Private control of public regulation: A smart mix? The case of Greenhouse Gas Emission Reductions in the EU

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Private Control of Public Regulation: A Smart Mix?

The Case of Greenhouse Gas Emission Reductions in the EU

Marjan Peeters and Mathias N. Müller

12.1 INTRODUCTION

This chapter focuses on a specific mix of instruments established for reducing greenhouse gas emissions in an effective way. The case that will be studied is a core element of EU climate law and concerns greenhouse gas emissions trading (also referred to as the EU ETS: the EU emissions trading scheme). This market-based instrument is established with the aim of reducing greenhouse gas emissions from industries and aircrafts in a cost-effective way.[1] However, in order to reach an effective application of emissions trading, two complementary approaches established by EU law are relevant.[2] First, an important part of the regime for checking compliance by emitters covered by the emissions trading scheme has been outsourced to private actors, the so-called verifiers. The proper functioning of the verifiers is crucial for achieving the intended reduction of emissions. Second, the fundamental right of the public to get access to environmental information, which is established as a general right in EU environmental law, is applicable to the emissions trading instrument as well.[3] This means that, in principle, civil society at

[1] See Table 1.1 for a typology of instruments, including emissions trading. This table does not specify EU law, but distinguishes between international law and domestic law; EU law tends to be international law. See De Witte (2017) for a discussion of whether EU law can indeed be qualified as international law.

[2] As explained in Section 1.3 of this volume, effectiveness is chosen as the primary criterion for discussing the smartness of a mix; other factors, such as coherence, efficiency, unintended effect, legitimacy and the adaptability of the instrument mixes will serve as secondary benchmarks.

[3] The right of access to environmental information is established in EU environmental law, and, importantly, can be enforced by courts, see Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] *OJ* L 41/26 (hereafter Directive 2003/4/EC) and Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access

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large can employ control on the proper implementation of the emissions trading instrument. It is generally assumed that 'improved access to information' enhances 'the quality and the implementation of decisions'.[4] In this sense, the right of access to environmental information is expected to contribute to the effectiveness of environmental regulation.[5] Hence, a procedural instrument, established by public regulation, is applicable as a complementary approach to the market-based instrument of emissions trading.[6] In sum, the case to be studied in this chapter focuses on a threefold instrumental approach: (1) emissions trading, being a market-based instrument for reducing greenhouse gas emissions; (2) a control-regime expecting private actors (verifiers) to check compliance behaviour of emitters; and (3) the procedural right of access to information that enables civil society to exert control on the proper implementation of regulatory approaches. This chapter takes a legal perspective to this instrument mix and examines whether the 'outsourcing' of compliance control by the government to private verifiers in the case of emissions trading constitutes a recommendable instrument mix, particularly in view of the potential consequences this may have for civil society regarding their possibilities to access the relevant information needed for checking the effective functioning of the instrument.

The structure of the chapter is as follows: Section 12.2 puts in context the choice of the EU legislator to establish a market-based mechanism complemented with verification provisions to be carried out by private actors. Section 12.3 analyses the possibility for civil society to get insights into compliance information held by the verifier. Section 12.4 sheds light on the use of information by environmental non-governmental organisations (ENGOs). Section 12.5 concludes.

12.2 PUBLIC REGULATION AND PRIVATE MONITORING: THE CASE OF THE EU ETS

12.2.1 *The EU ETS and the Broad and Evolving Regulatory Package of EU Climate Law*

The instrument of emissions trading is advocated by economic theory since its market-based feature, established by the tradability of the allowances, would lead

to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, [2006] *OJ* L 264/13.

[4] See the preamble to the Convention on access to information, public participation in decision-making and access to justice in environmental matters, done at Aarhus, Denmark, on 25 June 1998 (hereafter the Aarhus Convention).

[5] This seems to be supported by practical experiences, see Gunningham, Grabosky & Sinclair (1998), at 63 ff., stating that the 'community right to know' can create pressure for stricter enforcement; they refer also to potential drawbacks such as the fact that the public can misunderstand information.

[6] Also procedural instruments, including access to information, are mentioned in Table 1.1.

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to a cost-effective reduction of emissions.[7] Also the EU has been motivated by economic reasons for introducing emissions trading, since the EU ETS Directive explicitly aims 'to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner'.[8] Another reason, however, is that the effectiveness – meaning that a reduction of pollution takes place – is in principle ensured. This follows from a core design element of emissions trading, which is that the maximum allowable amount of greenhouse gas emissions is fixed by establishing an EU-wide cap on pollution.[9] With this cap on the total amount of pollution, a predictable limitation of pollution is ensured, provided that full compliance takes place.[10]

The total allowable amount of pollution, hence the cap, is divided into allowances. Each allowance represents a unit of pollution, and the sum of all allowances totals the maximum amount of pollution that may be caused. Within the EU greenhouse gas emissions trading scheme, the distribution of the allowances takes place by means of two methods: 1) an auction and 2) a free allocation; the auction method is gradually replacing the free allocation method. Emitters may trade these allowances, but they have to comply with the rule that for each tonne of greenhouse gas emissions, one allowance has to be surrendered to the government.[11] Particularly in view of considering whether there is an effective approach for ensuring compliance with this rule, the instrument mix consisting of private verification and the procedural right of access to information held by the verifier will be discussed in the rest of this chapter. But interestingly, in the context of instrument mixes, it is to be noted that the EU ETS is as such part of a broad instrument mix applied by the EU in order to reduce the greenhouse gas emissions on its territory. In fact, even before the Treaty on the Functioning on the European Union introduced the mandate that Union policies shall 'promote measures at the international level to combat climate change',[12] a package of regulatory measures dealing with *inter alia* greenhouse gas

[7] See Dales (2002) for the original idea. For further elaboration, see also Cole (2016) and Tietenberg (2006), at 27.

[8] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] *OJ* L 275/32 (hereafter the EU ETS Directive, refers to the consolidated version), Article 1.

[9] This core design element of emissions trading motivates ENGO's to prefer emissions trading above taxation. For an example of support from the ENGO community for emissions trading (in this case, the Environmental Defense Fund supporting the US acid rain emissions trading program), see Dudek & Palmisano (1988).

[10] This is different in case of an environmental tax, or in case of traditional permitting, where a fixed total of allowable pollution is not part of the design. See for a discussion of instruments for environmental law Stewart (2007).

[11] Every year, before 1 May, emissions have to be surrendered covering the emissions of the previous year, see EU ETS Directive, Article 12(2a) and (3). The competent authorities are designated by the Member States.

[12] Article 191(1) TFEU (entered into force on 1 December 2009).

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emissions, renewable energy and energy efficiency was established. Among these approaches, the EU ETS is a core pillar. Its position has been strengthened in the course of updating the regulatory package in view of contributing to the aims of the Paris Agreement.[13] In fact, the EU aims to simplify its regulatory approach by focussing and improving two instruments of its climate policy: first, the EU greenhouse gas emissions trading scheme, and second the 'Effort sharing approach' through which national emission reductions for sources falling outside the scope of the emissions trading scheme will be established.[14] Both the EU ETS and the Effort sharing approach are seen by the European Council as key instruments to achieving the overall goal of the EU, which is to reduce greenhouse gas emissions to 40 per cent below 1990 levels by 2030. Nonetheless, several complementary instruments will still be used, such as a legal regime for carbon capture and storage and a regulation introducing a new governance approach for the Energy Union.[15] So, while the rest of this chapter focuses on the specific instrument mix for making EU greenhouse gas emissions trading effective by ensuring compliance, it is important to understand that the EU ETS itself is part of a broader and further evolving mix of instruments used in EU climate policy.

