment, is mandatory or merely indicative for the public authorities of the Member States. That provision states as follows:

*“A public authority shall respond to a person requesting information as soon as possible and at the latest within two months. The reasons for a refusal to provide the information requested must be given.”*

77. Advocate General Kokott made the following statements in her opinion in that case – an opinion which was<sup>56</sup> adopted by the Court:

*“23. The very wording of that provision [i.e the time-limit laid down in Article 3(4) of Directive 90/313] argues against the assumption that*

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<sup>54</sup> *Ryanair v Commission*, Case T-494/08 to T-500/08 and T-509/08, at paragraphs 39-40.

<sup>55</sup> *Housieaux v Delegates du Conseil de la Region de Bruxelles-Capitale (SDRB and Others, interveners)*, Case C-186/04, [2005] ECR I-03299.

<sup>56</sup> *Housieaux v Delegates du Conseil de la Region de Bruxelles-Capitale (SDRB and Others, interveners)*, Opinion of Advocate General Kokott delivered on 27 January 2005, Case C-186/04, [2005] ECR I-0329.

*the provision is merely indicative and in favour of a mandatory procedural time-limit. It provides that the public authority concerned is to respond to the person requesting information “as soon as possible and at the latest within two months”. Consequently, the two-month period represents the outside limit of the processing time (“at the latest”) and is coupled with a requirement to expedite matters which, in line with the principle of good administration, states that a response is to be given “as soon as possible”, that is to say, if possible, in less than two months. Scope for flexibility therefore exists at most within the two-month time limit—and even then subject to the objective of expediting matters—but not beyond that time limit.*

*24. That conclusion is also consistent with the spirit and purpose of the provision. After all, the aim of Directive 90/313 is to grant individuals a subjective right of access to information on the environment. However, that right could be devalued if a public authority were able to take as long as it pleased to decide on a request for such access. The value of information on the environment is dependent not least on the individual's being able to obtain it as quickly as possible. Thus, timely access to current information on the environment makes it in particular easier for the person requesting the information to use it, for example in ongoing construction or planning proceedings in which he may be involved as a neighbour and in which he would like to protect his interests.*

*25. Moreover, if it is assumed that the time limit is merely indicative, the legal protection available to the individual under Art.4 of the directive would be illusory. That article requires the Member States to provide legal remedies where a person considers that his request for information has been “unreasonably refused or ignored”. If, however, the public authority is not subject to any mandatory procedural time-limits, but rather to purely indicative time-limits, it cannot automatically be concluded from the fact that the time-limit has been exceeded that a request for information on the environment has been “unreasonably ... ignored”. Reliance on the legal protection provided for in Art.4 of the directive in the event of a failure to act would, therefore, be made at least more difficult if not altogether impossible.” (emphasis added).*

- 78.** Advocate General Kokott’s argument is equally applicable and persuasive in this case. The Commission’s failure to comply with the prescribed time-limits has the detrimental effect of depriving the Applicants of the ability to meaningfully engage in the decision-making process.

79. More specifically, the Applicants are unable to scrutinise the process by which voluntary certification schemes submitted to the Commission are to be assessed or the standards against which they are to be assessed. Likewise, without the requested information, the Applicants are severely limited in their capacity to provide meaningful inputs to the development of such processes or standards. Indeed, the Applicants remain limited in their capacity to scrutinise or provide meaningful inputs as to the precise role certification schemes are expected to play within the EU framework for ensuring compliance with the sustainability criteria for biofuels. In addition, the Applicants are unable to scrutinise the specific voluntary certification schemes submitted to the Commission as to whether or not each complies with any established assessment process or standards or are otherwise likely to provide robust and reliable evidence of compliance with the biofuels sustainability criteria.
80. A lack of clarity and transparency as to the process and standards for assessing voluntary certification schemes and the role of such schemes within the enforcement framework for biofuels sustainability criteria undercuts the legitimacy as well as the efficacy of the Directive 2009/28/EC enforcement framework. Reliance on a voluntary certification scheme that has not been properly scrutinised in accordance with a robust assessment process and standards poses significant and unacceptable risks that the sustainability criteria for biofuels will not be rigorously and consistently enforced. This, in turn, poses grave risks to the environment and people who will be directly affected, as well as the public at large.
81. Not only does the public have an obvious interest in ensuring that the EU biofuels policies comply with greenhouse gas reduction objectives, it also has an irrefutable interest specifically in ensuring that biofuels targets do not result in the destruction of forests and loss of biodiversity. Both of these related interests – the change in the earth’s climate and the conservation of forests and biological diversity – are recognised as **“common concern[s] for humankind”** within treaties signed and ratified by the European Union<sup>57</sup>.

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<sup>57</sup> United Nations Framework Convention on Climate Change (UNFCCC), Recital 1; Convention on Biological Diversity (CBD), Recital 3.

