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Access to Information related to the Monitoring of EU Environmental Law: The Case of the EU Emissions Trading System

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For Johann Müller, the grandfather I never really met

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Mathias Nikolaus Müller

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LIST OF ABBREVIATIONS

AC	Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998
ACCC	Aarhus Convention Compliance Committee
AG	Advocate General
CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
EU	European Union
EU ETS	European Union Emission Trading System
NGO	Non-governmental organisation
TEU	Treaty on the European Union 1992
TFEU	Treaty on the Functioning of the European Union 2007

CHAPTER I – INTRODUCTION

1. General Introduction

The European Union (EU) has a long-standing history of regulating environmental issues, even before the Treaties conferred express competences to the EU[1] in this area.[2] In 1972, the European Council, for the first time, emphasised the importance of a common environmental policy.[3] However, EU secondary legislation on the environment could only be adopted based on the residual competence (now enshrined in Article 352 TFEU). In 1986, the Single European Act introduced a Treaty title on the environment,[4] giving the EU an express competence to adopt secondary legislation with the aim of preserving and protecting the environment and human health, promoting the prudent and rational use of natural resources as well as bolstering measures to deal with global environmental problems.[5] Given the nature of environmental issues, secondary legislation in this area usually takes the form of directives.[6] Directives are binding on Member States with regard to the result that must be obtained but leave it to Member States to choose how to achieve that aim.[7] Moreover, 'Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.'[8] Thus, Member States must adopt national legislation that implements and transposes the provisions of directives into their national legal systems.[9] Besides adopting legislation, Member States must also ensure that the legislation implementing EU law is adhered to in practice.[10] Traditionally, enforcement of EU

[1] Formerly the European Community (EC)
[2] Robert Schütze, *An Introduction to European Law* (Oxford University Press 2020) 171.
[3] Bulletin of the European Communities, October 1972, No 10. Luxemburg: Office for official publications of the European Communities, "Statement from the Paris Summit", para 8.
[4] 'Single European Act' Article 25 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1987:169:FULL&from=EN> accessed 22 November 2021.
[5] Treaty of the Functioning of the European Union Article 191 (1).
[6] Josephine AW van Zeben, 'The Untapped Potential of Horizontal Private Enforcement within European Environmental Law' (2009) 22 Georgetown International Environmental Law Review 243 <https://heinonline.org/HOL/P?h=hein.journals/gintenlr22&i=245> accessed 22 November 2021 states that 'Environmental law is typically […] an area where many laws are adopted by means of directives because they allow member states with diverging views to reach consensus on a minimum level of protection. Moreover, they allow for the divergence in environmental and economic situations within member states to be taken into account.'.
[7] Treaty of the Functioning of the European Union Article 289.
[8] Treaty of the European Union Article 4 (3).
[9] Martin Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (2nd edn, Routledge 2015) 29.
[10] Treaty of the European Union Article 4 (3).

environmental law has been the task of national public authorities.[11] However, since the 1980s, there has been a tendency to outsource this task partly to private entities.[12] Three examples illustrate this trend: First, the EU has opted to vest the power to control the sustainability of biofuels in private actors.[13] Since biofuels are contested with regard to their sustainability,[14] Member States are obliged to require economic operators[15] to demonstrate that certain sustainability criteria[16] are met.[17] A framework that is effective, clear and transparent is regarded as absolutely necessary in order to ensure compliance.[18] The European Commission can approve voluntary schemes that set standards for the production of biomass products.[19] With a view to safeguarding that these standards actually ensure the sustainability of biofuels, economic operators must 'arrange for an adequate standard of independent auditing'.[20] Thus,

[11] van Zeben (n 6) 242.

[12] Jonas Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' (2011) 4 Erasmus Law Review 73 <https://heinonline.org/HOL/P?h=hein.journals/erasmus4&i=73> accessed 22 November 2021.

In its 2020 climate and energy package, the EU set out that, by the year 2020, 20% of its energy should come from renewable sources. (In the meantime, the EU has adopted a new goal, which is to achieve 32% of renewable energy by 2030). In order to reach this EU-wide target, each Member State agreed on a binding national target that reflected its starting point and abilities. In addition, and independent from national circumstances, each Member State is obliged to achieve a 10% share of renewables in the transport sector. Due to the lack of alternatives, this 10% target created an increased demand for biofuels. Since biofuels are contested with regard to their sustainability, Member States are obliged to require economic operators to demonstrate that certain sustainability criteria are met. A framework that is effective, clear and transparent is regarded as absolutely necessary in order to ensure compliance. Therefore, the Commission can approve voluntary schemes that set standards for the production of biomass products. With a view to safeguarding that these standards actually ensure the sustainability of biofuels, economic operators must 'arrange for an adequate standard of independent auditing'. See also 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.

[14] Jolene Lin, 'Governing Biofuels: A Principal-Agent Analysis of the European Union Biofuels Certification Regime and the Clean Development Mechanism' (2012) 24 Journal of Environmental Law 46–50 <https://doi.org/10.1093/jel/eqr025> accessed 14 December 2021; Seita Romppanen, 'The EU's Biofuels: Certified as Sustainable' (2012) 3 Renewable Energy Law and Policy Review 175 <https://heinonline.org/HOL/P?h=hein.journals/relp2012&i=179> accessed 14 December 2021. Concerns about biofuels relate to environmental as well as social arguments and include concerns regarding the net GHG savings compared with traditional fossil fuels, changes in land use changes, loss of biodiversity and nutrients, greater use of fresh water, increased demand for pesticides, scarcity of agricultural land, and competition between commodities.

[15] Interestingly, 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) does not specify who qualifies as an 'economic operator', thus leaving quite some discretion to the Member States. See Romppanen (n 14) 178.

[16] 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 Article 19 lists the sustainability criteria.

[17] ibid Article 18 (1).

[18] Romppanen (n 14) 177.

[19] 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 Article 18 (4).

[20] ibid Article 18 (3).

Directive 2009/28/EC delegates authority to private parties in two ways. First, the power to certify that biofuels meet the sustainability criteria is delegated to voluntary schemes. Second, the power to verify that the certification scheme is independent and transparent is delegated to independent auditors.[21]

Second, pursuant to Regulation 2015/757, companies are obliged to monitor and report the CO_2 emissions of each of their ships that arrives at or departs from a port within the territory of a Member State.[22] The monitoring is carried out pursuant to a monitoring plan that must be approved by a private third-party verifier.[23] Subsequent to the monitoring of emissions, companies must compile a report in which they lay down how much CO_2 each of their ships has emitted.[24] Again, it is a private third-party verifier that checks whether this report is in line with the requirements of Regulation 2015/757.[25] After the emissions report is approved by the verifier, the companies must submit the emissions report to the European Commission and to the authorities of the Member State.[26] Thus, private parties have a central role in the monitoring, reporting and verification process of emissions from maritime transport. Regulation 2015/757 confers on them the power and responsibility to approve the monitoring plan and to verify the accuracy of emissions reports drafted by operators of vessels.[27]

The final example to be presented in this chapter is the EU Emissions Trading System (EU ETS).[28] The EU ETS is a cap-and-trade system that aims to reduce greenhouse gas emissions.[29] There is an EU-wide cap on certain greenhouse gases that may be emitted by activities that are

[21] For further reading see for example Issachar Rosen-Zvi, 'Climate Change Governance: Mapping the Terrain' (2011) 5 Carbon & Climate Law Review <https://www.jstor.org/stable/24324035> accessed 14 December 2021; Lin (n 14).
[22] 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 2015 Article 4 (1).
[23] ibid Article 13 (1) does not provide for any involvement of the public authority. 'The verifier shall assess the conformity of the monitoring plan with the requirements laid down in Articles 6 and 7.'
[24] ibid Article 11 (1) & (3).
[25] ibid Article 13 (2).
[26] ibid Article 11 (1).
[27] Beatriz Huarte Melgar, 'EU Energy Law in the Maritime Sector' in Rafael Leal-Arcas and Jan Wouters (eds), *Research Handbook on EU Energy Law and Policy* (Edward Elgar Publishing Limited 2017); Natalie L Dobson, 'Provocative Climate Protection: EU "Extraterritorial" Regulation of Maritime Emissions' (2017) 66 International & Comparative Law Quarterly.
[28] There are also examples from other areas such as standardisation where transparency problems arise as well. See in this regard Mariolina Eliantonio and Caroline Cauffman, 'The Legitimacy of Standardisation as a Regulatory Technique in the EU–A Cross-Disciplinary and Multi-Level Analysis: An Introduction' in Mariolina Eliantonio and Caroline Cauffman (eds), *The Legitimacy of Standardisation as a Regulatory Technique* (Edward Elgar Publishing Limited 2020).
[29] For a detailed discussion see for example Simone Borghesi, Massimiliano Montini and Alessandra Barreca, *The European Emission Trading System and Its Followers: Comparative Analysis and Linking Perspectives* (Springer Verlag 2016) 1–26; Stefan E Weishaar, *Research Handbook on Emissions Trading* (Edward Elgar Publishing Limited 2016) The EU ETS is also discussed in further detail in chapter 3.

covered by the EU ETS. Over time, this cap is reduced.[30] The total amount of greenhouse gases that may be emitted is divided into allowances, where each allowance gives the owner the right to emit one tonne of CO_2 or the amount of other gases that have the equivalent effect on climate change[31] and are covered by the EU ETS.[32] Operators may buy and sell allowances,[33] which aims to ensure that emissions are reduced where it is most cost-efficient. Operators for whom it is cheaper to reduce emissions, for instance by changing their production process, can choose that option instead of buying allowances; also they may sell any excess allowances they already possess to other operators for whom it may be cheaper to buy allowances than to reduce their greenhouse gas emissions.[34]

The set of measures intended to ensure compliance with the EU ETS rules is called the compliance cycle. The EU ETS Directive prescribes that operators must monitor their emissions throughout a given year and record in an emissions report how much greenhouse gas they emitted.[35] The operator must contract a private third-party verifier who attests that the annual emissions report is complete and free from material misstatements.[36] At the end of the compliance cycle, operators must surrender a number of allowances that cover their greenhouse gas emission in the past year.[37] However, operators may only do so if the private verifier has attested that the emissions report is free from misstatements.[38] Thus, the operator's obligation to hire a verifier makes the verifier the only actor that has to check in all cases whether

[30] Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ L 140/63) Article 1 (9) amends Article 9 of the original EU ETS Directive and introduces the linear reduction of allowances. Section 5.2. will explain why this study focuses on the consolidated version from 2017.

[31] According to 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) Article 3 (27); Commission Implementing Regulation (EU) 2018/2066 of 19 December 2018 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/4/EC of the European Parliament and of the Council amending Commission Regulation (EU) No 600/2012 (OJ L 334/1) Article 3 (28)'CO2(e) means any greenhouse gas, other than CO2, listed in Annex II to Directive 2003/87/EC with an equivalent global-warming potential as CO2'.

[32] David Langlet and Said Mahmoudi, *EU Environmental Law and Policy* (Oxford University Press 2016) 259.

[33] 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 Article 12 (1).

[34] Borghesi, Montini and Barreca (n 29) 3 ff. The authors explain that the scarcity of allowances creates an incentive for operators to reduce their greenhouse gas emissions. Alternatively, operators buy extra allowances to match their reported greenhouse gas emissions. Alternatively, operators may also choose to save their excess allowances for the future.

[35] 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 Article 14 (3).

[36] ibid Article 15, first paragraph.

[37] ibid Article 12 (3).

[38] ibid Article 15 and Annex V.

individual operators have correctly monitored and reported their emissions. Consequently, the verifiers play a pivotal role in ensuring compliance with the EU ETS Directive. There are no specific requirements established by the EU ETS Directive, obliging the competent national authorities to do this in every case. Nevertheless, it must be borne in mind that the competent national authorities are responsible for ensuring the proper application of EU law and thus the correct application of the compliance cycle. Consequently, the competent national authorities may perform additional controls such as checks of the emissions report.

Operators of EU ETS installations are economic actors and as such are deemed to behave rationally. From an economist's point of view, they decide whether or not to comply with the applicable regulations by weighing the expected benefits and expected costs of complying against the expected benefits and costs of not complying.[39] However, non-compliance is not necessarily always a deliberate choice. Operators may also violate the law without realising, particularly when dealing with complex legislation such as the EU ETS Directive. Moreover, there may be other factors influencing the choice whether or not to comply, such as moral considerations. The benefit of (deliberately) not complying in the case of the EU ETS is that the operator in question saves money, provided that the non-compliance is not detected. By reporting emissions as lower than they actually are, the operator may surrender fewer allowances, which means that the operator can either sell excess allowances or has to buy fewer additional allowances.

The market price of allowances has a positive relationship with the cost of compliance of the operator. This means that the higher the market price for one allowance, the higher the cost of compliance. This in turn means that the higher the price of allowances, the stronger the incentive to report lower emissions than actually occurred. The implications for the EU ETS as a whole are potentially drastic. If a few operators undercount their emissions to cut costs, their demand for allowances will inevitably decrease. Pursuant to the law of supply and demand, a lower demand for allowances naturally leads to a decrease in their price.[40] This will make it cheaper to pollute for all operators. Thereby, the incentive to lower emissions is weakened for all operators, even for those who comply with the rules.[41] The consequence of

[39] John K Stranlund, Carlos A Chavez and Barry C Field, 'Enforcing Emissions Trading Programs' (2002) 30 Policy Studies Journal 351 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1541-0072.2002.tb02151.x> accessed 22 November 2021; Lesley K McAllister, 'THE ENFORCEMENT CHALLENGE OF CAP-AND-TRADE REGULATION' (2010) 40 Environmental Law 1201 <https://www.jstor.org/stable/43267323> accessed 22 November 2021.

[40] McAllister (n 39) 1199.

[41] David M Driesen, 'Is Emissions Trading an Economic Incentive Program: Replacing the Command and Control/Economic Incentive Dichotomy' (1998) 55 Washington and Lee Law Review 333 <https://heinonline.org/HOL/P?h=hein.journals/waslee55&i=299> accessed 22 November 2021.

non-compliance of only a few operators may be that the overall objective of the EU ETS – reducing emissions through a linearly decreasing cap – is not achieved.[42] Obviously, the more widespread non-compliance is, the more detrimental it is in light of effectively addressing climate change.

Verification could contribute to preventing non-compliance and the related possible consequences by ensuring that operators report their emissions correctly.[43] However, it is unclear whether the verification system is achieving its goal. Therefore, the European Environmental Agency recommends that the competent national public authorities check EU ETS verification reports.[44] However, the national public authorities that are responsible for the EU ETS only carry out limited checks of the emissions and verification reports.[45] Moreover, the verifier is paid by those whom it verifies – operators of installations that emit greenhouse gases.[46] This creates a conflict of interest for two reasons. First, verifiers compete with each other to win verification contracts with operators. One can envision that certain verifiers who are more lenient and are willing to turn a blind eye might obtain contracts more easily, at least with those operators for whom, from an ethical perspective, it is acceptable to save costs by undercounting their emissions and thereby breaching the law. In a worst-case scenario, this could lead to a race to the bottom of verifiers' standards, with the result that verification does not have the intended effect of ensuring that emissions reports are free from material misstatements. Second, over time, verifiers and operators become more and more acquainted with each other,[47] which may lead to collusion. Even though, there are no empirical results

[42] McAllister (n 39) 1200.

[43] European Commission, 'The Accreditation and Verification Regulation – Explanatory Guidance' 9 <https://ec.europa.eu/clima/system/files/2018-07/quick_guide_verification_operators_aircraft_op_en.pdf> accessed 22 November 2021.

[44] European Commission, 'Application of the European Union Emissions Trading Directive - Analysis of National Responses under Article 21 of the EU ETS Directive 2016' (2017) 04/2017 30 <https://www.eea.europa.eu//publications/application-of-the-european-union> accessed 22 November 2021; Annalisa Volpato and Ellen Vos, 'The Institutional Architecture of EU Environmental Governance: The Role of EU Agencies', *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Limited 2020) 57.

[45] Annex I shows that in 2017, national authorities reported to have analysed in detail the emissions report of 4054 stationary installations. Given that there were 9817 installations that participated in the EU ETS, this means that 5,763 or 58.7% of emissions reports were not checked in detail. Thus, regarding almost 60% of the emissions reports, national authorities rely on the verifier and other more superficial checks of the emissions report they perform themselves. However, there no guarantee that the numbers reported by the Member States are correct.

[46] Marjan Peeters and Mathias N Müller, 'Private Control of Public Regulation: A Smart Mix?' in Judith van Erp and others (eds), *Smart Mixes for Transboundary Environmental Harm* (Cambridge University Press 2019) 262 f.

[47] 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); Commission Implementing Regulation (EU) 2018/2066 These regulations do not state that there is a limit on how often an operator may contract an individual verifier.

available on this issue yet, it is not unimaginable that operators and verifiers make mistakes or even engage in fraudulent behaviour, which has become apparent in another environmental but related field, which is the regulation of car emissions (the Diesel scandal).[48] Therefore, in addition to governmental and private controls, the public, including citizens, non-governmental organisations and the media, may play a complementary role in this regard assuming a role of watchdog over how monitoring, reporting and verification are carried out.[49]

2. Access to Information

As explained in the previous section, the public may act as a watchdog over how monitoring, reporting and verification of greenhouse gas emissions under the EU ETS are carried out. However, a prerequisite for assuming that role is that the public have access to the necessary information. This is where the right of access to information comes into play. It entails the right of the public to ask for and receive information effectively. Usually, the general public is given this right vis-à-vis the government.[50] This right comes with benefits and challenges, which are briefly discussed in the following sections.

[48] The German Federal Court (Bundesgerichtshof) ruled that it amounts to fraud where a car manufacturer equips diesel engines with a software that makes cars recognise when they are being tested, thereby fraudulently attains the approval of the car approval authority (Kraftfahrt-Bundesamt) and subsequently sells such cars to consumers as being in compliance with the emission limits set by law (VI ZR 252/19, 1). According to Directive 2007/46/EC, Article 11 (1), which was in force at the time of the Diesel scandal: 'compliance with the technical prescriptions [...] shall be demonstrated by means of appropriate tests performed by designated technical services.' In Germany, the TÜV Nord is this designated technical service. In the course of the investigation of the Diesel scandal, it was unclear why the TÜV Nord did not notice the unusual emission levels of the cars that were tested. (see https://www.handelsblatt.com/english/companies/pollution-controls-vws-dieselgate-sparks-testing-debate/23507714.html)

[49] Ludwig Krämer, 'Transnational Access to Environmental Information' (2012) 1 Transnational Environmental Law 103 <https://www.cambridge.org/core/journals/transnational-environmental-law/article/abs/transnational-access-to-environmental-information/0916AC20172F16BC18C49DDF652F18A1> accessed 22 November 2021 observes that 'administrative decisions on the environment might occasionally be wrong or erroneous. The best way to reduce such erroneous or wrong decisions is to lay open the different underlying assumptions, assessments and findings and to let the civil society that is concerned or affected by the environmental decision participate in the decision-making process. This implies that the public concerned has the same amount of information on the environment at its disposal as the deciding administration.'

[50] Dirk Bünger and Thomas Schomerus, 'Private Bodies as Public Authorities under International, European, English and German Environmental Information Laws' (2011) 8 Journal for European Environmental & Planning Law 81 <https://brill.com/view/journals/jeep/8/1/article-p62_5.xml> accessed 22 November 2021.

2.1. Benefits of access to information

The arguments in favour of public access to information can be divided into three blocks – normative, procedural, and substantive. Pursuant to the normative argument, access to information is seen as intrinsically good.[51] Thus, access to information is regarded as a right of its own, and not only as a means to achieve a desired outcome. In addition to being a right of its own,[52] it is argued that access to information is a prerequisite for the realisation of many other human rights,[53] such as the achievement of social and economic justice, and that it supports 'the realization of [the] rights to proper welfare support, clean environment, adequate housing, health care, or education.'[54] Moreover in an environmental context, people who may be exposed to harm have a normative right to know about environmental processes.[55]

From a procedural point of view, there are three main arguments in favour of access to information. The first relates to democracy. It is argued that the right to access information is an essential element of a functioning democracy.[56] Since representative democracies are based on informed consent,[57] it is necessary that those who are being represented have access to information about the practices of those who represent them.[58] Another aspect of the democracy argument is that of empowerment. In a representative democracy, power stems from the people. However, they have transferred their power to representatives. Access to information directly influences this notion of transferred power. By giving the people the right to access information, information is democratised and those who are being represented are empowered, as it enables them to induce political change by exposing undesirable practices, threatening exposure, naming and shaming[59] or elections. In addition, access to information empowers those represented to make their voices heard in the political processes and defend

[51] Arthur PJ Mol, 'The Lost Innocence of Transparency in Environmental Politics', *Transparency in Global Environmental Governance: Critical Perspectives* (MIT Press 2014) 40, 45.
[52] Monika Bauhr and Marcia Grimes, 'Indignation or Resignation: The Implications of Transparency for Societal Accountability' (2014) 27 Governance 292.
[53] Ann Florini, *The Right to Know: Transparency for an Open World* (Columbia University Press 2007) 3.
[54] Richard Calland and Alison Tilley, *The Right to Know, the Right to Live: Access to Information and Socio-Economic Justice* (ODAC 2002) 3.
[55] Aarti Gupta and Michael Mason, 'A Transparency Turn in Global Environmental Governance', *Transparency in Global Environmental Governance: Critical Perspectives* (MIT Press 2014) 19.
[56] Kristin M Lord, *The Perils and Promise of Global Transparency: Why the Information Revolution May Not Lead to Security, Democracy, or Peace* (SUNY Press 2006) 91; Florini (n 53) 3.
[57] In this context, informed consent means that the citizens know what their elected representatives are doing and can approve or disapprove.
[58] Florini (n 53) 3.
[59] Lord (n 56) 91. The shaming of undesired practices is taken up again in the discussion of the EU ETS in chapter 3, section 1.1.

their interests.[60] Overall, access to information also strengthens civil society and increases the impact that it can have on decision-making processes.[61]

The second procedural argument relates to legitimacy. In a state where citizens cannot access information concerning governmental activities, they start to speculate – usually concluding that the government is trying to hide something.[62] With regard to environmental issues, there are often competing interests at stake. One example is the construction of a dam for the production of renewable energy that has substantial, potentially negative, consequences for the adjacent area. In a democracy, public support is essential for the legitimacy of the outcome of decision-making processes, especially with regard to decisions 'that entail significant trade-offs among' competing interests of society.[63] By providing access to information, the public is informed about the deliberation process, which increases the perceived legitimacy of the final decision – regardless of the substantive outcome.[64]

The third procedural argument relates to accountability and is rooted in the principal-agent dilemma.[65] Broadly speaking, 'the relation of Principal and Agent [can be observed] wherever one [entity] authorises another to do acts, or make engagements in [its] name.'[66] It is assumed that both the principal and the agent are rational actors, which means that the principal strives to maximise the benefits derived from delegating tasks to the agent, while the agent seeks to carry out the delegated tasks at a minimum cost.[67] However, the agent may have other interests that collide with those of the principal. One of the main problems in a principal-agent relationship is the information asymmetry between the two actors. The principal does not fully know what the agent is doing which makes it difficult to monitor and hold the agent accountable.[68] To ensure that the agent carries out the delegated tasks in the desired way, the principal must set up an incentive structure.[69] Access to information can help to overcome the

[60] Vivek Ramkumar and Elena Petkova, 'Transparency and Environmental Governance'', *The Right to Know: Transparency for an Open World* (Columbia University Press 2007) 283.
[61] Lord (n 56) 91.
[62] Ramkumar and Petkova (n 60) 283.
[63] ibid A dam project will on the one hand generate sustainable energy, but on the other hand will have significant effects on the environment and the people living in the area.
[64] Gupta and Mason (n 55) 6; Ramkumar and Petkova (n 60) 283.
[65] Jan-Erik Lane, *Public Administration & Public Management: The Principal-Agent Perspective* (Routledge 2006); Charles F Sabel, 'Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability' (2004) 3 De Staat van de Democratie. Democratie voorbij de Staat. WRR Verkenning.
[66] William Paley, *A Treatise on the Law of Principal and Agent: Chiefly with Reference to Mercantile Transactions* (Saunders & Benning 1883) 1; Eric Blackwood Wright, *The Law of Principal and Agent* (Stevens and Sons 1901) 1.
[67] Ondřej Filipec, 'Agent–Principal Dilemma and the EU Chemical Management' (2018) 8 TalTech Journal of European Studies 158 <https://sciendo.com/article/10.1515/bjes-2018-0009> accessed 3 December 2021.
[68] Bauhr and Grimes (n 52) 293.
[69] Terry M Moe, 'The New Economics of Organization' (1984) 28 American Journal of Political Science 756 <https://www.jstor.org/stable/2110997> accessed 3 December 2021.

problems arising from principal-agent relationships,[70] as it reduces 'the problem of information asymmetry by shedding light on the extent to which the agent (i.e., the government) is pursuing goals that are in the interests of principals (i.e., its citizens) effectively and efficiently.'[71] Where citizens can access information on the practices of the government, there is a likelihood that citizens 'will detect malfeasance of [governmental actors] and will exact punishment,[72] thereby deterring the abuse of public power.'[73] However, this requires that citizens have at their disposal means of sanctioning the government to hold it accountable.[74] These can be either elections or other channels such as public pressure, which, if properly used, can coerce the government to act in a certain way.[75] Thus, access to information is a *conditio sine qua non* for holding the government to account.[76]

Lastly, from a substantive perspective, it is argued that access to information leads to better policies. Having access to information enables the public to provide feedback to decision-makers on how the policies they have set up are working in practice.[77] Based on this feedback, decision-makers are able to improve their policies so that they deliver substantively better results.[78]

2.2. Disadvantages and challenges of access to information

Despite the benefits of the right to access information, this right is not without challenges and disadvantages. These negative points can be divided into two categories – possible negative side-effects of access to information and valid interests that may be harmed by disclosing information. Each of these categories are briefly discussed below.

[70] Florini (n 53) 6.
[71] Bauhr and Grimes (n 52) 310.
[72] The word punishment does not refer to the legal concept. Here, it refers to any action that the public may take with a view to inflicting a change in the behaviour of governmental actors.
[73] Bauhr and Grimes (n 52) 292.
[74] ibid 310.
[75] ibid 294.
[76] ibid 309.
[77] Florini (n 53) 2.
[78] Gupta and Mason (n 55) 20.

2.2.1. Negative effects of access to information

The first negative effect of access to information is that instead of empowering the public, increasing its trust in government and improving the perceived legitimacy of the outcome of decision-making processes, access to information may also lead to public resignation in the sense that the public loses faith in government and public authorities. If the public uses the right to access information and uncovers malfeasance, such as clientelism, officials prioritising their own interest over the public interest, or venality, citizens' trust in government may decrease and induce them to retreat from civic and public life.[79] Moreover, where the public's knowledge of the government's behaviour increases, the expectations of government performance may rise and result in disappointment if these expectations are not met.[80] This is not an argument against a right of access to information; it merely means that the existence of a right to access information may have negative side-effects.

The next potential negative effect of access to information is that this right may be abused. Experience from the United States (US) can illustrate this. In some US states, information about the location of sex offenders must be published. Such information can easily be abused by groups of people who 'take the law into their own hands.'[81] Moreover, it has been observed that, at least in the US, a large part of requests for access to information is actually submitted by private companies that collect data and resell it to companies who are interested in 'patterns of regulatory enforcement or […] their competitors.'[82] Only a minority of requests come from journalists or individuals who are interested in government performance.[83] The remainder of the requests are submitted by a diverse set of actors, including individuals conducting genealogical research and people involved in lawsuits trying to circumvent rules of discovery[84].[85] While such requests do not have a direct negative effect, they also do not reflect the normative ends of democratic accountability, legitimacy and involvement of the public in the governmental decision-making process, and it can be debated whether they serve the goals

[79] Bauhr and Grimes (n 52) 296.
[80] Frank Bannister and Regina Conolly, 'The Trouble with Transparency: A Critical Review of Openness in e-Government' (2012) 3 Policy & Internet 21.
[81] ibid 12.
[82] Mark Fenster, *The Transparency Fix: Secrets, Leaks, and Uncontrollable Government Information* (Stanford University Press 2017) 67.
[83] ibid.
[84] Discovery in US procedural law is the process through which the parties to a lawsuit formally exchange evidence and information before a case goes to trial.
[85] Fenster (n 82) 68.

of access to information in any other way.[86] Moreover, it should be borne in mind that answering requests also involves costs and hence the question arises whether there should not be limits to the public's right to access information, in particular where a request does not serve the goals of the right access to information. Unfortunately, there is not much empirical research available on the use of the right to access information in the EU.

The costs caused by requests for information is a traditional argument against access to information.[87] The collection, processing and dissemination of information costs money.[88] Especially the processing can be time consuming for the public authority in charge, since it must review the information to assess whether there is sensitive data included that may have to be redacted.[89] For example, in 2015, the US federal government had 4122 employees who worked exclusively on access to information and it spent almost $500 million on activities related to access to information.[90] Moreover, even though public authorities can ask applicants to pay a fee for disclosing information, in 2012, US federal agencies collected less than 1 percent of the costs incurred as a result of requests for access to information.[91] Thus, the costs of implementing the right to access information in practice 'are not insignificant.'[92] Again, there is little data available on the costs European public authorities incur as a result of answering requests for access to information. In 2006, the British central government incurred costs of £24.4 million for answering requests for information.[93] In 2019, applicants submitted 56.894 requests for information to German federal authorities. The authorities requested a fee for providing the answer to 1.117 of those requests. For 497 requests, the authorities asked for less than €50, for 329 requests they charged between €50 and €100 and for 351 requests they charged more than €100.[94] Thus, it seems that, similar to their US counterparts, German public

[86] ibid.
[87] Bannister and Conolly (n 80) 3.
[88] Amitai Etzioni, 'Is Transparency the Best Disinfectant?' (2010) 18 Journal of Political Philosophy 394 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9760.2010.00366.x> accessed 3 December 2021; Ramkumar and Petkova (n 60) 281.
[89] Fenster (n 82) 66.
[90] ibid 66 f.
[91] ibid 67.
[92] Fenster, Mark 'The Transparency Fix: Secrets, Leaks, and Uncontrollable Government Information' (2017) Stanford: Stanford University Press, p. 67.
[93] Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (4th edn, Cambridge University Press 2010) 151. Bundesministerium des Innern, für Bau und Heimat 'Statistik der IFG-Anträge 2019 (2020) available at https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/moderne-verwaltung/ifg/ifg-statistik-2019.pdf;jsessionid=50CAD73DA300A40496273DBC85494B48.1_cid287?__blob=publicationFile&v=2. Last accessed 3 September 2020.

[94] Bundesministerium des Innern, für Bau und Heimat 'Statistik der IFG-Anträge 2019 (2020) available at https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/moderne-verwaltung/ifg/ifg-

authorities only recover a fraction of the costs incurred as a result of answering requests for information.

Another point of criticism is that the obligation to disclose information may induce a change in behaviour by governmental authorities. This may occur in two ways. First, access to information may affect how public authorities make internal decisions. It is argued that an obligation to disclose information can stifle the internal debate in the sense that officials will not raise controversial points if they know that they are under the scrutiny of the public eye.[95] Questioning the status quo is not easy, even where the discussion is entirely internal. If the discussion is public, participants tend to self-censor.[96] Thus, secrecy may be beneficial in cases where it protects the deliberative process, allowing radical thinking.[97] Second, the obligation to disclose information may lead to obfuscation. The expectation of access to information is that it makes officials behave better. However, if everything that is recorded in writing may be disclosed to the public, the effect may be that fewer things will be written down in the first place.[98] The consequence could be that debates take place only informally or not at all.[99] Neither of these options is desirable from a democratic point of view. Another problem related to obfuscation is that governments may deliberately make policies complex, so that it becomes extremely hard for the average citizen to understand them, thereby falling short of one of the aims of access to information.[100]

This last point is also a criticism of access to information in general. Access to information will achieve its aims only if the public is able to understand and act upon the information they receive.[101] It is argued that it is a major flaw of the right to access information that it is based on the assumption that the public 'can properly process [the information it receives] and that [its] conclusions will lead them to reasonable action.'[102] However, this is not to say that the right to access information does not attain any of its aims, even if it is assumed that the disclosed information is too complicated to be understood by the average citizen, since non-

statistik-2019.pdf;jsessionid=50CAD73DA300A40496273DBC85494B48.1_cid287?__blob=publicationFile&v=2. Last accessed 3 September 2020.

[95] Bannister and Conolly (n 80) 3; Fenster (n 82) 69 f.

[96] Bannister and Conolly (n 80) 19.

[97] Fenster (n 82) 60; Bannister and Conolly (n 80) 19.

[98] Gupta and Mason (n 55) 4.

[99] Bannister and Conolly (n 80) 18.

[100] ibid 17.

[101] Mol (n 51) 46; Bauhr and Grimes (n 52) 292; Ramkumar and Petkova (n 60) 283; Etzioni (n 88) 398.