12.2.2 *Identifying the 'Mix of Actors' in the EU ETS in View of Compliance*

For the emissions market to work effectively, compliance by industries is crucial, particularly with regard to the basic rule that for the amount of greenhouse gas emissions caused in a given year, a corresponding number of tradable allowances has to be surrendered to the competent public authority.[16] Industries must file an annual report setting out their emissions, and for having the credibility of this report

[13] In order to contribute to the Paris Agreement, the EU aims to reduce greenhouse gas emissions by at least 40 per cent below 1990 levels by 2030. The EU submitted this policy aim, on behalf of itself and its member states, to the international climate change negotiations on 6 March 2015; see www4.unfccc.int/sites/submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf.

[14] European Council conclusions, 23 and 24 October 2014, http://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/en/pdf; this instrument choice is discussed by Peeters (2016a). This chapter will concentrate on the EU ETS that is a common regulatory framework for major industries, and flight operators, in the EU; for implementing the Effort Sharing Decision, the Member States have to develop their own specific national policies themselves.

[15] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directives 85/337/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] *OJ* L 140/114 and Proposal for a Regulation of the European Parliament and of the Council on the Governance of the Energy Union, amending Directive 94/22/EC, Directive 98/70/EC, Directive 2009/31/EC, Regulation (EC) No 663/2009, Regulation (EC) No 715/2009, Directive 2009/73/EC, Council Directive 2009/119/EC, Directive 2010/31/EU, Directive 2012/27/EU, Directive 2013/30/EC and Council Directive (EU) 2015/652 and repealing Regulation (EU) No 525/2013, [2017] COM(2016) 759 final/2.

[16] EU ETS Directive, Article 12(3) (applicable to industries).

checked, they must hire a verifier. The EU ETS Directive obliges Member States to ensure that emission reports submitted by industries are verified in accordance with a set of criteria set out in Annex V of the Directive, and any detailed provisions of the Verification Regulation adopted by the European Commission.[17] The importance of this verification activity can be illustrated by the fact that an industry is not allowed to make further transfers of allowances until the emission report has been verified as 'satisfactory'.[18] In essence, if the verifier does not approve the emission report of the emitter, the emitter is acting in breach of the emissions trading regulations, and sanctions must be imposed by the competent authority.[19] In other words, the approval by the verifier of the emission report from the emitter is crucial for the latter for being in compliance with the emissions trading regime. Moreover, the approval of the emission report by the verifier also determines the amount of allowances that must be surrendered by the emitter.[20] In this sense, the decision by the verifier whether to approve an emission report is of pivotal legal and economic importance for the EU ETS industry.

The specific design of the EU ETS as explained in Section 12.2.1 implies that the actual regulatory effect needs to be realized by various private actors. First of all, the *emitters* themselves (the industries and aviation companies covered by the EU ETS regime) need to take action in order to comply with the regulatory requirements.[21] Within the EU ETS, in essence, ample freedom for decision-making is given to emitters, since they – depending on the price of allowances and costs of their emission reduction possibilities – may choose either to cover their emissions with the tradable allowances, or to reduce their emissions themselves.[22] Second, *verifiers* play an important role since they have the task to check the emission reports developed by the emitters. Here, contractual relationships will be developed between emitters and verifiers: industries must hire an accredited verifier to get

[17] EU ETS Directive, Article 15, Commission Regulation (EU) No 600/2012 of 21 June 2012 on the verification of greenhouse gas emission reports and tonne-kilometre reports and the accreditation of verifiers pursuant to Directive 2003/87/EC of the European Parliament and of the Council [2012] *OJ* L 181/1 and Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council [2012] *OJ* L 181/30.

[18] EU ETS Directive, Article 15.

[19] See Article 16 of the EU ETS Directive regarding the obligation of the emitter to surrender allowances equal to the total of emissions of the installation in a calendar year as stipulated in Article 6(2)(e) of the EU ETS Directive. For the precise applicable rules, including sanctions, the implementing national legislation has to be consulted.

[20] EU ETS Directive, Article 12(3).

[21] According to its official terminology, the EU ETS Directive applies to 'operators' and 'aircraft operators'; see EU ETS Directive, Article 3(f).

[22] There exists a vast amount of literature on emissions trading, from several disciplines. Recent examples include Weishaar (2016); for research overviews from a legal perspective, see Bogojević (2013) and Peeters (2016b).

approval for their annual emission report. But, in addition to emitters and verifiers, civil society – and more particularly, ENGOs and investigative journalists – may play a role by using their procedural rights in order to control, to the extent legally possible, how industries, verifiers and the responsible authorities comply with the applicable requirements. With regard to the emissions trading instrument, it is even the case that specialised ENGOs (such as *Carbon Market Watch* and *Carbon Trade Watch*) have been established with the specific aim of critically following the design and application of the specific instrument.[23] But also ENGOs with a general focus, such as Greenpeace, have shown interest for using the right of access to information for checking the emission behaviour of EU ETS industries.[24]

12.2.3 *The EU ETS: The Choice for a Double Market-Based Approach*

With the emissions trading instrument, the EU in fact applies a double market-based approach. Clearly, with introducing the possibility for polluters to trade in emission rights, a market-based regulatory approach is taken. But another market dimension is introduced by the EU's choice to make use of private verifiers in order to control the emission reports of emitters: verifiers must compete with each other to win contracts with the emitting industries for conducting the verification of emission reports. The resulting competition among verifiers may lead to a decrease in the cost of verification for the emitters. The choice of the EU legislator to task private verifiers with controlling greenhouse gas emitters can in this respect be seen as a way to let polluters pay an important part of the regulatory costs. However, the competition among verifiers may lead to concerns with regard to the integrity of the verification-regime: will the strive to deliver the verification-task at least costs be detrimental to its quality?[25]

The establishment of this second market dimension – competition in the control chain – is not strictly necessary: the control of the emission reports from industries could also be carried out under the responsibility of administrative authorities by civil servants. For instance, in the case of the Industrial Emissions Directive – a core directive of EU environmental law, aiming at the protection of the environment as a whole by means of a permit-system – no use is made of private verifiers or other types

[23] For the specific missions of *Carbon Market Watch* and *Carbon Trade Watch*, see the following websites: http://carbonmarketwatch.org/ and http://www.carbontradewatch.org.

[24] See the legal dispute decided by the Dutch Administrative Court to the Council of State from 28 October 2009, file number ECLI:NL:RVS:2009:BK1375, in which Greenpeace requested access to information included in the emission reports from 17 EU ETS industries. The requested information was refused by the Administrative Authority holding this emission report, and this refusal was considered lawful by the administrative court. However, the correctness of this court decision in view of EU law is questioned by Thurlings (2017), at 270–275, arguing that a preliminary question should have been submitted to the CJEU.