82. Without access to the requested documents, the Applicants' ability to take meaningful action to protect these interests is severely compromised. There is frequently, as here, only a small window of opportunity for members of the public and organisations representing the public interest to play this important role. In failing to comply with the statutory timeframes, the Commission has – with total disregard for the fundamental nature of the right to environmental information – unlawfully closed that window. The time limits imposed by the legal framework are in recognition of the extreme importance of such issues. The Commission's failure to comply is therefore all the more serious.
83. In the same way, it should be noted in passing that the Commission had also failed to comply with Article 7 of Regulation 1049/2001 in its original response, this having been received two days after the 15 day extension deadline had expired.

**III. Third plea in law: Failure to provide detailed reasons for withholding each document in violation of Article 7 and 8 of Regulation 1049/2001**

84. Under Articles 7(1) and 8(1) of Regulation 1049/2001, the Commission must “state the reasons for the total or partial denial” of a request for information.
85. The Court of Justice has interpreted this provision on a number of occasions. In *Kingdom of Sweden v Commission of the European Communities and Others*<sup>58</sup> it stated that it is “incumbent on the institution concerned to give a detailed statement of reasons for such a refusal” because such information “will allow the person who has asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review.”<sup>59</sup> In *WWF European Policy Programme v Council of the European Union*, the Court of Justice stated further that this obligation to state the reasons for denial is “to provide the person concerned with sufficient

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<sup>58</sup> *Kingdom of Sweden v Commission of the European Communities and Others*, Case C-64/05 P, [2007] ECR I-11389, paragraph 69.

<sup>59</sup> *Ibid.*, at paragraph 89.

information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested”<sup>60</sup>.

**86.** In the case of *Spain v Commission of the European Communities (Re Aid Scheme for Purchase of Commercial Vehicles)*, the Commission’s decision was found to be vitiated by a failure to give reasons and was partially annulled as a result<sup>61</sup>. In that case the Court of Justice was dealing with a different legislative framework, but it is submitted that the principles are equally applicable.

**87.** Advocate General Kokott also dealt with this issue in her opinion in *Housieaux v Delegates du Conseil de la Region de Bruxelles-Capitale (SDRB and Others, interveners)*<sup>62</sup>, the Commission having also failed to provide detailed reasons within the required timeframe for its refusal to disclose:

*“32. The right to good administration creates for the administration an obligation to give reasons for its decisions. Such a statement of reasons is not merely a general expression of the transparency of the administration's actions, but is also intended, in particular, to give the individual the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in his applying to the courts. There is therefore a close connection between the obligation to give reasons and the fundamental right to effective legal protection. [...]*  
*37. If a public authority were permitted simply to let the time-limit prescribed for processing a request made to it expire rather than responding to it expressly, the obligation to give reasons which stems from Community law would be rendered meaningless. After all, contrary to the view taken by the defendants, a public authority's failure to respond cannot as such provide any explanation as to whatever reasons there may be for authorising or refusing the action requested. Thus under Art.3(2) and (3) of Directive 90/313, a request*

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<sup>60</sup> *WWF European Policy Programme v Council*, Case T-264/04, [2007] ECR II-00911, paragraph 36, citing *Isabella Scipparcola v Commission of the European Communities*, Case T-187/03, [2005] ECR II-01029, paragraph 66.

<sup>61</sup> *Spain v Commission of the European Communities (Re Aid Scheme for Purchase of Commercial Vehicles)*, Case C-409/00, [2003] ECR I-1487, paragraphs 98-100.

<sup>62</sup> *Housieaux v Delegates du Conseil de la Region de Bruxelles-Capitale (SDRB and Others, interveners)*, Opinion of Advocate General Kokott delivered on 27 January 2005, Case C-186/04, [2005] ECR I-0329.

*for information on the environment can be refused for a wide variety of reasons. The same applies to any refusal of access to documents under Art.4 of Regulation 1049/2001. Indeed, a decision on the compatibility with the common market of a concentration or a measure of State aid generally requires the assessment of complex economic issues. The reasons which prompted the public authority in a particular case not to respond within the time-limit, if indeed it had formed an opinion at all within that period, could only be guessed at by those concerned by the decision (the applicant or third parties). **Reliance on guesswork, however, would not satisfy the right of members of the public to good administration and their fundamental right to effective legal protection**". (emphasis added).*

- 88.** Applying Advocate General Kokott’s reasoning, the Court of Justice held that an implied refusal *must* be regarded as unlawful by reason of the failure to provide reasons within the time limit set out in the Directive<sup>63</sup>.
- 89.** The reasons given by the Commission in the 7 December 2010 Letter offer only a perfunctory and categorical rebuff, and this despite the additional time taken by the Commission to respond. In fact, the reasons for withholding the documents under the exceptions that are invoked are expressed in a mere ninety words (see above at paragraph 29). It is submitted that this is woefully insufficient, and certainly did not allow the Applicants to properly understand the origin and grounds of refusal. These arguments are therefore interlinked with the 5<sup>th</sup> and 6<sup>th</sup> pleas in law stated below in relation to the exceptions claimed by the Commission, and are to be taken as repeated in full therein.
- 90.** It is submitted, in relation to the ‘implied refusal’ to the Applicant’s Confirmatory Application, as part of the Contested Decision, that the automatic failure to give reasons therein is *prima facie* unlawful in light of the argument above.