[102] Etzioni (n 88) 398.

governmental organisations 'and other groups can assist citizens in understanding the information provided.'[103]

2.2.2. Interests limiting access to information

While a right to access information comes with many advantages, 'given the merits of retaining varying degrees of secrecy', it is not desirable to make this right absolute.[104] Thus, rules governing access to information must deal with the dilemma that transparency is a prerequisite for democracy but that there are, at the same time, policies the success of which depends on secrecy and other legitimate interests served by keeping certain information secret.[105]

The literature distinguishes between three core interests that may be harmed by disclosure of information and that are deemed to be worth protecting – privacy of individuals, business secrets and national security. First, limitless access to information 'would infringe on the privacy interests of individuals.'[106] Disclosure of information violates privacy rights if the individual in question does not provide her or his consent. Thus, access to information should be limited to the extent that information contains personal data for the disclosure of which no consent has been given.[107] Similarly, it is argued that access to sensitive business information should be denied. In the same vein, access to information protected by intellectual property rights should also be restricted.[108] Lastly, it is argued that access to information should be circumscribed where the information in question relates to the most important governmental operations that would be impeded by disclosure of information. This is the case for national

[103] Ramkumar and Petkova (n 60) 281.
[104] Gupta and Mason (n 55) 15.
[105] Fenster (n 82) 560; Bannister and Conolly (n 80) 3 state that 'there are circumstances when [a] lack of transparency may be necessary or even correct, and where opacity is not only publicly accepted, but publicly desired.'
[106] Fenster (n 82) 59; Bannister and Conolly (n 80) 3; Michael Schudson, *The Rise of the Right to Know: Politics and the Culture of Transparency, 1945–1975* (Belknap Press: An Imprint of Harvard University Press 2015) 4.
[107] Fenster (n 82) 68.
[108] See for example Informationsfreiheitsgesetz vom 5. September 2005 (BGBl. S. 2722), das zuletzt durch Artikel 44 der Verordnung vom 19. Juni 2020 (BGBl. S. 1328) geändert worden ist (This is the original title of the German Freedom of Information Act), section 6; Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] O.J. L 145/43, Article 4 (2)

defence where the state has a clear reason for secrecy, i.e. protection of nationals from enemies.[109]

In addition to those three interests, there are other grounds that may give rise to a request for information being refused. Partly, these grounds aim to remedy the negative effects of access to information discussed in section 2.2.1. Examples include provisions that a request may be refused where the disclosure of the information in question would impede a public authority's ability to 'think' freely. For example, a request for information that relates to ongoing internal decision-making processes may be refused.[110] Moreover, many access to information regimes include a provision that allows a request for information to be refused where the disclosure of information would influence the course of justice or impede the ability of a person to receive a fair trial.[111] Access to information regimes have to balance conflicting interests and it is upon public authorities that receive requests to strike a balance between them.[112] However, as will also become clear in chapters 4 and 5 of this study, this is not an easy task, as it is not always clear where the line separating disclosure and secrecy should be drawn in practice.[113]

3. Outsourcing governmental powers and implications for access to information

As mentioned in section 1, there are several examples of legislative instruments in the field of climate change regarding which the EU legislator has chosen to transfer powers that are traditionally of a governmental nature to private actors. There is an array of reasons why a legislator may choose to outsource a part of governmental functions to a private actor. The main aim 'is to improve the operation of government by enhancing its efficiency or

[109] Fenster (n 82) 59; Andrea Prat, 'The More Closely We Are Watched, the Better We Behave?', *Transparency: The Key to Better Governance?* (British Academy Scholarship 2012) 94.
[110] See for example Informationsfreiheitsgesetz vom 5. September 2005 (BGBl. S. 2722), das zuletzt durch Artikel 44 der Verordnung vom 19. Juni 2020 (BGBl. S. 1328) geändert worden ist (German Freedom of Information Act), section 4; The Freedom of Information Act, 5 U.S.C. § 552 As Amended By Public Law No. 110-175, 121 Stat. 2524, (b) (5); UK Freedom of Information Act 2000, section 35.
[111] See for example Informationsfreiheitsgesetz vom 5. September 2005 (BGBl. S. 2722), das zuletzt durch Artikel 44 der Verordnung vom 19. Juni 2020 (BGBl. S. 1328) geändert worden ist (German Freedom of Information Act), section 3 (1) (g); The Freedom of Information Act, 5 U.S.C. § 552 As Amended By Public Law No. 110-175, 121 Stat. 2524, (b) (7); UK Freedom of Information Act 2000, section 32. This ground of refusal will be discussed in further detail in chapter 2, section 7.3.2. and chapter 4, section 4.5.
[112] Fenster (n 82) 71.
[113] Florini (n 53) 3.

effectiveness.'[114] It has been argued that efficiency and effectiveness may be enhanced by delegating governmental functions to private parties, provided that there is a strong supervisory framework.[115] In this context, effectiveness means the extent to which set aims are attained and efficiency refers to how resource-efficiently they are achieved.[116] Delegating governmental power can enhance efficiency and effectiveness in two ways – either the government's workload is reduced or certain tasks regarding which the government lacks expertise are outsourced to experts.[117] The legislator may wish to reduce the government's workload, since the 'sheer volume and technical complexity of the work exceed what government, with its limited staff and resources, can manage alone.'[118] Moreover, outsourcing governmental powers to private actors may contribute to preserving the limited capacities of government, both in terms of financial means as well as human resources.[119] It could, for instance, be cheaper for governments to outsource parts of their powers to private actors than to build up the capacity to fulfil the task itself.[120] This is particularly relevant in a context such as the EU ETS, where the polluter (operator) must pay for the service that the private actor (verifier) performs. Moreover, the advantage of outsourcing governmental power is that experts who work in a certain industry know that industry much better than government officials generally do. Thus, it would also be easier for private delegates to discover and prove fraud.[121]

However, the outsourcing of public tasks to private actors has not been without criticism. Regarding the argument that outsourcing governmental powers to private parties is beneficial if the government lacks the necessary expertise, it has been argued that where certain tasks are outsourced to private actors, 'governmental actors will simply fail to develop those specialized' skills that are necessary to carry out the function in question themselves.[122] Thus, once a certain function has been outsourced to a private actor it may be cumbersome to revert this process and to reassign the function to a governmental actor since the government has failed to develop

[114] Catherine M Donnelly, *Delegation of Governmental Power to Private Parties* (Oxford University Press 2007) 77.
[115] Trevor L Brown, Matthew Potoski and David M Van Slyke, 'Managing Public Service Contracts: Aligning Values, Institutions, and Markets' (2006) 66 Public Administration Review 323.
[116] Karen Yeung, 'Privatizing Competition Regulation' (1998) 18 Oxford Journal of Legal Studies 589 <https://doi.org/10.1093/ojls/18.4.581> accessed 3 December 2021.
[117] Lester Salamon, 'The New Governance and the Tools of Public Action: An Introduction' (2011) 28 Fordham Urban Law Journal 1634 <https://ir.lawnet.fordham.edu/ulj/vol28/iss5/4>.
[118] Donnelly (n 114) 77.
[119] Louis L Jaffe, 'Law Making by Private Groups' (1937) 51 Harvard Law Review 180.
[120] David Lawrence, 'Private Exercise of Governmental Power' (1986) 61 Indiana Law Journal 657.
[121] Pamela H Bucy, 'Moral Messengers: Delegating Prosecutional Power' (2006) 59 SMU Law Review 329–330.
[122] Donnelly (n 114) 79.

the necessary expertise and the initial investments necessary to reintegrate the function into the public domain would be high.[123]

Another criticism of outsourcing governmental powers to private actors is that the problems common to a principal-agent relationship arise.[124] In the context of outsourcing government functions to private parties, this means that the government must monitor the performance of the private actor.[125] Yet, setting up such a monitoring system requires resources and it must be evaluated whether the government actually conserves resources by outsourcing parts of its functions to private actors and monitoring those actors or whether it would not be more resource-efficient to carry out the function itself.[126]

Outsourcing governmental tasks may also pose challenges to democracy by decreasing transparency.[127] The activities of governments and other public bodies, such as ministries and agencies, are usually open to the public through mechanisms such as administrative procedures, due process requirements, opportunities for hearings, access to information, and judicial review. According to Donnelly, such controls normally do not exist vis-à-vis private actors to which the government has outsourced parts of its functions.[128] However, it is not excluded that other outsourcing schemes do not include transparency requirements.[129] Thus, the outsourcing of governmental powers to private parties 'can render it very difficult to know what the government is up to.'[130]

4. The research problem and the research question

The EU ETS is one of the major EU regulatory measures to reduce greenhouse gas emissions and relies, to a considerable extent, on private parties for ensuring compliance.[131] As explained in section 1, 'the absence of cheating is crucial if the system is supposed to work

[123] Peter Vincent-Jones, *The New Public Contracting: Regulation, Responsiveness, Relationality* (Oxford University Press 2006) 79.
[124] Explained above in section 2.2.
[125] Ronald Cass, 'Privatization: Politics, Law and Theory' (1988) 71 Marquette Law Review 468 <https://scholarship.law.marquette.edu/mulr/vol71/iss3/3>.
[126] Donnelly (n 114) 82.
[127] ibid.
[128] ibid 87.
[129] The international standard ISO 14065 for instances includes information requirements (ISO 14065, third edition, para 10.
[130] Donnelly (n 114) 96.
[131] See chapter 2, section 1 for a detailed discussion of the EU ETS compliance cycle.

and not [to] break down.'[132] The public could play a supplementary role by acting as a watchdog checking how the monitoring, reporting and verification of greenhouse gases are carried out.[133] Thereby, the public may contribute to compliance and the proper enforcement of applicable laws and regulations. Ultimately, the threat of public pressure that would arise in case non-compliance were made public may already prevent actors from violating the applicable rules.[134] However, to assume this role of watchdog, transparency of the compliance cycle is particularly important. This depends on the extent to which the public is able to access the relevant information in order to understand how the compliance cycle is applied in practice with a view to drawing conclusions regarding the compliance of individual operators and verifiers.

In EU law, access to information is enshrined, *inter alia*, in the Treaties[135] and the Charter of Fundamental Rights of the EU.[136] Moreover, on 25 June 1998, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted in Aarhus, Denmark under the auspices of the United Nations Economic Commission for Europe.[137] The EU and all its Member States have ratified the Aarhus Convention.[138] As the name indicates, the Aarhus Convention establishes procedural environmental rights, one of which is access to environmental information. Parties to the Convention must ensure that public authorities make environmental information available to the public upon request.[139] The Environmental Information Directive[140] implements into EU law the right to access environmental information as well as the right of access to justice in the event of a violation of the right to access environmental information.[141]

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[132] Urs Steiner Brandt and Gert Tinggaard Svendsen, 'A Blind Eye to Industry-Level Corruption? The Risk of Favouring Domestig Industries in the EU ETS' (2014) 25 Energy & Environment 265.
[133] Marjan Peeters, 'About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental NGOs' (2018) 24 European Public Law 449 f.
[134] Bauhr and Grimes (n 52) 292.
[135] See for instance Article 11 TEU and Article 15 TFEU.
[136] Articles 11 and 42.
[137] The text of the Convention is available at https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf. In the following 'Aarhus Convention' or the 'Convention'.
[138] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en
[139] Aarhus Convention, Article 4 (1).
[140] Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC [2003] O.J. L 41/26.
[141] Ralph Hallo, 'Access to Environmental Information: The Reciprocal Influences of EU Law and the Aarhus Convention' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) explains that the predecessor of Directive 2003/4/EC, Directive 90/313/EEC is said to have served as a blueprint for the first pillar of the Aarhus Convention. Besides Directive 2003/4/EC which regulates access to environmental information at Member State level, there is also Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information,

There is a vast array of literature discussing the right to access environmental information as enshrined in the Aarhus Convention and the Environmental Information Directive.[142] Since the Environmental Information Directive regulates public access to environmental information vis-à-vis national authorities, its implementation into national legislation has also received quite some attention. While Jendroška[143] provides an overview of the state of implementation of the three pillars of the Aarhus Convention at national level and identifies key challenges that remain, DeGroff[144] and Bugdahn[145] compare the implementation of the right to access environmental information in several Member States. Moreover, there have been numerous analyses of the legislation implementing the first pillar of the Aarhus Convention and the Environmental Information Directive in individual Member States.[146]

Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] O.J. L 264/13 which is concerned with public access to environmental information vis-à-vis EU institutions and bodies.

[142] ibid examines the impact that the predecessor of Directive 2003/4/EC, which was adopted in 1990, on the development of the first pillar of the Aarhus Convention as well as the impact that the Aarhus Convention had on the right to access environmental information as enshrined in Directive 2003/4/EC; Peter Oliver, 'Access to Information and to Justice in EU Environmental Law: The Aarhus Convention' (2013) 36 Fordham International Law Journal discusses the implementation of the Aarhus Convention within the scope of EU law; Attila Tanzi and Cesare Pitea, 'The Interplay between EU Law and International Law Procedures in Controlling Compliance with the Aarhus Convention by EU Member States' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) delve into the obligations for Member States stemming from the Aarhus Convention. Moreover, they discuss the possibility of provisions of the Aarhus Convention of having direct effect as well as remedies for individuals under the Aarhus Convention; Jonas Ebbesson, 'Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) elaborates on the discussion of access to justice concerning requests for environmental information.

[143] Jerzy Jendrośka, 'Citizen's Rights in European Environmental Law: Stock-Taking of Key Challenges and Current Developments in Relation to Public Access to Information, Participation and Access to Justice' (2012) 9 Journal for European Environmental & Planning Law, the main challenge that Jendroška mentions is that there are two separate access to information regimes: a general regime and a special regime for environmental information.

[144] Eric A DeGroff, 'Access to Information: International Perspective', *Encyclopaedia of Environmental Law* (Edward Elgar Publishing Limited 2016).

[145] Sonja Bugdahn, 'Of Europeanization and Domestication: The Implementation of the Environmental Information Directive in Ireland, Great Britain and Germany' (2005) 12 Journal of European Public Policy.

[146] See for example for the implementation in Germany: Andreas Geiger, 'Das Umweltinformationsrecht Der EU Und Seine Umsetzung in Deutschland' [2010] Anwaltsblatt; Anette Guckelberger, 'Geschichte Des Umweltinformationsrecht Und Allgemeine Anspruchsvoraussetzungen' [2018] Natur und Recht; Bilun Müller, 'The Aarhus Convention: The Legal Cultural Picture: Country Report for Germany' in Roberto Caranta, Anna Gerbrandy and Bilun Müller (eds), *The Making of a New European Legal Culture: The Aarhus Convention: at the Crossroad of Comparative Law and EU Law* (Europa Law Publishing 2018); Roman Götze and Gernot-Rüdiger Engel, *Umweltinformationsgesetz - Kommentar* (Erich Schmidt Verlag GmbH & Co KG 2017); Moritz Karg, 'Umweltinformationsgesetz' in Hubertus Gersdorf and Boris Paal (eds), *Beck'scher Online-Kommentar Informations- und Medienrecht* (Verlag CH Beck oHG 2017); Olaf Reidt and Gernot Schiller, 'UIG' in Martin Beckmann and others (eds), *Landmann/Rohmer Umweltrecht Band 3* (Verlag CH Beck oHG 2020); Literature on the implementation of Directive 2003/4/EC in the United Kingdom includes: P Coppel, 'Environmental Information: The New Regime'; David Altaras, 'The Environmental Information Regulations 2004 – An Update' [2010] Journal of Planning Literature; Carol Day, 'United Kingdom' in Roberto Caranta, Anna Gerbrandy and Bilun Müller (eds), *The Making of a New European Legal Culture: The Aarhus Convention at the Crossroad*

One of the central issues of the right to access environmental information is the question of what bodies are under the obligation to disclose environmental information upon request or, in other words, who the public can ask for environmental information. In addition to governmental authorities, both the Aarhus Convention and the Environmental Information Directive extend the obligation to disclose environmental information upon request to private parties under certain conditions.[147] The concept of 'public authorities' is one of the most central definitions of the right to access environmental information and has received some attention in the literature. Ebbesson[148] and Zuluaga Madrid[149] both examine the definition of public authorities in the Aarhus Convention with a view to determining to what extent private entities are under the obligation to disclose environmental information. In addition, Zuluaga Madrid also briefly examines the definition in EU law and identifies the central elements of the concept of 'public authorities'[150] that will also be discussed in more detail in this study.[151] Schomerus and Bünger add to this with their comparison of the concept of public authorities as set out in EU, English and German legislation.[152] In 2011, they concluded that, based on an analysis of the applicable legislation alone, it is hardly possible to provide a comprehensive assessment of

of Comparative Law and European Law (Europa Law Publishing 2018); Paul Gibbons, 'The EIRs Part III: The Exceptional Regulations' (2017) 13 Freedom of Information Journal; Alan Stead, *Information Rights in Practice: The Non-Legal Professional's Guide* (1st edition, Facet Publishing 2008); Roy W Davis, 'The Environmental Information Regulations 2004: Limiting Exceptions, Widening Definitions and Increasing Access to Information?' (2006) 8 Environmental Law Review; For the implementation of the Aarhus Convention and Directive 2003/4/EC in other Member States see Guilia Parola, 'The Aarhus Convention - The Legal Cultural Picture: Country Report for France' in Roberto Caranta, Anna Gerbrandy and Bilun Müller (eds), *The Making of a New European Legal Culture: The Aarhus Convention at the Crossroad of Comparative Law and European Law* (Europa Law Publishing 2018); Áine Ryall, 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' in Roberto Caranta, Anna Gerbrandy and Bilun Müller (eds), *The Making of a New European Legal Culture: The Aarhus Convention at the Crossroad of Comparative Law and European Law* (Europa Law Publishing 2018); Allessandro Comino, 'The Application of the Aarhus Convention in Italy' in Roberto Caranta, Anna Gerbrandy and Bilun Müller (eds), *The Making of a New European Legal Culture: The Aarhus Convention at the Crossroad of Comparative Law and European Law* (Europa Law Publishing 2018); Bogdana Neamtu and Dacian C Dragos, 'Mimicking Environmental Transparency – The Implementation of the Aarhus Convention in Romania' in Roberto Caranta, Anna Gerbrandy and Bilun Müller (eds), *The Making of a New European Legal Culture: The Aarhus Convention at the Crossroad of Comparative Law and European Law* (Europa Law Publishing 2018); Jorge Agudo Gonzáles, 'The Implementation and Influence of the Aarhus Convention in Spain' in Roberto Caranta, Anna Gerbrandy and Bilun Müller (eds), *The Making of a New European Legal Culture: The Aarhus Convention at the Crossroad of Comparative Law and European Law* (Europa Law Publishing 2018); Barbara Beijen, 'The Aarhus Convention in the Netherlands' in Roberto Caranta, Anna Gerbrandy and Bilun Müller (eds), *The Making of a New European Legal Culture: The Aarhus Convention at the Crossroad of Comparative Law and European Law* (Europa Law Publishing 2018).

[147] See chapter 2, section 2.2 for a detailed discussion.

[148] Ebbesson (n 12).

[149] Juliana Zuluaga Madrid, 'Access to Environmental Information Held by the Private Sector under International, European and Comparative Law' (2020) <https://lirias.kuleuven.be/retrieve/584936> accessed 3 December 2021.

[150] (1) The entity has special powers that go beyond those that regular private parties have, (2) The entity carries out public tasks that relate to the environment and is under the control of a public authority.

[151] See chapter 4, section 3 and chapter 5 section 5; Zuluaga Madrid (n 149).

[152] Bünger and Schomerus (n 50) 81.

what private bodies are under an obligation to provide environmental information pursuant to either German or British national law. With regard to the obligation of private parties to disclose environmental information, Elfeld extensively analyses the applicable German legislation, also in light of the Aarhus Convention and the Environmental Information Directive. He finds, similarly to Schomerus and Bünger, that it is not possible to develop an abstract definition of public authorities with a clear delineation according to clear criteria.[153] Both Etemire[154] and Whittaker[155] examine the difficult issue under what circumstances a formally private company may constitute a public authority pursuant to British legislation at the hand of the influential Smartsource case,[156] which arose in 2010. In 2014, the CJEU shed some light on the issue with its ruling in Case C-279/12 (referred to in this thesis as *Fish Legal*).[157] Nevertheless, it seems that the conclusion to which the literature has come – that it is not possible to develop an abstract definition of public authorities according to clear criteria – still holds up.

Importantly, the right to access environmental information is not absolute. The Aarhus Convention and the Environmental Information Directive set out grounds based on which public authorities may refuse a request for environmental information. These grounds of refusal cover interests that are deemed to be worth protecting such as private data, sensitive business information and the deliberations of public authorities. Thus, when receiving a request for environmental information, public authorities must strike a balance between the importance of public access to environmental information on the one hand – also in view of preventing harm to the environment and/or human health – against the confidentiality of sensitive information, such as business information, on the other.[158] However, it has been said that Member States tend to transpose or try to transpose EU legislation in a way that is in line with their local habits exploiting ambiguities in the EU provisions.[159] Even though the public has a general right to

[153] Fabian Elfeld, *Pflichten Privater zur Herausgabe von Umweltinformationen aus der Umsetzung der RL 2003/04 EG* (Kovac, Dr Verlag 2014) 243.
[154] Uzuazo Etemire, 'Public Access to Environmental Information Held by Private Companies' (2012) 14 Environmental Law Review <https://doi.org/10.1350/enlr.2012.14.1.142> accessed 3 December 2021.
[155] Sean Whittaker, 'Access to Environmental Information and the Problem of Defining Public Authorities' (2013) 15 Environmental Law Review.
[156] *Smartsource Drainage & Water Reports Limited v The Information Commissioner and A Group of 19 Water Companies* [2010] Upper Tribunal (Administrative Appeals Chamber) No. GI/2458/2010. The issue in this case was whether a privatised water company is a public authority for the purposes of the Environmental Information Regulations. The Upper Tribunal found that this is not the case.
[157] *Case C-279/12 Fish Legal, Emily Sherly v Information Commissioner and others* [2013].
[158] Oliver (n 142) 1437.
[159] Philipp Butt, 'The Application of the EEC Regulations on Drivers' Hours and Tachographs' in Heinrich Siedentopf and Jacques Ziller (eds), *Making European Policies Work: The Implementation of Community Legislation in the Member States. Volume 1: Comparative Syntheses* (Sage Publishing Ltd 1988) 99; see also Esther Versluis, 'Explaining Variations in Implementation of EU Directives' (Social Science Research Network

access to environmental information, in practice, governmental authorities may fail to provide information on the basis of sometimes-illegitimate justifications and practices such as charging extraordinarily high prices or simply not answering requests.[160] It is uncertain, however, how serious this problem is. Moreover, the law itself may not be clear on whether disclosure of environmental information is obligatory.[161] The existing literature has analysed the grounds of refusal and the jurisprudence of the provisions in question with a view to providing some more certainty concerning these issues. Tilling, for example, examines the public access to commercially sensitive information and finds that the boundaries between openness and transparency on the one hand and protection of commercially sensitive information on the other are still in the process of being defined.[162] The same holds true for other grounds of refusal.[163] Consequently, there is still 'a lack of certainty about where the lines [are] drawn.'[164][165]

With a view to the uncertainty that still remains with regard to the definition of public authorities, as set out in the Aarhus Convention and the Environmental Information Directive, as well as regarding the balancing of competing interests, this study aims to answer the following question: *to what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS, that is held by governmental*

2004) SSRN Scholarly Paper ID 626066 7–9 <https://papers.ssrn.com/abstract=626066> accessed 3 December 2021 who argues that national veto blocks and facilitating institutions have a strong influence on the way and the speed with which EU Directives are implementation and enforced in practice; Müller (n 146) 108–109 states that "prior to the implementation of [Directive 90/313/EEC,] German administration was ruled by the principle of secrecy, the so called Arkantradition, i.e. to keep everything that the state did secret". Moreover, she found that German civil servants and industry alike met the introduction of the right to access to environmental information with resistance. She argues that this resistance can be explained by the underlying German principle of protecting the secrecy of the administration's files. The result of this difficulty with implementing the right to access environmental information in practice was the emergence of numerous court cases.

[160] Ludwig Krämer, *EU Environmental Law* (Sweet & Maxwell 2012) 136 states: 'the most frequent [attempts not to grant access to information] concern the charging of prohibitively high prices, wide interpretations of the exceptions […] or the simple omission to give an answer to an application.' However, he does not provide any data or refer to any source to back up this claim. Müller (n 146) 109 found that when the right to access environmental information was first introduced many bodies were denying requests based on the argument that they were not a public authority and hence not under an obligation to disclose information.

[161] Examples of this are the following provisions: CFREU, Articles 7 & 8; Aarhus Convention, Article 4 (4) (d) & Directive 2003/4/EC, Article 4 (2) (d).

[162] Simon Tilling, 'Access to Commercially Sensitive Environmental Information' (2013) 14 ERA Forum.

[163] Ludwig Krämer, 'Emissions into the Environment and Disclosure of Information Comments on ECJ C-442/14 and C-673/13P' [2017] elni Review 25; Bernhard W Wegener, 'Kein „Mund Auf – Augen Zu" – Der Freie Zugang Zu Informationen Über Emissionen in Die Umwelt' [2017] ZUR 146; Mathias Hellriegel, 'Akteneinsicht Statt Amtsgeheimnis – Anspruch Auf Umweltinforma- Tionen Gegen Am Gesetzgebungsverfahren Beteiligte Behörden' [2012] Europäische Zeitschrift für Wirtschaftsrecht 456; Götze and Engel (n 146); Karg (n 146); Reidt and Schiller (n 146); Susanna Much, 'Der Zugang Zu Umweltinformationen Nach Dem Urteil Des EuGH in Der Rechtssache EUGH Aktenzeichen C-204/09' [2012] ZUR.

[164] Riddell, Peter, 'Impact of Transparency on Accountability' in in Bowles, N., Hamilton, J. & Levy, D., (eds.) *Transparency in Politics and the Media*, (2014) London: I.B. Tauris & Co. Ltd, p. 27.

[165] Peter Riddell, 'Impact of Transparency on Accountability' in Nigel Bowles, James T Hamilton and David AL Levy (eds), *Transparency in Politics and the Media: Accountability and Open Government* (1st edition, IB Tauris & Co Ltd 2013) 27.

authorities and/or private verifiers, be provided to the public upon request and to what extent do governmental authorities and private verifiers provide such information in practice?

5. Methodology

In order to answer the main research question, it is necessary to apply a threefold methodology, doctrinal, comparative and empirical. The first part of the research question – to what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS, that is held by governmental authorities and/or private verifiers, be provided to the public upon request? – will be answered by the doctrinal and comparative analyses. It would not be possible to answer this first part of the research question solely with a traditional doctrinal analysis, since the Environmental Information Directive, the legislation that sets out the right to access environmental information, must be implemented at national level. Therefore, the comparative analysis complements the doctrinal approach. The second part of the research question – to what extent do governmental authorities and private verifiers provide such information in practice? – can only be answered by an empirical analysis. Each part will be guided by sub-research questions, the answers to which will be imperative steps towards answering the main research question. This research is current up to 30 June 2021. After that date, no new sources were considered.

5.1. The doctrinal part

The doctrinal part will examine both the legislation applicable to the right to access environmental information and the legislation governing the EU ETS. First, the Aarhus Convention and the Environmental Information Directive will be analysed from a doctrinal perspective. The aim of the doctrinal analysis is to determine the framework of the right to access environmental information at the level of international law and of EU law and to examine the goals, purpose and aims of the right to access environmental information according to the Aarhus Convention and the Environmental Information Directive. This contributes to answering the main research question by determining how applicable international law and EU law regulate the right to access environmental information. This analysis focuses on the key elements of the right to access environmental information, i.e., the

definitions of the concepts of 'environmental information', 'public authorities' as well as the grounds of refusal. The right to access environmental information *vis-à-vis* national public authorities is enshrined in the Environmental Information Directive. Since directives only provide the aim to be achieved but leave it up to the Member States to choose how to achieve that aim, part of the doctrinal analysis will be also to ascertain the boundaries within which Member States must implement the Aarhus Convention and the Environmental Information Directive into their national legislation with a view to determining those issues where Member States enjoy discretion. In light of this, the doctrinal part will answer the following sub-research questions:

- What is the definition of environmental information?
- What is the definition of public authorities?
- What are the limits of the right to access environmental information?
- What procedural requirements must be observed?
- What issues are left to the discretion of Member States?

The questions will be answered by a legal analysis of the Aarhus Convention and the Environmental Information Directive. In addition, the relevant case law of the CJEU as well as the Findings of the Aarhus Convention Compliance Committee, guidance documents, such as the Aarhus Convention Implementation Guide and academic literature will be analysed.

The EU and all its Member States are parties to the Aarhus Convention. Such international agreements are called complete mixed agreements.[166] Provisions of mixed agreements are part of EU law as far as they cover issues on which the EU has adopted legislation.[167] The Member States are not only bound by the Environmental Information Directive but also by the Aarhus Convention. If national law does not correctly implement the provisions of the Aarhus Convention or the Environmental Information Directive, the following question arises:

- Are the relevant provisions of the Aarhus Convention and the Environmental Information Directive capable of having direct effect?

Besides the Aarhus Convention and the Environmental Information Directive, in the doctrinal part, the EU ETS Directive will be analysed. A prerequisite to answering the main research question is to determine what information is actually produced throughout the EU

[166] Andrzej Gadkowski, 'Direct effect of the European Union's mixed agreements and the rights of individuals' (2016) 107 Przegląd Prawa i Administracji 120 & 122.
[167] ibid 126; See also 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 Recital (5) states: 'Provisions of Community Law must be consistent with that Convention with a view to its conclusions by the European Community'.

ETS compliance cycle. Hence, there are two questions that will be addressed in this part of the study in order to answer the main research question:

- What does the EU ETS compliance cycle entail?
- What information would a member of the public need to access in order to assume the role of watchdog by checking monitoring, reporting and verification of EU ETS emissions?

In order to answer these questions, the EU ETS Directive, as well as the Monitoring and Reporting Regulation[168] and the Accreditation and Verification Regulation[169] will be analysed with a view to providing a detailed explanation of the EU ETS compliance cycle. In the course of this explanation, it will also be examined what information is generated and what information could be helpful to investigate issues of non-compliance. The original EU ETS Directive has been amended eleven times. This study examines the year 2017.[170] Therefore, the consolidated version of the EU ETS Directive that was applicable on 1 January 2017 will be used for the analysis. This version includes the original EU ETS Directive and seven revisions,[171] the amendment following the accession of Croatia to the EU[172] and a correction.[173]

[168] Commission Regulation (EU) No 601/2012 in the subsequent Monitoring and Reporting Regulation.
[169] Commission Regulation (EU) No 600/2012 in the subsequent Accreditation and Verification Regulation.
[170] This is especially relevant for the empirical part of this study which will be explained in more detail below and in chapter 6, section 3.
[171] M1: Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms (OJ L 338/18); M2: Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ L 8/3); M3: Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part Two (OJ L 87/109); M4: Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community; M5: Decision No 1359/2013/EU of the European Parliament and of the Council of 17 December 2013 amending Directive 2003/87/EC clarifying provisions on the timing of auctions of greenhouse gas allowances (OJ L 343/1); M6: Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions (OJ l 129/1); M7: Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC (OJ L 264/1).
[172] A1: Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the European Union (OJ L 112/6).
[173] C1: Corrigendum to Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions (OJ L 129, 30.4.2014) (OJ L 140/177).

After 2017, the EU ETS Directive has been amended three more times.[174] However, since this study examines the year 2017, these amendments will not be included in the analysis. Regardless of this, it must be noted that the three amendments that were adopted since 1 January 2017 have not introduced material changes with regard to the topic analysed in this study. Thus, the results remain relevant in the future.

In 2017, the Monitoring and Reporting Regulation set out the rules according to which operators have to monitor and report their greenhouse gas emissions,[175] while the Accreditation and Verification Regulation laid out the rules applicable to the verification of reported emissions.[176] On 1 January 2019, the Accreditation and Verification Regulation was replaced by a new regulation[177] and on 1 January 2021, the same was the case for the Monitoring and Reporting Regulation.[178] Since this study examines the year 2017, the law that was in place at that time will be analysed. However, in order to make the findings more relevant for the legislation that is in place at the time of publication, whenever there is a reference to an article of the Monitoring and Reporting Regulation or the Accreditation and Verification Regulation, the corresponding article in the legislation that has replaced those two regulations will be mentioned as well.

Besides provisions establishing the EU ETS, the EU ETS Directive also includes provisions on access to certain information related to the EU ETS. Those provisions and their relation to the Environmental Information Directive will be explained and it will be discussed how they relate to the Aarhus Convention and to the Environmental Information Directive.

To conclude the doctrinal part of the research, the insights of the analyses of the legislative framework setting out the right to access environmental information and of the EU ETS are combined and it is examined to what extent the information that has been identified as relevant for checking compliance with the EU ETS should be made available pursuant to the Environmental Information Directive following a request by a member of the public. The three

[174] Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021 (OJ L 350/7); Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC; Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ L 76/3) 410.
[175] Commission Regulation (EU) No 601/2012.
[176] Commission Regulation (EU) No 600/2012.
[177] Commission Implementing Regulation (EU) 2018/2067 of 19 December 2018 on the verification of data and on the accreditation of verifiers pursuant to Directive 2003/87/EC of the European Parliament and of the Council (OJ L 334/94).
[178] Commission Implementing Regulation (EU) 2018/2066.

central concepts – environmental information, public authorities and the grounds of refusal – play a central role and the following three questions will be answered:

- Does the relevant information constitute environmental information?
- Do the entities that hold the relevant information constitute public authorities?
- Can access to the relevant information be refused based on one of the grounds of refusal?