[25] As far as is known to the authors, no empirical research has been employed in this respect.

of third-party action for controlling the performance of industries.[26] Nonetheless, in the field of greenhouse gas emissions trading the use of private actors for checking the performance of emitters has emerged into a large practice across the world, not only with respect to the trading provisions as established by Kyoto Protocol but also in the case of voluntary carbon trading mechanisms.[27] Furthermore, particularly for the EU, for which the establishment of the internal market is a main goal, the choice for using private verifiers fits to its market-oriented focus and seems to be part of a trend: the approach is also taken in the EU's regime for the reduction of CO_2 emissions from maritime transport, which requires companies to draft an emission report that must be verified by a private verifier.[28] Next to this, the EU also chose to involve private actors for controlling the sustainability of biofuels, which happens by means of voluntary certification regimes approved by the European Commission.[29]

12.2.4 *Access to Information Related to Compliance*

The question is, however, whether this privatisation of compliance control may have negative effects on the possibility for the public to check the performance of industries. In particular, ENGOs who specialise in controlling carbon trading may be interested in compliance information: if the emission reporting were to show deficiencies, the functioning of the emissions trading regime would be fundamentally damaged and the environmental effectiveness would be compromised. While the certification regime for biofuels has already been criticised for its lack of transparency with regard to the verification process,[30] Section 12.3 will examine to what extent ENGOs and other interested parties may face barriers in accessing

[26] Directive 2010/75/EU, Article 23 has this clear focus on public authorities, and does not provide any specific provision for auditing or third-party verification, except for its reference to the European Union eco-management and audit scheme (EMAS as regulated by Regulation (EC) No 1221/2009), meaning that for the systematic appraisal of the environmental risks of an installation the participation to EMAS needs to be taken into account.

[27] Ebbesson (2011), at 82; Peeters (2009); Wang et al. (2016), at 382–383 ff.; Levin et al. (2011), at 1906 and Livingston, Lee and Nguyen (2015), at 57 f. Also, the US Greenhouse Gas Reporting Program 'requires enterprises to entrust third-party verification institutions with the verification of their GHG emission list reports and to submit the same to the US Environment Protection Agency'. Wang et al. (2016), at 386.

[28] Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC [20015] *OJ* L 123/55, see more specifically Article 11(1).

[29] The European Commission has the competence to authorise voluntary certification schemes – developed by and carried out by private companies – for the purposes of certifying whether biofuels comply with sustainability standards as established by the 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 and amending and subsequently repealing directives 2001/77/EC and 2003/30/EC, [2009] *OJ* L 140/16, Article 18.

[30] Romppanen (2015), at 49 and 106 ff. (pointing at the weak legislative and non-binding provisions as regards to the transparency provided by verifiers).

information used during the EU ETS verification process.[31] The practical relevance can be illustrated by observations from the European Environmental Agency, stating that 'it is not possible to conclude on how well the verification system is functioning in practice'.[32] Furthermore, Fleurke and Verschuuren have pointed at some critical issues with regard to how the monitoring of the EU ETS is carried out in practice. They observe that the control of verified emission reports varies greatly between the six Member States they examined, with the least thorough approach found in Hungary.[33] If it is the case that governmental oversight of the correctness of the emission reports and their verification is not conducted at the highest level possible, additional action by ENGOs could be helpful to identify possible shortcomings or even mistakes in the correct measurement of emissions. After all, in principle, it should not be disregarded that verifiers (and emitters) make mistakes, or, worse, commit fraud for instance by deliberately approving an emission report in which less emissions are mentioned compared to the actual data. While access to information may not be sufficient for preventing all non-compliance with law, it may be one of the important strategies for preventing such behaviour.

12.3 TRANSPARENCY WITH REGARD TO VERIFICATION

The role of civil society for strengthening (compliance with) environmental law is stressed by the Aarhus Convention, giving important procedural rights such as the right to access environmental information held by the public authorities upon request.[34] This procedural right may be helpful to some extent for checking compliance, and already the threat of being exposed in the case of non-compliance might encourage emitters to comply.[35] However, the application of this right may encounter legal problems. In light of the general observation by Liz Fisher that '... transparency may be a truism in regards to public administration, its operation is

[31] As observed in an earlier footnote, it remains necessary to conduct further in-depth research, including empirical research, towards the applicability of the provisions on access to information in the Aarhus Convention with regard to the verification of biofuels. This falls outside the scope of this chapter. For more general discussions of the applicability of Aarhus provisions in case of privatisation, see Ebbesson (2011) and Etemire (2012).

[32] European Environmental Agency (2016), at 30.

[33] Fleurke and Verschuuren (2016), at 221–222. Furthermore, in Greece, Hungary and Poland, the authorities primarily rely on the verified reports, conducting less ex-post control compared to the UK, Germany and The Netherlands (Fleurke and Verschuuren (2016), at 220). Here, additional checking by ENGOs could be helpful in view of getting insight into the trustworthiness of the emission reports.

[34] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, 2161 UNTS 447; 38 ILM 517 (1999) entered into force on 30 October 2001, approved by the EU on 17 February 2005 (Decision 250/360/EC), (hereafter Aarhus Convention).

[35] Explanatory Memorandum of the Proposal for a Directive of the European Parliament and of the Council on public access to environmental information COM (2000) 402 final, para. 1.2.

profoundly complex',[36] this section will delve into some complexities with regard to the question whether the right of access to environmental information may also be successfully executed in the specific case of information held by a verifier operating under the EU ETS.

The EU ETS Directive illustrates that the EU legislator deems it important that the public at large is informed about compliance and non-compliance by industries. An example is the concept of naming and shaming set out in the EU ETS Directive. The names of operators who are in breach of the requirement to surrender sufficient allowances are published.[37] However, if operators are trying to cheat it is unlikely that they will do so by surrendering fewer allowances than they are supposed to since this can be easily detected. Instead, it is more likely that they will try to submit false emission reports that enable them to emit more than they are declaring, and consequently to pay less than they should. In this vein, false verification reports are also imaginable.[38] Broad public access to environmental information in the realm of the EU ETS is important as it might contribute to detecting such cases of fraud. Unfortunately, the process by which civil society can determine whether emitters and verifiers are meeting their duties as stipulated in the compliance provisions of the EU ETS directive, and subsequently bring violators to the attention of public authorities, is as yet unclear. One crucial question to be investigated is that of whether private verifiers are covered by access to information legislation, and, if yes, to what extent or in what circumstances they are obligated to disclose the information they hold.

12.3.1 *The Aarhus Convention: Access to Environmental Information*

The first pillar of the Aarhus Convention establishes the right of the public to access environmental information held by the government.[39] This stipulates that public authorities must disclose environmental information (if no grounds for refusal apply) upon request by 'a member of the public'.[40] 'The public' is defined very broadly and refers to any natural or legal person and associations thereof as defined under national law. This means that not only individuals but also the media and non-

[36] Fisher (2010), at 314.

[37] See Article 16(2) EU ETS Directive for the precise legal provision. A discussion of the value and applicability of this provision falls outside the scope of this chapter. For a critique of its effectiveness, see Fleurke and Verschuuren, (2016), at 224.

[38] For submitting a false verification report, collusion between the operator and the verifier is most likely the case.

[39] The second pillar provides the right to participation to governmental decision-making, and the third pillar concerns access to the court in environmental matters. This chapter concentrates on the first pillar.