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<sup>63</sup> *Housieaux v Delegates du Conseil de la Region de Bruxelles-Capitale (SDRB and Others, interveners)*, Case C-186/04, [2005] ECR I-03299, paragraph 36.

**IV. Fourth plea in law: Failure to provide a concrete, individual assessment of the content of each document in violation of Article 6, 7 and 8 of Regulation 1049/2001**

**91.** It is settled law that an institution must carry out a concrete, individual assessment of the content of the documents referred to in a request for information<sup>64</sup>. This is made apparent in “*that all exceptions mentioned in Article 4(1) to (3) [of Regulation 1049/2001] are specified as being applicable to ‘a document.’*”<sup>65</sup> On this point, the Court has therefore rejected as insufficient an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents, “*since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents.*”<sup>66</sup>

**92.** A concrete, individual assessment is also needed to ensure compliance with other provisions of Regulation 1049/2001, including determination of whether redaction is appropriate under Article 4(6), whether the period of time for protection is justified under Article 4(7), and whether the party has complied with its obligation to provide “public access to a register” under Article 11(1) with an itemised list of the documents<sup>67</sup>. In addition, the purpose of this assessment must be forwarded to the applicant to serve as the basis for determining the applicability of the exception with respect to the document in question<sup>68</sup>.

**93.** In response to the Applicants’ request for access in this case, however, such concrete, individual assessments were never conducted by the Commission. Instead, the

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<sup>64</sup> *Verein für Konsumenteninformation v Commission*, Case T-2/03, [2005] ECR II-01029, paragraphs 69-74; see also *Aldo Kuijer v Council of the European Union*, Case T-188/98, [2000] ECR II-01959, paragraph 38; *Heidi Hautala v Council of the European Union*, Case T-14/98, [1999] ECR II-02489, paragraph 67.

<sup>65</sup> See *Verein für Konsumenteninformation v Commission*, Case T-2/03, [2005] ECR II-01029, paragraph 70.

<sup>66</sup> *Verein für Konsumenteninformation v Commission*, Case T-2/03, [2005] ECR II-01029, paragraph 73, citing *JT’s Corporation Ltd v Commission of the European Communities*, Case T-123/99, [2000] ECR II-03269, paragraph 46.

<sup>67</sup> See *Verein für Konsumenteninformation v Commission*, Case T-2/03, [2005] ECR II-01029, paragraph 73; see also Public Access Regulation, Article 4(6), Article 4(7) and Article 11(1).

<sup>68</sup> See, e.g., *Verein für Konsumenteninformation v Commission*, Case T-2/03, [2005] ECR II-01029, paragraphs 69-74; *Aldo Kuijer v Council of the European Union*, Case T-188/98, [2000] ECR II-01959, paragraph 38; *Heidi Hautala v Council of the European Union*, Case T-14/98, [1999] ECR II-02489, paragraph 67.

Commission assessed the documents in the aggregate, if at all. There is no list of documents and the exceptions are claimed quixotically for all documents and portions thereof without identifying those to which the exceptions apply. This response evinces a failure to assess in concrete and individual manner each document requested<sup>69</sup>. Nor did the Commission provide an itemised list of the documents on which the assessments were purportedly performed and the reasons for the claim to exception for each document in question.

**94.** In addition, no public access to a register of documents under Article 11(1) of Regulation 1049/2001 was provided. As a result, the Applicants are precluded from being able to determine for each document whether the decision is well founded or whether it is vitiated by an error which may permit its validity to fall within Article 4(2) or (3) of Regulation 149/2001 to be contested<sup>70</sup>.

## **5.2 Pleas in law resulting from unlawful reliance upon exceptions**

**95.** Even if the Decision was not vitiated by the procedural defects outlined above in the first category of breaches, it is submitted that in any event the exceptions relied upon by the Commission in the 7 December 2010 Refusal Letter were not available as a matter of law, and the implied decision of refusal of Applicants' Confirmatory Application – constituting part of the Contested Decision – is therefore void as a result.

### **V. Fifth plea in law: Unlawful reliance upon the 'protecting commercial interests' exception in violation of Article 4(4) of the Aarhus Convention, Article 4(2) of Regulation 1049/2001 and Article 6 of Regulation 1367/2006**

**96.** The information requested on the certification schemes constitutes environmental information. The exceptions to the right of access to environmental information are governed by the Aarhus Convention and Regulation 1367/2006.