5.2. The comparative part

The second part of the research examines national law implementing the right to access environmental information in two jurisdictions – Germany and the United Kingdom. These two jurisdictions have been chosen for several reasons. In 2017, the year which this study focuses on, both Germany and the United Kingdom were Member States of the European Union and parties to the Aarhus Convention.[179] Thus, the applicable legislation, both at an international and an EU level in those two countries was the same at that time. However, it has been observed that the United Kingdom does a better job at dealing with the legal difficulties that arise when implementing the right to access to environmental information compared to Germany.[180] Moreover, the two states score very differently on the Global Right to Information Rating and it seems that in the United Kingdom there is more of a tradition in favour of access to information than in Germany. The United Kingdom ranks in the upper third scoring 99 out of 150 points[181] while Germany is one of the last countries on the list, with only 54 out of 150 points.[182] When comparing the two jurisdictions to other EU Member States of the EU in 2017, the United Kingdom ranked fifth out of 28 while Germany was next to last.[183] In a comparison of all parties to the Aarhus Convention, the United Kingdom is 12th and Germany ranks 41st

[179] The United Kingdom has left the European Union on 31 January 2020 and a transition period during which the future relations between the EU and the United Kingdom were supposed to be negotiated ended unsuccessfully on 31 December 2020 resulting in a hard Brexit. Hence, Directive 2003/4/EC no longer applies since the United Kingdom left the EU. However, the United Kingdom is still a party to the Aarhus Convention.
[180] Bünger and Schomerus (n 50) 80; see also Müller (n 146).
[181] Global Right to Information Rating, 'United Kingdom'. Last accessed 21 September 2020 from http://www.rti-rating.org/view_country/?country_name=United%20Kingdom, (GRTIR UK).
[182] Global Right to Information Rating, 'Germany'. Last accessed 21 September 2020 from http://www.rti-rating.org/view_country/?country_name=Germany, (GRTIR Germany).
[183] Global Right to Information Rating, Global Right to Information Rating Map, accessed 20 September 2017 from http://www.rti-rating.org.

out of 45.[184] In light of these differences (see also further below), comparing how the two jurisdictions have implemented the right to access environmental information may lead to insightful results, as both have to comply with the Aarhus Convention, and until Brexit, also with the Environmental Information Directive.

Lastly, the knowledge of the official languages of the two countries and the resulting possibility to analyse domestic legislation naturally played a role. However, apart from this practical reason, there are more reasons why these two jurisdictions are relevant to compare.

Tilling found that when it comes to access to environmental information, there is a 'general presumption in favour of disclosure' in the United Kingdom,[185] while Germany seems to have taken a different approach. Before the adoption of the Aarhus Convention, access to environmental information was governed by the predecessor of the Environmental Information Directive. Germany, coming from a tradition of secrecy of public administration (*Arkantradition*),[186] implemented the predecessor directive 'in a conservative and cost-restrictive manner', unlike the United Kingdom.[187] German public authorities, for example, denied requests for environmental information by arguing that the requested information did not fall under the definition of 'environmental information' or that the body to which the request was addressed was not a public authority.[188] In the pre-Aarhus Convention time, citizens in Germany more frequently took 'the administration to court for failure to provide information than […] in Britain.'[189] However, since the entry into force of the Aarhus Convention, British courts have become more experienced in striking a balance between access to information and the confidentiality of sensitive information, which, as explained above, is a crucial element of the application of the right to access environmental information in practice.[190] In 2011, it was observed that Germany has a record of being reluctant to grant access to environmental information and that 'there remains a strong resentment […] [to the] fundamental ideas of the Aarhus Convention.'[191] Illustratively, the German government vetoed the adoption of the predecessor of the Environmental Information Directive in the Council of the European Union for months, arguing that access to environmental information should only

[184] Global Right to Information Rating, Global Right to Information Rating Map, accessed 20 September 2017 from http://www.rti-rating.org. Not all 48 parties to the Aarhus Convention are in the ranking. Two parties were not evaluated, i.e. Belarus, Cyprus, Iceland, Luxembourg, Monaco and Turkmenistan.
[185] Tilling (n 162) 496.
[186] Müller (n 146) 108.
[187] Bugdahn (n 145) 190.
[188] Müller (n 146) 109.
[189] Tilling (n 162) 503 ff.
[190] ibid 493.
[191] Bünger and Schomerus (n 50) 80.

be granted if the applicant could prove a legitimate interest in obtaining the information.[192] This view is shared by some German legal scholars arguing that four important pillars of German administrative law are challenged by the right of access to environmental information: '(1) secrecy of administrative files, (2) the system of remedies based on subjective rights, (3) the power of control by the state, and (4) data protection rights.'[193]

The legal system of the United Kingdom is somewhat unique, as it consists of four individual countries – England, Wales, Scotland and Northern Ireland. The four countries differ with regard to their status in the legal system. Scotland and Northern Ireland enjoy a considerable degree of autonomy, while Wales does so to a lesser extent.[194] As a result of the autonomy that Northern Ireland and Scotland enjoy, there is different legislation regulating access to environmental information and the EU ETS. Therefore, this study focuses on the law applicable in England alone, hence the terms 'English law' and 'England' will be used.

In the comparative part, it will be analysed to what extent and how Germany and England have made use of their discretion to implement the Environmental Information Directive. Moreover, the national particularities regarding the implementation of the right to access environmental information will be analysed. Here, the focus is on the three main elements of the right to access environmental information – environmental information, public authorities and the grounds of refusal. The sub-research questions addressed by the comparative part are:

- How have German law and English law implemented the Environmental Information Directive?
- What are the particularities of the German and the English legislation in the implementation of the Environmental Information Directive?
- Do these choices affect the conclusion whether the relevant information should be made available?

The analysis in the comparative part is mainly based on the national legislation implementing the Environmental Information Directive, the German Environmental Information Act and the British Environmental Information Regulations. In addition, case law, guidance documents as well as legal commentaries will be used.

[192] Krämer, 'Transnational Access to Environmental Information' (n 49) 136; Bünger and Schomerus (n 50) 80.
[193] Martin Ibler, 'Zertören Die Neuen Informationszugangsrechte Die Dogmatik Des Deutschen Verwaltungsrechts?' in Carl-Eugen Eberle, Martin Ibler and Dieter Lorenz (eds), *Der Wandel des Staates vor den Herausforderungen der Gegenwart: Festschrift für Winfried Brohm zum 70. Geburtstag* (Verlag CH Beck oHG 2002) 405 & 408.
[194] Alisdair Gillespie and Siobhan Weare, *The English Legal System* (Oxford University Press 2019) 1 ff.

As will be explained in further detail in chapter 5,[195] Brexit was formally completed on 31 January 2021. Since then, the United Kingdom is no longer bound by EU legislation and its interpretation by the CJEU. Nevertheless, the United Kingdom remains a party to the Aarhus Convention and, therefore, continues to be bound by it. Moreover, it has not amended its legislation on access to environmental information since it has left the EU. Thus, the legislation that was adopted to implement the Environmental Information Directive is still in effect.

5.3. The empirical part

By answering the sub-research questions formulated for the doctrinal part and the comparative part, it will be possible to answer the first part of the main research question – to what extent and in which circumstances must environmental information regarding compliance and non-compliance with the EU ETS, that is held by governmental authorities and/or private verifiers involved, be provided to members of the public upon request? The second part of the main research question – to what extent do public authorities and/or private verifiers provide such information in practice – will be answered in the third part of the study, the empirical part. The aim of the empirical part is to test the findings of the doctrinal and comparative parts to gain a better understanding of how the right to access environmental information is applied in practice. This has been done by sending requests for the relevant information to the competent authorities of Germany and England as well as to the verifiers in question. Their conduct, their replies and their argumentation when refusing information will be compared with the conclusions of the preceding parts.[196] The main questions that guide the empirical chapter are:

- How do public authorities apply legislation concerning the right to access environmental information legislation in practice?
- Is there a discrepancy between the theoretical analysis of the preceding parts and the way in which the competent authorities have applied the law in practice?
- What are the reasons for those discrepancies?
- Do the public authorities adhere to the procedural requirements?
- Are there any practical issues that hinder access to environmental information?

[195] See chapter 5, section 3.2.
[196] A more detailed description of the methods and approach of the empirical part are provided in chapter 6.

6. Contributions and limitations

EU environmental law is an area of EU law that is infamous for being plagued by non-compliance.[197] As explained above,[198] the public, including individuals and ENGOs, may assume the role of watchdog in ensuring compliance with and enforcement of EU environmental law. This study contributes to the existing knowledge in this field, by examining the issue of ensuring compliance with EU environmental law based on a specific piece of EU environmental legislation, the EU ETS. Despite this study's focus on the EU ETS, the results and conclusions will be, to a certain extent, transferable to other pieces of EU environmental law. In that regard, the discussion of the central elements of the right to access environmental information, such as the definition of the concepts of environmental information, public authorities and the grounds of refusal, will be of value for the general discussion of the right to access environmental information, not specifically applied only to the EU ETS. With regard to the definition of the concept of 'public authorities', the discussion of the concrete case of the EU ETS will improve the understanding of this concept. This is particularly relevant, since the literature has concluded that, at least as case law currently stands, it is not possible to develop an abstract definition of public authorities according to clear criteria.[199]

Moreover, the results will contribute to the understanding of the degree to which the right to access environmental information is useful for investigating issues related to compliance with and enforcement of EU environmental law. Especially, the empirical testing of the results of the theoretical part of the analysis will yield insights into the practical application of the right to access environmental information. This will generally deepen the understanding of how the right to access to environmental information is applied in practice.

Even though this study does contribute to the general discussion on compliance with EU environmental law and access to environmental information, this study does not provide a general solution for all problematic issues related to compliance with EU environmental law. It provides an illustration of the aptness of the right of access to environmental information

[197] Marjan Peeters and Mariolina Eliantonio, 'On Regulatory Power, Compliance, and the Role of the Court of Justice in EU Environmental Law' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Limited 2020) 483. This is also indicated by the fact that, in 2019, 175 out of 797 or 22% of all new infringement cases related to this policy areas. See Commission Staff Working Document – Part I: General Statistical Overview Accompanying the Document 'Monitoring the Application of European Union Law 2019 Annual Report' (available at https://ec.europa.eu/info/sites/info/files/file_import/report-2019-commission-staff-working-document-monitoring-application-eu-law-general-statistical-overview-part1_en.pdf) last retrieved 24 September 2020, p. 20.

[198] See section 1 of this chapter.

[199] Bünger and Schomerus (n 50); Elfeld (n 153).

being used as a tool to investigate compliance with EU environmental law with the example of the EU ETS. The study will not discuss the question whether access to information is desirable from a normative point of view. The starting point of the study is that the right to access environmental information vis-à-vis public authorities is enshrined in EU law in the Aarhus Convention and the Environmental Information Directive. Furthermore, this study will not evaluate whether and to what extent the supposed benefits of access to information are achieved by the access to environmental information regime provided by the Aarhus Convention, the Environmental Information Directive and national law. It will also not systematically analyse whether the disadvantages and challenges that are associated with the right to access information as described in section 2.2 materialise in the regime of the Aarhus Convention. However, in the concluding chapter, some reflections on these issues will be provided to the extent that the analysis conducted in this study and the insights gained through the empirical study will allow to do so.

Moreover, within the EU ETS, the research focuses on access to environmental information concerning compliance of stationary installations but does not consider emissions from aviation. The laws applicable to stationary installations and aviation differ with regard to the compliance cycle. This focus was chosen since stationary installations make up a much larger part of the total activities covered by the EU ETS.[200] Therefore, the EU ETS-specific conclusions of this study will be relevant for the greatest part of the installations covered by the EU ETS.

7. Outline

This study is structured in three parts: a doctrinal, a comparative and an empirical part. The first three substantive chapters (chapters 2, 3 and 4) will discuss EU law and the Aarhus Convention. Chapter 2 discusses the right to access environmental information as enshrined in the Aarhus Convention and the Environmental Information Directive. After a brief overview of the historical development of the right to access to environmental information in Europe, chapter 2 discusses the structure of the regime of the Aarhus Convention and the right to access environmental information with a focus on the definitions of the most important concepts – the grounds of refusal, procedural requirements and the possibilities of review. Moreover, it will

[200] Report on the functioning of the European carbon market, COM(2019) 557 final/2, 7 ff. states that that in 2018, there were 10,744 stationary installations and 655 aircraft operators covered by the EU ETS.

be examined whether the Aarhus Convention and the Environmental Information Directive are capable of producing direct effect.

Chapter 3 is dedicated to the EU ETS. This chapter first examines, in detail, the EU ETS compliance cycle with a view to determining what information is produced throughout the cycle and to identifying the information that is relevant for trying to check compliance with the EU ETS rules. Subsequently, the role of the Commission and the provisions on access to environmental information that can be found in the EU ETS legislation are discussed.

In chapter 4, the insights from the two preceding chapters are combined and it will be analysed whether pursuant to EU law, i.e., the Environmental Information Directive, the entities holding the relevant information (the competent national authorities and verifiers) would be under an obligation to disclose it upon a request by a member of the public. Moreover, it will be examined to what extent, and regarding which issues the Member States enjoy discretion in the implementation of the right to access environmental information.

In the next part, the comparative part, which comprises chapter 5, the ways Germany and England have implemented the first pillar of the Aarhus Convention and the Environmental Information Directive into their national legislation are analysed. After examining the specific choices that these two jurisdictions have made when implementing the right to access environmental information, it will be analysed whether and how these specific choices affect the conclusion of chapter 4, i.e. whether the relevant information must be disclosed upon request.

Chapter 6 contains the empirical part of this study. First, the methodology for the empirical study is explained in detail. Then, the results and insights gained from the requests to the competent authorities and verifiers in the two jurisdictions are discussed and compared. Moreover, the extent to which the experiences gained in the empirical analysis reflect the conclusions of chapters 4 and 5 are analysed.

Chapter 7, the final chapter, presents an overview of the findings of this study, thereby answering the main research question, and provides some final conclusions and reflections.

CHAPTER II – ACCESS TO ENVIRONMENTAL INFORMATION IN THE AARHUS CONVENTION AND THE ENVIRONMENTAL INFORMATION DIRECTIVE

1. Introduction

In 1990, the European Economic Community adopted Directive 90/313/EEC on the freedom of access to information on the environment (the old Environmental Information Directive).[201] For the first time, there was legislation at Union level regulating public access to environmental information. This directive was founded on the rationale that participation by the public in decision-making contributes to better decisions in questions related to the environment and more environmental protection.[202] Since access to information is a prerequisite for participation by the public, the purpose of the directive was 'to ensure freedom of access to information on the environment held by public authorities and to set out basic terms and conditions on which such information is to be made available.'[203]

According to the old Environmental Information Directive, Member States were obliged to report to the European Commission their experiences with the implementation and application of the old Environmental Information Directive.[204] The reports by the Member States were generally about the specific arrangements Member States had made to comply with the old Environmental Information Directive.[205] Interesting was, for example, that the Member States had laid down very different time limits within which public authorities were obliged to answer requests for environmental information.[206] Moreover, Germany indicated that in some instances the maximum time of two months was not sufficient. Another interesting issue was that Luxembourg reported that there had not been a single court case that had arisen from a request for environmental information. The Netherlands and the United Kingdom noted that the definition of environmental information should not be based on an exhaustive list of

[201] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment 1990.
[202] ibid Preamble.
[203] Commission of the European Communities, 'Report from the Commission to the Council and the European Parliament on the Experience Gained in the Application of Council Directive 90/313/EEC of 7 June 1990, on Freedom of Access to Information on the Environment' (2000) COM(2000) 400 final.
[204] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (n 201) Article 8.
[205] Commission of the European Communities (n 203) Annex B.
[206] Finnish public authorities had to answer within a few days, while in other countries (e.g. Belgium) public authorities could take two months to provide an answer to a request.

elements of the environment but should be made more comprehensive and explicit.[207] Moreover, Austria and the United Kingdom pointed out that the provision on charging was not sufficiently clear.[208] Finally, the United Kingdom brought up three points that will become quite important in the course of this thesis. First, it pointed out that it should only be allowed to apply exceptions where potential harm could be demonstrated and where there is no overriding public interest.[209] Second, it stated that the definition of public authorities covering private entities should be clarified;[210] and finally, it noted that while judicial remedies are a fair means to resolve disputes over access to environmental information, they can be slow and expensive.[211]

Next to these reports by the Member States, the Commission gathered insights on the application of the right to access environmental information from complaints by the public and compiled these into a report.[212] The Commission found that while the public had made wide use of the right to access environmental information,[213] there were several problematic issues. For instance, it was reported that in some Member States, access to environmental information was refused due to a strict interpretation of the term 'environmental information'.[214] Moreover, there were complaints that bodies to which requests for environmental information were addressed refused requests based on the argument that they were not a public authority.[215] Another problem was that public authorities interpreted the exceptions rather extensively so that they would not have to disclose information.[216] Furthermore, it was observed that public authorities did not stick to the time limits within which requests for environmental information had to be answered or did not answer requests at all.[217] Lastly, there were complaints about public authorities refusing requests for environmental information but nonetheless charging applicants.[218]

It had been planned to use these insights to review and revise the old Environmental Information Directive. However, before this could be done, following a ministerial conference

[207] Commission of the European Communities (n 203) 36 & 41.
[208] ibid 24 & 42.
[209] ibid 41.
[210] ibid 42.
[211] ibid.
[212] Commission of the European Communities (n 203).
[213] ibid 9.
[214] ibid 4.
[215] Council Directive 90/313/EEC only obliged public authorities with responsibilities related to the environment to disclose environmental information upon request. Bodies argued that their responsibilities did not relate to the environment ibid.
[216] ibid.
[217] ibid 5.
[218] ibid.

on ‘Environment for Europe’ in Bulgaria in 1995, negotiations for a pan-European convention on public participation in environmental decision-making were launched in 1996.[219] These negotiations resulted in the adoption of the Aarhus Convention in 1998 which was signed by the EU and all its, then 15, Member States.

In light of the adoption of the Aarhus Convention and the problematic issues with the old Environmental Information Directive mentioned above, the Commission proposed a new Directive that was to replace the old Environmental Information Directive.[220] This proposal not only included improvements that the Aarhus Convention made based on the lessons learned from the implementation and application of the old Environmental Information Directive, but also went beyond and contained several provisions that were not part of the Aarhus Convention. Some of these improvements also made it into the Environmental Information Directive that was adopted based on the Commission’s proposal in 2003.[221]

This first substantive chapter discusses the right to access environmental information as set out in the Aarhus Convention and the Environmental Information Directive and serves as the main building block for the subsequent parts of this thesis and for answering the first part of the main research question, i.e., to what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS that is held by governmental authorities and/or private verifiers be provided to the public upon request? The purpose of this chapter is to analyse the main rules governing the right to access environmental information as set out in the Aarhus Convention and the Environmental Information Directive. This analysis will focus on the following sub-research questions:

- What is the definition of environmental information?
- What is the definition of public authorities?
- What are the limits of the right to access environmental information?
- What procedural requirements must be observed?

By answering these questions, this chapter maps out the right to access environmental information, so that it will be possible, in chapter 4, to assess whether certain information should be disclosed upon request.

Another sub-research question that this chapter will answer is

- What issues are left to the discretion of Member States?

[219] Hallo (n 141) 60.
[220] European Commission, Proposal for a Directive of the European Parliament and of the Council on public access to environmental information 2000 [2000/C 377 E/24]; Commission of the European Communities (n 203) 12.
[221] Hallo (n 141) 57.

Throughout this chapter, it will be analysed with regard to which elements the Aarhus Convention and the Environmental Information Directive leave discretion to the Member States. This is a necessary step towards answering the first part of the main research question. After analysing whether certain information should be disclosed upon request pursuant to the Aarhus Convention and the Environmental Information Directive in chapter 4, chapter 5 will examine with regard to which issues, the national legislation implementing the right to access environmental information differs from the framework set out by the Aarhus Convention and the Environmental Information Directive. Then, it will be possible to determine whether these differences change the conclusions drawn in chapter 4. However, in order to analyse this issue, it is necessary to find out with regard to what issues and to what extent the Aarhus Convention and the Environmental Information Directive give discretion to national legislation.

The EU and all its Member States are parties to the Aarhus Convention, which makes the Aarhus Convention a mixed agreement.[222] Hence, the provisions of the Aarhus Convention have become part of EU law and, consequently, Member States are not only bound by the Aarhus Convention as an instrument of international law but also pursuant to EU law.[223] Moreover, this means that the CJEU has jurisdiction to interpret the provisions of the Aarhus Convention which also 'benefit from the enhanced legal force which is provided by EU doctrines, such as primacy and direct effect'.[224] Thus, the question arises whether the relevant provisions of the Aarhus Convention and the Environmental Information Directive are capable of being directly effective, which will be briefly tackled in this chapter.

This chapter is structured as follows. Sections 2, 3 and 4 are dedicated to briefly explaining the general structure of the Aarhus regime (section 2), the basic rule of access to environmental information (section 3) and defining who enjoys the right to access environmental information (section 4). The following three sections analyse the definitions of three concepts that are at the very core of the right to access environmental information. The definition of 'environmental information' (section 5), the definition of 'public authority' (section 6) and the grounds of refusal (section 7). Following the discussion of these three central concepts, section 8 discusses some of the most important procedural requirements that must be observed by public authorities when handling requests for environmental information. In section 9, the possibility

[222] Roberto Caranta, Anna Gerbrandy and Bilun Müller, 'Introduction' in Roberto Caranta, Anna Gerbrandy and Bilun Mueller (eds), *The Making of a New European Legal Culture: the Aarhus Convention: At the Crossroad of Comparative Law and EU Law* (Europa Law Publishing 2018) 4.
[223] ibid.
[224] ibid.

of provisions of the Aarhus Convention and/or the Environmental Information Directive having direct effect is analysed. Section 10 concludes.

2. The structure of the Aarhus Convention regime

There are several bodies that govern the implementation and administration of the Aarhus Convention as well as disputes arising in its context which shall be briefly explained.[225] The Meeting of the Parties serves as the principal governing body of the Aarhus Convention. All parties to the Convention participate in these meetings. Furthermore, other states and NGOs may observe these meetings. The main role of the meeting is to make sure that the Convention is properly implemented.[226] According to Article 10 of the Aarhus Convention, an ordinary Meeting of the Parties is to take place every two years, however the Parties may decide otherwise. In practice, the ordinary Meeting of the Parties has taken place every three years starting with the first one in 2002.[227] In the meantime, the Working Group of the Parties overlooks the implementation of the decisions of the Meeting of the Parties.[228]

The Aarhus Convention Compliance Committee (ACCC) issues findings 'of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of [the] Convention.'[229] The Committee is composed of environmental law experts from the Contracting Parties, although this is not a formal requirement.[230] Apart from investigating 'compliance issue[s] on its own initiative', parties to the Convention, the secretariat and members of the public may submit an issue to the Compliance Committee.[231] There is a debate in scholarship on the character of the findings of the ACCC. Some argue that

[225] Veit Koester, 'The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)' in Geir Ulfstein (ed), *Making Treaties Work – Human Rights Environment and Arms Control* (Cambridge University Press 2007); M Fitzmaurice, 'The Participation of Civil Society in Environmental Matters: The 1998 Aarhus Convention' (2010) 4 Human Rights & International Legal Discourse (HR&ILD) 56–60 <https://www.jurisquare.be/en/journal/hrild/4-1/the-participation-of-civil-society-in-environmental-matters-the-1998-aarhus-convention/>.
[226] United Nations Economic Commission for Europe, 'Meeting of the Parties' <https://unece.org/meeting-parties-1> accessed 8 April 2021.
[227] United Nations Economic Commission for Europe, 'Introduction' <https://unece.org/environment-policy/public-participation/aarhus-convention/introduction> accessed 8 April 2021.
[228] United Nations Economic Commission for Europe, 'Meeting of the Parties' (n 226).
[229] Aarhus Convention 1998 (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) Article 15.
[230] Oliver (n 142) 1467.
[231] United Nations Economic Commission for Europe, 'Background' <https://unece.org/env/pp/cc/background> accessed 8 April 2021.

while the findings of the ACCC themselves are not formally binding,[232] the subsequent endorsement by the Meeting of the Parties makes them authoritative interpretations of the Aarhus Convention in the sense of Article 31 (3) of the Vienna Convention on the Law of Treaties.[233] Others take the view that 'the endorsement of the rulings by the [Meeting of the Parties], the application of the domestic remedies rules, and the procedure for considering communications are evidence that the Committee offers not just a soft remedy but is already a judicialized institution capable of generating decisions with legal effect.'[234] In any case, the findings of the ACCC have 'considerable influence on the interpretation of the Aarhus Convention.'[235] Moreover, thus far, the Meeting of the Parties has approved every but one of the ACCC's findings.[236] In this respect, the decisions of the ACCC have a transnational character as they not only affect the country concerned in a specific case but impact how the Aarhus Convention is interpreted across all its Parties.[237] The Executive Secretary of the UN Economic Commission for Europe acts as the secretariat for the Aarhus Convention and prepares the meeting of the parties.[238]

In addition to these official bodies, there is the Aarhus Convention Implementation Guide, a book written by scholars and officials of the ACCC and the Aarhus Convention secretariat based on their experience with the Convention, instruments of international law, decisions adopted by the Meeting of the Parties, findings of the Compliance Committee as well as academic works on the topic.[239] Their interpretations set out in the Guide do not necessarily represent the official view of the Parties of the Convention.[240] However, the Meeting of the Parties has demonstrated that it values the Implementation Guide highly. It stated in the Riga Declaration that 'the *Implementation Guide* […] has provided a valuable source of guidance

[232] Oliver (n 142) 1434.
[233] Jendrośka (n 143) 75; Koester (n 225) 201–215; for an alternative view see Elena Fasoli and McGlone Alistair, 'The Non-Compliance Mechanism Under the Aarhus Convention as "Soft" Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65 Netherlands International Law Review 37–41.
[234] Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9 Transnational Environmental Law 227 f.
[235] Krämer, 'Transnational Access to Environmental Information' (n 49) 98.
[236] Jendrośka (n 143) 75; Matthijs van Wolferen and Mariolina Eliantonio, 'Access to Justice in Environmental Matters in the EU: The EU's Difficult Road Towards Non-Compliance with the Aarhus Convention' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Limited 2020); interestingly the only opinion of the ACCC that has not been adopted yet by the Meeting of the Parties is the opinion in which the ACCC found the EU to be in non-compliance with Article 9 (3) of the Aarhus Convention. Since no consensus could be reached, the decision has been postponed to the next Meeting of the Parties. For an account see chapter by van Wolferen & Eliantonio.
[237] Krämer, 'Transnational Access to Environmental Information' (n 49) 98.
[238] Aarhus Convention Article 12.
[239] Jonas Ebbesson and others, 'The Aarhus Convention - An Implementation Guide' 8 f.
[240] ibid 7.

on the text of the Convention.'[241] Moreover, in the Chisinau Declaration, it entrusted the secretariat 'to promote electronic information tools at the regional level […] through an interactive online version of the […] Implementation Guide.'[242] Thus, even though the Meeting of the Parties has not formally elevated the Implementation Guide to an official level, as a source of interpretation, it still puts great confidence in it. In a similar vein, the CJEU has ruled in *Solvay*[243] that 'it is permissible to take the Aarhus Convention Implementation Guide into consideration, but that [the] Guide has no binding force and does not have the normative effect of the provisions of the Aarhus Convention.' In subsequent judgments the CJEU has confirmed this view.[244] Nonetheless, it can be of assistance to policymakers, legislators and public authorities implementing the Aarhus Convention and it can be a helpful tool for members of the public exercising their rights under the Convention as well as academics working on this topic.

The Aarhus Convention itself is characterised by a three-pillar structure,[245] access to environmental information,[246] public participation in environmental decision-making[247] and access to justice in environmental matters.[248] The Environmental Information Directive transposes the right to access environmental information *vis-à-vis* national authorities into EU law. While the Environmental Information Directive in principle closely follows the provisions of the Convention or often even copies them, there are a number of instances in which the EU 'made ample use of the possibility set out in Article 3 (5) of the Convention for Contracting Parties to grant broader access to information than is required by the Convention.'[249] The subsequent section discusses and compares how the right of access to environmental information is set out in the Aarhus Convention and the Environmental Information Directive. It is important to note that due to the fact that the EU and its Member States account for more

[241] 'Riga Declaration' (Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2008) ECE/MP.PP/2008/2/Add.1 para 22.
[242] Chisinau Declaration (ECE/MPPP/2011/CRP4/rev1) para 12.
[243] *Case C-182/10 Marie-Noëlle Solvay and Others v Région wallonne* [2012] para 28.
[244] Case C-260/11 *The Queen, on the application of: David Edwards, Lilian Pallikaropoulos v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs* [2013], published in the electronic Reports of Cases, para 34, Case C-279/12 *Fish Legal, Emily Shirley v Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd, Southern Water Services Ltd,* [2013], published in the electronic Report of Cases, para 38 and Case C-673/13 P *European Commission v Stichting Greenpeace Nederlands & Pesticide Action Network Europe* [2016], published in the electronic Reports of Cases, para. 59.
[245] *Case C-260/11 The Queen, on the application of: David Edwards, Lilian Pallikaropoulos v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs* [2013] para 34; *Fish Legal* (n 157) para 38; *Case C-673/13 P European Commission v Stichting Greenpeace Nederlands & Pesticide Action Network Europe* [2016] para 59.
[246] Aarhus Convention Articles 4 & 5.
[247] ibid Articles 6, 7 & 8.
[248] ibid Article 10.
[249] Oliver (n 142) 1435.

than half (27 of 47) of the Parties to the Aarhus Convention,[250] the fact that the first pillar of the Aarhus Convention is to a considerable extent based on the old Environmental Information Directive[251] and the resulting experience of the CJEU with this issue, make the judgements of the CJEU not only important for the EU and its Member States but also for the ACCC and the Meeting of the Parties as well as national courts outside of the EU that have to rule on access to environmental information issues.[252]

3. The general rule

The general rule of access to environmental information is essentially the same in the Aarhus Convention and Environmental Information Directive. Both provide that public authorities must, in principle, provide environmental information to the public upon request (passive right to access environmental information).[253] Importantly, the applicant does not have to state reasons for her interest in receiving the information.[254] Both the Aarhus Convention and the Environmental Information Directive provide definitions of the central concepts underlying this right – environmental information and public authorities. Moreover, both lay down a set of exceptions based on which a request for environmental information may be refused. In the following sections, the definition of the two fundamental definitions as well as the most important exceptions will be examined. Moreover, the procedural requirements that applicants and public authorities must adhere to as well as the possibilities for reviewing a decision of a public authority will be discussed.

Besides the passive right to access environmental information, the Aarhus Convention and the Environmental Information Directive also set out an active right to environmental information. They both provide that public authorities must make sure that they have available and regularly update environmental information that is relevant to their functions and

[250] United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en, retrieved on 19 September 2017.
[251] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (n 201).
[252] Oliver (n 142) 1426 f.
[253] Aarhus Convention Article 4 (1); 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 Article 3 (1)'Passive' refers to public authorities who are taking a passive role in the sense that they only act once approached by the public.
[254] Aarhus Convention Article 4 (1) (a); 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.

systematically disclose this information to the public.[255] While the information that is actively disclosed by public authorities may be relevant for checking compliance, this thesis focuses on the passive right to access environmental information, since, as will be explained in chapter 3, the information on compliance with the EU ETS that is publicly available does not suffice to make adequately assess the compliance of individual operators.

4. The public

In consonance with their respective aim to provide wide access to environmental information,[256] both the Aarhus Convention and the Environmental Information Directive contain a broad definition of 'the public'. The Aarhus Convention defines 'the public' as 'one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.'[257] It is clear that individuals, companies and other entities that have legal personality are included in this definition. It has been suggested that the Aarhus Convention also includes groupings that do not have legal personality themselves.[258] However, the Convention itself leaves it up to the Parties to determine in their national legislation whether such groupings without legal personality are included. Thus, it may be that the national legislation of a Party requires legal personality for making a request. However, in case of a group without legal personality, this is not a significant barrier to access to environmental information in practical terms, since any member of the group, as a natural person, may submit a request for environmental information. Nevertheless, any requirements set out by national legislation must be in line with the overall aim of the Aarhus Convention – providing wide access to the rights enshrined in the Aarhus Convention, including access to

[255] Aarhus Convention Article 5; 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 Article 7; For a discussion of the active dissemination of environmental information see for example: Michael Mason, 'Information Disclosure and Environmental Rights: The Aarhus Convention' (2010) 10 Global Environmental Politics 14 ff; Svitlana Kravchenko, 'Procedural Rights as a Crucial Tool to Combat Climate Change' (2010) 38 Georgia Journal of International and Comparative Law 622 ff.

[256] Aarhus Convention preamble and Article 1; 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 recital (9) and Article 1 (b).

[257] Aarhus Convention Article 2 (4).

[258] See for example Marianne Dellinger, 'Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law' (2012) 23 Colorado Journal of International Environmental Law and Policy 325 <https://heinonline.org/HOL/P?h=hein.journals/colenvlp23&i=327> accessed 6 December 2021 confirming this view which is also expressed in the Aarhus Convention Implementation Guide, 2014, p. 55.

environmental information. Moreover, Article 3 (9) of the Convention provides that the rights enshrined in the Aarhus Convention apply irrespective of 'citizenship, nationality or domicile [or] in the case of a legal person its registered seat or an effective centre of its activities.' Thus, a person who does not possess the nationality of a signatory state and who does not reside in a signatory state still enjoys the rights to access environmental information held by the public authorities of a Party.

The wording of the definition of 'the public' set out in the Environmental Information Directive is essentially the same as that found in the Convention.[259] As the Convention, the Environmental Information Directive refers to national law. The CJEU's judgment in *Djugården-Lilla* may shed some light on the meaning of the reference to national law.[260] In this case, the CJEU was inter alia asked to interpret the term 'in accordance with the relevant national legal system' referred to in Article 10a of the Environmental Impact Assessment Directive.[261] As the Environmental Information Directive, the Environmental Impact Assessment Directive implements the Aarhus Convention into EU law. It concerns public participation in the assessment of the effects of certain public and private projects on the environment. Article 10a of the Environmental Impact Assessment Directive sets out that 'in accordance with the relevant national legal system, [certain] members of the public concerned […] have access to a review procedure before a court of law.'