[40] Aarhus Convention, Article 4(1). Article 5 covers the active right of access to environmental information. It deals with instances in which public authorities must actively disseminate environmental information without a request by the public being necessary.

governmental organisations are included in this definition.[41] It is not necessary for the member of the public to state an interest in the information requested. The public authority must disclose the information in the form requested within one month after receiving the request with the possibility of extending this deadline to two months if the volume or complexity of the information requested make this necessary.[42] The EU and all its Member States are a party to the Aarhus Convention, and the EU has adopted several measures to transpose the right to environmental information into EU secondary law.[43]

12.3.2 *Access to Information as Held by the Verifier: Specific Provisions in the EU ETS Directive*

This section and Section 12.3.3 will show the main difficulties in answering the question of whether information held by the verifier should be accessible to the public. This information could, for example, concern the way a verifier has checked a specific industry, the minutes of meetings between the verifier and the industry, including the report of a site visit, or certain agreements made between the industry and the verifier on the specific methodology for calculating the emissions.[44] Sections 12.3.2.1 and 12.3.2.2 discuss some core articles of the EU ETS Directive concerning access to information related to emission trading.[45]

12.3.2.1 Disclosure of Information upon Request: A Limited Provision in the EU ETS

Access to information within the realm of the EU ETS is in principle governed by Article 17 of the EU ETS Directive.[46] Information covered by that Article must be made available to the public upon request pursuant to Directive 2003/4/EC, which transposes the first pillar of the Aarhus Convention into EU law, thereby providing a

[41] Aarhus Convention, Article 2(4). Importantly, the first pillar of the Aarhus Convention does not require the public to be 'concerned' as for instance Article 6 does (participation to governmental decision-making).

[42] Aarhus Convention, Article 4(2).

[43] The most prominent ones are Directive 2003/4/EC [2003] *OJ* L 41/26 and Regulation (EC) No 1367/2006 [2006] *OJ* L 264/13. In this chapter we mainly refer to the provisions of the Aarhus Convention, as this EU secondary legislation often contains the same provisions.

[44] Case law has already shown that different interpretations on the question of which emissions are covered by the EU ETS may lead to legal conflicts; for a case in which the verifier followed another approach than then competent authority, see C-148/14 *Federal Republic of Germany v. Nordzucker AG* [2015], published in the electronic Report of Cases.

[45] Next to the general provision for access to environmental information as regulated by Directive 2003/4/EC, other environmental directives may contain specific provisions on access to information. Nonetheless, this can lead to uncertainty as to which provisions prevails, as will be discussed in Sections 12.3.2.1 and 12.3.2.2.

[46] EU ETS Directive, Article 17.

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general right of access to environmental information held by public authorities within Member States. However, Article 17 of the EU ETS Directive only covers 'decisions relating to the allocation of allowances, information on project activities … and the reports of emissions required under the greenhouse gas emissions permit and held by the competent authority'. The wording of the article – information on verification and the verifier are not mentioned at all – suggests that information held by the verifier, other than emission reports, is not covered by Article 17 of the EU ETS Directive.[47] The scope of the access to environmental information provision of the EU ETS Directive is hence limited. A small-scale empirical test confirms that it was impossible to get access to verification reports which were requested from the competent authorities.[48] As a first conclusion, it appears that regarding information necessary to assess the level of compliance, Article 17 of the EU ETS Directive delineates access to environmental information only to emission reports, while there might be reasons for ENGO's or members of the public to ask for various other pieces of information, including information on how the verifier has carried out its tasks.[49]

12.3.2.2 Active Dissemination Duty: Again a Limited Provision in the EU ETS Directive

One solution for getting access to information compiled during the verification process may be found in Article 15a of the EU ETS Directive, which governs an *active* information dissemination duty for the Member States and the Commission.[50] It stipulates that 'all decisions and reports relating to … the monitoring, reporting and verification of emissions are immediately disclosed in an orderly manner ensuring non-discriminatory access'. Thus, this article asks for the active disclosure of the specified information to the public, including 'all decisions and reports' related to verification. However, it is not stipulated in this article whether the

[47] For a definition of `competent authority', see Article 18 of the EU ETS Directive, with no reference to the verifiers. For the duty of industries to submit their emission report to the competent authority, see Article 14(3) of the EU ETS Directive.

[48] Müller (2016), available from the authors upon request. Requests to access individual verification reports were sent to the competent public authorities in Germany and Austria. While the German authorities did not answer at all, their Austrian counterparts refused to provide the requested information, arguing that some information contained therein was protected by the national legislation on professional secrecy. No requests for information were sent to individual verifiers (it may already be difficult to know which verifier has checked the emission report of an individual industry).

[49] As explained in Section 12.3.2; it may concern minutes or e-mails in which certain agreements – for instance, on the interpretation and application of the calculation methodology – have been noted between the industry and the verifier.

[50] This obligation hence rests on both the EU level and the national level. Such a joint obligation is very unique in EU environmental law. We do not delve in this chapter into the potential complexities that may derive from this joint obligation.

active information duty covers only information held by the national authorities, or whether it also includes information held by the verifier but not (yet) physically held by the competent authority.[51] Also, it might be that ENGOs want information other than that contained in verification reports, such as information on the way the verifier has checked a specific industry, the minutes of meetings between the verifier and the industry, including the report of a site visit, or certain agreements made between the industry and the verifier on the specific methodology for calculating the emissions. Moreover, the aforementioned study – which did a small-scale empirical test – determined that the competent Austrian and German public authorities neither published verification reports nor provided access to them upon request. Until now, there is not yet case law answering the question of whether this access should have been given or, actually, whether the authorities themselves should have disclosed this information on their own initiative.

Furthermore, the second paragraph of Article 15a explains that, by derogation from the first paragraph, information covered by 'professional secrecy' may only be disclosed to third parties in accordance with the 'applicable laws, regulations or administrative provisions'.[52] As with the first paragraph of the Article, the second one is also relatively vague. There is neither any indication as to what information is covered by 'professional secrecy', nor any specification of what 'professional secrecy' means. Furthermore, it is necessary to investigate how this matter is regulated by national legislation. '[A]pplicable laws, regulations or administrative provisions' could at least in part also refer to EU legislation, including directives that need implementation by Member States. However, it is not likely, or at least very uncertain, that Directive 2003/4/EC is meant in this reference since the term 'professional secrecy' is not mentioned in this directive.[53] Furthermore, in analogy with the *Ville de Lyon*[54] case, one should perhaps consider that the EU legislator did not have the

[51] See for the point of view that it would not be necessary that the public authority 'physically' holds the requested information Etemire (2013), at 372, and earlier, Ebbesson (2011), at 81.

[52] EU ETS Directive, Article 15a.

[53] Only 'tax secrecy'; see Article 4(d) of Directive 2003/4/EC. The term 'professional secrecy' is also not mentioned in the Aarhus Convention. One can wonder whether this provision of Article 15a EU ETS Directive is compatible with the Aarhus Convention. There is no case law yet on this matter; such case law could develop in view of a request for access to information that would be refused using the 'professional secrecy criterion' in connection to the 'confidentiality of commercial and industrial information' clause mentioned in Article 4 of Directive 2003/4/EC. Such a request for information may not be refused where the request relates to information on emissions, discharges or other releases into the environment (which is also a multi-interpretation term).