<sup>69</sup>Regulation (EC) No 1049/2001, Article 4(3); *Verein für Konsumenteninformation v Commission*, Case T-2/03, [2005] ECR II-01029, paragraph 70.

<sup>70</sup> *WWF European Policy Programme v Council of the European Union*, Case T-264/04, [2007] ECR II-00911, paragraph 36, citing *Isabella Scipparcola v Commission of the European Communities*, Case T-187/03, [2005] ECR II-01029, paragraph 66.

**(a) The requested documents constitute “environmental information”**

**97.** The information on the certification schemes regarding the production of biofuels are “environmental information” within the meaning of the Aarhus Convention.

**98.** Article 2(3) of the Aarhus Convention provides:

*“Environmental information” means any information in written, visual, aural, electronic or any other material form on:*

*(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;*

*(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.”*

**99.** Article 2(1)(d) points (i) and (ii) of Regulation 1367/2006 provides for an almost identical definition of “environmental information”:

*“environmental information” means any information in written, visual, aural, electronic or any other material form on:[ ... ]*

*(i) The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, waste and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

(ii) *Factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);*

(iii) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements*

(iv) *the state of human health and safety including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii)."*

**100.** Therefore, information on substances, affecting or likely to affect the environment, should be treated as environmental information. This is particularly true for substances like biofuels that can have harmful effects on the environment, on biodiversity and on greenhouse gas emission due to an increased production and use of biofuels.

**101.** It derives therefrom that the requested documents, constitute “environmental information” for the purposes of Article 2(3)(a)(b) of the Aarhus Convention which provides a right of access to these documents. The requested documents also constitute “environmental information” for the purposes of Article 2(1)(d)(iii) of Regulation 1367/2006.

***(b) The Aarhus Convention prevails over Article 4(2) of Regulation 1049/2001, and therefore Article 4(2) of Regulation cannot expand the limited exceptions set out in the Aarhus Convention***

**102.** The Aarhus Convention was approved by the Council’s Decision 2005/370/EC<sup>71</sup>. Pursuant to Article 216(2) TFEU, “*Agreements concluded by the Union are binding on*

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<sup>71</sup> Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (2005/370/EC), OJ L 124, 17.5.2005, p. 1–3.

*the institutions of the Union and on its Member States*”. The Convention is thus an integral part of the EU legal order which makes it binding on EU institutions, agencies and bodies.

**103.** The Aarhus Convention constitutes an international agreement concluded by the European Union with non-member countries, and is thus binding law upon the European Union. In this respect, The Court of Justice, in Case C-240/09<sup>72</sup> has ruled that “*a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in particular, Case C -265/03 Simutenkov [2005] ECR I -2579, paragraph 21, and Case C -372/06 Asda Stores [2007] ECR I -11223, paragraph 82).*”

**104.** Article 4(1) of the Convention provides:

*“1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:*

*(a) Without an interest having to be stated;*

*(b) In the form requested unless:*

*(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or*

*(ii) The information is already publicly available in another form”.*

**105.** This provision establishes a general rule of freedom of access to information. The provision is unconditional, as it grants the right of access to environmental information

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<sup>72</sup> *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, Case C-240/09 [2011] ECRO.

without requiring further measures to be adopted by the Parties to the Convention. Also, if a Contracting Party does not take the measures which are necessary to make operational a right provided by a Convention which it has ratified, it may not invoke its own omission in order to contest the direct applicability of the provisions of the said Convention. Article 4 of the Convention is also sufficiently precise as it specifies the information to which the right of access applies.

**106.** The Court of Justice has confirmed this interpretation in Case C-344/04 holding that *“Article 300(7) EC [now Article 216(2) TFEU] provides that ‘agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States’. In accordance with the Court’s case law, those agreements prevail over provisions of secondary Community law.”*<sup>73</sup>

**107.** The exceptions to the right of access to environmental information laid down in the Aarhus Convention may thus not be enlarged or completed by any of the exceptions which are mentioned in Regulations 1049/2001 or 1367/2006, given that the Aarhus Convention prevails over secondary EU legislation. The fundamental right of access to information, granted by the Aarhus Convention and its ratification by the EU cannot, therefore, be restricted by secondary EU legislation. This is confirmed by Article 2(6) of Regulation 1049/2001 which provides: *“This shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.”*

**108.** It follows that the Aarhus Convention prevails over Regulation 1049/2001 and that Article 4 of the Convention is unconditional and sufficiently clear and precise to be directly applicable in the instant case.

**109.** Neither the Aarhus Convention nor Regulation 1367/2006 provide any exceptions to the right of access to environmental information relating to protecting the “commercial interests of a natural or legal person, including intellectual property” as it is set out in Article 4(2) of Regulation 1049/2001.

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<sup>73</sup> See case C-344/04, paragraph 35.

