ClientEarth, The International Chemical Secretariat v European Chemicals Agency (ECHA) Case T-245/11- 2015

Access To Environmental Information And Commercial Confidentiality Of Third Parties

There are obvious tensions between the right to know and the right to confidentiality. This is especially so where environmental concerns cross swords with commercial interests. That can mean for instance that there is a reluctance for large commercial enterprises such as privatised utilities which carry out some administrative functions to be subject to the same amount of scrutiny as a government agency (see Fish Legal and Emily Shirley v ICO ELM March 2015 issue). But also more commonly, a public authority may hold environmental information from commercial third parties which becomes the subject of information requests.

Aarhus And Commercial Confidentiality

The first pillar of the Aarhus Convention provides for exemptions to the presumption of the accessibility of information. Article 4 (4) provides that:

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;

. . . .

(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

. . . .

Article 4 (4) adds however, as a rider to the rule that, “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.’

This is effectively written directly into the European Directive 2003/4/EC on public access to environmental information and domestically into the Environmental Information Regulations 2004. Crucially, European Community bodies such as the Commission, Parliament and Council are also subject to the same principles of scrutiny and commercial exemptions apply.

REACH And Access To Information

The REACH Regulation (Registration, Evaluation, Authorisation and restriction of Chemicals) which provides for the European–wide regulation of the chemical industry - principles that reflect the first pillar of the Aarhus Convention. They require, for instance, as a basic standard that:

"EU citizens should have access to information about chemicals to which they may be exposed, in order to allow them to make informed decisions about their use of chemicals. A transparent means of achieving this is to grant them free and easy access to basic data held in the Agency's database, including brief profiles of hazardous properties, labelling requirements and relevant Community legislation including authorised uses and risk management measures.

The Agency and Member States should allow access to information in accordance with Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, Regulation … No 1049/2001 … and with the [Aarhus] Convention …"

But the REACH Regulation also sets boundaries: Article 118.2, for instance, provides as follows:

"Disclosure of the following information shall normally be deemed to undermine the protection of the commercial interests of the concerned person:

. . . .

(c) the precise tonnage of the substance or preparation manufactured or placed on the market;

(d) links between a manufacturer or importer and his distributors or downstream users.

Where urgent action is essential to protect human health, safety or the environment, such as emergency situations, the Agency may disclose the information referred to in this paragraph".

The exemptions are more specific than the Aarhus Convention, but the effect is similar in that it attempts to balance public access with commercial confidentiality.

Chemical Secretariat And ClientEarth Information Requests

The International Chemical Secretariat ('ChemSec') made an information request to the European Chemicals Agency (ECHA) for access to three specific categories of information on 356 chemical substances including manufacturer/ importer details; the precise tonnage of the substances manufactured or placed on the market; and the total tonnage band within which the 356 substances have been registered, in case the precise tonnage is not provided. The chemicals included those which were known to be carcinogenic, mutagenic and toxic to reproduction (CMRs). Some were also persistent, bioaccumulative and toxic.

The ECHA replied in pre-action correspondence that the disclosure of such information would "reveal information on links between manufacturer/ importer and downstream users, and thus undermine the protection of commercial interest". They added that "an overriding public interest" in disclosure of this information could not be established to get around the final paragraph of Regulation 118 (see above). ECHA also reasoned that providing details of tonnage would undermine the protection of commercial interests and that there was no "overriding public interest" in disclosing the information in the circumstances to outweigh the exemption.

The "Action For Annulment"

Chemsec and ClientEarth issued proceedings seeking an "annulment" of the refusal decision with the European Commission and the European Chemical Industry Council (Cefic) intervening in support of the ECHA. The ECHA raised a number of procedural points which were not accepted by the Court. They also argued that the subject matter of the challenge had ceased to apply as they had published some of the requested details since the complaint was raised in 2011. Whilst the court agreed that pursuing the case for the documentation which had now been published was "devoid of purpose", it went on to consider the information which had not been published and the arguments for unlawfulness from the Chem Sec and ClientEarth.

The Challenge

The applicants put forward a number of arguments including that the ECHA had failed to demonstrate a sufficiently specific adverse effect on the commercial interests; that the exception to the right of access to environmental information had not been interpreted restrictively; that the overriding public interest of the request required disclosure; that because the request related to emissions, the ECHA could not rely on the commercial confidentiality exemption; that the competing interests had not been correctly weighed and that the EHCA had been wrong to refuse a request for information which was not in the possession of the EHCA.

Demonstrate Adverse Effect On Interests

The court agreed that the ECHA had failed to demonstrate that there was a sufficiently specific adverse effect on the commercial interest, ruling that it must be shown that the access in question was likely specifically and actually to undermine the interest protected by the exception, and that the risk of that interest being undermined should be "reasonably foreseeable and not purely hypothetical". The court therefore annulled part of the reasoning for the refusal relating to information not yet disclosed.

Interpret Exceptions Restrictively

The second argument was that the ECHA was in breach of the principle that any exception to the right of access to environmental information must be interpreted in a restrictive way, in accordance with Article 4(4) of the Aarhus Convention and the REACH Regulation.

However, the court was not persuaded:

Where the legal presumption in Article 118(2)(c) of the REACH Regulation is applicable, the authority concerned are free to take the view that disclosure would undermine the protection of the commercial interests of the persons concerned without having to make an individual assessment of the content of each of the documents disclosure of which is requested. By reason of that legal presumption, and in the absence of specific factors which could call it into question, ECHA was not obliged to demonstrate how disclosure of the precise tonnage would have undermined the commercial interests of the concerned persons.

Overriding Public Interest As A Presumption

Interestingly, as to the question of whether there is a default overriding public interest for environmental requests, the Court ruled that although Article 4(4) of the Aarhus Convention, requires that a refusal of a request for information on the environment "shall be interpreted in a restrictive way":

An overriding public interest… cannot be inferred from the mere fact, even if it is proved, that the information at issue constitutes environmental information.

There is therefore no unqualified presumption.

Emissions To The Environment

Client Earth relied on Article 4(4)(d) of the Aarhus Convention, which limits the use of the commercial confidentiality exemption where the requested information relates to emissions to the environment. The Court therefore considered the definition of "emissions:

"Even though the aim of Article 2(1)(d) of Regulation No 1367/2006 is, in principle, to define the concept of 'environmental information', it is legitimate to conclude, having regard to the wording of 'point (ii)' of that provision, that emissions can only be releases into the environment which affect or are likely to affect the elements of the environment". . .

So, what is an emission? The Aarhus Convention Implementation Guide relies on the definition provided in the Integrated Pollution Prevention and Control (IPPC) Directive which defines an emission as being the "direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land. . ."

Applying this here, the Court deemed that:

… "the manufacture of a substance or placing it on the market cannot per se be regarded as the release of that substance into the environment, and consequently nor can information on the tonnage manufactured or placed on the market constitute information relating to emissions into the environment".

Simply being on the market and no longer under the control of the operator is not enough – the emission must be "real or actual and not merely potential".

Comment

The applicants – although winning on one point - failed to persuade the court of their arguments for annulment. In effect the watershed for access to environmental information had been reached and the long judgment appeared to show little sympathy for Client Earth's public interest arguments. Although the judgment specifically examined disclosure under REACH, it provides clarity on several points on the use of the confidentiality exemption which will no doubt be applied elsewhere.

It is extraordinary that where once the European jurisprudence would commit the Court to a "purposive" interpretation of emissions in order to achieve an end result (i.e. access to information on chemicals which can be released into the environment) a more literal interpretation prevails.

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