[54] Case C524/09 (*Ville de Lyon v Caisse de dépôts et consignation*), ECR 2010 I-14115. The case concerned access to trading data by the city of Lyon. One of the questions the Court had to answer was 'whether the reporting of trading data … is governed by one of the derogations provided for in Article 4 of Directive 2003/4 or by the provisions of Directive 2003/87 and Regulation No 2216/2004'. The Court ruled that, according to the wording of Article 17 of the EU ETS Directive, the legislator subjected only parts of the reporting and implementation data to the regime of Directive 2003/4. However, Article 17 does not cover trading data. Instead,

intention of making access to information covered by Article 15a subject to the regime of Directive 2003/4/EC.[55] Just like in *Ville de* Lyon it could be argued that with Article 15a the EU legislator 'sought to introduce a specific, exhaustive scheme for public reporting and confidentiality of that data'.[56] In this vein, Article 15a governs as a *lex specialis* access to information concerning verification, but particularly the reference to 'professional secrecy' and the use of the word 'decisions' cause legal uncertainty as to what extent the information held by verifiers should be disclosed.[57]

12.3.3 *Observations on a Possible Request for Information in View of the Aarhus Convention*

In Section 12.3.2 we have shown that the EU ETS Directive contains a specific information regime, which entails several limits and uncertainties regarding the transparency of information from the verification process. Meanwhile, the EU ETS Directive must be consistent with the Aarhus Convention because international agreements concluded by the EU take precedence over secondary legislation.[58] Thus, EU legislation must be interpreted as far as possible in line with international agreements to which the EU is a party. Hence, in this section we examine how a request for environmental information related to the verification process should be dealt with in view of the Aarhus Convention provisions.

Taking the Aarhus Convention as the starting point for our analysis, one can see that if there is a request to access verification reports (or other information held by the verifier), two conditions must be fulfilled: First, the information must qualify as

Article 19 covers this kind of information. This Article does not refer to Directive 2003/4, but sets out a specific scheme that governs access to the information that falls within its scope. The fact that Article 19 sets out such a specific scheme precludes the application of Article 17, and thus Directive 2003/4/EC, for information covered by Article 19.

[55] Article 15a of the EU ETS Directive does not refer to Directive 2003/4/EC in the same way Article 17 does.

[56] Case C524/09 *Ville de Lyon*, [40].

[57] In this respect, further surveys to the following specific provisions are relevant: Article 41(3) of Commission Regulation (EU) No 600/2012 states that 'a verifier shall safeguard the confidentiality of information obtained during the verification in accordance with the harmonised standard referred to in Annex II'. Subsequently, Annex II refers to Regulation (EC) No 765/2008, and Article 8(4) of that Regulation states that national accreditation bodies 'shall have adequate arrangements to safeguard the confidentiality of the information obtained'. In addition to the provisions of the Regulation 'adequate arrangements to safeguard the confidentiality of information obtained' shall apply. Of course, the compatibility of these provisions with the fundamental right of access to environmental information as established by the Aarhus Convention – having become part of EU law – needs to be examined. A wide coverage or application of such 'confidentiality' provisions can be in breach of the Aarhus Convention.

[58] Case C-61/94 *Commission of the European Communities v Federal Republic of Germany* [1996] ECR I-3989.

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'environmental information'; second, the verifiers must be 'public authorities' pursuant to Article 2(2) of the Aarhus Convention.

12.3.3.1 Environmental Information

Firstly, the requested information needs to fall into one of the categories set out in the definition of environmental information.[59] The term 'environmental information' is defined in Article 2(3) of the Aarhus Convention and includes information in any format on the following three areas: First, information on the state of elements of the environment, which include *inter alia* air, water and soil, the landscape, natural sites and biological diversity, as well as the interaction of those elements;[60] second, information on factors affecting or likely to affect the elements of the environment mentioned under the first subparagraph. These 'factors' can, for example, be substances or energy, but they can also be activities or measures, policies and legislation;[61] last, information on 'the state of human health and safety, conditions of human life, cultural sites and built structures'[62] insofar as the factors mentioned in subparagraph (b) have an influence on them.

The term 'emissions' is not included, but since the Convention explicitly regulates that the grounds for refusing requested information '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',[63] it is accepted that the definition of 'environmental information' includes information on emissions in the environment. Meanwhile, the Court of Justice of the European Union has provided in its case law that the term 'emissions into the environment' must be interpreted rather broadly, which hence strengthens the right of access to environmental information.[64]

Furthermore, the Court set out in *Mecklenburg*[65] that activities of a public authority to ensure compliance with EU legislation aiming at protecting the environment might in principle be regarded as environmental information. Furthermore, the Court pointed out that a piece of information relates to the environment if it refers to an activity that either protects or adversely affects one of the elements of the

[59] Article 2(3) of the Aarhus Convention, the corresponding Article of Directive 2003/4/EC is Article 2(1).
[60] Aarhus Convention, Article 2(3)(a).
[61] Aarhus Convention, Article 2(3)(b).
[62] Aarhus Convention, Article 2(3)(c).
[63] Article 4(4) final sentence.
[64] Case C-442/14 *Bayer CropScience SA-NV, Stichting de Bijenstichting v College voor de toelating van gewasbescheringsmiddelen en biociden* [2016], published in the electronic Reports of Cases, [61–67].
[65] Case C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg – Der Landrat* [1998] ECR I-038009, [20].

environment.[66] In *Glawischnig*,[67] the Court specified further that information relating to the monitoring of compliance with individual pieces of EU legislation can be regarded as environmental information only if the purpose of the legislation is to protect the environment. A look at Article 1 of the EU ETS Directive shows that its goal is in fact to protect the environment by contributing 'to the levels of reductions that are considered scientifically necessary to avoid dangerous climate change'. One may, however, wonder to what extent information that is recorded during the verification process is to be seen as 'environmental information'. While the CJEU is already taking an extensive interpretation of the definition of environmental information (and specifically of "emissions into the environment"), uncertainty may exist in practice regarding the extent of the definition.[68] However, in view of the fact that the definition of 'environmental information' is not exhaustive and that the decisive element for whether 'factors or measures' are to be considered environmental information is whether they 'have … or are likely to have … an effect on the environment',[69] it seems reasonable to say that information relevant for checking the trustworthiness of the EU ETS, and thus its effectiveness, are to be seen as environmental information. As noted earlier, if a specific verification report is wrong, for whatever reasons, the operator has possibly emitted more than reported, and, consequently, surrenders fewer allowances, thereby compromising the system as a whole. Thus, verification reports can have an effect on the environment; they can therefore be considered as environmental information under the Aarhus Convention. The same may be true for other information of the verification process such as information on the way the verifier has checked a specific industry, the minutes of meetings between the verifier and the industry, including the report of a site-visit, or certain agreements made between the industry and the verifier on the specific methodology for calculating the emissions.

12.3.3.2 Are Verifiers "Public Authorities"?

The second requirement for being able to effectuate the right to access to environmental information is that private verifiers must qualify as public authorities. Article 2(2)(a) of the Aarhus Convention defines a public authority as any governmental authority on any level of administration. Furthermore, the term 'public authority' includes any natural or legal person to whom a public authority has delegated public

[66] Ibid., [21]; those elements are mentioned in Article 2(1) (a) of Directive 2003/4/EC.

[67] Case C-316/01 *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen* [2003] ECR I-05995.

[68] If a piece of information does not qualify as environmental information a request to access it cannot be made under the Aarhus Convention and Directive 2003/4/EC. Instead the general (but more limited) access to information legislation applies.

[69] Case C-316/01 *Glawischnig*, [38].

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administrative tasks,[70] as well as any natural or legal person who provides a public service or has another public responsibility that relates to the environment and is under the control of an entity falling under the first two categories.[71] The distinction between these two definitions needs to be emphasised: the activities of entities carrying out public administrative tasks need not to relate to the environment while those entities carrying out non-administrative public responsibilities must do so in order for the entity to fall under the definition of public authority.