**110.** Article 4(4)(d) of the Aarhus Convention is the most akin provision, and states as follows:

*“4. A request for environmental information may be refused if the disclosure would adversely affect: [...] (d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed.”<sup>74</sup>*

**111.** This wording is narrower and more restrictive than that in Article 4(2), first indent, of Regulation 1049/2001, and the latter therefore is limited as a result. It cannot go *further* than the Convention exception. The vague and generic reasons given by the Commission for refusing to disclose the requested information do not satisfy this provision. There is no indication in the refusal decision of any law protecting the confidentiality of the documents. In any event, even if the Commission could establish that they satisfy the first part of sub-paragraph (d) above, they are clearly and unequivocally excluded from relying on such an exception by the latter part, because the request in this case did relate to information on emissions of greenhouse gas.

**112.** Because the Aarhus Convention prevails over Regulation 1049/2001, the exception as set out in Article 4(2), first indent, of Regulation 1049/2001 is unavailable to the Commission in this instance. The Aarhus Convention plainly states that exceptions to disclosure based upon the alleged confidentiality of commercial and industrial information are not available where the information requested related to emissions into the environment. Therefore, the Commission’s reliance on Article 4(2), first indent, as its basis for withholding the requested documents violated Article 4(1), (2) and (4) of the Aarhus Convention<sup>75</sup>.

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<sup>74</sup> UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25 June 1998, Article 4(4)(d).

<sup>75</sup> See Case T-111/11, *ClientEarth v Commission*, lodged on the 21<sup>st</sup> February 2011 and which is currently pending before the Court, in which much the same arguments in relation to the overarching status of the Aarhus Convention exceptions where the information requested relates to the environment are brought at paragraphs 60-74 of the Application.

*(c) The overriding public interest in disclosure of the information on certification schemes*

- 113.** If it is found that Regulation 1049/2001 exceptions as set out in Article 4 are applicable, it is submitted that they were nevertheless unlawfully applied for the following reasons.
- 114.** Article 4 of Regulation 1049/2001 is divided into exceptions which are absolute and exceptions which are qualified. Article 4(1) relates to the protection of public security, defence, military matters, international relations, member-state or EU economic policy and privacy. These exceptions are absolute. Article 4(2) and 4(3) are qualified by an overriding public interest, which will compel disclosure.
- 115.** In relation to the Commission's reliance on Article 4(2), specifically the first indent (commercial interests), Article 6 of Regulation 1367/2006 provides that, in relation to that exception, an overriding public interest in disclosure *shall* be deemed to exist where the information requested relates to emissions into the environment.
- 116.** The information requested by the Applicants would certainly meet this criterion. As explained above at paragraph 6, the biofuels sustainability criteria set out in Directive 2009/28/EC include criteria relating to greenhouse gas emissions resulting from the production and use of the biofuels. Specifically, Article 17(2) sets out greenhouse gas savings thresholds, requiring biofuels to reduce such emissions by certain percentages over the fossil fuels comparator. Therefore, the information requested, which relates to how voluntary certification schemes will assure compliance with the Directive's greenhouse gas criteria, relates to emissions into the environment for the purposes of Article 6 of Regulation 1367/2006.
- 117.** In providing that the 'commercial interest' exception is overridden by the public interest in information relating to emissions into the environment, the EU legislature has determined that the protection of commercial interests, inspections and audits is *subject* to the protection of the public interest in timely access and effective participation in environmental policy making when related to emissions into the environment. Clearly this

is in recognition of the significance to the public at large of the potentially broad, harmful consequences of such emissions, over the more limited scope of harm to commercial interests.

118. As a result, the Commission has erred in finding that there was no overriding public interest in disclosure – indeed the Commission was acting *ultra vires* – it did not and does not have the power to make such a finding, given the overriding public interest in disclosure imposed by Article 6 of Regulation 1367/2006.

**VI. Sixth plea in law: Unlawful application of the Article 4(3) exception that the documents will seriously undermine decision making in violation of Article 4 of the Aarhus Convention, Article 4(3) of Regulation (EC) No 1049/2001 and Article 6 of Regulation (EC) No 1367/2006**

119. It derives from the Commission’s Reply, that the Commission relies on Article 4(3) of Regulation 1049/2001 on the basis that a disclosure of the requested documents “*which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure would seriously undermine the institution’s decision making process, unless there is an overriding public interest in disclosure*”.
120. As set out above, this provision must be read in tandem with the Aarhus Convention exceptions at Article 4. Where the two are inconsistent, the Aarhus Convention exceptions take precedence. The most akin provisions in the Aarhus Convention are the exceptions at Article 4(3)(c) and Article 4(4)(a) which state:

“(3). A request for environmental information may be refused if:  
 (c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure. [...]  
 (4) A request for environmental information may be refused if the disclosure would adversely affect:  
 (a) The confidentiality of the proceedings of public authorities where such confidentiality is provided for under national law. [...]  
 The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by

*disclosure and taking into account whether the information requested related to emissions into the environment.”*

**121.** In relation to the reference in Article 4(3)(c) to “*material in the course of completion*”, this references the state of completion of the material information requested, not whether the decision-making process to which the information relates is complete. So, for example, it cannot plausibly be argued that the Applicants’ request for the names and details of the voluntary participation schemes in the completed form in which they had been submitted to the Commission was for material ‘in the course of completion’ at that stage.