In this case, a Swedish ENGO had appealed against the decision to grant development consent to build a tunnel which involved the abstraction of ground water. The appeal was held inadmissible based on the ground that the ENGO did not have at least 2000 members – the condition laid down in Swedish law in accordance with Article 10a of the Environmental Impact Assessment Directive. The ENGO appealed against the decision to the Swedish Supreme Court which decided ask the CJEU whether the requirement to have at least 2000 member was in line with the objective of the Environmental Impact Assessment Directive – to give the public the opportunity to participate in environmental decision-making procedures at an early stage and in an effective manner.[262] The CJEU acknowledged that Article 10a of the Environmental Impact Assessment Directive leaves it to national legislation to set out

[259] 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 Article 2 (6) states the 'public shall mean one or more natural or legal person, and, in accordance with national legislation or practice, their associations, organisations or groups.'
[260] *Case C-263/08 Djugården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* [2009].
[261] Council Directive 85/337/EEC of June 1985 on the assessment of the effects of certain public and private projects on the environment O.J. L 175/40 1985.
[262] ibid Article 6 (4).

requirements that ENGOs must fulfil before they have a right of appeal against such development consents. However, at the same time, the Court made it clear that these national rules must ensure wide access to justice and 'render effective the provisions of the Environmental Impact Assessment Directive on judicial remedies.[263] In that regard, the CJEU explained that while it is possible for national legislation to require ENGOs to have a certain minimum number of members in order to ensure that an ENGO actually exists and is active, this minimum number may not be so high that it restricts access to justice.[264] The Court found that the minimum number of 2000 was too high, since it effectively barred all but two Swedish ENGOs from making use of the right to access to justice.[265]

Applied by analogy to the definition of 'the public' in the Environmental Information Directive, this means that national legislation may lay down conditions which associations, organisations or groups without legal personality must fulfil to have a right to access environmental information. However, such national rules must ensure a wide access to environmental information and render effective the provisions of Environmental Information Directive.

5. Environmental information

5.1. General remarks

Both the Aarhus Convention and the Environmental Information Directive provide a broad definition of environmental information. The Aarhus Convention sets out three categories of environmental information,[266] while the Environmental Information Directive provides six categories of environmental information.[267] The reason why the directive has more categories than the Conventions is partly that it splits one category of the Convention into two separate ones and partly that, as will be discussed below, it goes beyond the Convention and broadens the definition of environmental information. Both the Convention and the Directive provide an indicative list of what falls within each of the categories they set out. However, both the

[263] *Case C-263/08 Djugården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (n 260) para 45.
[264] *ibid para 47.*
[265] *ibid para 52.*
[266] Aarhus Convention Article 2 (3) (a)-(c).
[267] 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 Article 2 (1) (a)-(f).

examples provided by the Convention and the Directive are non-exhaustive.[268] Thus, even items that are not specifically listed may fall within a certain category. When receiving a request for information, public authorities must assess whether the requested information constitutes environmental information. However, they must take into account the intention of the Convention and the Directive – to provide broad access to environmental information.[269]

This section discusses the definition of environmental information as laid down in the Convention and the Environmental Information Directive. Moreover, those issues with regard to which the definition found in the Environmental Information Directive differs from the one in the Aarhus Convention are examined. The discussion follows the three-category structure of the Aarhus Convention.

5.2. Category 1: the state of elements of the environment

The wording of the first category is virtually the same in the Aarhus Convention and The Environmental Information Directive. Both state that environmental information includes information on the elements of the environment.[270] The only difference is that the Directive gives more examples of what is meant by elements of the environment. The Aarhus Convention gives the examples of air, atmosphere, water, soil, land, landscape and natural sites, biological diversity, including genetically modified organisms. The Directive adds that natural sites include wetlands, coastal and marine areas. Since the examples that the Convention and the Directive list are only indicative, other information that is not listed may also constitute information on the elements of the environment. For example, the CJEU concluded that

[268] *Case C-321/96 Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat* [1998] para 19 f.; *Case C-316/01 Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen* [2003] para 24; See also Ebbesson and others (n 239) 50.

[269] 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 Article 1 (b) states that the 'objectives of this Directive are to ensure that […] environmental information is made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information; See also *Findings and recommendations with regard to communication ACCC/C/2011/63 concerning compliance by Austria* [2014] para 54; *Findings and recommendations with regard to communication ACCC/C/2010/53 concerning compliance by the United Kingdom of Great Britain and Northern Ireland* [2013] para 74; Oliver (n 142) 1431.

[270] Aarhus Convention Article 2 (3) (a); 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 Article 2 (1) (a).

information on the presence of residues of plant protection products in or on plants such as lettuce constitutes information on elements of the environment.[271]

5.3. Category 2: factors, activities, measures and economic analyses

The second category set out in the Convention comprises '[f]actors, 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 and cost-benefit and other economic analyses and assumptions used in environmental decision-making.'[272] This category can be broken down into two sub-categories. First, factors and activities or measures and second, economic analyses and assumptions. The fundamental difference between these two elements is that the factors and activities or measures need to affect or be likely to affect the elements of the environment in order to qualify as environmental information, whereas economic analyses and assumptions must be used in environmental decision-making.

Within the first sub-category, the Convention makes a further distinction between factors on the one hand and activities and measures on the other. The examples of factors that are listed in the Aarhus Convention suggest that the term generally includes physical or natural substances. Activities or measures seem to imply some form of human action. It is important to recognise that it is not necessary that these factors and activities or measures are part of the decision-making process regarding the environment. The benchmark in this regard is whether they are likely to have an impact on the environment.[273]

As with the first category, the wording of the Directive is very similar. Nevertheless, there are a few differences that are worth examining. First, the Directive sets out more examples of factors, adding waste, including radioactive waste, emissions,[274] discharges and other releases into the environment. These examples might have been added to make it clear that they specifically fall under the definition of environmental information, or simply to provide a better overall characterisation of this category of environmental information. With regard to the

[271] *Case C-266/09 Sitchting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en bioceden* [2009] para 42.
[272] Aarhus Convention Article 2 (3) (b).
[273] See in this regard Coppel (n 146) 17; Stead (n 146) 87; similarly also suggested by Ebbesson and others (n 239) 53.
[274] As will become clear in section 7 of this chapter as well as in chapter 4, section 2, the concept of emissions into the environment is central to the application of the right to access to environmental information.

phrase ‘emissions, discharges and other releases into the environment’, the CJEU has decided that there is no distinction between the three terms and that it encompasses all types of releases of substances into the environment. Moreover, while the concept includes releases that are foreseeable in the future it does not cover hypothetical releases.[275]

Despite the fact that the Directive adds examples of factors, it must be borne in mind that also other factors that are not specifically mentioned can fall under this definition, since it is not an exhaustive list.[276] The decisive element, pursuant to both the Aarhus Convention and the Directive, is whether the factor in question affects or is likely to affect the elements of the environment. The definition of the phrase ‘likely to affect’ is rather important in this context, since, how broad or narrow it is interpreted determines the scope of this category of environmental information.

Thus far, there has not been a case in which the CJEU interprets the term ‘affecting or likely to affect’ setting out abstract conditions that must be fulfilled so that it is considered likely that a factor affects the environment.[277] However, in her Opinion in the case C-515/11, Advocate General Sharpston gave an example which illustrates the potential meaning of the phrase.[278] In this case, the German Federal Ministry of Economic Affairs and Technology adopted a regulation amending a law on energy-consumption labelling of motor cars. The regulation dealt with the provision of information to consumers regarding the fuel consumption, CO_2 emissions and electricity consumption of new cars. Pursuant to the regulation, prior to the sale of a car, the consumer must be given information on those issues. The underlying assumption was that such information may influence the decision of the consumer whether or not to buy a certain car. Advocate General Sharpston argued that ‘consumer’s decisions determine which cars are on the road generating carbon dioxide emissions and thus ultimately affect the air and the atmosphere.’[279] Therefore, she considered the regulation to affect or be likely to affect the elements of the environment. Unfortunately, this was not the main question submitted in this case and the CJEU did not pick up on this issue in its judgment.

A major difference between the Convention and the Directive can be observed with regard to ‘measures and activities’. According to the Convention, information on measures and

[275] *Case C-442/14 Bayer CropScience SA-NV, Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden* [2016] paras 74-77.
[276] *Case C-321/96 Mecklenburg* (n 268) para 19 f; *Glawischnig* (n 268) para 24.
[277] The phrase ‘affecting or likely to affect’ has also found its way into national legislation implementing the Aarhus Convention and Directive 2003/4/EC and has been interpreted by courts at the national level. The interpretation of the phrase in national legislation is discussed in chapter 5, section 2.
[278] *Case C-515/11 Deutsche Umwelthilfe eV v Bundesrepublik Deutschland* [2013] Opinion of Advocate General Sharpston.
[279] *ibid para 21.*

activities only qualifies as environmental information in so far as these measures and activities affect or are likely to affect the elements of the environment. The wording of the Directive suggests that measures and activities not only constitute environmental information where they affect or are likely to affect the elements of the environment, but also in so far as they affect or are likely to affect factors that affect or are likely to affect elements of the environment.[280] Thus, in this aspect, the definition of environmental information as set out in the Environmental Information Directive is broader than the one found in the Aarhus Convention. In its case law, the CJEU has not touched upon this particular issue. However, it stated that the term 'measures and activities' includes 'any of the activities engaged in by […] public authorities.'[281] Consequently, information on anything that a public authority does is environmental information pursuant to the Environmental Information Directive, as long as it affects or is likely to affect the elements of the environment or the factors that affect or are likely to affect the elements of the environment. However, the question arises whether the term 'measures and activities' only includes activities by public authorities or whether information on measures and activities carried out by other natural or legal persons are also included in the definition of environmental information. Given that the definition of environmental information should be interpreted widely,[282] that the aim of the Environmental Information Directive is to provide broad access to environmental information[283] and that activities by other natural or legal persons can have significant effects on the environment,[284] it seems that an interpretation of the term 'measures and activities' as to exclude activities by natural or legal persons would go against the underlying rational of the Environmental Information Directive. Therefore, it can be argued that the definition of environmental information should be interpreted as to include information on measures and activities of natural or legal persons, to the extent that they are held by public authorities. However, this has not been confirmed by the CJEU.

The second sub-category found in Article 2 (2) (b) of the Aarhus Convention includes economic analyses and assumptions in the definition of environmental information. However, this is only the case in so far as they are used in environmental decision-making. This sub-

[280] 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 Article 2 (1) (c) states that environmental information shall mean any information on 'measures […] and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements.'
[281] *Case C-321/96 Mecklenburg* (n 268) para 20.
[282] *Case C-266/09 Stichting Natuur en Milieu* (n 271) para 59.
[283] 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 recital 9.
[284] For instance, polluting activities of industries can have significant consequences for biodiversity.

category can also be found in the Directive which states in Article 2 (1) (e) that 'cost-benefit and other economic analyses and assumptions *used within the framework of the measures and activities referred to in (c)*' (emphasis added) qualify as environmental information. While the Convention includes in the definition of environmental information economic analyses and assumptions that are used in all environmental decision-making, the Directive specifically restricts this to those measures and activities referred to in its Article 2 (1) (c). On first sight it may seem as if the Directive is slightly narrower in scope than the Convention, since there might be environmental decision-making procedures not covered by Article 2 (1) (c) of the Directive. However, the examples of measures and activities set out in the Directive as well as the fact that the definition of environmental information, including the terms measures and activities, must be interpreted broadly suggest that the phrase 'measures and activities' as set out in Article 2 (1) (c) of the Directive not only encompasses the term 'environmental decision-making' but that it goes beyond this term as to include other instances in which economic analyses and assumptions are used. Thus, the conclusion would be that the definition of environmental information in the Directive is broader that the one in the Convention.[285]

5.4. Category 3: state of human health and safety, conditions of human life, cultural sites and build structures

The last category of environmental information set out in the Aarhus Convention covers information on 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 Article 2 (3) (b). Thus, a link to either elements of the environment or to factors, activities or measures is a prerequisite for information on human health and safety, conditions of human life, cultural sites and built structures to qualify as environmental information. Importantly, the phrase 'through these elements' indicates that it is necessary that the factors, activities or measures affect or are likely to have an effect on elements of the environment. Thus, information only qualifies as environmental information if it has a direct or indirect link to elements of the environment.

[285] So far, this issue has not been discussed in the literature.

Again, the Directive has a very similar wording to the Convention.[286] In *Stichting Natuur en Milieu*, the CJEU confirmed that information on human health only qualifies as environmental information inasmuch it is or may be affected by elements of the environment or through those elements by factors, measures or activities by the elements.[287] In the case before the Court, the question was whether information on the presence of residues of plant protection products in or on plants constitutes environmental information. The Court concluded that 'although such information does not directly involve an assessment of the consequences of those residues for human health, it concerns elements of the environment which may affect human health if excess levels of those residues are present.'[288]

5.5. Reports on the implementation of environmental legislation

Besides the categories of environmental information set out in the Aarhus Convention, the Environmental Information Directive provides for an additional category. Pursuant to Article 2 (1) (d), reports on the implementation of environmental legislation qualify as environmental information as well. Reports on the implementation of environmental legislation could be quite important for the public when trying to identify instances of non-compliance with environmental legislation such as the EU ETS Directive. However, it is unclear what the phrase 'reports on the implementation of environmental information' exactly means, since, thus far, the CJEU has not interpreted this phrase.[289] How useful such reports are when trying to identify non-compliance with environmental legislation, depends, first of all, on whether they contain any compliance-related information but also on how much in detail such reports go. If they only contain aggregated information on compliance, in other words no information on specific actors, it is hard to imagine how such reports could be useful in this regard.[290]

[286] As an example, it adds the contamination of the food chain. Other than that, the wording and content of 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 Article 2 (1) (f) is essentially the same as ; Aarhus Convention Article 2 (3) (c).
[287] *Case C-266/09 Stichting Natuur en Milieu* (n 271).
[288] *ibid para 42.*
[289] A search for the term 'reports on the implementation of environmental legislation' on the search form of the CJEU only yielded one judgment that referred to the term in the context of the Environmental Information Directive. However, in this judgment, the CJEU did not interpret the term 'reports on the implementation of environmental legislation'.
[290] See also chapter 4 on this issue.

5.6. Reflection on environmental information

This section has demonstrated that the definitions of environmental information set out in both the Aarhus Convention and the Environmental Information Directive are quite broad including information on elements of the environment, information on factors that are likely to affect the elements of the environment and information on factors that are likely to affect these elements or factors. One reason why the definition is so wide is that it is an open and non-exhaustive definition. At the same time, this non-exhaustiveness is also the cause of a certain degree of uncertainty. Two of the main elements of the definition of environmental information that have been discussed in this section but with regard to which some uncertainty persists is the meaning of the phrase 'likely to affect' and the term 'measures and activities'. It will be important to see how these concepts have been implemented into national law and interpreted by national courts. Depending on how broad of a meaning the phrase 'likely to affect' is interpreted, the definition of 'environmental information' will cover a broader range of information. With regard to the term 'measures and activities' it could not be determined with certainty whether it only includes the activities of public authorities, or whether it also covers activities of private parties. These issues will be particularly relevant when analysing some of the national law that implements the right to access environmental information in chapter 5.[291]

6. Public authorities

6.1. General remarks

The definition of 'public authority' is crucial in setting the scope for the Convention and the Directive, as it determines *vis-à-vis* which bodies the public has a right to access environmental bodies. Therefore, it is also highly relevant for determining to what extent the public can access information that would make it possible to identify instances of non-compliance. As will be explained in more detail in chapter 3, the information that would be relevant for checking compliance with the EU ETS is held by several entities, some of which are formally private, e.g., limited liability companies. However, the definition of public authorities set out in the Aarhus Convention is rather broad, encompassing four categories. The

[291] See chapter 5, section 3.

definition of public authorities in the Environmental Information Directive is largely the same, almost copying the wording of the Aarhus Convention. Both the Aarhus Convention and the Environmental Information Directive set out that, under certain circumstances, private entities, such as limited liability companies, may fall within the definition of public authorities. This section examines the definition of public authorities as set out in the Aarhus Convention and the Environmental Information Directive, so that it will be possible in chapter 4 to determine whether those actors that hold the information that is necessary for checking compliance with the EU ETS come within the ambit of the Aarhus Convention and the Environmental Information Directive. Both the Aarhus Convention and the Environmental Information Directive distinguish between three categories of public authorities, each of which shall be discussed below.

6.2. Category 1: governmental authorities

The first category of public authorities covers 'government at national, regional and other level.'[292] This category refers to the more traditional public authorities, in other words all state bodies.[293] It is important to emphasise that public authorities at all levels of government are included, ranging from national governments to city councils. Moreover, it is relevant to note that it is not necessary that the public authority in question has responsibilities related to the environment – all governmental authorities regardless of the nature of their functions are covered by Article 2 (2) (a) of the Aarhus Convention.[294]

The Directive follows the wording of the Convention very closely, setting out that 'public authority shall mean government or other public administration, including public advisory bodies, at national, regional or local level.'[295] The CJEU interpreted the provision in *Fish Legal*. First, it confirmed the interpretation of the Aarhus Convention Implementation Guide that the responsibilities of the public authority in question do not have to relate to the

[292] Aarhus Convention Article 2 (2) (a).
[293] Sean Whittaker, 'The Right of Access to Environmental Information and Legal Transplant Theory: Lessons from London and Beijing' (2017) 6 Transnational Environmental Law 10 <https://www.cambridge.org/core/journals/transnational-environmental-law/article/right-of-access-to-environmental-information-and-legal-transplant-theory-lessons-from-london-and-beijing/4D560FDAA1C11646EDE00C5C27AC0F19> accessed 6 December 2021.
[294] Ebbesson and others (n 239) 46.
[295] 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 Article 2 (2) (a).

environment.[296] Second, the CJEU concluded that 'the first category [of public authorities] includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.'[297]

6.3. Category 2: public administrative functions

The second category of public authorities set out by the Aarhus Convention comprises 'natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment.'[298] The Aarhus Convention Compliance Committee has not yet defined the term 'public administrative functions'.[299] However, it found that the Kazakh National Atomic Company was a public authority because it carried out public administrative functions, an assessment that was later adopted by the Meeting of the Parties.[300] The Directive literally copies the wording of the second category of public authorities, as set out in the Convention, stating that the term 'public authority shall mean any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment.'[301] Just like the Aarhus Convention, the Environmental Information Directive does not define the term 'public administrative functions', even though it is crucial to the second category of public authorities.

However, the CJEU interpreted the term in *Fish Legal*.[302] The case arose following a request for a preliminary ruling from the Administrative appeals chamber of the British Upper

[296] *Fish Legal* (n 157) para 50.
[297] *ibid 51.*
[298] Aarhus Convention Article 2 (2) (b).
[299] Ebbesson and others (n 239) 46 suggest that 'public administrative functions' are functions that are normally carried out by governmental authorities and that in this regard, it is national law which determines what functions are normally carried out by government authorities and consequently, this may differ from party to party. Moreover, it suggests that in order for a public administrative function to exist, 'there needs to be a legal basis for the performance of the functions' .
[300] *Findings and Recommendations with regard to compliance by Hungary with the obligations under the Aarhus Convention in the case of Act on the Public Interest and the Development of the Expressway Network (Communication ACCC/C/2004/04 by Clean Air Action Group (Hungary))* [2005] [17].
[301] 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 Article 2 (2) (b).
[302] *Fish Legal* (n 157) This case has been discussed by the literature only to a limited extent. Almost all literature only reports on the findings of the CJEU but does not critically discuss this case. See for example: ; 'Fish Legal v Information Commissioner (C-279/12): Case Digest' (*Practical Law*) <http://uk.practicallaw.thomsonreuters.com/Document/I7EB57D00B34711E3A8CF8095AD69AF68/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 8 December 2021; Erin C Ferguson, 'Clear as Water : Water Industry Transparency in the United Kingdom', *Global Conference on*

Tribunal and concerned three water companies that were requested to disclose environmental information.[303] The applicants did not receive the requested information within the time limit set out by the applicable British legislation and, upon being brought to court for not disclosing the requested information, the water companies argued that they did not qualify as public authorities. The Upper Tribunal asked the CJEU 'to ascertain the criteria for determining whether entities such as the water companies concerned can be classified as legal persons which perform 'public administrative functions' under national law, within the meaning of Article 2 (2) (b) of the Environmental Information Directive.[304]

As a preliminary point, the CJEU stated that due to the need for uniform application of EU law as well as the principle of equality, a provision of EU law which does not refer expressly to Member State law in order to establish the meaning and scope of that provision must in principal 'be given an autonomous and uniform interpretation throughout the European Union.'[305] When determining the meaning and scope of such a provision, the context of the provision as well as the purpose of the legislation in question must be taken into account.[306] Consequently, the Court had to establish whether the reference to national law in Article 2 (2) (b) of the Directive ('under national law') had to be understood as an express reference to national law.[307] The Court noticed a difference in the French[308] and English language versions of the Directive which mirrors the same difference between the French and English language versions of the Aarhus Convention. The CJEU concluded that, in the French language version, the phrase 'under national law' (en vertu du droit) means that the functions must be conferred on the entity in question by means of a legal act.[309] This conclusion is also in line with the interpretation put forward in the Implementation Guide – that the phrase 'under national law'

Transparency Research (2019) <https://strathprints.strath.ac.uk/68646/> accessed 8 December 2021; Wolfgang Kahl, 'Neuere Höchstrichterliche Rechtsprechung Zum Umweltrecht – Teil 1' (2014) 69 JuristenZeitung (JZ); No author, 'Case Law of the Court of Justice of the European Union and the General Court' (2014) 11 Journal for European Environmental & Planning Law <https://brill.com/view/journals/jeep/11/2/article-p192_9.xml> accessed 8 December 2021; for some reflections see Sébastien Platon, 'The Notion of "Public Authority" in the Recent Case Law of the European Court of Justice and Its Impact on French Administrative Law' [2015] Montesquieu Law Review.

[303] *Fish Legal* (n 157) para 15 f.

[304] *ibid para 40.*

[305] *ibid para 42.*

[306] *ibid.*

[307] *ibid para 43.*

[308] Translated to English, Article 2 (2) (b) of the French language version of the Directive reads 'all natural or legal person who perform, under national law, public administrative functions.' The Court finds that in the French language version of Article 2 (2) (b), the phrase 'under national law' (en vertu du droit interne) is linked to the verb 'perform' (exercer).

[309] The CJEU observed that the French language version of the definition of 'public administrative functions' does not make an express reference to national law.

means that the entity in question needs to be authorised by law to perform a certain function.[310] On the contrary, in the English language version, the phrase 'under national law' follows the phrase 'public administrative functions' which led the CJEU to conclude that the English language version does not contain an express reference to national law.[311] Unfortunately, CJEU does not expressly state whether it follows the French or English language version.

The CJEU set out that in order to achieve the objective set out in recital 7 of the directive – preventing disparities between the laws of the Member States concerning access to environmental information – the concept of 'public administrative functions' must be an EU concept and be uniformly interpreted throughout the Union.[312] Here, the CJEU refers to the Aarhus Convention Implementation Guide, stating that the fact that the Guide notes that what functions are considered to be of a public administrative nature could differ from country to country, does not change the conclusion that the concept must be given a uniform interpretation throughout the EU.[313] Moreover, the CJEU confirms the assessment put forward in the Aarhus Convention Implementation Guide that the phrase 'under national law' means that 'there needs to be a legal basis for the performance of the functions.'[314]

Therefore, the CJEU notes that only entities whose powers have been vested in them by the virtue of national law can qualify as a public authority pursuant to Article 2 (2) (b) of the Environmental Information Directive. However, not every entity in which functions have been vested pursuant to national law - constitutes a public authority pursuant to the Environmental Information Directive. It must be assessed whether these functions are in fact public *administrative* functions within the meaning of the Directive. This examination must take into account EU law and the relevant interpretative criteria set out in the Aarhus Convention.[315] Again, the CJEU refers to the Implementation Guide, confirming that 'a function normally performed by governmental authorities as determined according to national law' is a public administrative function.[316] The CJEU determined that the decisive element when determining whether an entity carries out public administrative functions, is whether this entity is entrusted with the performance of a service that is in the public interest and for this purpose it has been 'vested with special powers beyond those which result from the normal rules applicable in

[310] Ebbesson and others (n 239) 46.
[311] *Fish Legal* (n 157) para 44.
[312] *ibid para 45.*
[313] *ibid para 46.*
[314] Ebbesson and others (n 239) 46; *Fish Legal* (n 157) para 46.
[315] *Fish Legal* (n 157) 48.
[316] *ibid para 50.*

relations between persons governed by private law.'[317] Platon notes that the definition put forward by the CJEU is reminiscent of the definition of 'emanation of the state' given by the CJEU in *Foster*.[318] Indeed there exists a certain similarity with the wording in *Foster*.[319] However, as Platon correctly observes, the main difference is the element of control. One of the crucial elements of an 'emanation of the state' is that the entity in question is under the control of the State, while this is not a prerequisite for being public administrative bodies, i.e., public authorities pursuant to Article 2 (2) (b) of the Environmental Information Directive.

Finally, the CJEU was asked whether an entity that fulfils the criteria for 'public authority' set out in Article 2 (2) (b) of the Environmental Information Directive only with regard to some of its functions, consequently, also only constitutes a public authority regarding the environmental information it holds in the context of those functions. The CJEU notes that such an interpretation would 'give rise to significant uncertainty and practical problems in the effective implementation of the Directive.'[320] Moreover, it not only finds that such a view is neither supported by the wording of the Directive nor that of the Convention[321] but that such a hybrid interpretation contradicts the underlying aim of both the Convention and the Directive – to provide the widest possible availability of environmental information to the public.[322] The CJEU explains that Article 4 (1) of the Convention and Article 3 (1) of the Directive, which are virtually identical, set out that where an entity qualifies as a public authority pursuant to one of the three categories, 'it is obliged to disclose to any applicant all the environmental information […] that is held by it or for it,' unless one of the exceptions apply.[323] Based on these considerations, the CJEU concluded that entities that qualify as a public authority pursuant to the second category set out in Article 2 (2) (b) of the Directive constitute public authorities with regard to all the environmental information they hold.[324]

[317] *ibid 52.*
[318] Platon (n 302) 4.
[319] *Case C-188/89 Foster and others v British Gas plc* [1990] para 20.
[320] *Fish Legal* (n 157) para 76.
[321] *ibid.*
[322] *ibid para 77.*
[323] *ibid 78.*
[324] *ibid paras 78 & 83.*

6.4. Category 3: other bodies

Besides governmental bodies (category 1) and entities carrying out public administrative functions (category 2), the Aarhus Convention includes in the definition of public authorities also 'any natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body' qualifying as public authority pursuant to the first or second category.[325]

The third category is distinct from category 2 in two ways. The first distinctive element is the source of authority. While entities falling under subparagraph (b) derive their authority from a legal basis, the source of authority for bodies falling under subparagraph (c) is their subordination to a body falling under subparagraph (a) or (b). The second group only includes bodies that have public *administrative* functions that are conferred onto them by law, expressing the link between law and State administration, while the authority of entities that qualify as public authorities pursuant to subparagraph (c) is not based on a legal act. The Aarhus Convention Implementation Guide suggests that instead, they derive their authority through the governmental authority or entity with public administrative functions which controls them.[326] This illustrates the wide approach the Aarhus Convention takes to access to environmental information.

During the negotiations leading to the Aarhus Convention, Belgium, Denmark and Norway submitted that according to their understanding an entity is 'under the control of' a public authority pursuant to the first and second category where the 'policy and major issues [of the entity in question] were subject to approval or [a] decision by public authorities.'[327][328] However, due to the vague terminology, e.g. 'major issues', and the fact that this view was submitted by only three negotiating parties and not subsequently endorsed by any other party, this interpretative statement does not clarify when an entity is under the control of a public authority. Unfortunately, thus far, the Aarhus Convention Compliance Committee has not had

[325] Aarhus Convention Article 2 (2) (c).
[326] Ebbesson and others (n 239) 47.
[327] United Nations Economic and Social Council, Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making, *Report of the Eighth Session*, CEP/AC.3/16, 17 December 1997, para 12 on p. 3
[328] Committee on Environmental Policy Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making, 'Report of the Eighth Session' para 12 on p. 3.

the possibility to interpret the phrase 'under control' as set out in Article 2 (2) (c).[329] However, as discussed below, the CJEU has interpreted this term, providing some clarification.

The second element that distinguishes the third category from the two preceding ones relates to the entity's area of activity. Whereas the nature of the activities does not matter with regard to the first or second category of public authorities, pursuant to the third category, the entity in question qualifies as a public authority only if the public responsibilities, functions or services that it provides relate to the environment.[330] The Convention does not specify when a certain function relates to the environment and the Compliance Committee has not yet had the opportunity to provide an abstract definition of the term. It did, however, opine that the activities of the National Atomic Company Kazatomprom relate to the environment.[331] Similarly, the Committee determined that a company which is established by a legislative act and is state-owned falls 'under the definition of the public authority in accordance with Article 2, paragraphs 2 (b) and (c).'[332] Another example of an entity that may constitute a public authority pursuant to the third category is a private company on which some functions relating to the maintenance and distribution of environmental information have been conferred.[333]

The third category as set out in the Directive is almost a copy from the Convention stating that public authority means 'any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person' qualifying as public authority pursuant to the first or second category.[334] As the Aarhus Convention, the Directive does not define when a responsibility relates to the environment or when an entity is under the control of a public authority. The second issue has been interpreted by the CJEU in *Fish Legal*.[335] The Court was asked 'to ascertain the criteria for determining whether entities […] are under the control of a body or person falling within Article 2(2)(a) or (b) of' the Environmental Information Directive.[336]

The Court explains that the situation of control as part of the concept of 'emanation of a state' laid down in *Foster*[337] may serve as an indication that the control condition of the third

[329] The only reference to Article 2 (2) (c) in findings of the compliance committee can be found in the *Addendum to the Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus* [2011] para 67.
[330] Ebbesson and others (n 239) 47.
[331] *ACCC/C/2004/04 Hungary* (n 300) para 17.
[332] *ibid para 10.*
[333] *Addendum to ACCC/C/2009/37 Belarus* (n 329) para 67.
[334] 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 Article 2 (c).
[335] See section 2.2.3.2 for information on the background of this case.
[336] *Fish Legal* (n 157) para 57.
[337] *Foster* (n 319).

category of public authorities as laid down in the Environmental Information Directive is satisfied. '[I]n both of those contexts the concept of control is designed to cover manifestations of the concept of 'State' in the broad sense best suited to achieving the objectives of the legislation concerned.'[338] In *Foster* the CJEU noted that according to its own case law,[339] in case Member States have failed to implement or have incorrectly implemented an EU Directive, individuals may directly rely on provisions of that Directive *vis-à-vis* the State if those provisions are sufficiently clear, precise and unconditional. Further, the CJEU held 'that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provision capable of having direct effect may be relied upon.'[340]

However, while the Court in *Fish Legal* acknowledges that the presence of control pursuant to the *Foster* criteria may indicate that the control condition of the Environmental Information Directive is fulfilled as well, it points out that the exact meaning of the concept of control found in the Environmental Information Directive must be determined by taking into account the Directive's objectives.[341] Referring to Article 1 (a) and (b), the Court determines that the objectives of the Environmental Information Directive are 'to guarantee the right of access to environmental information held by or for public authorities, to set out the basic terms and conditions of, and practical arrangements for, exercise of that right and to achieve the widest possible systematic availability and dissemination to the public of such information.'[342] Based on these considerations, the CJEU concludes that an entity is 'under the control' where it 'does not determine in a genuinely autonomous matter the way in which it performs the functions in the environmental field which are vested in it, since' an entity which qualifies as public authority pursuant to the first or second category exerts 'decisive influence on the entity's action in that field.'[343]

The CJEU explains that for the presence of control, the way in which control is exerted is irrelevant. An entity may be under the control of a public authority since the latter has the power to issue directions to the entity in question, the power to suspend or require prior

[338] *Fish Legal* (n 157) para 64.
[339] See for example *Case C-8/81 Becker v Hauptzollamt Münster-Innenstadt* [1982] paras 23-25.
[340] *Foster* (n 319) para 20.
[341] *Fish Legal* (n 157) para 65.
[342] *ibid para 66.*
[343] *ibid para 68.*

authorisation of those entities or to appoint or remove members of the board.[344] Moreover, the CJEU explains that simply because an entity is a commercial company, it is not excluded that this entity is under control of a public authority.[345] If a commercial company is subject to a specific system of regulation which is particularly precise laying down 'a set of rules determining the way in which such companies must perform the public functions related to' the environment which they carry out and which may include 'administrative supervision intended to ensure that those rules are in fact complied with,' the company may not be genuinely autonomous from the state, even if the State is not involved in the day-to-day business.[346]

Finally, the question arises whether entities that qualify as a public authority pursuant to the third category with regard to only some of its functions, constitute public authorities only in relation to the environmental information held in the context of those functions, or whether they constitute public authorities in respect of all the environmental information they hold. With regard to entities qualifying as public authorities pursuant to the second category the CJEU decided that those entities must be regarded as public authorities regarding all environmental information they hold.[347] However, regarding entities qualifying as public authorities pursuant to the third category, the CJEU decided differently. It considered that entities falling within Article 2 (2) (c) of the Directive 'are capable of being a public authority by virtue of that provision only in so far as, when they provide public services in the environmental field, they are under the control of' an entity that is a public authority pursuant to the first or second category.[348] The CJEU concluded that such entities are under an obligation to disclose only environmental information that they hold as part of the provision of those public functions.[349] Conversely, they do not have to disclose environmental information regarding which it is clear that it does not relate to the public service that they provide. However, in case it is uncertain that the environmental information in question does not relate to the provision of the public service, the entity in question must disclose it.[350]

[344] *ibid para 69.*
[345] *ibid para 70.*
[346] *ibid para 71.*
[347] See section 2.2.3.2. of this chapter and ibid para 78.
[348] *ibid para 80.*
[349] *ibid para 81.*
[350] *ibid para 82.*

6.5. Category 4: institutions of regional economic integration organisations

The fourth group of public authorities is defined in Article 2 (2) (d) of the Aarhus Convention. It provides that 'institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention' is a public authority as well. Behind the veil of this empurpled language lies the EU as it is, thus far, the only regional economic integration organisation that has become a party to the Aarhus Convention. Thus, EU institutions can be considered public authorities. This paragraph does not have a counterpart in the directive since there is a separate piece of legislation which governs access to environmental information held by EU institutions.[351]

6.6. Reflections on public authorities

As explained in this section, the term 'public authority' as set out in the Aarhus Convention and the Environmental Information Directive is defined in functional terms and besides governmental bodies also includes private bodies that perform public administrative functions or perform public functions that relate to the environment and that are under the control of a public authority pursuant to the other two categories. It was explained that the decisive question when determining whether a certain function is of a public administrative nature is whether the entity in question has been 'vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.'[352] While this guidance by the CJEU does shed some light on what is to be understood under the term public administrative functions, it remains to be seen how exactly this guidance is applied at the national level by authorities and courts.