The EU ETS Directive – which has introduced the verifier – does not provide any textual explanation whether the verifier should be qualified as a public authority.[72] The Accreditation and Verification Regulation defines a verifier as either a 'legal entity carrying out verification activities pursuant to this Regulation' and who is accredited by a national accreditation body in accordance with Regulation (EC) No 765/2008 or a natural person who is certified by the national certification body.[73] Accreditation means that a national accreditation body attests that the verifier meets the standards set out in Regulation (EC) No 765/2008 and Commission Regulation (EU) No 600/2012. It is important to note that these definitions do not give public authorities the leeway to decide to carry out verification themselves.[74]

According to Article 2(2)(b) and (c) of the Aarhus Convention, for private verifiers to qualify as public authorities, they must either perform (a) public administrative functions or (b) have public responsibilities or functions, or (c) provide a public service in relation to the environment and be under the control of a public authority.[75] In *Fish Legal*,[76] the CJEU interpreted the corresponding article of Directive 2003/4/EC and noted that, for the purposes of interpreting Directive 2003/4/EC, account is to be taken of the wording and aim of the Aarhus Convention.[77] Regarding Article 2(2)(b), it explained that 'the concept of 'public

[70] Aarhus Convention, Article 2(2)(b).

[71] Aarhus Convention, Article 2(2)(c).

[72] There is no definition of 'verifier' in the EU ETS Directive.

[73] Commission Regulation (EU) No 600/2012 of 21 June 2012 on the verification of greenhouse gas emission reports and tonne-kilometre reports and the accreditation of verifiers pursuant to Directive 2003/87/EC of the European Parliament and of the Council (hereafter Verification Regulation).

[74] The legislation does not explicitly exclude public authorities from taking the role of a verifier. However, it seems unlikely that this was intended by the EU legislator as requiring that a public authority be accredited by a national accreditation body before performing the verification would be redundant. In any event, outsourcing verification to the private sector is widespread (according to European Environmental Agency (2016), at 30, twenty-six countries have at least one accredited verifier, and there is widespread use of verifiers from other countries).

[75] To be specific, the private verifier should be under control of a public authority as meant in Article 2(2)(a) or (b) Aarhus Convention.

[76] Case C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others* [2013] published in the electronic Reports of Cases.

[77] Case C-279/12 *Fish Legal* 2013 [37], Article 2(2) of Directive 2003/4/EC.

administrative functions' . . . cannot vary according to the applicable law' and must therefore be uniformly applied EU wide.[78] To determine whether a private entity qualifies as a legal person performing a 'public administrative function' one must determine whether it is equipped with special powers that it normally does not have under private law.[79] In other words, in order to fall under the definition of Article 2(2)(b) of the Aarhus Convention the private entity must be a governmental authority in functional terms.[80] Thus, to qualify as public authorities pursuant to Article 2(2)(b) private verifiers must perform a service in the public interest and have special powers to perform this service. One could well argue that verifiers perform a service in the public interest since they contribute to the enforcement of environmental legislation that is intended to protect the environment, which is clearly in the public interest. Moreover, the EU ETS directive requires that the emission reports *be verified*, and that an industry may not make transfers of allowances until the report has been verified as satisfactory.[81] In other words, without this verification activity, it may be possible for industries to operate in breach of the EU ETS.[82] Furthermore, Article 7(3) of the Verification Regulation states that verification must be performed in the public interest. In sum, in case of the EU ETS, one can say that the verifier acts as a public authority and thus meets the first of two criteria that need to be fulfilled in order to classify a body as a public authority.[83]

The next question is whether the private verifier has special powers to perform the provided service that go 'beyond those which result from the normal rules applicable to relations between entities governed by private law'.[84] It can be argued that verifiers do fulfil this criterion, as they are given the mandate to audit. Furthermore, by issuing a positive or negative verification report they effectively determine whether operators can surrender allowances and subsequently continue to participate in the EU ETS.[85] Moreover, verification reports cannot be issued by anyone but

[78] Case C-279/12 *Fish Legal*, [45].This case concerns private companies which manage a public service relating to the environment (water and sewage services).

[79] Case C-279/12 *Fish Legal*, [56].

[80] Case C-279/12 *Fish Legal*, [52] & Ebbesson (2011), at 81.

[81] EU ETS Directive, Article 15.

[82] EU ETS Directive, Article 15, second subparagraph.

[83] However, it is imaginable that, in practice, private verifiers will try to argue that they do not qualify as public authority, or that they qualify as a public authority only under Article 2(2)(c) of the Aarhus Convention instead of Article 2(2)(b). The reason for this is that, according to the interpretation of the CJEU in Case C-279/12 *Fish Legal*, [83] under subparagraph (c), 'they are not required to provide environmental information [requested] if it is not disputed that the information does not relate to the provision of' the public service in the environmental field which they provide. Governmental authorities do not have the option of making this argument.

[84] Case C-279/12 *Fish Legal*, [56].

[85] Competent authorities may have competences to control the correctness of the emission reports and the verification, see for varying practices in this respect among Member States Fleurke and Verschuuren (2016).

accredited verifiers.[86] Thus, one can conclude that private verifiers also fulfil the second criterion that must be fulfilled in order for them to fall under the definition of 'public authority' and therefore be classified as public authorities according to Article 2(2)(b) of the Aarhus Convention.[87] This means that they must provide environmental information upon request, except when a valid reason for refusing this request applies.

12.3.4 *Grounds for Refusal*

The grounds based on which a public authority may refuse a request for environmental information are set out in paragraphs 3 and 4 of Article 4 of the Aarhus Convention. This section will give particular attention to the grounds for refusal that may be relevant in the case of a request by the public for information from a verifier. For the focus of our examination, which is access to information held by the private verifier, a few grounds may be particularly relevant. Firstly, a request may be refused if the information requested relates to internal communications of public authorities (following the analysis in Section 12.3.3.2, this includes verifiers), and public authorities may refuse to provide access to environmental information if disclosure would adversely affect the 'confidentiality of proceedings of public authorities'.[88] These grounds can only be invoked in situations in which confidentiality is provided for by national law. Thus, the implementing legislation of Member States would have to be analysed. It can be remarked that if the implementation legislation were to show striking differences on this point, the accessibility of information held by the verifier would be fragmented throughout the European Union. Another situation in which access to environmental information may be refused is where releasing this information would adversely affect judicial proceedings, including the ability of any person to receive a fair trial and the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.[89] Since the function of the verifier is situated at the stage of compliance, disclosure of information to the public (for instance, where this concerns information related to potential fraud with the emissions data) may be refused on these grounds, depending on the specific facts of the case.

[86] Verification Regulation, Article 3(3) & (4). Furthermore, verifiers have to carry out site visits and request corrections from the operator: Verification Regulation, Articles 21 and 22(1), which are specific inspection tasks, see Ebbesson (2011), at 81.

[87] In view of the limited length of this chapter, we do not delve into Article 2(2)(c) of the Aarhus Convention, but we note that, also according to this criterion, verifiers must be qualified as public authorities. Furthermore, see for instance the German national accreditation body, which is 'entrusted by the federal government to carry out its public authority accreditation tasks'. www.dakks.de/en/content/profile (accessed 15 November 2018).

[88] Directive 2003/4/EC, Articles 4(2)(a) and (4)(2)(d).

[89] Aarhus Convention, Article 4(4)(c).