**122.** In relation to the reference in Article 4(3)(c) to “*communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure*” and to Article 4(4)(a), the implementing guide of the Aarhus Convention states:

*“The Convention does not define “proceedings of public authorities”, but one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence. The confidentiality must be provided for under national law. This means that public authorities may not unilaterally declare a particular proceeding confidential and stamp documents “confidential” in order to withhold them from the public.”<sup>76</sup>*

**123.** Under this reasoning, the wording of the exceptions set out above would not apply to documents submitted to the Commission where the Commission is acting in its area of competence in relation to external authorities or parties. Therefore, these exceptions would not be applicable to voluntary certification schemes submitted to the Commission to assess compliance with sustainability and other criteria.

**124.** In the alternative, if the exception in Article 4(3), first indent, of Regulation 1049/2001 were to be taken to apply to environmental information (which Applicants deny), rather than in the more limited form resulting from reading that exception in accordance with

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<sup>76</sup> The Aarhus Convention, An Implementation Guide, p.59.

the Aarhus Convention exceptions, the Commission's application of Article 4(3) would still be unlawful for the following reasons.

**125.** The exception set forth at Article 4(2), first indent, of Regulation 1049/2001 is subject to an overriding public interest in disclosure. Unlike in the case of commercial interests, Regulation 1367/2006 does not provide in relation to claims to exception made under Article 4(3) that an overriding public interest in disclosure is deemed to exist in every case where the requested information relates to emissions into the environment. However, Article 6 of Regulation 1367/2006 states that “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”. This is a mirroring provision to the Aarhus Convention at Article 4(4) set out at paragraph 110 above.

**126.** The Commission's failure to undertake a concrete, individual assessment of the content of each document, and provide detailed reasons for its application of the exceptions<sup>77</sup> limits the Applicants' ability to discuss the balance of interests at stake here with precision, at least in relation to the Commission's claim that disclosure would “affect [...] the internal decision making procedure of the Commission.”<sup>78</sup>

**127.** However, this failure on the part of the Commission clearly implies—and should be interpreted by the General Court to mean—that the Commission is unable to justify its position that the interest in protecting the confidentiality of its internal decision-making outweighs the Applicants' public interest in disclosure. The Commission has failed to show that its internal decision-making procedure would be compromised in any way by disclosure of the requested documents. Indeed, it is the Applicants' case that disclosure of the requested documents would, in fact, enhance both the quality and the legitimacy of the Commission's decision making procedure in relation to its approval of voluntary certification schemes under Article 18(4) of Directive 2009/28/EC.

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<sup>77</sup> See the argument at paragraphs 72 and 83 to 90 above in relation to the Commission's failure to comply with Article 7 of Regulation 1049/2001 in terms of the duty to give reasons for refusal of disclosure.

<sup>78</sup> See the 7 December 2010 Refusal Letter attached at Annex A7.

**128.** In sharp contrast to the Commission’s failure to substantiate its purported interest underlying its claim to an exception under Article 4(3) of Regulation 1049/2001, the public interest served by disclosure of the requested documents to the Applicants is clear, as detailed below. For these reasons it is submitted that the Commission has unlawfully applied the Regulation 1049/2001, Article 4(3) exception, and is also in breach of Article 6 of Regulation 1367/2006 in relation to its application of this exception.

**129.** In this respect there are two key breaches, as set out below.

***(a) Disclosure would not seriously undermine the Commission’s decision-making process***

**130.** Firstly, exception 4(3) of Regulation 1049/2001 may only be claimed where disclosure would “seriously undermine” the institution’s decision-making process in respect of either access to a document where a decision has not yet been taken or even after it has been taken. In addition, in applying this exception the Commission must meet the requirement to interpret the grounds for refusal in a *restrictive way* as required by Article 6(1) of Regulation 1367/2006 and Article 4(4) of the Aarhus Convention.

**131.** The Courts have found that the burden to meet this “seriously undermine” standard rests with the institution, and that “*the exception must be interpreted and applied strictly.*”<sup>79</sup> The word “seriously” is in line with the strong presumption in favour of disclosure of environmental information provided for by the legal framework set out above. Regulation 1049/2001 alone unequivocally asserts this presumption, its stated purpose being to “*give the fullest possible effect to the right of public access to documents*”<sup>80</sup> and that “in principle all documents of the institutions should be accessible to the public”.<sup>81</sup> When taken together with the provisions of the Aarhus Convention and Regulation 1367/2006, this presumption is all the more forceful.