With regard to the third category of public authorities, the most central question was when an entity must be considered to be under the control of a public authority. The CJEU has explained that the decisive criterion is that the entity in question does not determine in a genuinely autonomous matter the way in which it performs the functions in the environmental field which are vested in it, since an entity which qualifies as public authority pursuant to the

[351] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies 2006 (OJ L 264/13).
[352] *Fish Legal* (n 157) para 52.

first or second category exerts decisive influence on the entity's action in that field.[353] Further, the CJEU explained that where a commercial company is subject to a specific system of regulation which is particularly precise laying down 'a set of rules determining the way in which such companies must perform the public functions related to' the environment which they carry out and which may include 'administrative supervision intended to ensure that those rules are in fact complied with,' the company may not be genuinely autonomous from the state, even if the State is not involved in the day-to-day business.[354] However, the question remains when a regulatory framework can be considered to be 'particularly precise'. This question will be further examined in chapter 5.[355]

7. Grounds of Refusal

7.1. General remarks

As already stated in the introductory chapter[356], the right to access information is usually not absolute. Both the Aarhus Convention and the Environmental Information Directive set out several grounds based on which a public authority may refuse a request for environmental information and both the Aarhus Convention and the Directive divide the grounds of refusal into two categories. The first category contains a set of exceptions of a general nature and the second category is aimed at protecting specific interests that could be harmed by disclosing the requested information. The Environmental Information Directive states that Member States may provide that for a request for environmental information may be refused if:

> *(a) The information requested is not held by or for the public authority to which the request is addressed;*
> *(b) The request is manifestly unreasonable;*
> *(c) The request is formulated in too general a manner […];*
> *(d) The request concerns material in the course of completion or unfinished documents or data;*

[353] *ibid para 68.*
[354] *ibid para 71.*
[355] See chapter 5, section 4.
[356] See chapter 1, section 2.2.

(e) The request concerns internal communications.[357]

Moreover, a public authority may refuse a request for environmental information where the disclosure would have adverse effects on:

(a) The confidentiality of the proceedings of public authorities;
(b) International relations, public security or national defence;
(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;
(e) Intellectual property rights;
(f) The confidentiality of personal data […]
(g) The interests or protection of any person who supplied the information requested on a voluntary basis;
(h) The protection of the environment to which such information relates.[358]

The grounds of refusal set out in the Aarhus Convention match these to a very large extent. Importantly, the wording of both the Aarhus Convention and the Environmental Information Directive give some leeway to Member States as they do not oblige Member States to provide for these grounds of refusal in their national law.

As mentioned in section 1, the purpose of this chapter is to analyse the rules governing the right to access environmental information, so that it is possible to assess whether certain information should be made available pursuant to the Environmental Information Directive in a subsequent step.[359] That assessment involves determining whether the information in question constitutes environmental information, as well as, whether the body that holds the information in question is a public authority. Moreover, it is necessary to evaluate whether any of the grounds of refusal apply. However, not all grounds of refusal are likely to be applicable in case of information on compliance with the EU ETS. Therefore, it would be unnecessary to discuss all grounds of refusal contained in the Aarhus Convention and the Environmental Information Directive. Instead, only those that seem likely to be applicable to the information

[357] 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 Article 4 (1).
[358] ibid Article 4 (2).
[359] See chapter 4.

in question are discussed in this section. It has already been explained in chapter 1 that the information in question relates to compliance with the EU ETS. In chapter 3, it will be explained in more detail what kind of information this is.

The grounds of refusal that will not be discussed in this chapter because they are very unlikely to apply to the information in question include the ground of refusal protecting material in the course of completion. It is not necessary to discuss this ground of refusal, since, as briefly mentioned in the introduction and as will be explained in more detailed in chapter 6[360], this thesis looks at compliance information for the year 2017. As will be explained in chapter 3,[361] the relevant information had to be finalised until 30 April 2018.[362] Therefore, it seems highly unlikely that this ground of refusal applies to the relevant information covering the year 2017, at any point after 30 April 2018, because it must have been completed by that time.

Although it cannot be ruled out completely in all individual cases, it seems unlikely that the disclosure of information on the compliance of certain operators with the rules of the EU ETS may have adverse effects on international relations, national defence or public security. Therefore, the exception allowing public authorities to refuse a request for environmental information on this ground will also not be discussed.

Initially, the ground of refusal protecting intellectual property was not supposed to be discussed in detail. The World Intellectual Property Organization defines intellectual property as 'creations of the mind, such as inventions; literature and artistic works; designs; and symbols, names and images used in commerce.'[363] As will become clear in chapter 3, the relevant information relates almost exclusively to data that must be collected throughout the EU ETS compliance cycle. Thus, it seemed that the relevant data does not constitute such creations of the mind but rather simply factual data. However, when the relevant information was requested from verifiers in practice,[364] several verifiers refused access to the relevant information based on the argument that disclosing the requested information would have

[360] See chapter 6, section 3.
[361] See chapter 3, section 2.
[362] 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 Article 12 (3) sets out that the compliance cycle for a given year must be completed until the 30 April of the subsequent year. This means that the relevant information for any chosen year must be finished, at the latest, until the 30 April of the subsequent year. See chapter 3 for an in-depth explanation of the compliance cycle.
[363] https://www.wipo.int/about-ip/en/, last retrieved 30 November 2020.
[364] See chapter 6 for an in-depth discussion.

adverse effects on their intellectual property rights. Therefore, a section discussing the ground of refusal relating to intellectual property rights was added to this thesis retroactively.

Further, Article 4 (2) (g) of the Aarhus Convention allowing public authorities to refuse a request where disclosure would have adverse effects on the interests of a third party which has supplied the information requested without that party being under a legal obligation to do so will not be discussed in detail. While it is not unfeasible that the relevant information would have adverse effects on the party which has supplied the information, i.e., the operators of installations taking part in the EU ETS, they are under a clear obligation to supply this information to the public authority to which a request for this information would be addressed. Therefore, this ground of refusal does not seem to apply in the case at hand.

Finally, the last ground of refusal set out in the Aarhus Convention and the Environmental Information Directive will not be discussed. It allows public authorities to refuse a request for environmental information where the disclosure would have adverse effects on the environment to which the information relates. This ground of refusal is intended to restrict access to information on, for example, the location of rare species, since, if that information was public, there might be a risk to those rare species. However, the information identified as relevant relates to compliance of the EU ETS, an instrument which is designed to reduce greenhouse gas emissions and thereby protect the environment. It is hard to imagine how disclosure of the relevant information could harm the environment. Consequently, this ground of refusal will also not be discussed further.

Before discussing the individual grounds of refusal, it is important to note that the Convention sets out in the last sentence of Article 4 (4) that the 'aforementioned grounds of refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure.' This suggests that the requirement to interpret the grounds of refusal restrictively only applies to those mentioned in Article 4 (4) but not to those set out in Article 4 (3). Moreover, it seems that the same is true for the requirement to take into account the public interest served by disclosure. This interpretation is supported by the fact that Article 4 (3) (c) specifically points out that in the application of the ground of refusal set out therein, the public interest served by disclosure must be taken into account. The fact that the Convention specifically mentions this requirement in subparagraph (c) of Article 4 (3) suggests that the last sentence of Article 4 (4) does not apply to the other subparagraphs of Article 4 (3). Otherwise, it would not have been necessary to expressly mention the requirement to take into account the public interest in disclosure.

The Environmental Information Directive stipulates that 'the grounds for refusal […] shall be interpreted in a restrictive way, taking into account […] the public interest served by disclosure.'[365] In that regard, public authorities must weigh the public interest served by disclosure against the interest served by non-disclosure.[366] Thus far, the literature has only acknowledged that public authorities must perform this public interest test, without actually scrutinising what such a public interest test entails and how it should be performed.[367] The CJEU has merely explained that the public interest test must be performed in every particular case.[368] However, the Court also pointed out that Member States may set out criteria 'to facilitate that comparative assessment of interests involved, provided only that [these criteria do] not dispense the competent authorities from actually carrying out a specific examination of each situation.'[369] Thus, it will be interesting to see whether national legislatures have adopted such provisions.[370]

The fact that the grounds of refusal have to be interpreted in a restrictive way is also emphasised in the preamble to the Directive[371] and has been confirmed by the CJEU on multiple occasions.[372] Moreover, it is in line with the overall objective of the Environmental Information Directive – to provide wide access to environmental information – and is consistent with the assessment of the Court that the definition of environmental information must be interpreted broadly. Otherwise, a strange situation would arise where the right to access to environmental information is broadened on one end while being restricted on the other. Furthermore, the CJEU has ruled that Article 4 of the Environmental Information Directive entails that public authorities must carry out a balancing test, in which the public interest in disclosure is weighed against any interest in non-disclosure, in every particular case, even where the national legislature has laid down general criteria on which the balancing exercise is

[365] 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 Article 4 (2), penultimate sentence.
[366] ibid.
[367] Langlet and Mahmoudi (n 32) 180; Jeremy Wates, 'The Aarhus Convention: A Driving Force for Environmental Democracy' [2005] Journal for European Environmental & Planning Law 4; Tilling (n 162) 496; Oliver (n 142) 1437; Mason (n 255) 15.
[368] *Case C-266/09 Stichting Natuur en Milieu* (n 271) para 56.
[369] *ibid para 58.*
[370] See chapter 5, section 5.
[371] 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 Recital 16.
[372] *Case C-619/19 Land Baden-Württemberg v DR, other parties: Deutsche Bahn AG, Vertreter des Bundesinteresses beim Bundesverwaltungsgericht* [2021] Court of Justice of the European Union published in the electronic Reports of Cases para 28; *Bayer CropScience and De Bijenstichting* (n 275) para 56; *Case C-266/09 Stichting Natuur en Milieu* (n 271) para 52.

to be based.[373] Where the request concerns information on emissions into the environment, it is automatically assumed that the public interest in disclosure outweighs any interest in maintaining any of the exceptions in Article 4 (2) (a), (d), (f), (g) and (h). The public interest test will be examined in more detail in chapter 5.[374]

The analysis of the grounds of refusal as set out in the Aarhus Convention and the Environmental Information Directive is conducted by reference to their interpretation by the Aarhus Convention Compliance Committee and the CJEU. Moreover, the views of the literature will be discussed. However, it must be stated at the outset that the literature on the Aarhus Convention and the Environmental Information Directive has, so far, rarely analysed the grounds of refusal in depth. Mostly, the grounds of refusal are only mentioned without any further examination. This may be due to the fact that, as will be explained below, it must be examined on a case-by-case basis whether any of them apply. Hence, it is difficult to analyse their meaning in a general way. Nonetheless, this makes it even more relevant to discuss them. A more detailed analysis of the relevant grounds of refusal is beneficial for answering the research question of this study, since, besides the definition of the terms 'environmental information' and 'public authority', the grounds of refusal are one of the crucial elements of the right to access environmental information. On the one hand, there are the definitions of 'environmental information' and 'public authority' that are broad and extend the degree to which the public can access environmental information. On the other hand, depending on how the grounds of refusal are interpreted, they have the potential to limit the degree to which the public is actually able to access environmental information in practice.

7.2. Category 1: general grounds of refusal

7.2.1. The public authority does not hold the information

Article 4 (3) (a) of the Aarhus Convention sets out that a request for environmental information may be refused where the public authority that is addressed with the request does not hold the information that is being requested. In this context, it is important to note that while public authorities are not expected to acquire environmental information, in case they do

[373] *Case C-266/09 Stichting Natuur en Milieu* (n 271) para 59.
[374] See chapter 5, section 5.4.

not hold it, however, they are obliged to 'possess and update environmental information which is relevant to their functions.'[375] In this regard, the Convention leaves it to national law to determine under what circumstances a public authority is deemed to hold information. The Implementation Guide notes that it is not necessary that a public authority holds the environmental information itself, instead it is also possible that another body holds the information for the public authority in question.[376] This approach was formally adopted by the Directive stating that public authorities shall disclose information held by or for them.[377] Moreover, pursuant to Article 4 (5), in case a public authority does not hold the environmental information requested, it is obliged to either inform the applicant of the public authority which it believes holds the information or forward the request to that public authority itself. This obligation is owed to the principle that all public authorities in a party state together have a 'collective responsibility for dealing with information requests from the public, irrespective of the particular agency or department to which a request is submitted.'[378]

The Compliance Committee opines that the transfer of requests is subject to two conditions. First, the request must be transferred to another public authority.[379] Thus, conversely, requests may not be transferred to purely private entities. However, it must be borne in mind that also formally private entities may qualify as public authorities pursuant to the Aarhus Convention.[380] The second condition which must be met is that transferring a request may not compromise the obligations set out in Article 5, which include inter alia the obligation to ensure that public authorities possess and update environmental information relevant for their functions and to ensure that environmental information is effectively accessible.[381]

In the same vein as the Convention, the Directive provides that 'a request for environmental information may be refused if the information requested is not held by or for the public authority to which the request is addressed.'[382] Under the Directive, if they do not hold the requested information but know which other public authority holds the information, public authorities are obliged to transfer the request to the public authority that holds the information and inform the applicant thereof. If the public authority does not know which other public

[375] Aarhus Convention Article 5 (1) (a).
[376] Ebbesson and others (n 239) 83.
[377] 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 Article 3 (1).
[378] Ebbesson and others (n 239) 91.
[379] *Addendum to ACCC/C/2009/37 Belarus* (n 329) para 66.
[380] See section 2.2.3.2 and 2.2.3.2.3 of this chapter.
[381] *Addendum to ACCC/C/2009/37 Belarus* (n 329) para 69.
[382] 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 Article 4 (1) (a).

authority holds the information, it must 'inform the applicant of the public authority to which it believes it is possible to apply for the information' in question.[383] The wording of the Directive seems to assign a slightly more proactive role to public authorities than the Convention. While the Convention leaves it up to public authorities to decide whether to transfer the request or to inform the applicant of the public authority which might hold the requested information, the Directive gives less leeway to the public authority. It prescribes that in case the public authority is aware which other public authority holds the requested information, it must transfer the request. Only if it is not sure which other public authority holds the information in question is it permissible to inform the applicant of other public authorities which might hold it. However, thus far, this interpretation has not been confirmed by case law.

7.2.2. Manifestly unreasonable

The Aarhus Convention sets out in Article 4 (3) (b) that a request for environmental information may be refused if it 'is manifestly unreasonable.' It does not explain what the term manifestly unreasonable exactly means. However, the Compliance Committee interpreted the term in ACCC/A/2014/1 *Belarus*.[384] The Committee refers to the relevant passage of the Implementation Guide which states that what determines whether a request is manifestly unreasonable is more than simply its volume and the complexity of the requested information.[385] This seems logical since the Convention itself sets out in Article 4 (2) that the normally applicable one month-period within which public authorities must answer requests may be extended where 'the volume and complexity of the information justify an extension.'[386] The Compliance Committee confirmed this view in ACCC/C/2004/3 *Ukraine* stating that while environmental information should be provided upon request regardless of its volume, public authorities have the option of providing the requested information in electronic form, indicate where such information can be examined, levy a charge for supplying the requested information pursuant to Article 4 (8)[387] and/or extend the one month-period.

[383] ibid.
[384] *Addendum to ACCC/C/2009/37 Belarus* (n 329).
[385] Ebbesson and others (n 239) 82.
[386] See section 2.2.6.5 for a more in-depth discussion of applicable time limits.
[387] *Findings and recommendations with regard to compliance by Ukraine with the obligations under the Aarhus Convention in the case of Bystre deep-water navigation canal construction (submission ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine))* [2005] para 33.

The Committee made clear that the reason for submitting the request does not have any relevance in this context, since the Convention explicitly states in Article 4 (1) (a) that an applicant is not required to state why she is interested in obtaining the environmental information in question.[388] Moreover, the Committee found that whether a request is manifestly unreasonable depends on 'the nature of the request itself [including] its volume, vagueness, complexity or repetitive nature.'[389] This seems to confirm the interpretation of the Implementation Guide that while the volume and complexity of a request may be an indication that the request is manifestly unreasonable, the fact that a request concerns a large volume of complex information does not suffice to make it manifestly unreasonable. Conversely, other factors, such as the fact that the information in question has been requested before, is a prerequisite for a public authority to refuse a request as manifestly unreasonable.

In line with the provision of the Aarhus Convention, Article 4 (1) (b) of the Directive, permits public authorities to refuse a request where it is manifestly unreasonable. As the Convention, the Directive does not provide a definition of the term 'manifestly unreasonable'. Unfortunately, thus far, there has not been case law by the CJEU interpreting the term.[390] In the explanatory memorandum accompanying the proposal for the Environmental Information Directive, the Commission explained that '[m]anifestly unreasonable requests would include those, variously described in national legal systems as vexatious or amounting to an *abus de droit*.'[391] This seems to suggest that a request is manifestly unreasonable where it is clear that answering the request does not serve any of the aims of the Environmental Information Directive, such as contributing to a greater awareness of environmental matters, free exchange of views and a more effective participation by the public in environmental decision-making.[392] This could be the case where the applicant does not actually have an interest in the environmental information as such but submitted the request simply to occupy resources of the public authority.

Further, the Commission explained that a public authority would be permitted to refuse a request on the ground that it was manifestly unreasonable where answering the request 'could involve the public authority in disproportionate cost or effort or would obstruct or significantly

[388] *Recommendations with regard to request for advice ACCC/A/2014/1 by Belarus* [2017] para 28.
[389] *ibid.*
[390] A search for the terms 'manifestly unreasonable' and 'Directive 2003/4' on the Curia website yielded one result. However, while the term 'manifestly unreasonable' is mentioned in that case, it is not interpreted.
[391] Commission of the European Communities, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Public Access to Environmental Information' 13.
[392] 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 Recital 1.

interfere with the normal course of its activities.'[393] In this context, the question arises when costs or efforts are disproportionate and when an interference with the normal activities of a public authority is to be regarded as significant. The Commission does not provide any guidance on this. Hence, until there is case law on this issue, the exact meaning of this ground of refusal remains unclear.

7.2.3. Formulated in too general a manner

The Aarhus Convention stipulates that a public authority may also refuse a request where it is formulated in a too general way.[394] The term 'too general' is neither been defined by the Convention, nor has the Compliance Committee interpreted it so far.[395] However, the Convention does give some guidance as to how a public authority should act when receiving a request that is too general. In Article 3 (2), it states that public authorities shall give guidance to the public in accessing environmental information. This seems to suggest that when a public authority receives a request that could be refused because it is too general, it should help the applicant to find the information that she is looking for.

The Implementation Guide notes that the Parties have considerable flexibility when defining the term 'too general' and that national practice may serve to illustrate the meaning of the term.[396] Literature on the German legislation implementing this provision of the Aarhus Convention convincingly suggests that a request can be regarded as too general where it is not possible to infer from its wording what kind the information the applicant is requesting.[397] Similarly, the British Information Commissioner notes in its guidance documents that it regard a request as too general where it is 'too unclear or non-specific for the authority to identify and locate the information requested, or a request is ambiguous, and therefore could be interpreted in more than one way.'[398]

The Environmental Information Directive contains the same exception in Article 4 (1) (c). It stipulates that a request for environmental information may be refused if 'the request is

[393] Commission of the European Communities (n 391) 13.
[394] Aarhus Convention Article 3 (3) (b).
[395] A search for the term 'too general' in the compilation of Compliance Committee findings containing all opinions until 1st April 2021 only yielded one hit, which did not relate to Article 3 (3) (b).
[396] Ebbesson and others (n 239) 84.
[397] Götze and Engel (n 146) §8, para 49 & §4, 9 See chapter 5, section 9.2.1.7.
[398] Information Commissioner's Office, 'Requests Formulated in Too General a Manner (Regulation 12 (4) (c)' 3.

formulated in too general a manner, *taking into account Article 3 (3)*.' Article 3 (3) states that in case a public authority receives a request that is formulated in too general a manner, it must, as soon as possible but at least before the lapse of the time limits applicable for answering requests,[399] ask the applicant to specify her request and help her to do so. Thus, by explicitly stating that it is applicable to requests that are formulated in too general a way, the Directive goes beyond the provision of the Convention which obliges public authorities to assist applicants with accessing environmental information. The Directive adds in Article 3 (3) that 'public authorities may, where they deem it appropriate, refuse a request under Article 4 (1) (c). The question arises when it is appropriate to refuse a request. Since there has not been any case law interpreting this ground for refusal, this question cannot be answered with certainty.[400] However, it seems logical that when a public authority receives a request that is formulated in too general a way, it must first ask the applicant to specify the request and assist her in doing so. Only when the applicant's specification does not lead to a significant clarification of the request, may the public authority refuse the request based on Article 4 (1) (c) of the Directive.

7.2.4. Internal communications of public authorities

The last ground of refusal set out in paragraph 3 of Article 4 of the Aarhus Convention relates to internal communications. Public authorities may refuse a request for environmental information if that request concerns 'internal communications of public authorities where such an exemption is provided for in national law or customary practice.[401] The term 'internal communications of public authorities' is not expressly defined in the Aarhus Convention. The Compliance Committee opined that the rationale of this ground of refusal is to give the personnel of public authorities the possibility to freely discuss ideas and opinions. The Committee concluded that not all documents that are sent around within a public authority can be considered as 'internal communications'. 'For instance, factual matters and the analysis thereof may be distinguished from policy perspectives or opinions.'[402] Further, the Compliance Committee found that where a public authority has commissioned a study to 'a somehow-

[399] See section 2.2.6.5
[400] A search for the term 'too general' and 'Directive 2003/4/EC' yielded four results, two of which were judgments. However, in none of these judgements did the CJEU interpret the term 'too general' as set out in Article 4 (1) (c) of Directive 2003/4/EC.
[401] Aarhus Convention Article 4 (3) (c).
[402] *Findings and recommendations with regard to communication ACCC/C/2013/93 concerning compliance by Norway* [2017] para 71.

related-to-it-but separate entity' and that study has been handed in with the ministry and approved by it, such a study cannot be considered to qualify as 'internal communications'.[403]

Similar to the Convention, the Directive sets out that a public authority may refuse a request for environmental information where it concerns internal communications.[404] The Directive adds that when considering refusing a request because it concerns internal communications, public authorities must take into account the public interest served by disclosure. It is unclear why the Directive makes this addition, since it already points out in the penultimate sentence of Article 4 (2) that when applying any of the grounds of refusal, public authorities must take into account the public interest served by disclosure. Advocate General Hogan suggested that the fact that the legislator repeats the requirement that public authorities must take into account the public interest served by disclosure specifically in Article 4 (1) (e), emphasises the importance attached to the requirement in the context of this particular ground of refusal.[405]

The CJEU has defined the term 'internal communications' as 'all information which circulates within a public authority and which, on the date of the request, has not left that authority's internal sphere – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received.'[406] The CJEU explained further that the term 'communications' entails that information is imparted by a sender to an addressee, which may be an abstract entity such as the members of the executive board of a company.[407] It also specified that not all information that a public authority holds can automatically be considered 'internal'. Only information that 'has not been disclosed to a third party or been made available to the public' may be considered to constitute 'internal'.[408] Further, the CJEU explained that the term 'internal communications' is not limited to personal opinions of a public authority's staff but also factual information, since such a limitation would be incompatible with the objective of this ground of refusal, i.e., creating a protected space for public authorities to engage in internal discussions.[409]

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[403] *Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2010/51 concerning compliance by Romania* [2008] para 87.
[404] 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 Article 4 (1) (e).
[405] *Opinion of Advocate General Hogan in Case C-619/19 Land Baden-Württemberg v DR, joined parties Deutsche Bahn AG, Vertreter des Bundesinteresses beim Bundesverwaltungsgericht* [2020] Opinion of Advocate General Hogan published in the electronic Reports of Cases para 28.
[406] *Case C-619/19 Land Baden-Württemberg v D.R., other parties: Deutsche Bahn AG, Vertreter des Bundesinteresses beim Bundesverwaltungsgericht* (n 372) para 53.
[407] *ibid para 37.*
[408] *ibid para 42.*
[409] *ibid para 50.*

7.3. Category 2: exceptions protecting specific interests

In Paragraph 4 of Article 4, the Aarhus Convention lays down a second set of grounds based on which a public authority may refuse a request for environmental information. All of these grounds aim to protect legitimate interests that would be harmed if the requested information was disclosed. As with the exceptions laid down in the previous paragraph, Parties are not obliged to incorporate these exceptions into their national legislation. The Convention states that a 'request for environmental information may be refused if the disclosure would adversely affect' any of the listed interests.[410] The Aarhus Convention does not define what exactly 'adversely affect' means. The Implementation Guide suggests that it refers to any kind of negative impact and that the use of the word 'would' indicates that a certain degree of certainty is necessary.[411] This seems convincing, especially in light of the wording of Article 6 (1) (b) of the Aarhus Convention, which states 'activities […] which *may* have a significant effect on the environment. [emphasis added]' Here, the use of the word 'may' indicates that it is not necessary that the activity will have a significant effect on the environment for certain. Conversely, the use of the word 'would' in Article 4 (4) means that the disclosure of the requested information must have adverse effects on at least one of the interests listed. The CJEU has never interpreted the phrase 'adversely affect'. However, in the national context, the British Information Tribunal has taken a very similar approach stating that 'it is necessary to show that disclosure 'would' have an adverse effect – not that it could or might have such [an] effect.'[412]

The Directive is structured in the same way. The second paragraph of Article 4 sets out that a request for access to environmental information may be refused if one of the interests laid out in the subparagraphs would be adversely affected by the disclosure of the requested environmental information. As already stated in section 6 of this chapter, in its penultimate subparagraph, Article 4 (2) provides that all grounds of refusal must be interpreted in a restrictive way and be weighed against the public interest served by disclosure. This balancing act must be performed on a case-by-case basis. Moreover, the Directive sets out that access to environmental information may not be refused by reference to any of the grounds of refusal

[410] Aarhus Convention Article 4 (4).
[411] Ebbesson and others (n 239) 86.
[412] *Benjamin Archer v Information Commissioner and Salisbury District Council* [2007] para 51, see chapter 4 for a more in-depth discussion of British and German national law implementing the right to access environmental information.

laid out in Article 4 (2) (a), (d), (f), (g) and (h), where the request concerns information relating to emissions into the environment.[413]

7.3.1. The confidentiality of proceedings of public authorities

The Aarhus Convention sets out that a request for environmental information may be refused where the disclosure of the requested information would adversely affect 'the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law.'[414] The Convention does not provide a definition of the term 'proceedings of public authorities'. The Compliance Committee set out in ACCC/C/2010/51 *Romania* that that the term 'proceedings' refers 'to concrete events such as meetings or conferences and does not encompass all the actions of public authorities.'[415] Further, with a view to preventing any arbitrary use of this ground of refusal and in line with the rule that all grounds of refusal must be interpreted restrictively, the Compliance Committee recommends that national legislation should lay down the criteria for this exception as clearly as possible in order to reduce the discretionary power of public authorities to decide which proceedings are to be considered confidential.[416]

The Directive contains a literal copy of this ground of refusal. In *Flachgas Torgau*, the CJEU interpreted the phrase 'where such conditionality is provided for by law', explaining that this condition is fulfilled where the national law of a Member State contains a general rule according to which the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information, if the 'national law clearly defines the concept of 'proceedings'.[417] Thus, the CJEU did not consider it necessary to give the term 'proceedings of public authorities' an EU-wide uniform meaning. However, it also pointed out that national law must clearly define the concept and it is up to national courts to determine whether this is the case. The CJEU does not expressly explain what the consequence would be if a national court found that the national law of that Member States did not clearly define the concept of 'proceedings'. It could be that in such a case, public authorities would not be able to invoke the ground of refusal laid down in Article 4 (2) (a).

[413] See section 7.1 of this chapter and section 4.9 of chapter 4.
[414] Aarhus Convention Article 4 (4) (a).
[415] *ACCC/C/2010/51 Romania* (n 403) para 89.
[416] *ibid.*
[417] *Case C-204/09 Flachglas Torgau GmbH v Federal Republic of Germany* [2012] para 65.

7.3.2. The course of justice

The Aarhus Convention permits public authorities to refuse a request for environmental information where disclosure of the information in question would have adverse effects on 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.'[418] The Convention neither explains what exactly is to be understood under 'the course of justice' nor when the ability of a person to receive a fair trial or the ability of a public authority to conduct an investigation is adversely affected, nor has the Compliance Committee provided any interpretation of those terms.[419] According to the Implementation Guide, the term 'the course of justice' 'implies that an active judicial procedure capable of being prejudiced must be' ongoing.[420] However, the Guide adds that only because a document was part of a judicial procedure at one point, a public authority may not refuse access to information contained therein based on the argument that disclosure may adversely affect the course of justice.[421] It seems that the judicial procedure to which the requested information relates must be ongoing at the time of the request. This is only logical, since once the judicial procedure has been concluded, the course of justice cannot be altered anymore and the necessity of preventing information from being disclosed has ceased. This interpretation is backed by the fact that the German legislation implementing the right to access to environmental information does not actually use the phrase 'the course of justice' but 'ongoing judicial proceedings'.[422] Similarly, the applicable French legislation uses the phrase 'proceedings initiated before courts'.[423]

Moreover, the Aarhus Convention also protects the ability of a person to receive a fair trial. While the reference to the course of justice seems to be intended to protect the judicial process in its entirety, the reference to the ability of a person to receive a fair trial appears to be aimed at protecting individuals.[424] Article 6 of the European Convention of Human Rights (ECHR) sets out that everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. The ECHR adds that the press and public may be excluded

[418] Aarhus Convention Article 4 (4) (c).
[419] A search for the terms on the compilation of the findings of the Compliance Committee did not yield any results.
[420] Ebbesson and others (n 239) 87.
[421] ibid.
[422] Umweltinformationsgesetz [in der Fassung der Bekanntmachung vom 27. Oktober 2014 (BGBl. I S. 1643), das zuletzt durch Artikel 2 Absatz 17 des Gesetzes vom 20. Juli 2017 (BGBl. I S. 2808) geändert worden ist] §8 (1) (3) refers to 'laufende Gerichtsverfahren'. This provision will be discussed in further detail in chapter 4.
[423] Code des relations entre le public et l'administration (dernière modification 18 juillet 2020) L. 311-5 (f).
[424] See on the corresponding provision in German law: Reidt and Schiller (n 146) §8, para 31.

from the trial where this is in the interest of morals, public order or national security, 'where the interests of juveniles or the protection of the private life of the parties so require, or […] where publicity would prejudice the interests of justice.'[425] The Charter of Fundamental Rights of the European Union contains a very similar provision.[426]

In light of the provisions of the ECHR and CFREU on this matter and the wording of Article 4 (4) (c) of the Aarhus Convention and its interpretation by the Implementation Guide, it seems that a public authority could refuse a request based on this ground of refusal, where the disclosure of the requested information would impede one of the elements of the right to receive a fair trial. For example, where the disclosure of the requested information could undermine the impartiality of the court because it puts an unfavourable complexion on the accused.

Further, the Convention does not provide any detail on what is to be understood under enquiries of criminal or disciplinary nature. Unfortunately, the Compliance Committee has not interpreted the meaning of this phrase and literature has not touched upon this issue. The Implementation Guide, however, suggests that 'criminal and disciplinary' investigations must be delineated from other types of investigations such as civil or administrative ones. With regard to the meaning of these terms as set out in the Convention, their meaning in national legal systems may be an indication. The French version of the Convention uses the term 'enquête d'ordre penal ou disciplinaire.' The French Government defines the term 'enquête penale' (criminal investigation) as the process of investigation throughout which the judicial police collects evidence and determines the perpetrator of a certain crime.[427] The British Criminal Procedure and Investigations Act defines a criminal investigation as 'an investigation conducted by police officers with a view to it being ascertained (a) whether a person should be charged with an offence, or (b) whether a person charged with an offence is guilty of it.'[428] Thus, it seems that, next to information on ongoing judicial proceedings, Article 4 (4) (c) also protects the investigations of a crime by the police that precede and lead up to judicial proceedings.

The French government does not provide a definition of disciplinary investigations but only of the term disciplinary sanctions (sanctions disciplinaires) and explains that it refers to the

[425] European Convention on Human Rights Article 6 (1).
[426] Article 47 of the Charter of Fundamental Rights of the European Union states that 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.'
[427] Direction de l'information légale et administrative (Premier ministre), Ministère chargé de la justice, 'Information judiciaire' <https://www.service-public.fr/particuliers/vosdroits/F1456> accessed 9 December 2021 French original: 'L'enquête pénale est une phrase de la procédure pendant laquelle la police judiciaire recherche les auteur des infraction et tente de rassembler les preuves.'
[428] Criminal Procedure and Investigations Act 1996 Section 22 (1).

procedure that has to be followed before disciplinary sanctions can be imposed. A disciplinary sanction is any measure, other than a verbal observation, taken by the employer following an employee's act which, in the employer's view, amounts to misconduct.[429] The British government defines disciplinary procedures as 'a set way for an employer to deal with disciplinary issues.'[430] Hence, both the French and the British definition indicate that disciplinary investigations relate to investigations of an employer into the possible misconduct of one of its employees. In the context of the Article 4 (4) (c) of the Aarhus Convention, this would mean that public authorities may refuse a request for environmental information where disclosing the requested information would have adverse effects on the investigations into the (possible) misconduct of one of its employees.