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Another important reason for refusing access to environmental information is the *by law* protected confidentiality of commercial and industrial information guarding legitimate economic interests.[90] Particularly in the case of monitoring and controlling greenhouse gas emissions, one may wonder to what extent commercial and industrial information should be legitimately protected by law. In any event, the EU ETS Directive does not contain a clear provision that obliges Member States to regulate in their national implementing legislation the confidentiality of commercial and industrial information on industries that is gathered by the verifier.[91] In Section 12.3.2.2 we have already discussed the provision on "professional secrecy" in Article 15a EU ETS Directive, and the uncertainty of how to interpret this provision.

Regarding the EU ETS's specific provision that emission reports held by the competent authority must be made available on request according to Article 17 of the EU ETS Directive, industries may still claim that one of the grounds of refusal, as mentioned in Directive 2003/4/EC, applies. This attempt at preventing disclosure may not be successful in view of the fact that disclosure is obligatory in cases of 'emissions into the environment'.[92] But other pieces of information, such as misstatements addressed by the verifier, or any other information exchanged between the operator and the verifier, may be requested by the public; however, the operator may claim the need to protect sensitive business information.[93] In such a case, this argument is valid only *if* such confidentiality is provided for under the national legislation, and if the information does not concern 'emissions into the environment'. Furthermore, there is no guarantee that the public is interested in accessing information that, in the opinion of the verifier, should not be disclosed to protect its legitimate economic interest or its ability to receive a fair trial in case the verifier fears criminal prosecution (for instance, related to fraud or collusion).

Furthermore, the Aarhus Convention provides that access to information may be refused if disclosure would violate intellectual property rights[94] or infringe the confidentiality of personal data.[95] Additionally, disclosure may be refused if this would have an adverse effect on the interests of a third party from which the information originated, unless that third party has given its consent to the release of the information. All in all, although EU law clearly includes the general right for the public to obtain access to environmental information, the application of this right may face many barriers. The specific circumstances under which information related to the compliance stage, including particularly the verification activity, may

[90] Aarhus Convention, Article 4(4)(d) (same wording is used in Article 4(2)(d) of Directive 2003/4/EC).
[91] As far as we could observe, the implementing regulations also do not have such provisions.
[92] Directive 2003/4/EC, Article 4(2).
[93] Verification Regulation, Article 10(1).
[94] Aarhus Convention, Article 4(4)(e).
[95] Aarhus Convention, Article 4(4)(f).

be held confidential, are not very clear, and trial procedures may be needed to test the enforceability of this right.

12.3.5 *Interim Conclusion: Problems in Effectuating the Right of Access to Environmental Information*

The discussion in Sections 12.3.2, 12.3.3 and 12.3.4 has shown the complexities of effectuating the right to access environmental information as held by verifiers according to the current legislative provisions. While the EU legislator has introduced the function of the verifier for controlling emission reports, it did not provide a clear legislative framework with regard to the transparency of the verification process. First of all, it has not been made clear in the regulatory provisions whether the verifier can be qualified as a public authority from which access to environmental information can be requested. Secondly, the restriction of the scope of Directive 2003/4/EC in the EU ETS Directive is particularly remarkable: verification reports and other verification information are not covered. Next to this, the applicability of the active dissemination duty of decisions and reports related to verification is unclear in view of the term 'professional secrecy'. Moreover, the extent to which Member States can lawfully provide in their implementing law for either transparency or confidentiality of information used in the verification process is unclear.

Some uncertainty, however, continues to exist with respect to the grounds for refusal. How must these grounds be interpreted and applied, and may access to information related to the verification process be limited as a consequence? Currently, there are no clear answers to these questions; however, this may change by means of future case law development.[96]

In our opinion, fine-tuned legislative provisions would be needed to clarify how and to what extent the right to access environmental information held by verifiers can be used.[97] When developing such provisions, consideration must also be given to legitimate grounds for refusing the requested information, such as the arguably needed confidentiality of information in case of enforcement proceedings. Furthermore, it would be naïve to assume that there will ever be legal provisions that provide 100 per cent certainty on when access to environmental information must be provided. Hence, the public may still be confronted with refusals and it is then up to them to start legal proceedings.[98] This brings us to the point of how to enforce the

[96] Krämer (2011), at 136.

[97] The support for broadening access to environmental information is yet to be determined: Schomerus and Bünger (2011), at 80 have reported that because of a fear of activism, there is resentment in Germany directed at the requirement to provide broad access to information.

[98] In this sense, further research should investigate the extent to which Member States give full implementation to the current provisions, and, in light of this, how the regulatory provisions for access to environmental information held by the verifier can be improved.

right of access to environmental information. If an ENGO has submitted a request to a verifier, and if the verifier indeed qualifies as a public authority, the applicant should be able to take the verifier to court.[99] Further research should show how Member States, in their implementing law, have regulated this opportunity, and whether these procedures are 'expeditious and either free of charge or inexpensive'.[100] If ENGOs face difficulties with accessing courts, or if the courts lay down unsatisfactory decisions, they are also entitled to file a complaint with the Aarhus Convention Compliance Committee.[101] The Committee may give further interpretations on the question of whether, and under which circumstances, the public should be given access to environmental information held by private actors in cases where they conduct a monitoring activity essential to the effectiveness of the EU ETS.[102]

12.4 ACTION BY ENGOS REGARDING INFORMATION DISCLOSURE

In our findings in Section 12.3.5, we have argued that, according to the Aarhus Convention, access to environmental information held by verifiers should in principle be possible, and that the extent to which this right can be exercised, also in view of applicable grounds of refusal, should be further clarified by means of case law and interpretations by the Aarhus Convention Compliance Committee. However, arguing that ENGOs (and other members of the public) should be able to use the right to access verification information does not mean that ENGOs will be especially eager to make use of that right.[103]

Nonetheless, the fact that some specialised greenhouse gas emissions trading ENGOs exist, as has been explained in Section 12.2.2, makes it plausible to expect that they, in their desire to check the proper functioning of the instrument, may want to get insight into the compliance performance of industries. However, as far as we can determine on the basis of available sources, we have not seen much activity yet with regard to the use of this right.[104] Moreover, Fleurke and Verschuuren found, on

[99] Directive 2003/4/EC, Article 6 & Aarhus Convention, Article 9(1).

[100] This criterion is mentioned only in Article 6(1) of Directive 2003/4; the Aarhus Convention contains in Article 9(1) juncto Article 9(3) and (4) different wording, more beneficial to the public.

[101] Economic Commission for Europe, 2004, [18].

[102] Such interpretations by the Compliance Committee will then be discussed by the Members to the Convention, Economic Commission for Europe, 2004, [35].

[103] Chapter 1 has already raised the issue that the involvement of NGOs cannot always be controlled (by public regulators or other actors).

[104] There is no discussion of the use of this right in literature so far, nor has any case law been developed at the EU level. We only have knowledge of one Dutch administrative court procedure in which Greenpeace asked for information included in the emissions report – this request was denied – which has been critically discussed by Thurlings (2017), at 270 f. stating that the administrative court wrongfully omitted submitting a request for a preliminary ruling to the Court of Justice of the EU: Further empirical investigations to case law in EU member

the basis of an interview with the German emissions trading authority, that ENGOs are 'more concerned with the level of emissions than on compliance issues'.[105] It may also be that reluctance to request environmental information stems from practical barriers, such as costs and the lack of sufficient legal expertise and representation to engage in court procedures for enforcing the right to environmental information. Nonetheless, it may also be that some requests for information *have* been filed, and have been positively followed up with disclosure of information.[106] In other words, a more comprehensive picture is needed on the current and future use of the right to access to environmental information in order to get insight into the compliance cycle of the EU ETS. If ENGOs (or civil society at large: individual citizens are also eligible to ask for such information) hardly make use of this right, the result will be less control of the compliance behaviour of emitters and verifiers, which may have a negative impact on the effectiveness of the emissions trading instrument. For the future, strategies of ENGOs may of course change: the car emissions fraud cases have illustrated that also with major industries, with presumably highly qualified (technical) experts, non-compliance may take place.[107] This event may cause ENGOs to concentrate more on checking compliance behaviour.