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<sup>79</sup> In *Kingdom of Sweden v Commission of the European Communities and Others*, Case C-64/05 P, [2007] ECR I-11389, paragraph 66 and *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, Joined cases C-39/05 P and C-52/05 P, [2008] ECR I-04723.

<sup>80</sup> Regulation (EC) No 1049/2001, Recital 4.

<sup>81</sup> *Ibid*, Recital 11.

**132.** The 7 December 2010 Refusal Letter states:

*“No information about the content of the schemes or the Commission’s interaction with the owners or developers of schemes can be disclosed at this stage [because] [...] disclosure would inevitably affect [...] the internal decision making procedure of the Commission”.*

**133.** As argued above, the impact of any disclosure on the decision-making process must be sufficiently grave and acute to justify withholding information. The reasons stated in the 7 December 2010 Refusal Letter fall far short of the “seriously undermine” standard, and the Commission has therefore clearly erred in failing to substantiate its assertion that the decision-making process would be seriously undermined.

**134.** Secondly, even if (which is strongly denied) the Commission did lawfully find that the “seriously undermine” standard was met, the application of the Article 4(3) exception is nevertheless void as a result of the Commission’s failure to properly consider the overriding public interest in disclosure as required by Article 4(3) itself and Article 6 of Regulation 1367/2006.

***(b) Failure to consider the public interest in disclosure***

**135.** In relation to the public interest consideration, the 7 December 2010 Refusal Letter simply states:

*“We do not consider that there is an overriding public interest to make these documents public at this time”.*

**136.** There is no consideration whatsoever of even any potential public interest in disclosure. Given the clear suggestion that the information was in the public interest implied by the fact that a number of civil society organisations (representing the public interest) had requested such information, this failure to recognise a public interest is all the more unjustifiable. This is a clear and flagrant breach of the provisions of the Regulations 1049/2001 and 1367/2006.

- 137.** As outlined in the introduction, the public interest in an open and transparent process for verifying voluntary certification schemes for the purposes of Directive 2009/28/EC is clear given the potentially grave environmental and social impacts at stake. The public interest in ensuring a minimisation of harms to the climate and to biodiversity is obvious and irrefutable. The Dakatcha case-study detailed above at paragraphs 10 to 12 provides a clear example of the potential harms, and the widespread nature of the media attention it has attracted soundly demonstrates the high level of public interest in these issues.
- 138.** It is clear therefore that the ability of the Applicants to have informed participation in the decision-making process would plainly serve the public interest. Moreover, their participation would serve the objectives of Directive 2009/28/EC, in particular, the biofuels sustainability criteria contained therein.
- 139.** In addition to scrutiny of voluntary certification schemes' conformity with the sustainability criteria, there are other factors relevant to the determination of whether a scheme should be approved under Article 18 of Directive 2009/28/EC. It is not clear that these factors will be adequately assessed. The one document produced by the Commission (the assessment framework for voluntary schemes, attached as **Annex A.6**) refers only to Sustainability, Chain of Custody and Audit Quality criteria. It appears on the face of it therefore that there are a number of factors which are not being considered by the Commission, but which should be. These include factors such as legal personality, transparency, and potential conflicts of interest (i.e. the identity of the bodies submitting the schemes and their specific interests and agendas). Both the definition of the standards against which schemes will be assessed and the process of assessment are of interest to the Applicants, and to the public at large.
- 140.** The public interest in accessing information in such a context as has arisen in this case is also heightened by the nature of the process by which the Commission will certify voluntary schemes. As is clear from the provisions set out at paragraphs 45 to 48 above, Directive 2009/28/EC provides that in reaching its decisions on the compliance of voluntary certification schemes with the sustainability criteria, the Commission will be assisted by an advisory committee. This advisory procedure is one of the so-called

‘comitology procedures’, and for the reasons outlined above at paragraph 48, it remains unaffected by the recent amendments introduced by the Lisbon Treaty.

- 141.** The issues and problems surrounding such comitology procedures are well-recognised, particularly in relation to their inherent lack of transparency. In fact, it was as a result of these issues that the Commission, in a White Paper on European Governance, called for reform of the comitology procedures and made a proposal for amendment of the ‘Comitology Decision’ to make the procedures more transparent<sup>82</sup>, subsequently recognised by the Lisbon Treaty amendments.
- 142.** In light of the above, it is all the more serious that, in failing to comply with its lawful obligations in its application of exceptions to the presumption of public access to documents held by the Commission, the Commission in refusing to release the requested documents is maintaining its practice of undertaking advisory procedures in an opaque rather than transparent manner.
- 143.** The Commission is therefore, as a result of its total failure to consider the clear overriding public interest in access to the documents requested, in breach of Article 4(3) of Regulation 1049/2001.