The corresponding provision of the Directive, Article 4 (2) (c), is a literal copy of the Convention's provision. The CJEU interpreted this provision in *Stefan*.[431] After heavy rainfalls, subsequent flooding caused substantial damage to property in residential areas in the vicinity of the banks of the Austrian river Drau.[432] Due to reports that the severity of the floods was at least partly due to the negligent operation of locks, criminal investigations were launched, inter alia against the keeper of the locks.[433] Mr Stefan sent a request for environmental information to the responsible ministry asking for access to information relating to the levels and flow rates of the river Drau in the vicinity of several power stations.[434] The ministry refused the request based on the argument that disclosure of the information might have adverse effects on the criminal proceedings and the ability of the lock keeper to receive a fair trial.[435] Mr Stefan appealed against the decision to refuse his request. The Austrian court noted that Austrian law only made limited use of the option which Article 4 (2) of the Environmental Information Directive gives to Member States to regulate the refusal to disclose environmental information. It does not permit the ground of refusal relied upon by the ministry to be applied to the request for disclosure of the information sought by Mr Stefan because, according to Austrian law, the ground of refusal does not apply to the kind of environmental information sought by Mr

[429] Direction de l'information légale et administrative (Premier ministre), 'Sanctions disciplinaires dans le secteur privé' <https://www.service-public.fr/particuliers/vosdroits/F2234> accessed 9 December 2021 French original: 'Une sanction disciplinaire correspond à toute mesure, autre que les observations verbales, prise par l'employeur à la suite d'un agissement du salarié considéré par l'employer comme fautif.'
[430] 'Disciplinary Procedures and Action against You at Work' (*GOV.UK*) <https://www.gov.uk/disciplinary-procedures-and-action-at-work> accessed 9 December 2021.
[431] *Case C-329/13 Ferdinand Stefan v Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft* [2014].
[432] *ibid para 9.*
[433] *ibid para 10.*
[434] *ibid para 11.*
[435] *ibid para 12.*

Stefan.[436] However, the Austrian court was of the opinion that even though, pursuant to Austrian law, the requested information should have been disclosed, it was clear that providing the information would have adverse effects of the lock keeper's ability to receive a fair trial within the meaning of Article 6 of the ECHR and Article 47 of the CFREU.[437] The Austrian court argued that 'since [the Environmental Information] Directive […] does not oblige Member States to refuse a request for access to environmental information in a case where the disclosure thereof would compromise the ability of any person to receive a fair trial, but merely permits such a refusal […], that directive authorises Member States to adopt measures that are […] incompatible with' Article 47 of the CFREU and Article 6 TEU.[438] Therefore, the Austrian court asked the CJEU 'whether [the Environmental Information] Directive […] is valid in light of Article 6 TEU and […] Article 47' of the CFREU.[439] The Court found that Member States may not interpret and implement the Environmental Information Directive in a way that is incompatible with Article 47 of the CFREU or with Article 6 TEU.[440] Moreover, even if a Member State's legislation does not contain an exception to the right to access environmental information protecting the right of a person to receive a fair trial, that Member State is nonetheless obliged to use its margin of discretion under Article 4 (2) (c) of the Directive in a way that is consistent with the requirements set out in Article 47 of the Charter.[441]

Thus, it is clear that the Directive leaves a margin of discretion to the Member States when adopting implementing legislation and to public authorities in the application of the grounds of refusal in as much as they, according to the wording of the Directive, are not obliged to refuse a request for environmental information where disclosure would adversely affect any of the competing interests referred to in Article 4 (2) of the Directive. However, as this case shows, Article 47 CFREU puts a clear limitation to that discretion to the effect that where disclosure of information would impede the ability of a person to receive a fair trial, access to that information must be refused.

[436] *ibid para 13.*
[437] *ibid para 14.*
[438] *ibid para 15.*
[439] *ibid para 29.*
[440] *ibid para 36.*
[441] ibid para 34. See also *Case C-540/03 European Parliament v Council of the European Union* [2006] par 104.

7.3.3. The confidentiality of commercial and industrial information

The Aarhus Convention allows public authorities to refuse a request for environmental information where the disclosure would have adverse effects on the confidentiality of commercial and industrial information, provided that such confidentiality is provided by law in order to protect a legitimate economic interest. However, public authorities may not refuse a request for environmental information where the request concerns information on emissions which is relevant for the protection of the environment.[442] Thus, before a public authority can refuse a request based on the ground that disclosure would have adverse effects on the confidentiality of commercial and industrial information, three conditions must be fulfilled. First, the confidentiality of the information concerned must be explicitly protected by the law of the Party. The Compliance Committee observed that, since the Aarhus Convention does not define the term 'commercial and industrial information', 'the criteria and the process for characterization of information as confidential on this basis should be clearly defined by law, so as to prevent authorities from withholding information in an arbitrary manner.'[443]

Second, keeping the information in question confidential must serve a 'legitimate economic interest'. Again, the Convention does not define what a 'legitimate economic interest' is. Therefore, the Implementation Guide suggests that Parties to the Convention establish a procedure to identify 'information that has a legitimate economic interest in being kept confidential.'[444] While it is necessary that a legitimate economic interest would be harmed by disclosure, the Compliance Committee pointed out that this does not mean 'that public authorities are only required to release environmental information where *no* harm to the interest concerned is identified. [emphasis added]'[445] Such an interpretation would not be in line with the requirement to interpret the grounds of refusal in a restrictive way and to take into account the public interest in disclosure set out in Article 4 (4) of the Convention. Instead, 'where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interest involved, the Convention could require disclosure.'[446] Third, the information may not be information on emissions into the

[442] Aarhus Convention Article 4 (4) (d).
[443] *ACCC/C/2010/51 Romania* (n 403) para 90.
[444] Ebbesson and others (n 239) 88.
[445] *Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Community* [2011] para 30 (c).
[446] *ibid.*

environment that is relevant for the protection of the environment. The concept of emissions into the environment is further examined in section 7.4.

The Environmental Information Directive also sets out that a request for environmental information may be refused if disclosure would have adverse effects on 'the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy.'[447] However, also the Environmental Information Directive does not define the term commercial and industrial information. Given that the provision states that national law must provide for the confidentiality, it seems likely that national law sets out in more detail, what information is covered by this ground of refusal and under what circumstances.

In this context, Case C-266/09 *Stichting Natuur en Milieu* may illustrate how this exception is applied in practice. Stichting Natuur en Milieu asked a public authority (CTB) to disclose environmental information on the maximum permitted residue level for a pesticide on lettuce.[448] CBT rejected the request and the applicant appealed against that decision.[449] CTB offered Bayer, the producer of the pesticide, the opportunity to submit a request for confidential treatment of parts of the information contained in the document.[450] Bayer communicated to CTB that it considered studies on residues and reports of field trial as commercial secrets and asked CTB not to disclose those documents.[451] Subsequently, CTB refused to disclose the information that Bayer had asked not be disclosed based on the argument that disclosure would have adverse effects on the confidentiality of commercial and industrial information.[452] The applicant contested the decision to refuse the requested information before a national court. Unsure about the precise meaning of Article 4 (2) (d) of the Environmental Information Directive, the national court decided to stay the proceedings and ask the CJEU whether a request for environmental information must be refused where it concerns environmental information whose confidentiality is provided by law.[453]

[447] 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 Article 4 (2) (d).
[448] *Case C-266/09 Stichting Natuur en Milieu* (n 271) para 15.
[449] *ibid para 16.*
[450] *ibid para 17.*
[451] *ibid para 18.*
[452] *ibid para 19.*
[453] *ibid para 44.*

The Court observed that Article 14 of the Plant Protection Directive[454] allows applicants seeking marketing authorisations for plant protection products to request that information submitted by them be treated confidentially, where they contain commercial and industrial information. This provision, however, only applies without prejudice to the Environmental Information Directive.[455] Therefore, the Court found, that where a request for access to environmental information is submitted to a public authority and the requested information has been submitted by an applicant to the public authority in the course of a market authorisation procedure for a plant protection product and that applicant has asked the public authority to keep the requested information confidential, the public authority is 'nevertheless obliged to allow the request for access to that information if it relates to emissions into the environment or if […] the public interest served by disclosure appears to outweigh the interest served by the refusal to disclose.'[456] However, in *Bayer CropScience*, the CJEU made clear that the fact that the submitter of information declared it as confidential is not a prerequisite for refusing access to environmental information based on Article 4 (2) (d).[457] Thus, a public authority could also determine that disclosing certain information would harm the confidentiality of commercial and industrial information on its own initiative.

7.3.4. Intellectual property

According to the Aarhus Convention, public authorities may refuse a refuse a request for environmental information, where the disclosure would have adverse effects on intellectual property rights.[458] Intellectual property is defined as 'creations of the mind, such as inventions; literature and artistic works; designs; and symbols, names and images used in commerce.'[459] As with so many of the exceptions, the literature has done little more than simply

[454] Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market 1991 in the meantime repealed by; Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC 2009 (OJ L 309/1).
[455] *Case C-266/09 Stichting Natuur en Milieu* (n 271) para 47.
[456] *ibid para 52.*
[457] *Bayer CropScience and De Bijenstichting* (n 275) para 49.
[458] Aarhus Convention Article 4 (4) (e).
[459] St Albans City & District Council, 'Environmental Information Regulations (EIR) 2004 - When We Will Charge for Requests Involving Large Amounts of Environmental Information – Paper or Electronic Format' <https://www.stalbans.gov.uk/sites/default/files/documents/publications/council/The+Environmental+Information+Regulations+-+Fees+and+charges+2017-18.pdf> accessed 14 December 2021.

acknowledging the existence of the ground of refusal protecting intellectual property.[460] Unfortunately, there have not been any analyses of what the ground of refusal relating to intellectual property entails and how it should be applied. The Aarhus Convention Compliance Committee has touched upon this ground of refusal on two occasions. It has decided that access to studies, such as environmental impact assessments and archaeological studies, cannot be refused based on the argument that disclosure would have adverse effects on intellectual property rights.[461] However, it did not provide any abstract guidance as to how this ground of refusal is to be interpreted or applied. The Environmental Information Directive contains the same ground of refusal. Similarly, to the Aarhus Convention, there is virtually no literature discussing this ground of refusal in detail. Moreover, the CJEU has not yet examined this ground of refusal in any of its cases.[462]

However, there is a vast array of literature on intellectual property law in general.[463] The World Intellectual Property Organizing distinguishes between five different categories of intellectual property: patents, industrial designs, trademarks, geographical indications and copyright.[464] It would go beyond the scope of this thesis to comprehensively discuss the law on all of those categories. For the purposes of defining the scope of this ground of refusal, it is sufficient to adumbrate the different categories of intellectual property.

Patents 'may be granted for an invention in any field of technology if it is new, involves an inventive step and is capable of industrial application.'[465] In that regard, patents may cover what an invention does, how it works and what it is made of.[466] The Community Design Regulation defines the term 'designs' as 'the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation.'[467] Trademarks are defined as

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[460] Dariusz Adamski, 'How Wide Is "the Widest Possible"? Judicial Interpretation of the Right of Access to Official Documents Revisited' (2009) 46 Common Market Law Review; Gérardine Garçon, 'Access to Regulatory Information on Agrochemicals - To Which Extent Does Regulation 1107/2009 Prevail over the EU Transparency Legislation?' (2012) 2012 European Journal of Risk Regulation.

[461] *ACCC/C/2004/3 Ukraine* (n 387) paras 16, 31 and 32; *Findings and recommendations with regard to communication ACCC/C/2012/69 concerning compliance by Romania* [2015] paras 57-59.

[462] A search on the CJEU website for the terms 'Directive 2003/4/EC' and 'Article 4 (2) (e)' yielded 118 results. Each of these results was scanned for the word 'Intellectual'.

[463] Catherine Seville, *EU Intellectual Property Law and Policy* (Edward Elgar Publishing Limited 2016); Justine Pila and Paul Torremans, *European Intellectual Property Law* (Oxford University Press 2019); Jennifer Davis, *Intellectual Property Law* (4th edn, Oxford University Press 2012).

[464] St Albans City & District Council (n 459).

[465] Seville (n 463) 103.

[466] European Commission, 'Patent Protection in the EU' <https://ec.europa.eu/growth/industry/strategy/intellectual-property/patent-protection-eu_en> accessed 9 December 2021.

[467] Council Regulation (EC) No 6/2002 [of 12 December 2001 on Community designs [2002] OJ L 3/1] Article 3.

> *any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of (a) distinguishing the goods or services of one undertaking from those of other undertakings; and (b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.*[468]

A geographical indication demonstrates that a certain product originates from a specific geographical location and due to that origin possesses certain qualities. Currently, geographical indications are only protected with regard to agricultural products, such as Parmigiano Reggiano.[469] The term 'copyright' refers to intangible property such as 'books, music, plays, art works, dance and mime, films, photographs, computer programs and broadcasts.'[470]

Broadly speaking, the ground of refusal protecting intellectual property may be interpreted so that something that qualifies as intellectual property belongs to its owner and that consequently cannot be disclosed to anyone, unless the owner gives express consent. In the context of the discussion of the right to access environmental information, this means that where information is protected by intellectual property law, public authorities may not share this information, unless the owner of that information gives her consent.[471]

7.3.5. Personal data

According to the Aarhus Convention, a public authority may refuse a request for environmental information to protect '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.'[472] The Directive provides the same ground of refusal, only adding that the confidentiality may also be provided

[468] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1 Article 3.
[469] 'Geographical Indications for Non-Agricultural Products' (26 January 2021) <https://ec.europa.eu/growth/industry/policy/intellectual-property/geographical-indications/non-agricultural-products_en>.
[470] Seville (n 463) 7.
[471] It must be noted that it may not always be clear who the owner of a certain piece of information is.
[472] Aarhus Convention Article 4 (4) (f).

by EU legislation.[473] The General Data Protection Regulation GDPR defines the term personal data as 'any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.'[474]

Thus, a public authority may refuse a request for environmental information where it contains personal data pursuant to the definition set out in the GDPR. However, where it is possible to separate the personal data from the rest of the information, the public authority is obliged to do so and disclose the remainder of the requested information.[475] In case of personal data, this can probably be done easily by simply redacting it and then disclosing the information to the applicant.

7.4. Emissions into the environment

As mentioned in section 7.1., the Aarhus Convention stipulates that the grounds of refusal set out in Article 4 (4) must be interpreted 'taking into account whether the requested information relates to emissions into the environment.'[476] The Convention does not define the term emissions into the environment. However, the Compliance Committee gave an example of information on emission into the environment in ACCC/C/2013/89 *Slovakia*, where it found information on nuclear waste to constitute environmental information on emissions into the environment.[477] The Implementation Guide suggests to use to the definition set out in the Industrial Emissions Directive[478] which defines emissions as 'the direct or indirect release of

[473] 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 Article 4 (2) (f).
[474] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC 2016 (OJ L 119/1).
[475] 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 Article 4 (4).
[476] Aarhus Convention Article 4 (4), last sentence.
[477] *Findings and recommendations with regard to communication ACCC/C/2013/89 concerning compliance by Slovakia* [2017] para 83.
[478] Ebbesson and others (n 239) 88.

substances, vibrations, heat or noise from individual or diffuse sources […] into air, water or land.'[479]

The Environmental Information Directive also sets out that request for environmental information may not be refused based on the grounds referred to in Article 4 (2) (a), (d), (f), (g) and (h), where they concern information on emissions into the environment. The CJEU defined the term emissions into the environment in *Bayer Cropscience*.[480] It decided that there is no distinction between the terms 'emissions into the environment', 'discharges' and 'releases'.[481] However, 'emissions into the environment' only refers to emissions that have actually occurred or 'to foreseeable emissions […] under normal conditions.'[482] In addition to covering information on emissions as such, the term includes 'data concerning the medium to long-term consequences of those emission on the environment.'[483] The concept of emissions into the environment will be discussed in more detail in chapter 5.[484]

7.5. Reflections on the grounds of refusal

In this section, it has been explained that the Aarhus Convention as well as the Environmental Information Directive set out two broad categories of grounds based on which a request for access to environmental information may be refused. Those grounds of refusal that seem most relevant for answering the main research question of this study were examined in more detail. In the course of the analysis in this section, it has become clear that with regard to some of these grounds of refusal, there are issues that are still unclear. The European Commission has explained that a request may be considered manifestly unreasonable, where the costs or efforts that are necessary to answer the request are disproportionate and interfere with the normal activities of the public authority. However, it is unclear what this exactly means. When are costs or efforts disproportionate? Moreover, unless a public authority has a dedicated information officer, a request will always result in the disruption of the normal activities to a certain extent. Hence, it is unclear how significant such a disruption must be, before a public authority may refuse a request based on this ground. With regard to the ground

[479] Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) OJ L 344/17 2010 Article 3 (4).
[480] *Bayer CropScience and De Bijenstichting* (n 275).
[481] *ibid para 75.*
[482] *ibid para 77.*
[483] *ibid para 87.*
[484] See chapter 5, section 5.4. See also chapter 4, section 4.9.

of refusal protecting the confidentiality of commercial and industrial information, it is still not entirely clear what exactly the concept 'commercial and industrial information' entails. In light of this, it will be interesting to examine how these grounds of refusal have been implemented into national law.

8. Procedural requirements

8.1. Costs

Article 4 (8) of the Aarhus Convention allows public authorities to charge the applicant for supplying the requested information. However, it specifically points out that the charge may not exceed a reasonable amount. In case public authorities are planning to ask an applicant to pay a charge, they must provide the applicant with a table of charges that can apply which also stipulates the circumstances in which charges apply, in which circumstances they may be waived and when an advance payment is necessary. While the Convention does not explain what a 'reasonable' amount is, the Compliance Committee has interpreted the term in its findings in ACCC/C/2008/24 *Spain*.[485] The Compliance Committee takes inspiration from the reasoning of the CJEU in *Commission v Germany*[486] and of the Information Tribunal of the United Kingdom in *David Markinson v Information Commissioner*,[487] noting that although it 'is not bound by decisions of these courts […], their jurisprudence can shed light on how the term "reasonable" of the Convention may be understood and applied at the domestic level.[488] In *Commission v* Germany, the CJEU explained that 'any interpretation of what constitutes "a reasonable cost" […] which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected.'[489] Therefore, the CJEU argued, public authorities may not pass on the entirety of the costs they incur, particularly indirect costs.[490]

In *David Markinson v Information Commissioner*, an applicant appealed against the decision of the Information Commissioner, arguing that a charge of £6 for a copy of a planning

[485] *Findings and recommendations with regard to Communication ACCC/C/2008/24 concerning compliance by Spain* [2011].
[486] *Case C-217/97 Commission of the European Communities v Federal Republic of Germany* [1999].
[487] *David Markinson v Information Commissioner* [2006].
[488] *ACCC/C/2008/24 Spain* (n 485) para 77.
[489] *Case C-217/97 Commission of the European Communities v Federal Republic of Germany* (n 486) para 47.
[490] *ibid para 48.*

decision notice was reasonable. The Information Tribunal found that when charging for supplying environmental information, public authorities may not take into account costs 'associated with the maintenance of the information in question or its identification or extraction from storage.'[491] Moreover, public authorities may only take into account the number and size of the sheets to be copied. Other factors such as the perceived significance of the content must be disregarded.[492] With regard to the price for providing photocopies public authorities may charge, the Information Tribunal stipulated a max price of 10p per A4 sheet, as suggested by the 'Good practice guidance on access to and charging for planning information' published by the Office of the Deputy Prime Minister.[493]

Based on the insights from these two cases, the Compliance Committee came to the conclusion that €2.05 per page that the Spanish authority asked could not be considered reasonable. In its findings, it referred to the commercial fee for copying, €0.03.[494] Since this amount is more or less the standard fee across the countries of the United Nations Economic Commission for Europe, this can serve as a very good indication of what charges are to be considered as reasonable.

The Directive sets out that public authorities may not charge applicants for accessing public registers or lists or for examining environmental information in person.[495] As indicated above, it allows public authorities to charge applicants in so far the charge does not exceed a reasonable amount. In *Commission v Germany,* the Court stated that public authorities may not pass on the entire costs of collecting the information.[496] With that in mind, the decisive element when determining the reasonableness of a charge seems to be whether the charge is able to deter a potential applicant from accessing environmental information.[497] The Court does not set out further how this should be determined. Thus, it is up to the national legislator to lay down more detailed rules on the determination of charges levied by public authorities and to the courts to determine whether those rules are in line with the framework set out by the CJEU.

[491] *EA/2005/0014 Markinson* (n 487) para 44 (c) (ii).
[492] *ibid para 44 (c) (iii).*
[493] *ibid para 44 (b).*
[494] *ACCC/C/2008/24 Spain* (n 485) para 79.
[495] 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 Article 5 (1).
[496] *Case C-217/97 Commission of the European Communities v Federal Republic of Germany* (n 486) para 48.
[497] *ibid para 47.*

8.2. In the form requested

When submitting a request for environmental information, the applicant is entitled to ask the public authority to disclose the requested information in a specific form. This right is subject to two limitations. First, if it is reasonable for the public authority to provide the information in another form than the one requested.[498] However, the public authority must provide to the applicant with an explanation why it is reasonable to disclose the information in a different form. Second, a public authority may refuse to provide the information in the form requested if it is already publicly available in another form. For example, if certain environmental information is already publicly available on the website of the ministry for the environment, a public authority receiving a request to provide this information on paper may refuse the request and refer the applicant to the website. The Compliance Committee has affirmed this approach in its findings in ACCC/C/2008/24 *Spain* finding that Spain had failed to fulfil its obligations since a Spanish authority had failed to provide the requested information in the form requested without giving any reasons.[499] However, where a public authority refuses a request based on the argument that it is already available elsewhere, it must inform the applicant about where she can access the desired information or direct the applicant to where the information is available, e.g. a link to the website.

In any case, it is however very important that the overall aim of the Convention – providing broad access to environmental information – is not impeded. Thus, a public authority may not refuse to provide information in the form requested on this ground if there is only one book in one public library in the whole country which contains the information requested.[500] In the same vein, the Implementation Guide remarks that where a public authority directs an applicant towards a location where the requested information is already available, access to the information in question at that other location is still subject to standard of 'reasonable costs'. Hence, it would not be in line with the overall aim of the Convention, if the applicant were to incur substantially higher costs as result of her accessing the information at the other location, compared to accessing the information at via the public authority. Additionally, the Implementation Guide notes that 'another form' implies that the form in which the information

[498] Aarhus Convention Article 4 (1) (b) (i) & (ii).
[499] *ACCC/C/2008/24 Spain* (n 485) para 115.
[500] Ebbesson and others (n 239) 81.

in question is already available must be 'the functional equivalent of the form requested, not a summary.'[501]

The Directive also contains an article setting out that public authorities must disclose the requested information in the form requested by the applicant.[502] However, the Directive's provision is more detailed and contains some additional provisions. First, the Directive sets out that public authorities must make environmental information available in the form *and format* requested by the applicant. Thus, in comparison to the Convention, the Directive adds the word format, which suggests that the words 'form' and 'format' refer to different concepts. The Directive does not provide an express definition of these two concepts and their meaning has not been interpreted by the CJEU.[503] However, according to Article 2 (1), 'environmental information shall mean any information in written, visual, aural, electronic or *any other material form*.' This suggests that the term 'form' refers to how the information is recorded. The term format is not mentioned anywhere else in the Directive. The Cambridge Dictionary defines the word 'format' as 'the way information is arranged and stored on a computer.' This suggest that the word 'format' as used by the Directive could refer to the file format where the applicant has requested the information to be disclosed in electronic from.[504] This is supported by the definition found in the Merriam-Webster dictionary according to which the term 'format' refers to 'a method of organizing data (as for storage) [or] various file formats.'[505]

8.3. Partial disclosure

The Aarhus Convention sets out that where a public authority is convinced that one of the grounds of refusal set out in Article 4 (3) (c) or (4) applies, it must consider whether it is possible to separate the information that is covered by the ground of refusal from the remaining information and disclose the rest of the requested information.[506] As the Implementation Guide

[501] ibid.
[502] 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 Article 3 (4).
[503] A search on the CJEU's website for the terms 'form and format' and Directive 2003/4/EC yielded one hit which only quotes Article 3 (4) of Directive 2003/4/EC but does not interpret the meaning of the terms 'form' and 'format'
[504] Cambridge English Dictionary, 'format' <https://dictionary.cambridge.org/de/worterbuch/englisch/format> accessed 9 December 2021.
[505] Merriam-Webster Dictionary, 'Definition of FORMAT' <https://www.merriam-webster.com/dictionary/format> accessed 9 December 2021.
[506] Aarhus Convention Article 4 (6).

explains, this means that the passages of the document containing the requested information will be redacted. It is important to emphasise that the requirement of partial disclosure does not apply to all grounds of refusal. Where a request for environmental information is refused since the public authority does not hold the information or since the request is manifestly unreasonable or formulated in too general a manner, public authorities are not obliged to disclose parts of the information. However, this is only logical. The rational underlying these grounds of refusal is not the protection of an interest competing with the public interest in disclosure. Instead, with regard to the first ground of refusal, it is obvious that where a public authority does not hold the requested information, it can also not disclose parts of it.[507] The underlying rational of the exception permitting a public authority to refuse a request in case a request is manifestly unreasonable or formulated in too general a way, is to protect public authorities from having to answer requests that are submitted with the sole intention to occupy the public authority's resources or it is not apparent what precise information the applicant is seeking.[508]

In the same vein, the Directive provides that public authorities shall partially disclose environmental information which has been requested by an applicant 'where it is possible to separate out any information falling within the scope of' the grounds of refusal laid down in Article 4 (1) (d) and (e) or (2).[509] Thus, as the Convention, the Directive excludes from the obligation to disclose environmental information in part where possible, information that is not held by the public authority in question, requests that are manifestly unreasonable and requests that are formulated in too general a way. However, Advocate General Hogan noted that, in some instances, for example in case of Article 4 (1) (e), protecting internal communications of public authorities, it will be difficult to separate information covered by the ground of refusal from information not covered by the ground of refusal.[510]

[507] Nevertheless, in this case the public authority is still obliged to refer the applicant to the public authority that may hold the desired information. See section 2.6.2.1.
[508] In the latter case (request is formulated in too general a way), pursuant to Article 3 (2), the public authority is required to help the applicant to reformulate the request (see section 2.6.2.3.).
[509] 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 Article 4 (4).
[510] *Opinion of Advocate General Hogan in Case C-619/19 Land Baden-Württemberg v D.R., joined parties Deutsche Bahn AG, Vertreter des Bundesinteresses beim Bundesverwaltungsgericht* (n 405) para 31.

8.4. Procedure for refusing a request

The Aarhus Convention prescribes that where a public authority decides to refuse a request that was made in writing, it must inform the applicant of its decision in writing. When informing the applicant of the refusal of her request, the public authority must explain the reasons for its decision to refuse the request and inform about the available review procedures, regardless of the way in which the applicant is informed.[511] The requirement to explain the reasons for the refusal of a request for environmental information is of great importance, as it enables the applicant to challenge the refusal pursuant to Article 9 (1) of the Convention.[512] In ACCC/C/2010/48 *Austria,* a communicant alleged that Austrian legislation was not in line with Article 4 (7), since it required public authorities to refuse requests for environmental information by way of a simple letter. The applicant argued that such a simple letter did not qualify as an 'official notification' which was necessary to pursue a review of the decision to refuse the request. Instead a separate request for such an official notification had to be made.[513] The Compliance Committee found that 'one of the purposes of the refusal in writing is to provide the basis for a member of the public to have access to justice under article 9, paragraph 1, and to ensure that the applicants can do so on an "effective" and "timely" basis, as required by article 9, paragraph 4.'[514] The Compliance Committee concluded that the fact that a separate request for the official notice had to be submitted significantly delayed the possibilities for initiating the process of having a negative decision by a public authority reviewed and determined that this was not in compliance with Article 4 (7) of the Convention.

The Directive is very brief on this issue. As the Convention, it states that the reasons for refusing a request for environmental information must be provided to the applicant within the applicable time limits.[515] The CJEU pointed out that where a public authority that has received a request for environmental information does not answer within a month and also does not inform the applicant of the extension of the one-month period pursuant to Article 3 (2) (b), the silence may be considered a tacit refusal of the request.[516] The same is the case where a public

[511] Aarhus Convention Article 4 (7).
[512] *ACCC/C/2013/93 Norway* (n 402) para 82; for a discussion of the review procedures pursuant to Article 9 (1) of the Aarhus Convention, see section 8.6. of this chapter.
[513] *Findings and recommendations with regard to communication ACCC/C/2010/48 concerning compliance by Austria* [2012] para 54.
[514] *ibid para 56.*
[515] 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 Article 3 (4), last sentence; see section 2.7.5. of this chapter for a discussion of the applicable time limits.
[516] *Case C-233/00 Commission v France* [2003] para 111.

authority has informed the applicant of the extension of the one-month period to two months but has failed to reply to the request within two months. However, this does not relieve the public authority from its obligation to explain to the applicant the reasons for refusing the request.[517] The CJEU has observed 'that the obligation to state reasons is a general principle of EU law, enshrined in […] Article 296 TFEU and in Article 41 (1) of the' CFREU.[518] It enables the courts 'to review the lawfulness of the decision' in question and the person concerned to 'defend their rights and ascertain whether or not the decision is well founded.'[519] However, 'the obligation to state reasons does not however require the [public authority] concerned to respond to each of the arguments put forward' by the applicant.[520]

8.5. Time limits

Article 4 (2) of the Aarhus Convention sets out time limits within which a public authority must answer a request for environmental information. In general, public authorities are obliged to provide the information as soon as possible, however, at the latest within one month after the request was submitted. When exactly a request will be deemed to be submitted is determined by the contracting parties' administrative law. Only if 'the volume and the complexity of the information [requested] justify an extension of this period', may a public authority extend the time limit.[521] A request may however not be refused because it would take a public authority a long time to answer.[522] Moreover, if a public authority decides to extend the time limit from one to two months, it must inform the applicant thereof and explain the reasons for the extension.[523] Importantly, the standard and extended periods of one and two months are maximum periods. Hence, wherever possible, a public authority should reply to a request before the lapse of the applicable period.

[517] *Case C-186/04 Pierre Housieaux v Délégués du conseil de la Région de Bruxelles Capitale* [2005] para 33.
[518] *Case T-185/19 PublicResourceOrg and Right to Know CLG v European Commission, supported by the European Committee for Standardisation (CEN)* [2021] para 82.
[519] ibid 82.
[520] *Cases T-639/15 to T-666/15 and T-94/16 Maria Psara and Others v European Parliament* [2018] para 134; For a an example of a review of the obligation to state reasons by the CJEU see *T-185/19 Public.Resource.Org* (n 518) 78–92.
[521] Aarhus Convention Article 4 (2).
[522] See section 2.6.2.2.
[523] Aarhus Convention Article 4 (2).

The Compliance Committee has acknowledged that 'in certain circumstances a temporarily heavy workload may cause […] delays.'[524] It makes it unequivocally clear that the absolute maximum time a public authority may take to answer a request for environmental information is two months and that there is no excuse for not giving an answer at all.[525] Consequently, upon 'lapse of [the] two-month time period, the [public authority] should either grant access to the requested information or deny access on the basis of the exceptions.'[526]

The Directive takes over the wording of the Convention stipulating that public authorities must answer requests within a month, or within two months where the volume and complexity of the requested information do not allow to answer the request within one month. However, the Directive adds that where the public authority intends to extend the period to two months, it must inform the applicant thereof by the end of the first month and explain the reasons for the extension.[527]

8.6. Review mechanism

The Aarhus Convention offers those applicants that are of the opinion that their request for environmental information 'has been ignored, wrongfully refused, [or] inadequately answered, [...] access to a review procedure before a court of law or another independent and impartial body established by law.'[528] Thus, the Convention leaves it to the Parties to either provide the option of contesting a decision of a public authority before a regular court or to create another body responsible for hearing access to environmental information cases. Where Parties decide to use courts to review decisions of public authorities, applicants who want to challenge the decision of a public authority must also be given access to an administrative review procedure carried out either by a public authority or another independent and impartial body which must be free of charge or inexpensive.[529] As the Compliance Committee explained, by obliging Parties to provide for an additional administrative review procedure where the review is carried out by courts, the Convention recognises the need for quick review procedures in case of

[524] *Findings and recommendations with regard to communication ACCC/C/2009/36 concerning compliance by Spain* [2011] para 56.
[525] *ibid.*
[526] *ibid para 74.*
[527] 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 Article 3 (2) (b).
[528] Aarhus Convention Article 9 (1).
[529] ibid.

requests for environmental information in comparison to other review procedures, as well as the fact that the regular judicial system might often not be able to provide for such speedy review procedures, for example due to an overload of cases.[530] An example of such an administrative review procedure is the Norwegian Ombudsman which has been given the competence to review disputes that have arisen in the context of requests for access to environmental information.[531] Further, the Compliance Committee remarks that since 'time is an essential factor in many access to information requests, for instance because the information may have been requested to facilitate public participation in an ongoing decision-making procedure', administrative review procedures 'will potentially be used prior to seeking review by a court of law.'[532] Therefore, it is important that administrative review procedures are expeditious. While the term is not defined in the Convention, the Compliance Committee has set out that there is no reason why a public authority should need more time to reconsider a request for environmental information than to decide on the original request in the first place. Therefore, it set out that when determining whether a procedure is 'expeditious' within Article 9 (1) of the Aarhus Convention, the time limits set out in Article 4 (2) and (7) serve as an indication.[533]

Moreover, it is important to note that the right to ask for review is not limited to natural persons. The Compliance Committee made clear that any applicant who has made a request pursuant to Article 4 of the Convention, including legal persons such as ENGOs, may submit a request for review.[534]

In a similar vein, the Environmental Information Directive obliges Member States to have in place a two-step review procedure.[535] It does not provide the option of only having an independent and impartial body apart from the regular judicial system. Pursuant to the Directive, Member States must have in place an administrative review procedure in which either the public authority that answered the request itself, another public authority or an independent and impartial body established by law administratively reviews the decision of the public authority. This procedure must be expeditious and either free of charge or inexpensive. In addition to the administrative review procedure, the Directive obliges Member States to

[530] *ACCC/C/2012/69 Romania* (n 461) para 89.
[531] *ACCC/C/2013/93 Norway* (n 402) para 86.
[532] *ibid para 88.*
[533] *ibid para 90.*
[534] *Findings and Recommendations with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case of information requested from Kazatomprom (Communication ACCC/C/2004/01 by Green Salvation (Kazakhstan))* [2005] para 22.
[535] 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 Article 6.

establish a judicial review procedure in which the applicant can challenge the decisions and omissions of a public authority before a court of law, or another independent and impartial body established by law.