If ENGOs were to become more active in checking compliance, the resulting question would then be whether the disclosed information will be used in a correct way. As Fisher has noted, even if information is disclosed, it is not certain that the received information will be understood correctly.[108] This may lead to the public being misinformed, and misinformation may also even do reputational damage to the industry being reported on.[109]

The following text provides an example of potential misinformation by using data that are made available under the EU ETS. Since all EU ETS industries have to submit emission reports to the competent administration, and these must consequently be disclosed to the public, it is easy to identify who the biggest emitters

states, and to administrative practice, would be necessary to understand the use of the right of access to environmental information by ENGOs with regard to the EU ETS.

[105] Fleurke and Verschuuren (2016), at 224.

[106] Legal research often focuses on problems that emerge from case law. It would also be important, however, to get insight into how administrative procedures, like requests for information, are being dealt with.

[107] The legal procedures for holding the car producers accountable are pending, so we cannot refer to final conclusions on what exactly happened (Draft Report on the inquiry into emission measurements in the automotive sector (2016/2215 (INI)).

[108] Fisher (2010), at 294. See also Gunningham, Grabosky and Sinclair (1998) about the fact that the public can misunderstand information (at 65). For an example of where an ENGO had to correct the information it provided over the Internet with regard to an EU ETS industry, see https://sandbag.org.uk/2011/11/17/note-of-correction-to-thyssenkrupp-figures-in-sandbags-klima goldesel/ (accessed on 28 November 2017).

[109] In the example given in the previous footnote, the ENGO has apologized for any reputational damage it may have caused to the specific industry on which it was reporting, also available at: https://sandbag.org.uk/2011/11/17/note-of-correction-to-thyssenkrupp-figures-in-sandbags-klima goldesel (accessed 28 November 2017).

are.[110] In other words, through knowledge of the emission reports of all individual EU ETS installations, it is easy to determine the industries that have emitted the largest quantities of greenhouse gases. Consequently, they could be portrayed as industries acting in a bad manner, since they evidently emit the most. However, within an emissions trading system, it is logical that there are differences in emission levels among industries. This follows from the rationale that polluters are able to decide whether to use emission allowances instead of reducing emissions by taking organisational, managerial or technological reduction measures. Depending on the price of the allowances and the abatement costs, there will be, on the one hand, industries that reduce emissions and, on the other hand, industries that use allowances – and hence emit more. Particularly if many different categories of industries are included in an emissions regime, as is the case with the EU ETS, with different abatement options, the existence of high-emitting and low-emitting industries is even more logical: it fits with the deliberate choice of the legislator to use emissions trading in order to achieve lower overall costs of reducing pollution than would be obtainable through a command-and-control approach. Hence, if high-emitting industries under an emissions trading regime were to be negatively portrayed by ENGOs simply because of the fact that these are the biggest emitters, this would be a misrepresentation of the rationale of the instrument, and would amount to a rejection of this regulatory approach.[111] In this respect, the EU Commission could be keen on how information about the functioning of the instrument is used by ENGOs. If, for instance, the biggest EU ETS industries were to be identified and negatively portrayed in press releases, the Commission could step in by explaining the nature of the instrument, which accepts that, under the market-mechanism, relatively big as well as small emitters exist for reasons of efficiency.

In sum, while the argument can be made that it would be valuable if ENGOs made use of the rights established by the Aarhus Convention with the aim of checking industry compliance, as they would thereby contribute to the effectiveness of regulatory instruments such as the EU ETS, it is then also necessary to examine how ENGOs subsequently use this information.[112] In addition, the responses of the government also need to be studied; if information requested by ENGOs were to show problems with the credibility of the process of monitoring, reporting and verifying emissions, appropriate governmental control and enforcement action would be needed. If this does not occur, the effectiveness of the emissions trading instrument is threatened.

[110] For the required disclosure, see Article 15 of the EU ETS directive. However, some confidentiality provisions may apply, although the extent to which this is possible is not yet crystallised, and further case law is needed.

[111] Furthermore, analysis of case law can provide further insight into what means exist for industries to take legal action against – in their view – misuse of information or – also in their view – unjust shaming or blaming.

[112] The normative choice that access to information is a valuable, fundamental right has been made in the Aarhus Convention as such, and hence, by the parties adhering to it.

12.5 CONCLUSION

The aim of this chapter has been to discuss the mix of governmental and private action for regulating the reduction of greenhouse gas emissions in an effective way. As such, the emissions trading instrument in itself has an important design feature that, in principle, ensures effectiveness: no more greenhouse gases can be emitted than those which are allowed pursuant to the EU-wide cap. Consequently, no more allowances will be distributed to emitters than is possible under this cap. However, the crux for reaching real effectiveness in practice is whether compliance takes place with the rule that all emissions that are caused by emitters have to be covered by allowances. In this respect, we have explained that the EU has made a regulatory choice to rely on verifiers for controlling the emission reports from the emitters. In this sense, a twofold market-based approach is established: first of all, the market in tradable allowances, and, secondly, the markets in which verifiers offer their services to the emitters. To check the trustworthiness of this regime, we have discussed the potential role of the procedural right of access to environmental information. The general assumption that access to environmental information contributes to the proper execution of regulatory instruments has yet to be tested. In this vein, the way in which disclosed information is used by ENGOs is also a point to consider, since there are indications that disclosed information is not always sufficiently understood and/or properly used. However, before delving into studies aiming to examine the extent to which access to information may help to ensure the effective functioning of regulatory instruments, including the EU ETS, the circumstances under which this right can be successfully enforced before the court need to be clarified. Sections 12.3 and 12.4 have discussed the legal complexities that the public, and in this vein particularly ENGOs, face when trying to get insights into the verification of emission reports that must be delivered by the EU ETS emitters. Our conclusion is that, in view of the Aarhus Convention, the duty to provide access to environmental information also applies to verifiers, since they should be classified as public authorities. Nonetheless, the extent to which access to environmental information can be successfully employed is surrounded with legal uncertainty. Several grounds exist for justifying the rejection of a request for environmental information. This is, for instance, the case if the request concerns confidential business information, although this reason is by no means absolute. According EU law, 'professional secrecy' may also be used to justify the non-disclosure of environmental information, but the requirements for how this criterion is to be applied, as well as the question of whether it is compatible with the provisions of Aarhus Convention, are still uncertain. Another point that has yet to be clarified is the extent to which information that may be relevant in administrative or criminal enforcement procedures should be kept secret from the public.

In conclusion, while we see some prospect that ENGOs may contribute to achieving an effective application of the emissions trading instrument,

particularly by exerting control on the correct functioning of verifiers, the opportunities and limits of the right of access to information have yet to be further examined. Hence, it cannot yet be determined whether the mix of instruments as discussed in this chapter can guarantee an effective reduction of greenhouse gas emissions. Legal actions from the public requesting access to information related to the compliance process of the EU ETS would stimulate further crystallisation of this matter.

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