**VII. Seventh plea in law: Failure to determine the period of application of the replied upon exception in violation of Articles 4(6) and 4(7) of Regulation 1049/2001**

- 144.** For the reasons set out above, it is only in very limited circumstances that documents with environmental information, especially those with information relating to emissions into the environment, can be withheld from the public. This request was not one of them. As set out above, it is denied that any information was lawfully withheld under any exception. To the extent that any document was properly withheld, it is submitted that the Commission erred in failing to determine the period of application of the exception.

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<sup>82</sup> White Paper on European Governance, July 2001, available at: [http://eurlex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0428en01.pdf](http://eurlex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf) (link checked XXXX).

**145.** Upon a finding that documents with environmental information may be withheld, these two additional determinations must be made. Firstly, Article 4(6) of Regulation 1049/2001 requires that any parts of the document not covered by the exceptions shall be released where the exceptions only partially apply. In *WWF European Policy Programme v Council of the European Union*<sup>83</sup> the Court of Justice interpreted this language to mean that documents must be redacted, if possible, to allow their disclosure:

*“It is clear from the wording itself of Article 4(6) that an institution is required to consider whether it is appropriate to grant partial access to documents requested and to confine any refusal to information covered by the relevant exceptions. The institutions must grant partial access if the aim pursued by that institution in refusing access to a document may be achieved where all that is required of the institution is to blank out the passages which might harm the public interest to be protected.”*

**146.** It is inconceivable that the Commission could justifiably have determined that there were no documents at all in the Applicant’s request that could have been provided subject to the action of redacting protected passages. The Commission has therefore failed to comply with Article 4(6) of Regulation 1049/2001.

**147.** Second, under Article 4(7) of Regulation 1049/2001 as set out in full above, *“the exceptions shall only apply for the period during which protection is justified on the basis of the content of the document.”* Like Article 4(6) of Regulation 1049/2001, this is document specific, and requires a detailed appraisal of the contents of each document to assess the timeframe for which the exceptions apply. Again, this is a clear example of the EU legislature ensuring that the right of public access to information be as broad as possible.

**148.** Yet, as emphasised in relation to the different pleas above, the 7 December 2010 Refusal Letter is cursory, vague, poorly reasoned, and does not represent a detailed and careful analysis of what information could or could not be provided. The Commission is therefore in violation of Article 4(7) of Regulation 1049/2001.

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<sup>83</sup> *WWF European Policy Programme v Council of the European Union*, Case T-264/04, [2007] ECR II-00911, paragraph 50, citing *Council of the European Union v Headi Hautala*, Case C-353/99 P, [2001] ECR I-09565, paragraph 29.

## VI. FORM OF ORDER SOUGHT

**149. For the reasons outlined above, the Applicants respectfully request the Court to:**

**(1) Declare the Commission in violation of Regulation 1049/2001 namely:**

(i) Articles 8(1) and (2) for not replying to the Applicants request within the prescribed time limits and not providing detailed reasons for doing so;

(ii) Article 4(2) first indent and Article 4(3) first sub-paragraph for failure to provide the Applicant access to the requested information regarding the voluntary certification schemes;

(iii) Article 4(2) first indent and Article 4(3) first sub-paragraph for failure to assess whether there was an overriding public interest in disclosure;

(iii) Article 4(6) for failure to provide partial access to the requested document

(iv) Article 4 for failure to perform concrete, individual assessments for the requested documents.

**(2) Declare the Commission in violation of the Aarhus Convention namely:**

(i) Article 4(1), (2), (3) and (4) for failure to provide the Applicant timely access to the requested information regarding voluntary certification schemes and the failure to provide detailed reasons in doing so.

**(3) Declare the Commission in violation of Regulation 1367/2006 namely:**

(i) Article 6(1) for failure to interpret the exceptions provided under Article 4 of Regulation 1049/2001 in a restrictive way and for unlawful application of the Article 4(2) first indent exception;

**(4) Annul the Decision under Article 8(3) of Regulation 1049/2001, by which there was an implied negative decision the failure by the Commission**

to reply within the prescribed time-limits to the Applicant's Confirmatory Application;

(5) Grant injunctive relief as provided for by the Aarhus Convention Article 9(4)<sup>84</sup> ordering the Commission to provide within a set timeframe access to all requested documents, unless protected under an absolute exception in Article 4(1) of Regulation 1049/2001;

(6) Order the Commission to pay the Applicants' costs pursuant to Article 87 of the Rules of Procedure of the General Court, including the costs of any intervening parties.

25 May 2011

Respectfully submitted,



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Pierre Kirch, Avocat

On behalf of ClientEarth Corporate Advisory  
Europe, Stichting FERN, and Friends of the  
Earth Europe

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<sup>84</sup> UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25 June 1998, Article 9(4) which requires administrative and judicial review procedures to "provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."