The CJEU has interpreted Article 6 of the Environmental Information Directive in Case C-71/14 *East Sussex*.[536] The Court explained that since the Directive is silent on this issue, Member States are free to designate the courts and tribunals having jurisdiction to determine the procedural rules applying to 'actions for safeguarding rights which individuals derive from' the Directive.[537] However, the Court stresses that, according to the principle of equivalence, those national rules may not be less favourable than those governing similar issues. Moreover, as enshrined in the principle of effectiveness, they may not make it practically impossible or even excessively difficult to exercise the right to ask to have a decision of a public authority reviewed.[538] The principle of effectiveness is also enshrined in Article 47 of the CFREU, which states that '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.'[539] Since the terms 'be reconsidered' and 'reviewed administratively' in Article 6 (1) and 'be reviewed' in Article 6 (2) do not specify the how far the administrative and judicial review must go, pursuant to the Directive, it is for Member States to determine the extent of the review. However, when doing so, they must observe the principles of equivalence and effectiveness.[540] Moreover, the Directive gives Member States the option to provide 'that third parties incriminated by the disclosure of information may also have access to legal recourse.'[541]

9. Direct effect of the Aarhus Convention

According to the doctrine of direct effect, as established by the CJEU in *Van Gend en Loos*, individuals may directly rely on a provision of EU law where the provision contains a negative obligation for Member States and is precise and unconditional.[542] In subsequent case law, the

[536] *Case C-71/14 East Sussex County Council v Information Commissioner* [2015].
[537] *ibid para 52.*
[538] ibid; see also *Case Case C-570/13 Karoline Grube v Unabhäniger Verwaltungssenat für Kärnten and Others* [2015] para 37.
[539] See also *Case C-432/05 Unibet (London) Ltd and Unibet (International) v Justitiekanslern* [2007] para 37.
[540] Case C-71/14 *East Sussex County Council v Information Commissioner* [2015] published in the electronic reports of cases, para. 53.
[541] 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 Article 6 (2).
[542] *Case 26/62 Van Gend & Loos v Netherlands Inland Revenue Administration* [1963].

CJEU broadened and fine-tuned the definition of direct effect also in relation to secondary legislation and set out that : 'wherever the provisions of [EU legislation] appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with [EU law] or in so far as the provisions define rights which individuals are able to assert against the State.'[543] In *Van Gend en Loos*, the Court established that Treaty articles could be directly relied upon, if they fulfil these conditions. Subsequently, the Court also established that other sources of primary law such as the Charter of Fundamental Rights of the European Union were able to have direct effect[544] as well as Regulations,[545] Directives,[546] and Decisions.[547]

Besides the EU Treaties, Regulations, Directives and Decisions, international agreements can also have direct effect unless their nature and broad logic as shown 'by [their] aim, preamble and terms, preclude direct effect of [their] provisions.'[548] The CJEU has pointed out its monist view on international agreements on many occasions, stating that the provisions of an international agreement concluded by the EU 'form an integral part of the Community legal order as from its entry into force and, within the framework of that order, the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement.[549] However, this does not necessarily mean that all provisions of an international agreement have direct effect: 'The usual criterion of the sufficiently precise character of a single norm is subject to the prior qualification that the agreement, taken as a whole, should be suitable for producing direct effects.'[550]

With regard to the Aarhus Convention, the CJEU has made it clear that, since it was concluded by the EU 'and all the Member States on the basis of joint competence, it follows

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[543] *Case C-8/81 Becker* (n 339) para 25; *Case C-194/94 CIA Security International SA v Signalson SA and Securitel SPRL* [1996] para 42.
[544] *Case C-537/16 Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob)* [2018].
[545] *Case 43/71 Politi SAS, Robecco sul Naviglio v Ministry for Finance of the Italian Republic* [1971].
[546] *Case 41/74 Yvonne van Duyn v Home Office* [1974].
[547] *Case 9/70 Franz Grad, Linz-Urfahr (Austria) v Finanzamtamt Traunstein* [1970].
[548] *Case C-308/06 The Queen on the application of International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v Secretary of State for Transport* [2008] para 54.
[549] *Case 181/73 SPRL R & V Haegeman, Brussels v The Belgian State* [1974] paras 4-6; *Case 12/86 Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] para 7; *Case C-321/97 Ulla-Brith Andersson and Susanne Wåkerås-Andersson v Svenska staten* [1999] para 26; *Case C-301/08 Irène Bogiatzi, married name Ventouras v Deutscher Luftpool, Société Luxair, société luxembourgeoise de navigation aérienne SA, European Communities, Grand Dutchy of Luxembourg, Foyer Assurances SA* [2009] para 23.
[550] Bruno de Witte, 'Direct Effect, Primary, and the Nature of the Legal Order' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 336.

that […] the Court has jurisdiction to […] interpret the Aarhus Convention.'[551] This judgment has been interpreted as indicating that, in the eyes of the Court, the Aarhus Convention is, in principle, capable of having direct effect.[552] Consequently, the question whether individual provisions of the Aarhus Convention are capable of having direct effect, will be determined on a case by case basis according to the generally applicable criteria of direct effect – the provision in question must be sufficiently precise, unconditional, and the transposition deadline must have passed. With regard to the latter criterion, it can be said that the Aarhus Convention was adopted on 25 June 1998 when it was signed by then all EU Member States and came into force on 30 October 2001.[553] The EU approved it on 17 February 2005[554] and the last Member State to ratify it was Ireland on 20 June 2012.[555] The implementation period of the Aarhus Convention ended on the days when the parties ratified, accepted, approved or acceded to the Aarhus Convention, however, the earliest on the date of the entry into force. The implementation deadline of the Environmental Information Directive ended on 14 February 2005.[556]

Thus, where a Member States has incorrectly implemented a provision of the Aarhus Convention, or the Environmental Information Directive for that matter, or where a provision of national law is applied in a way that is not in line with the Convention or the Directive, it is possible that individuals directly rely on their provisions, provided that the provision in question is sufficiently precise and unconditional. This thesis examines to what extent the public can use the right to access to environmental information to access information related to compliance with the EU ETS at the national level. Therefore, if the public asks for this information in practice, the bodies that hold the relevant information will apply the national

[551] *Case C-240/09 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] para 31.
[552] Jendrośka (n 143) 79 f.; Tanzi and Pitea (n 142) 371 even go far as to state that 'the direct effect of the provision of the Convention for EU Member States is the key consequence of the fact that the Convention has become an integral part of EU law.'; However, in *Case C-240/09 Lsoochranárske zoskupenie VLK* (n 551) para 52 the CJEU pointed out that Article 9 (3) of the Aarhus Convention is not capable of having direct effect.
[553] In the meantime, all states that have become EU Member States since then have signed and ratified the Aarhus Convention as well. The EU approved it on 17 February 2005 and the last Member State to ratify it was Ireland on 20 June 2012. Therefore, the implementation period of the Aarhus Convention ended on the days when the parties ratified, accepted, approved or acceded to the Aarhus Convention, however, the earliest on the date of the entry into force.
[554] 2005/370/EC: 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 (OJ L 124/1).
[555] 'United Nations Treaty Collection' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en> accessed 3 January 2022.
[556] 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 Article 10.

legislation that implements the right to access environmental information. Thus, the possibility of directly relying on the provisions of the Convention and the Directive may be relevant, where it appears, for instance, that the provisions of national law restrict the right to access environmental information to a greater extent than envisaged by the Aarhus Convention and/or the Environmental Information Directive.

10. Conclusion

This chapter has mapped out and discussed the right to access environmental information as set out in the Aarhus Convention and the Environmental Information Directive. Here, the focus has been on the definition of the central concepts – environmental information and public authorities. It has become clear that the definition of environmental information is very inclusive and broad. The same seems to be true for the definition of public authorities. Particularly with regard to the definition of public authorities, the Member States enjoy a certain degree of freedom when implementing the directive into their national legislation. Therefore, it will be interesting to see to what extent and how Germany and England have made use of their discretion (see chapter 5). Moreover, it will be interesting to see how the two jurisdictions have implemented the review mechanisms envisaged by the Convention and the Directive. Finally, this chapter looked at the potential of the Aarhus Convention to have direct effect. In principle, the Aarhus Convention is capable of having direct effect, however, in practice, it must be analysed with regard to each individual provision whether they might be directly relied upon. This may be particularly relevant in case the analysis of national law shows that there may be incompatibilities with the Aarhus Convention, in particular article 4 and Article 9 (1).

CHAPTER III – THE COMPLIANCE CYCLE OF THE EU EMISSIONS TRADING SYSTEM

1. Introduction

The EU has adopted a comprehensive legislative package to mitigate climate change.[557] It includes *inter alia* legislation that promotes the use of renewable energy,[558] legislation that establishes a cap-and-trade system with the aim of reducing emissions, i.e., the EU ETS[559] and legislation that sets binding targets for Member States to reduce emissions in sectors that are not covered by the EU ETS.[560] The EU ETS is the most prominent piece of EU climate change legislation[561] since it aims to limit emissions of installations in a cost-effective way through a market-based mechanism, rather than a command-and-control instrument, which is

[557] Marjan Peeters, 'EU Climate Law: Largely Uncharted Legal Territory' (2019) 9 Climate Law 137 f.; The 2020 climate and energy package comprising legislation on emissions reduction such as 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 and; Decision No 406/2009/EC [of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L 140/136] legislation promoting the use of renewable energy ; Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community; and legislation establishing binding energy efficiency targets Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315/1). In light of the targets for the year 2030, the EU has revised existing and adopted new legislation. Particularly important are Directive 2003/87/EC, Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 2018 (OJ L 156/26); Regulation (EU) 2018/841 of the European Parliament and of the Council 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU 2018 (OJ L 156/1); ibid; Moreover, the European Commission has proposed to increase the greenhouse gas emission reduction target for 2030 to at least 55% compared to 1990 European Commission, 'COM(2020) 562 Final - COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS - Stepping up Europe's 2030 Climate Ambition - Investing in a Climate-Neutral Future for the Benefit of Our People' 2.

[558] 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.

[559] 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.

[560] Decision No 406/2009/EC (n 557).

[561] Charles Poncelet, 'The Emissions Trading Scheme Directive: Analysis of Some Contentious Point' [2011] European Energy and Environmental Law Review 245.

traditionally more common in EU environmental law.[562] It is a cap-and-trade system in which the cap decreases over time, thereby reducing overall greenhouse gas emissions.[563] The total maximum amount of emissions is divided into allowances, which represent the right to emit a certain amount of greenhouse gases. In the case of the EU ETS, one allowance equals one tonne of $CO_{2(e)}$.[564] Allowances can either be bought at auctions or from other operators participating in the EU ETS, although some sectors still receive allowances at no charge.[565] By making allowances tradable,[566] the system aims to ensure that emissions are reduced where it is most cost-efficient.[567] As explained in chapter 1,[568] the advantage of a market-based mechanism compared to a traditional command-and-control instrument is that, at least in theory, 'it is less costly because reductions take place where they are most cost-efficient.'[569] Moreover, a market-based mechanism may provide incentives for technical innovation and 'overachieving' by individual installations, as excess emissions can be sold to other market participants to make a profit.[570]

However, at the same time, the market nature of the EU ETS also provides an incentive for operators to look for loopholes.[571] When the price for allowances rises, it becomes more costly for operators to comply, which creates an incentive to look for loopholes. Assuming that operators are rational economic actors, they will weigh the costs of complying or not complying against the benefits. If the benefits of non-compliance outweigh the costs, they will choose not

[562] Vanessa Aufenanger, 'Challenges of a Common Climate Policy: An Analysis of the Development of the EU Emissions Trading Scheme' (Kassel University 2012) 83.
[563] ibid; 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 Article 9.
[564] Marjan Peeters, 'Inspection and Market-Based Regulation through Emissions Trading. The Striking Reliance on Self-Monitoring, Self-Reporting and Verification' (2006) 2 Utrecht Law Review 178; 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 Article 3 (a).
[565] 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 Article 10 (1).
[566] ibid Article 12 (1).
[567] Aufenanger (n 562) 84; 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 Article 1.
[568] See chapter 1, section 1.
[569] Aufenanger (n 562) 84.
[570] ibid.
[571] Peeters, 'Inspection and Market-Based Regulation through Emissions Trading. The Striking Reliance on Self-Monitoring, Self-Reporting and Verification' (n 564) 179. For a more thorough description of the implication of non-compliance, see chapter 1, section 1.

to comply.[572] However, if operators do not comply and are able to circumvent paying for their emissions, the system may become ineffective and the overall aim of reducing emissions may not be achieved.[573] Hence, it is of the utmost importance that any emissions trading system is designed with strong enforcement mechanisms in place.[574] Some even argue that enforcement is 'the most important part of' emission trading.[575] However, as observed by Stranlund, Chavez and Field in 2002, 'almost no effort has been devoted to describing the enforcement practices and compliance performance of […] emissions trading programs.'[576] Since then, there has been some literature discussing the enforcement mechanism of the EU ETS.[577] However, the general point that there is very little literature discussing the enforcement mechanism of the EU ETS is still true.[578]

Therefore, this chapter focuses on the enforcement provisions of the EU ETS, more specifically on the provisions dealing with the monitoring, reporting and verification of emissions. 'The possibility that any non-compliance will be detected [is] in this respect of crucial importance.'[579] As will be explained in section 5, the provisions of the EU ETS aimed at ensuring compliance have some deficiencies. Arguably, to a certain extent, the public may remedy these deficiencies.[580] By accessing and studying the relevant information, the public may, to some extent, gain insights into the degree of compliance of operators, or at least get some indication of potential non-compliant behaviour. Subsequently, it may be possible to identify potential instances of non-compliance and report them to public authorities. These

[572] McAllister (n 39) 1201; Stranlund, Chavez and Field (n 39) 346. It must be noted that there may be other factors besides economic ones that influence an operator's decision whether or not to comply. For example, adhering to the law may be seen as the morally right thing to do and hence as having intrinsic value.
[573] Peeters, 'Inspection and Market-Based Regulation through Emissions Trading. The Striking Reliance on Self-Monitoring, Self-Reporting and Verification' (n 564) 179.
[574] Marjan Peeters, 'Enforcement of the EU Greenhouse Gas Emissions Trading Scheme', *EU Climate Change Policy - The Challenge of New Regulatory Initiatives* (Edward Elgar Publishing Limited 2006) 171; Stranlund, Chavez and Field (n 39) 343.
[575] Jiangfu Wang and others, 'Comparative Analysis of the International Carbon Verification Policies and Systems' (2016) 84 Natural Hazards 381.
[576] Stranlund, Chavez and Field (n 39) 343.
[577] McAllister (n 39); Peeters, 'Inspection and Market-Based Regulation through Emissions Trading. The Striking Reliance on Self-Monitoring, Self-Reporting and Verification' (n 564); Peeters, 'Enforcement of the EU Greenhouse Gas Emissions Trading Scheme' (n 574); Astrid Epiney, 'Climate Protection Law in the European Union – Emergence of a New Regulatory System' (2012) 9 Journal of European Environmental & Planning Law; Jonathan Verschuuren and Floor Fleurke, 'Report on the Legal Implementation of the EU ETS at Member State Level' (2014) ENTRACTE GA No. 308481; Marjan Peeters and Huizhen Chen, 'Enforcement of Emissions Trading – Sanction Regimes of Greenhouse Gas Emissions Trading in the EU and China', *Research Handbook on Emissions Trading* (Edward Elgar Publishing Limited 2016).
[578] Peeters and Chen (n 577) 115.
[579] Peeters, 'Inspection and Market-Based Regulation through Emissions Trading. The Striking Reliance on Self-Monitoring, Self-Reporting and Verification' (n 564) 180.
[580] Karl S Coplan, 'Citizen Enforcement', *Decision Making in Environmental Law* (Edward Elgar Publishing Limited 2016).

authorities could further investigate the issue.[581] In that context, two questions arise. First, what information is necessary to identify non-compliance behaviour? Second, can this information be accessed by the public? This chapter is dedicated to answering the first of these two questions in the course of explaining the functioning of the EU ETS compliance cycle. By answering this question, this chapter contributes to providing an answer to the first part of the main research question of this study.[582] Chapters 4 and 5 will deal with the question whether public authorities must provide the relevant information to the public upon request.

In order to answer the question around which this chapter revolves, the EU ETS Directive, the Monitoring and Reporting Regulation[583] and the Accreditation and Verification Regulation[584] will be analysed, and a detailed explanation of the EU ETS compliance cycle will be provided. As explained in chapter 1,[585] after 2017, the year this thesis investigates, the Monitoring and Reporting Regulation and the Accreditation and Verification Regulation were replaced. However, the legislation[586] that replaced these two regulations did not introduce major changes to the compliance cycle. To ensure that the findings of this chapter can easily be used in the future, reference will be made to the corresponding articles in the new regulations when referring to the Monitoring and Reporting Regulation and the Accreditation and Verification Regulation.

In order to answer the question what information is necessary to identify non-compliance with the EU ETS, it is necessary to understand the mechanisms that are in place to ensure compliance. Therefore, section 2 explains the main features and the functioning of the EU ETS compliance cycle. Subsequently, in section 3, it is analysed what information on the compliance cycle is publicly available and it is evaluated to what extent this information allows the public to examine compliance with the EU ETS. It will become clear that the information that can be accessed by the public without having to request it is not sufficient to check

[581] 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 Article 16 (2) & (3) states that if an operator surrenders an insufficient number of allowances, public authorities are obliged to impose a penalty of EUR 100 and publish the names of the operator who is in breach of the requirement to surrender sufficient allowances.
[582] To what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS that is held by governmental authorities and/or private verifiers be provided to the public upon request?
[583] Commission Regulation (EU) No 601/2012. The Monitoring and Reporting Regulation is a delegated act based on Article 14 of the EU ETS Directive in which the Commission sets out standards for the monitoring and reporting of GHG emissions.
[584] Commission Regulation (EU) No 600/2012.
[585] See chapter 1, section 5.
[586] Commission Implementing Regulation (EU) 2018/2066; Commission Implementing Regulation (EU) 2018/2067.

compliance of individual operators. Therefore, the section 4 delves into the compliance cycle of the EU ETS with a view to identifying information the public would need to check compliance with EU environmental legislation. In section 5, the provisions on access to information that can be found in the EU ETS Directive are examined and it is analysed what their relationship with the Environmental Information Directive is analysed. Section 6 provides a summary of conclusions reached in this chapter.

2. The EU ETS compliance cycle

2.1 Introduction

EU ETS legislation establishes a set of measures and criteria aimed at ensuring compliance by operators. These measures and criteria are called the compliance cycle and comprise the recurring set of obligations of operators related to monitoring, reporting and verification of emissions.[587] The compliance cycle can be divided into five stages: (1) permitting, (2) monitoring, (3) reporting, (4) verification and (5) surrendering (see Figure 1). In the following, the different stages are briefly explained. While the division into these five stages makes it easier to explain the various requirements of the compliance cycle, it should be noted that the stages are not always clearly separate in practice. The various requirements of monitoring, reporting and verification are often interlinked and interrelated.

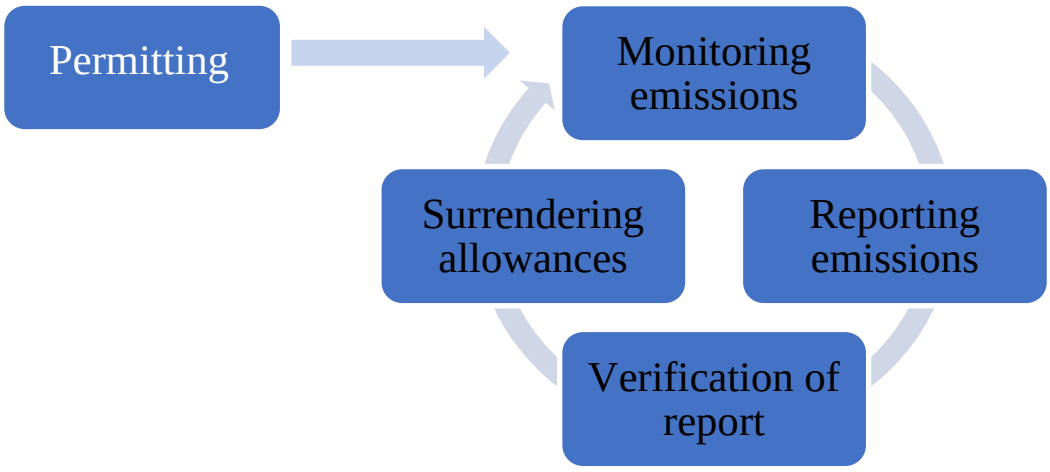

Figure 1: Developed by the author

[587] Borghesi, Montini and Barreca (n 29) 5.

2.2.Permitting stage

The first step of the compliance cycle is the greenhouse gas permit, which can be described as the entry ticket to participate in the EU ETS. Pursuant to Article 4 of the EU ETS Directive, installations that fall within its scope may only be operated if the operator holds a greenhouse gas permit.[588] Operators must apply for a greenhouse gas permit with the competent authority of the Member State in which the installation is located.[589] In the application for the greenhouse gas permit, the operator must set out, *inter alia*, the sources of greenhouse gas emissions[590] and 'the measures planned to monitor and report emissions in accordance with the' Monitoring and Reporting Regulation.[591] Where the national competent authority finds that the operator has demonstrated that it is able to monitor and report emissions from the installation in question, it is obliged to issue a greenhouse gas permit to the applicant.[592] Obtaining a greenhouse gas permit is essential for all industries that are covered by the EU ETS, since, without a permit, they are not allowed to operate at all.[593] Once the greenhouse gas permit has been issued, the public authority must review the permit at least every five years and make any appropriate amendments.[594] The greenhouse gas permit must contain a complete monitoring plan that fulfils all the requirements set out in the Monitoring and Reporting Regulation.[595] Furthermore, the permit obliges the operator to surrender a number of allowances equal to the amount of greenhouse gases that the installation in question emitted in the preceding year.[596]

2.3.Monitoring stage

The EU ETS Directive prescribes, in Article 14 (3), that Member States must oblige operators to monitor the emissions from their installations. They must do so according to the

[588] 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.
[589] ibid Article 4.
[590] ibid Article 5 (c).
[591] ibid Article 5 (d).
[592] ibid Article 6 (1).
[593] Peeters, 'Enforcement of the EU Greenhouse Gas Emissions Trading Scheme' (n 574) 173.
[594] 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 Article 6 (1).
[595] ibid Article 6 (2) (c).
[596] ibid Article 6 (2) (e).

monitoring plan, which the operators must draft themselves and subsequently submit for approval to the competent authority. When monitoring and reporting their emissions, operators must do so in a complete,[597] comparable,[598] transparent[599] and accurate way,[600] ensuring the integrity of the monitoring methodology[601] and striving for continuous improvement[602] and coordination.[603]

Operators must monitor their emissions according to one of several predefined methodologies. They can choose between a calculation-based monitoring methodology and a measurement-based monitoring methodology. Determining emissions according to a measurement-based methodology means that the operator continuously measures the flue gas flow and the greenhouse gas concentrations in the flue gas.[604] When applying a calculation-based methodology, emissions are determined according to a formula based on activity data and emissions factors of the fuels used at the installation.[605] The calculation-based methodology can be implemented either through the standard methodology[606] or the mass balance methodology.[607] The two differ with regard to the formula that is applied. Installations that apply a calculation-based monitoring methodology are divided into tiers. The higher the tier, the higher the degree of certainty of the monitoring methodology must be. Which tier needs to be applied depends on the activity that is carried out at the installation and the category of the installation.[608]

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[597] Commission Regulation (EU) No 601/2012 Article 5; Commission Implementing Regulation (EU) 2018/2066 Article 5.
[598] Commission Regulation (EU) No 601/2012 Article 6; Commission Implementing Regulation (EU) 2018/2066 Article 6.
[599] Commission Regulation (EU) No 601/2012 Article 6; Commission Implementing Regulation (EU) 2018/2066 Article 6.
[600] Commission Regulation (EU) No 601/2012 Article 7; Commission Implementing Regulation (EU) 2018/2066 Article 7.
[601] Commission Regulation (EU) No 601/2012 Article 8; Commission Implementing Regulation (EU) 2018/2066 Article 8.
[602] Commission Regulation (EU) No 601/2012 Article 9; Commission Implementing Regulation (EU) 2018/2066 Article 9.
[603] Commission Regulation (EU) No 601/2012 Article 10; Commission Implementing Regulation (EU) 2018/2066 Article 10.
[604] Commission Regulation (EU) No 601/2012 Article 21 (1); Commission Implementing Regulation (EU) 2018/2066 Article 21 (1).
[605] Commission Regulation (EU) No 601/2012 Article 21 (1); Commission Implementing Regulation (EU) 2018/2066 Article 21 (1).
[606] Pursuant to the standard methodology, the operator must calculate emissions by multiplying the activity data related to the amount of fuel combusted with the corresponding emissions factor.
[607] Pursuant to the mass balance methodology, emissions are calculated by multiplying the activity data related to the amount of material entering or leaving the boundaries of the mass balance, with the material's carbon content. The carbon content is determined by multiplying the emission factor with the net calorific value and dividing the result by 3664.
[608] Commission Regulation (EU) No 601/2012 Article 19 (2) sets out three categories of installations. Installations with average verified annual emissions of equal or less than 50,000 tonnes of CO2(e) fall in category A; installations with average verified annual emissions of more than 50,000 and equal to or less than 500,000 tonnes

2.4.Reporting stage

After having monitored their emissions, operators must compile an emissions report.[609] Chapter VI of Commission Regulation 601/2012 sets out the requirements for reporting greenhouse gas emissions.[610] The emissions report must contain at least[611] data identifying the installation,[612] information for all emission sources such as the total emissions in tonnes of $CO_{2(e)}$,[613] the monitoring methodology applied, the tiers applied,[614] and information on data gaps that have occurred and have been closed by surrogate data.[615] Moreover, there are different reporting requirements for each monitoring methodology.

2.5.Verification stage

The EU ETS Directive obliges operators to have their emissions reports verified as being free from material misstatements.[616] In this context, verification intends to be 'an effective and reliable tool in support of quality assurance and quality control procedures […] to improve performance in monitoring and reporting emissions.'[617] Broadly speaking, verification is an assessment of whether an emissions report is complete,[618] whether the operator has adhered to the requirements set out in the greenhouse gas permit[619] and whether the emissions report is

of CO2(e) fall in category B; and installations with average verified annual emissions of more than 500,000 tons of CO2(e) fall in category C. Commission Implementing Regulation (EU) 2018/2066 Article 19 (2).

[609] 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 Article 14 (3).

[610] Commission Regulation (EU) No 601/2012 Article 67 (3); Commission Implementing Regulation (EU) 2018/2066 Article 68 (3).

[611] Commission Regulation (EU) No 601/2012 Article 67 (3); Commission Implementing Regulation (EU) 2018/2066 Article 68 (3).

[612] Commission Regulation (EU) No 601/2012 Annex X, section 1 (1); Commission Implementing Regulation (EU) 2018/2066 Annex X, section 1 (1).

[613] CO2(e) is defined as 'any greenhouse gas, other than CO2 listed in Annex II to Directive 2003/87/EC with an equivalent global warming potential as CO2.' Commission Regulation (EU) No 601/2012 Article 3 (27); Commission Implementing Regulation (EU) 2018/2066 Article 3 (28).

[614] Commission Regulation (EU) No 601/2012 Annex X, section 1 (6); Commission Implementing Regulation (EU) 2018/2066 Annex X, section 1 (6).

[615] Commission Regulation (EU) No 601/2012 Annex X, section 1 (11); Commission Implementing Regulation (EU) 2018/2066 Annex X, section (11).

[616] 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 Article 15, first paragraph.

[617] Commission Regulation (EU) No 600/2012 Article 6, second paragraph.

[618] ibid Article 7 (4) (a); Commission Implementing Regulation (EU) 2018/2067 Article 7 (4) (a).

[619] Commission Regulation (EU) No 600/2012 Article 7 (4) (b); Commission Implementing Regulation (EU) 2018/2067 Article 7 (4) (b).

free from material misstatements.[620] The verified emissions report must be submitted to the competent national authority.[621] Only if the emissions report has been verified as satisfactory, may the operator proceed to the next stage of the compliance cycle and surrender an adequate number of allowances.[622]

If an operator submits an emissions report that has not been verified, the competent authority must bar it from making 'further transfers of allowances until' the operator submits an emissions report that has been verified as satisfactory.[623] Verification must be carried out by a private third-party verifier.[624] The verifier is a natural or legal person that is accredited by the national accreditation body of a Member State to carry out verification.[625] In practice, however, verifiers are rarely natural persons. In 2017, for example, there were 17 accredited verifiers in Germany,[626] all of which were legal persons, mostly limited liability companies.[627] Whenever a verifier accepts a verification contract, it must set up a verification team that will carry out the verification.[628] The term 'team' suggests that there are multiple individuals involved, although, depending on the scope of the verification, one individual alone may carry out the verification.[629] In any case, the verification team must at least consist of an EU ETS

[620] Commission Regulation (EU) No 600/2012 Article 7 (4) (c); Commission Implementing Regulation (EU) 2018/2067 Article 7 (4) (d).
[621] 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 Article 15, first paragraph.
[622] ibid Article 15, second paragraph.
[623] ibid Article 15 (2).
[624] Commission Regulation (EU) No 600/2012 Article 3 (4); Commission Implementing Regulation (EU) 2018/2067 Article 3 (4).
[625] Commission Regulation (EU) No 600/2012 Article 3 (3); Commission Implementing Regulation (EU) 2018/2067 Article 3 (3).
[626] Peter Hissnauer, 'Neues Aus Dem Bereich Akkreditierung Und Normung' (Berlin, 2017) <https://www.dehst.de/SharedDocs/downloads/DE/praesentationen/Pruefstellen_Hissnauer_Dakks.pdf?__blob=publicationFile&v=3> accessed 8 January 2021.
[627] In the empirical part of the study, all German and British verifiers are identified. It has become clear that almost all verifiers in Germany are limited liability companies (GmbH). There is one or non-profit organisation (*eingetragener Verein*) and one European cooperative (Societas Cooperativa Europaea) that are accredited as verifiers. A list of all verifiers can be found in Annex I.
[628] Commission Regulation (EU) No 600/2012 Article 36 (1); Commission Implementing Regulation (EU) 2018/2067 Article 37 (1).
[629] Commission Regulation (EU) No 600/2012 Article 36 (2); Commission Implementing Regulation (EU) 2018/2067 Article Article 37 (2).

lead auditor.[630] If the scope is larger, there must be a suitable number of EU ETS auditors[631] on the verification team.[632]

Annex V to the EU ETS Directive and the Accreditation and Verification Regulation set out detailed provisions concerning the verification process. Part A of the Annex sets out general principles for the verification of emissions reports from stationary installations. It prescribes that the verifier must conduct the verification based on a strategic analysis of all activities that are conducted at the installation in question.[633] Further, the verification process must be concerned with 'the reliability, credibility and accuracy of monitoring systems and the reported data and information relating to emissions.'[634] In order to credibly and reliably verify an emissions report, it is necessary that the emissions have been 'determined with a high degree of certainty,'[635] which can only be guaranteed if three conditions are fulfilled. First, data in the emissions report must be consistent;[636] second, the data used in the emissions report must have been collected according to the respective scientific standards;[637] and third, 'the relevant records of the installation [must be] complete and consistent.'[638] Moreover, 'the verifier shall plan and perform the verification with an attitude of professional scepticism recognising that circumstances may exist that cause information in the operator's [emissions] report to contain material misstatements.'[639] Further, the verifier is obliged to carry out its tasks in the public interest, and importantly, independently of the operator and the competent authorities.[640]

[630] Commission Regulation (EU) No 600/2012 Article 3 (21) defines the EU ETS lead auditor as the person "in charge of directing and supervising the verification team, who is responsible for performing and reporting on the verification of an operator's […] report."; See Commission Implementing Regulation (EU) 2018/2067 Article 3 (22).
[631] Commission Regulation (EU) No 600/2012 Article 3 (22) defines EU ETS auditor as "an individual member of a verification team responsible for conducting a verification of an operator's […] report other than the EU ETS lead auditor." ; Commission Implementing Regulation (EU) 2018/2067 Article 3 (23).
[632] Commission Regulation (EU) No 600/2012 Article 36 (2); Commission Implementing Regulation (EU) 2018/2067 Article 36 (2).
[633] 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 Annex V, para 6.
[634] ibid Annex V, para 2.
[635] ibid Annex V, para 3.
[636] ibid Annex V, para 3 (a).
[637] ibid Annex V, para 3 (b).
[638] ibid Annex V, para 3 (c).
[639] Commission Regulation (EU) No 600/2012 Article 7 (2); Commission Implementing Regulation (EU) 2018/2067 Article 7 (2).
[640] Commission Regulation (EU) No 600/2012 Article 7 (3); Commission Implementing Regulation (EU) 2018/2067 Article 7 (3).

2.6.Surrender allowances

At the end of the compliance cycle, after having monitored their emissions, having drafted an emissions report, and having the emission report verified as being free from material misstatements, operators must surrender a number of allowances that are 'equal to the total emissions from' the installation in question to the competent authority who then cancels them.[641] Operators have to surrender allowances for the preceding calendar year until 30 April.[642] If operators surrender an insufficient number of allowances by that day, they are liable to pay an excess penalty payment of EUR 100[643] per tonne of $CO_{2(e)}$, in addition to surrendering the missing allowances.[644] Moreover, the competent authority must publish their names.[645]

2.7.Interim reflections

The question that this chapter aims to answer is what information is relevant for checking compliance with the EU ETS. In order to answer this question, it was necessary to give a brief explanation of the different stages of the EU ETS compliance cycle. The next step to answer that question is to determine what information related to compliance with the EU ETS is publicly available and to assess whether that information suffices to determine whether individual actors comply with the EU ETS rules.

3. Publicly available information

3.1.Introduction

As explained in further detail in section 4 of this chapter, the enforcement of the EU ETS is mostly in the hands of the Member States.[646] Consequently, in light of the main research

[641] 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 Article 12 (3).
[642] ibid.
[643] ibid Article 16 (4) states that this amount is increased according to the European index of consumer prices.
[644] ibid Article 16 (3).
[645] ibid Article 16 (2).
[646] Verschuuren and Fleurke (n 577) 27; Antoine Dechezleprêtre, 'Report on the Empirical Assessment of Monitoring and Enforcement of EU ETS Regulation' (2012) GA No. 308481 6.

question of this thesis,[647] the primary focus of this chapter is to determine what information related to compliance the competent national authorities hold. In a subsequent step, it will be analysed whether and under what circumstances the public can access that information upon request (chapters 4 & 5). However, as a preliminary step, it is worthwhile to determine what information on compliance with the EU ETS is publicly available already, for instance in published reports and publicly accessible repositories and to determine to what extent that information may help to examine possible non-compliance with the EU ETS. There are two main sources of publicly available information on the EU ETS: the Member States' answers to a questionnaire and the Union Registry. Both will be examined in this section.

3.2.Article 21 questionnaire

The primary provision that governs Member States' reporting on the application of the EU ETS Directive to the European Commission is article 21 of the EU ETS Directive. It obliges Member States to submit an annual report to the European Commission that sets out how the EU ETS Directive has been implemented and is applied at the national level. These reports are based on a questionnaire by the European Commission and comprises 14 sections, including sections on the application of the monitoring and reporting regulation, on the arrangements for verification and accreditation, on compliance issues, and fraud. At the outset, it can be said that Member States are not obliged to submit much information on individual operators to the European Commission. Nevertheless, their responses to the questionnaire can provide valuable insights into how Member States have chosen to implement the mechanisms for monitoring, reporting and enforcement at the national level. These insights provide helpful guidance when analysing the national implementing legislation, as they give an indication of the particularities of the respective Member State. Further, Member States have to report on the aggregate levels of compliance regarding various elements of the EU ETS. These questions may help to identify vulnerable areas in the compliance cycle of the EU ETS, provided that the reports contain correct and sufficiently detailed information. In this regard, the most relevant sections of the questionnaire for this chapter are the following. Section 2 on the responsible authorities in the EU ETS, section 3 on the coverage of activities and installations, section 4 on permits, section

[647] To what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS that is held by governmental authorities and/or private verifiers be provided to the public upon request and to what extent do governmental authorities and private verifiers do so in practice?

5 on the application of the Monitoring and Reporting Regulation, section 6 on arrangements for verification, section 11 on issues related to compliance, and section 13 on fraud.

The responses to the questionnaire that the Member States submit to the European Commission are publicly available in the Central Data Repository of the European Environment Information and Observation Network (EIONET),[648] which was established alongside the European Environment Agency in 1993.[649] However, most of the information that Member States have to report to the Commission is aggregate. thus, there is very little information on the compliance of individual installations. It includes information about the national authorities responsible for the administration of the EU ETS, the accreditation and the registry administrator. If there are multiple competent public authorities, Member States have to explain how they have distributed the responsibilities among them and indicate one of them 'as the focal point for exchanging information, coordinating the cooperation between the national accreditation body […] and the competent authority.'[650] This information provides a good overview of the entities that are involved in ensuring compliance with the EU ETS at the national level.[651] Furthermore, Member States have to report if and how they have integrated the EU ETS permit procedure into the one for the Industrial Emissions Directive and to what extent these arrangements might impact compliance with the EU ETS.[652]

Even though, the Monitoring and Reporting Regulation is directly applicable at the national level, meaning that Member States must apply its provisions directly without implementing them into national legislation, some provisions of the Monitoring and Reporting Regulation allow Member States to provide complementary legislation.[653] Member States must indicate in their responses to the questionnaire whether they have adopted such complementary legislation.

With regard to verification, Member States must indicate how many verifiers were accredited by their national accreditation body as well as how many verifiers were suspended

[648] https://cdr.eionet.europa.eu/.
[649] Regulation (EC) No 401/2009 of the European Parliament and of the Council on the European Environment Agency and the European Environment Information and Observation Network 2009 (OJ L 126/13).
[650] 'Final Explanatory Note for the EU ETS Article 21 Questionnaire for Phase III' (2015) 3 This explanatory note is a guidance document issue by the European Commission in which it provides guidance on the questionnaire referred to in Article 21, Directive 200/87/EC.
[651] ibid 1.
[652] ibid 6 f. Question 4.1. asks the Member States about the 'integration of Article 5 – 7 of the EU ETS Directive into procedures provided for in the Industrial Emissions Directive (IED), or coordination between the EU ETS permit and the IED permit.' 'It seeks relevant information on how the permit procedures are regulated in the Member States and the impact these may have on the organisational aspects of the EU ETS compliance.'
[653] ibid 8.

or whose accreditation was withdrawn.[654] Member States must also note the number of installations for which verifiers have reported any outstanding material misstatements, non-conformities, non-compliance issues and recommendations for improvements pursuant to Article 27 of the Accreditation and Verification Regulation. Moreover, Member States are obliged to report to what extent their competent public authorities performed checks on the emissions and verification reports. In that regard, they must indicate *inter alia*:

- 'Share of emission reports checked for completeness and internal consistency
- Share of emissions reports checked for consistency with monitoring plans
- Share of emissions reports that were cross-checked with allocation data
- Share of emissions reports that were analysed in detail[655]
- Number of inspections of installations that were carried out through site visits by the competent authority
- Number of verified emissions reports that were rejected because of non-compliance with [the Monitoring and Reporting Regulation]
- Number of verified emissions reports that were rejected because of other reasons with an indication of the reasons
- Action taken as a result of rejection of verifier emission reports.'[656]

Lastly, Member States have to provide information on measures they have set up to deal with fraudulent activities. More specifically, Member States must report 'the number of investigations carried out in the reporting period (including ongoing); the number of cases brought to court in the reporting period; the number of cases settled outside of court without conviction and the number of cases leading to acquittal in the reporting period; and the number of cases in the reporting period leading to a conviction that a fraudulent activity was committed.'[657] While all this aggregated information can serve as a good starting point when investigating compliance with the EU ETS, as it helps to understand how the EU ETS compliance cycle works in practice, it does not allow to check compliance of individual operators. To do so, non-aggregated information in individual installations would be necessary.

[654] ibid 25.
[655] Here Member States must indicate the selection criteria that were applied when choosing emissions reports.
[656] Commission Implementing Decision amending Decision 2005/381/ as regards the questionnaire for reporting on the application of Directive 2003/87/EC of the Europen Parliament and of the Council O.J. L 89/45 2014 Annex, section 6.5.
[657] ibid Annex, section 13.3.

The only non-aggregated information found in the answers to the questionnaire is a list of those installations that have had recourse to the fall-back approach to monitor their emissions[658] pursuant to Article 22 of the Monitoring and Reporting Regulation,[659] a list of installations whose emissions the public authority had to estimate[660] and the names of operators and the installations on which excess emission penalties were imposed.[661] However, operators may not comply with the EU ETS in more ways than simply emitting too much greenhouse gas. For example, operators may use false data to draft their emissions reports. In light of this, it seems that the information that is available through the Article 21 questionnaire is not sufficient to adequately investigate the compliance of individual operators.

3.3.The Union registry

Since 2012, a central EU registry records, inter alia, all transactions of allowances, verified greenhouse gas emissions, and the surrendering of allowances. To access the Union registry, it is necessary to apply for an account with the national administrator of one of the Member States.[662] However, the Commission publishes some information from the Union registry on its website. For this thesis, three files are of particular interest: the Verified Emissions Report, the Compliance Data Report and the List of Stationary Installations in the Union Registry.[663] Each of these documents contains information on each individual installation participating in the EU ETS. The Verified Emissions Report sets out, for each installation for a specific year, the activity carried out, how many allowances were allocated and how many tonnes of greenhouse gases were verified. The Compliance Data Report sets out inter alia the total verified emissions and the total allowances surrendered. Finally, the List of Stationary

[658] As explained in section 2.3, operators can choose between a calculation-based monitoring methodology and a measurement-based methodology. Operator are subject to so-called tiers which determine the margin of certainty within which operators have to monitor their emissions. Where certain conditions are met, operators may apply a monitoring methodology not based on tiers, which is called the 'fall-back methodology'.
[659] The fall-back approach may only be applied 'in rare cases and under strict conditions' 'Final Explanatory Note for the EU ETS Article 21 Questionnaire for Phase III' (n 650) 16.
[660] The competent national authority needs to make a conservative estimation of emission where no verified emissions report was submitted, the verified emissions report was not in compliance with the Monitoring and Reporting Regulation, or the emissions report had not been verified Commission Regulation (EU) No 601/2012 Article 70 (1).
[661] Commission Implementing Decision 2014/166/EU [of 21 March 2014 amending Decision 2005/381/EC as regards the questionnaire for reporting on the application of Directive 2003/87/EC of the European Parliament and of the Council [2014] OJ L 89/45] Annex I, 13.2.
[662] 'Union Registry' <https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets/union-registry_en> accessed 10 December 2021.
[663] These reports are available for each year here: ibid.

Installations in the Union Registry sets out the operator of each installation, the permit ID, the contact city and the address of the installation.

The information from the Union registry allows the public to identify individual installations and their operators as well as the verified greenhouse gas emissions of each installation. Moreover, the information makes it possible to assess whether individual operators have surrendered a sufficient number of allowances. However, even though the information originating from the Union registry is not aggregated, unlike most of the information available from the questionnaire, it does not allow the public to investigate possible instances of non-compliance by individual operators with regard to issues other than the surrender of allowances, such as issues related to the monitoring, reporting and verification of emissions. In that regard, there is no information on other compliance related issues, such as whether public authorities have imposed a penalty on a specific operator for violating the monitoring and reporting rules. Moreover, it seems that it is very difficult to assess whether the information in the registry is actually correct. For example, where an operator and a verifier collude or a verifier simply does not do its job properly and erroneously verifies emissions reports as free from material misstatements, it would be impossible to tell based on the information in the Union Registry.

3.4.Interim conclusions

Throughout this section, it has become clear that the information publicly available is aggregated to a large extent. This is particularly the case for the information found in the Member States' answers to the questionnaire referred to in Article 21 of the EU ETS Directive. Since aggregated information does not allow the public to investigate the compliance of individual operators, it seems that this information is merely able to serve as a general starting point for any effort to identify instances of non-compliance with the EU ETS rules. The Union registry and the European Commission's website contain information on individual operators and installations and is a very useful starting point for checking compliance with the EU ETS. Nevertheless, there are feasible scenarios in which the information contained in the Union Registry is inaccurate. Moreover, it seems that the information that is publicly available does not suffice to properly assess whether an individual operator is in non-compliance with the EU ETS rules. In light of this, it is necessary to determine what information would allow the public

to do so. Therefore, the next section will examine the EU ETS compliance cycle with a view to identify information that could be relevant for checking compliance of operators but that is not publicly available.

4. Relevant information not publicly available

4.1. Introduction

In the previous section, it has been explained that the information on compliance with the EU ETS that is publicly available is to a large extent aggregated and even the installation-level information that is available does not allow to check compliance of specific operators. However, that does not mean that such information does not exist. It was already teasered in section 2 when explaining the basic functioning of the EU ETS compliance cycle that a multitude of documents and information is produced throughout the compliance cycle. Therefore, this section takes a closer look at specific stages of and activities performed throughout the compliance cycle with a view to identifying some of the information that would be necessary to properly assess installation level compliance with the EU ETS rules.

4.2. The greenhouse gas permit

The greenhouse gas permit contains inter alia a description of the activities and emissions from the installation in question, the monitoring plan and the reporting requirements. This information can constitute a useful starting point to investigate whether the operator has complied with its obligation to monitor and report emissions correctly. The reason is that in order to determine whether a specific operator has complied with its monitoring and reporting obligations, it is necessary to know precisely what these monitoring obligations entail. The greenhouse gas permit contains that information. Therefore, the greenhouse gas permit can be regarded as a piece of relevant information for the public when trying to investigate instances of non-compliance with the EU ETS rules.

4.3.The monitoring stage

The Monitoring and Reporting Regulation states that operators must 'obtain, record, compile, analyse and document monitoring data […] in a transparent manner *that enables the reproduction of the determination of the emissions* by the verifier and the competent authority' [emphasis added].[664] This sentence is interesting in two ways. First, it confirms that, in principle, it is possible to reproduce the outcome of the monitoring process, based on the monitoring data, and therefore, it seems that it should also be possible, based on this data, to check whether a certain operator undercounted its emissions or cheated in any other way. Second, the sentence expressly states that the verifier and the public authority should be able to reproduce the determination of emissions. The public is not mentioned in any way. This may indicate that the legislator might not have intended the public to have access to the monitoring data or to perform a controlling task by accessing monitoring data and identifying non-compliance.

Pursuant to the Monitoring and Reporting Regulation,[665] the monitoring plan must contain general information on the installation such as 'a description of the installation and activities carried out by the installation to be monitored, containing a list of emission sources.'[666] When investigating whether a particular operator complies with the EU ETS rules, this information can be a useful starting point. Even though, this information does not contain any information related to non-compliance, it is necessary to have information on, for example, the activities that are being carried out at the installation and the sources of emissions, in order to assess whether a particular installation complied with its obligations. Without this information, it is hardly possible to uncover mistakes or possible fraudulent behaviour.

Moreover, the monitoring plan must contain a detailed description of the methodology that the operator applies to monitor its emissions.[667] Knowing which monitoring methodology has been applied to monitor the emissions at an installation is crucial for checking whether emissions have been monitored and reported correctly, since it would allow the public to reconstruct the monitoring process and to examine whether the operator has followed all the

[664] Commission Regulation (EU) No 601/2012 Article 6 (2); Commission Implementing Regulation (EU) 2018/2066 Article 6 (2).
[665] Commission Implementing Regulation (EU) 2018/2066 Article 12 (1) and Annex I; ibid.
[666] Commission Regulation (EU) No 601/2012 Annex I, Part 1 (1) (a); Commission Implementing Regulation (EU) 2018/2066 Annex I, Part 1 (1) (a).
[667] Commission Regulation (EU) No 601/2012 Annex I, Part 1 (2), (3) and (4); Commission Implementing Regulation (EU) 2018/2066 Annex I, Part 1 (2), (3) and (4).

required monitoring steps and, in case of a calculation-based monitoring methodology, whether it has calculated its emissions correctly.

The monitoring plan contains more information that is relevant for checking compliance of individual operators. Article 57 of the Monitoring and Reporting Regulation obliges operators to 'establish, document, implement and maintain written procedures for data flow activities for the monitoring and reporting of greenhouse gas emissions.' In this context, the term 'data flow activities' refers to 'activities related to the acquisition, processing and handling of data that are needed to draft an Emissions Report from primary source data.'[668] Importantly, the monitoring report must contain 'a description of the written procedures of the data flow activities.'[669] Hence, the monitoring report contains information on how the operator collects, processes and manages data on its greenhouse gas emissions. This information can also be very useful for checking non-compliance, as it makes it possible to evaluate the way the operator deals with data on which the emissions report is based. Of course, it would be possible for an operator to submit a monitoring report with procedures that deal perfectly with data flow activities, and then apply different procedures. Moreover, the monitoring plan only contains a brief description of the procedure for data flow activities.[670] Nevertheless, the description gives an indication of how the operator acquires, manages and processes the data that serves as the basis of the emissions report. Therefore, the procedures for data flow activities would be relevant for the public when checking compliance of an EU ETS operator.

Another element that needs to be included in the monitoring plan and that is potentially relevant for checking non-compliance of operators is the 'description of the written procedures for the control activities established pursuant to Article 58' of the Monitoring and Reporting Regulation.[671] Operators must have a control system in place to make sure that their annual emissions report is factually correct.[672] The control system consists of two elements. The first element is the operator's assessment of the inherent risks and of the control risks. The term 'inherent risk' refers to 'the susceptibility of a parameter in the […] emissions report […] to misstatements that could be material […] before taking into consideration the effect of any

[668] Commission Regulation (EU) No 601/2012 Article 3 (25); Commission Implementing Regulation (EU) 2018/2066 Article 3 (26).
[669] Commission Regulation (EU) No 601/2012 Annex I, Part 1 (1) (d); Commission Implementing Regulation (EU) 2018/2066 Annex I, Part 1 (1) (d).
[670] Commission Regulation (EU) No 601/2012 Article 12 (2) (d); Commission Implementing Regulation (EU) 2018/2066 Article 12 (2) (d).
[671] Commission Regulation (EU) No 601/2012 Annex I, 1 (1) (e); Commission Implementing Regulation (EU) 2018/2066 Annex 1, Part 1 (1) (e).
[672] Commission Regulation (EU) No 601/2012 Article 58 (1); Commission Implementing Regulation (EU) 2018/2066 Article 59 (1).

related control activities.'[673] The term 'control risks' refers to the degree of susceptibility of an element of the emissions report to material misstatements that cannot be prevented or revealed and mitigated in time by the control system. Second, the control system must contain procedures that are intended to mitigate those risks.[674] The mitigation procedures must contain, inter alia, provisions on the 'segregation of duties in the data flow activities and control activities as well as management of necessary competencies [and] internal reviews and validation of data.'[675] Furthermore, the operator must monitor whether the control system is effective by implementing internal reviews and considering the findings of the verifier.[676] Information on the control system would be helpful for the public when checking compliance of operators. The operator's own assessment of the inherent risks and the mitigating procedures would help to identify weak spots in the monitoring system of the operator. Together with other monitoring data, this information could make it possible to identify non-compliance, since it is information about the quality assurance of data flow activities and a high quality of data flow activities is essential for an accurate reporting of emissions.

Article 65 of the Monitoring and Reporting Regulations sets out that 'where data relevant for the determination of the emissions of an installation are missing, the operator shall use an appropriate estimation method for determining conservative surrogate data for the respective time period and missing parameter.' Operators are obliged to establish a written procedure to determine the conservative surrogate data which needs to be approved by the competent public authority.[677] Information on data gaps may also help to identify non-compliance with the EU ETS rules. However, the most interesting piece of information related to data gaps are the reasons why these occurred, since it seems that a data gap occurs either due to a flaw in the monitoring methodology or due to a poor execution of the monitoring plan. In both cases, information on the reason for the occurrence of data gaps would be valuable for the public to check overall compliance. Moreover, despite the fact that the estimation method needs to be approved by the public authority, it would be beneficial for the public to have access to the

[673] Commission Regulation (EU) No 601/2012 Article 4 (10).
[674] ibid Article 58 (2); Commission Implementing Regulation (EU) 2018/2066 Article 59 (2).
[675] Commission Regulation (EU) No 601/2012 Article 58 (3) (c) & (d); Commission Implementing Regulation (EU) 2018/2066 Article 59 (3) (c) & (d).
[676] Commission Regulation (EU) No 601/2012 Article 58 (4); Commission Implementing Regulation (EU) 2018/2066 Article 59 (4).
[677] Commission Regulation (EU) No 601/2012 Article 65 (1); Commission Implementing Regulation (EU) 2018/2066 Article 66 (1); In this regard 'conservative' 'means that a set of assumptions is defined in order to ensure that no under-estimation of annual emissions […] occurs.' See Commission Regulation (EU) No 601/2012 Article 3 (19); Commission Implementing Regulation (EU) 2018/2066 Article (20).

estimation method to check whether (a) it is indeed conservative and (b) to validate whether it is correctly applied in the emission report.

As has become clear throughout this section, the information related to the monitoring of emissions seems to be useful for checking compliance of individual operators. It appears that, especially together with the monitoring plan, the public could be able to examine whether individual operators monitored their emissions in the way prescribed by the monitoring plan that was approved by the competent national authority.

4.4.The emissions report

As explained in section 2 of this chapter, the emissions report must contain at least[678] data identifying the installation,[679] information for all emission sources such as the total emissions in t $CO_{2(e)}$,[680] the monitoring methodology applied, the tiers applied,[681] and information on data gaps that have occurred and have been closed by surrogate data.[682] All information that the emissions report contains is helpful for identifying mistakes, interpretation issues, or even fraud or misconduct by operators. The emissions report contains the results of the monitoring process. Therefore, in combination with the relevant information related to the monitoring stage that have been discussed in sections 3.2 and 3.3, the information contained in the emissions report would allow the public to assess whether the operator has followed the monitoring plan and has correctly reported its emissions, or whether the operator has underreported its emissions.

Interestingly, it appears that the emissions report has a special status among the documents produced throughout the compliance cycle. It is the only document with regard to which the Monitoring and Reporting Regulation states that it 'shall be made available to the public […]

[678] Commission Regulation (EU) No 601/2012 Article 67 (3); Commission Implementing Regulation (EU) 2018/2066 Article 68 (3).
[679] Commission Regulation (EU) No 601/2012 Annex X, section 1 (1); Commission Implementing Regulation (EU) 2018/2066 Annex X, section 1 (1).
[680] Commission Regulation (EU) No 601/2012 Article 3 (27); Commission Implementing Regulation (EU) 2018/2066 Article 3 (28) define CO2(e) as ' any greenhouse gas, other than CO2 listed in Annex II to Directive 2003/87/EC with an equivalent global warming potential as CO2.'.
[681] Commission Regulation (EU) No 601/2012 Annex X, section 1 (6); Commission Implementing Regulation (EU) 2018/2066 Annex X, section 1 (6).
[682] Commission Regulation (EU) No 601/2012 Annex X, section 1 (11); Commission Implementing Regulation (EU) 2018/2066 Annex X, section 1 (11).

subject to national rules adopted pursuant to' the Environmental Information Directive.[683] However, operators have the right to 'indicate […] which information they consider commercially sensitive' in light of Article 4 (2) (d) of the Environmental Information Directive.[684] This provision gives operators the power to potentially circumscribe the right to access to environmental information by marking a lot of information as commercially sensitive. An extensive analysis of the ramifications of these provisions can be found in section 5 of this chapter. It is however important to keep in mind that when assessing whether to refuse access to environmental information based on any of grounds of refusal, public authorities must always weigh the public interest in disclosure against the interests served by non-disclosure. Thus, it seems that simply because an operator has marked a certain passage of the emissions report as confidential, it is not guaranteed that this passage or even the entire emissions report will not be disclosed. However, it is unclear whether the operator can appeal against the decision of a public authority not to classify a passage as confidential where the operator has marked it as confidential.[685] Moreover, when the public requests the emission report of an installation and the public authority discloses it partially, it would be insightful to know which parts the operator has indicated as being confidential,[686] as it is also possible that the public authority keeps parts confidential that the operator has not marked as confidential.

4.5.Information related to verification

The verification process can be divided into four phases - (1) the pre-verification phase, (2) the verification phase, (3) the phase of independent review and (4) the verification report. In the following, each of these four phases of the verification process is explained. Based on this explanation, the information that is most relevant for checking compliance with the EU ETS Directive is identified. Not every detail and eventuality of all phases of the verification process will be explained. Instead, the discussion is focused on the elements that are most relevant for enabling the public to identify non-compliance with the EU ETS Directive - information contained in the verification report and the so-called 'internal verification documentation'.

[683] Commission Regulation (EU) No 601/2012 Article 71; Commission Implementing Regulation (EU) 2018/2066 Article 71.
[684] See chapter 2, section 2.6.2.3 for an in-depth discussion of this provision.
[685] See chapter 4, section 5 for a detailed discussion of the rights of third parties in the context of requests for environmental information.
[686] See also chapter 7, section 3.2.1.

4.5.1. Pre-verification phase

Before the beginning of the actual verification process, a verifier has to 'obtain a proper understanding of the operator […] and assess whether it can undertake the verification.'[687] To that end, the operator must grant the verifier access to all necessary information, so that the verifier can assess whether it is capable of carrying out the verification.[688] This information includes, inter alia, the greenhouse gas permit,[689] the monitoring plan,[690] a depiction of the operator's data flow activities,[691] the assessment of the inherent risk[692] and the control risk[693] as well as the overall control system,[694] the emission report[695] and 'all relevant correspondence with the competent authority.'[696] Importantly, the Accreditation and Verification Regulation only lays down minimum requirements regarding the information the operator has to disclose to the verifier. Hence, it appears that operators may choose to disclose more information and verifiers may ask for additional information. It seems that the list of information that the operator is obliged to disclose to the verifier is a good indication of the information that is necessary for the public to check an operator's compliance with the EU ETS rules. The operator has to disclose this information to the verifier because it is unequivocal for verifying the operator's emissions report. Investigating whether a particular operator does not comply with

[687] Commission Regulation (EU) No 600/2012 Article 8 (1); Commission Implementing Regulation (EU) 2018/2066 Article 8 (1).
[688] Commission Regulation (EU) No 600/2012 Article 8 (2); Commission Implementing Regulation (EU) 2018/2067 Article 8 (2).
[689] Commission Regulation (EU) No 600/2012 Article 10 (1) (a); Commission Implementing Regulation (EU) 2018/2067 Article 10 (1) (a).
[690] Commission Regulation (EU) No 600/2012 Article 10 (1) (b); Commission Implementing Regulation (EU) 2018/2066 Article 10 (1) (b).
[691] Commission Regulation (EU) No 600/2012 Article 10 (1) (c); Commission Implementing Regulation (EU) 2018/2067 Article 3 (26) define data flow activities as 'activities related to the acquisition, processing and handling of data that are needed to draft an emissions report from primary source data'.
[692] Commission Regulation (EU) No 600/2012 Article 3 (15); Commission Implementing Regulation (EU) 2018/2067 Article 3 (16) define inherent risk as 'the susceptibility of a parameter in the operator's […] report to misstatements that could be material […] before taking into consideration the effect of any related control activities'.
[693] Commission Regulation (EU) No 601/2012 Article 3 (16); Commission Implementing Regulation (EU) 2018/2067 Article 3 (17) set out that that ' 'control risk' means the susceptibility of a parameter in the operator's […] report to misstatements that could be material […] and that will not be prevented or detected and corrected on a timely basis by the control system.'.
[694] Commission Regulation (EU) No 600/2012 Article 10 (1) (d); Commission Implementing Regulation (EU) 2018/2067 Article 10 (1) (e); Commission Regulation (EU) No 601/2012 Article 58 (1); Commission Implementing Regulation (EU) 2018/2066 Article 59 (1) define a control system as a system which ensures 'that the annual emission report […] does not contain misstatements and is in conformity with the monitoring plan and this Regulation.'.
[695] Commission Regulation (EU) No 600/2012 Article 10 (1) (f); Commission Implementing Regulation (EU) 2018/2067 Article 10 (1) (h).
[696] Commission Regulation (EU) No 600/2012 Article 10 (1) (f); Commission Implementing Regulation (EU) 2018/2067 Article 10 (1) (j).

the EU ETS rules entails, to some extent, a repetition of several of the activities carried out by the verifier. Thus, if this information is relevant for its verification, it is also relevant for the public when investigating possible instances of non-compliance on the part of individual operators.

4.5.2. Verification phase

4.5.2.1.Strategic analysis

The verification phase begins with a strategic analysis, which serves as the basis for the actual verification. The strategic analysis involves an assessment of the 'nature, scale and complexity of the verification tasks.'[697] Based on the strategic analysis, the verifier determines the composition of the verification team,[698] whether the time allocated for the verification is sufficient and whether 'it is able to conduct the necessary risk analysis.'[699] When carrying out the risk analysis the verifier identifies and analyses the inherent risks,[700] the control activities[701] and the control risks[702] in order to 'design, plan and implement an effective verification.'[703] In the course of the risk analysis, the verifier evaluates the reliability of the data stemming from all sources of emissions.[704] Based on this analysis, the verifier must identify those emission sources that are most susceptible to generating errors.[705] All information relating to the risk analysis is relevant for the public when checking compliance with the EU ETS Directive, as it

[697] Commission Regulation (EU) No 600/2012 Article 11; Commission Implementing Regulation (EU) 2018/2067 Article 11.
[698] Commission Regulation (EU) No 600/2012 Article 36; Commission Implementing Regulation (EU) 2018/2067 Article 37.
[699] Commission Regulation (EU) No 600/2012 Article 11 (2); Commission Implementing Regulation (EU) 2018/2067 Article 11 (2).
[700] Commission Regulation (EU) No 601/2012 Article 3 (9); Commission Implementing Regulation (EU) 2018/2066 Article 3 (9) set out that 'inherent risk means the susceptibility of a parameter in the annual emissions report […] to misstatements that could be material […] before taking into consideration any related control activities.'.
[701] Control activities are defined by Commission Regulation (EU) No 601/2012 Article 3 (11); Commission Implementing Regulation (EU) 2018/2067 Article (12) as 'any acts carried out or measures implemented by the operator […] to mitigate inherent risks.'.
[702] Commission Regulation (EU) No 601/2012 Article 3 (10); Commission Implementing Regulation (EU) 2018/2067 Article 3 (10).
[703] Commission Regulation (EU) No 600/2012 Article 12 (1) (a)-(c); Commission Implementing Regulation (EU) 2018/2067 Article 12 (1) (a)-(c).
[704] 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 Annex V, para 8.
[705] ibid Annex V, para 9.

allows to check where the 'weak spots' of the monitoring approach of a certain installation are. Where a verifier has not identified any reliability issues, this may have three reasons. First, it may mean that an operator has commendably followed all requirements. Second, it could be that the verifier has not carried out the evaluation properly and consequently has not detected an issue that was present. Third, it may hint at possible collusion between the verifier and the operator. When checking compliance with the EU ETS rules, it may be worth examining the verifier's evaluation and to re-evaluate the reliability of the data provided by the operator. Therefore, the strategic analysis and the risk analysis seem to be relevant for checking compliance as well.

4.5.2.2.Verification

Based on the strategic analysis and the risk analysis, the verifier must draft a verification plan[706] that sets out, inter alia, 'a verification programme describing the nature and scope of the verification activities'[707] and a plan to test the control activities of the operator.[708] The verification plan must be designed and implemented in such a way that 'the verification risk[709] is reduced to an acceptable level,' so that the verifier can reasonably assure that the emission report is free from material misstatements.[710] Unfortunately, the terms 'acceptable level' and 'reasonably' are not defined, which makes this provision rather vague and gives much interpretive freedom to verifiers. Therefore, an extra layer of control through public scrutiny could be beneficial.

Part of the verification is to check whether the operator has correctly implemented the monitoring plan as approved by the competent public authority.[711] In that vein, the verifier

[706] Commission Regulation (EU) No 600/2012 Article 13 (1); Commission Implementing Regulation (EU) 2018/2067 Article 13 (1).
[707] Commission Regulation (EU) No 600/2012 Article 13 (1) (a); Commission Implementing Regulation (EU) 2018/2067 Article 13 (1) (a).
[708] Commission Regulation (EU) No 600/2012 Article 13 (1) (b); Commission Implementing Regulation (EU) 2018/2067 Article 13 (1) (b).
[709] Commission Regulation (EU) No 600/2012 Article 3 (17); Commission Implementing Regulation (EU) 2018/2067 Article 3 (18) define the verification risk as 'the risk […] that the verifier expresses an inappropriate verification opinion when the operator's […] report is not free from material misstatements.' It is a function of the inherent risk, the control risk and the detection risk, i.e. (verification risk) = (inherent risk) x (control risk) x (detection risk).
[710] Commission Regulation (EU) No 600/2012 Article 13 (4); Commission Implementing Regulation (EU) 2018/2067 Article 13 (4).
[711] Commission Regulation (EU) No 600/2012 Article 14, first paragraph; Commission Implementing Regulation (EU) 2018/2067 Article 14, first paragraph.

must check the analytical procedures the operator employs, verify the data collected during the monitoring process and test the monitoring methodology.[712] Furthermore, in case the verifier is of the opinion that 'the inherent risk,[713] the control risk[714] and the aptness of the operator's […] control activities' suggest that the data may be inaccurate or flawed, it must analyse the data's plausibility and completeness.[715] If the verifier finds inconsistencies, the operator is required to provide explanations based on additional evidence.[716] Even though the Accreditation and Verification Regulation is silent on this issue, it seems likely that the verifier keeps the additional explanations and evidence in its records.

The verification of the data provided by the operator must be done by 'tracing the data back to the primary data source, cross-checking data with external data sources, performing reconciliations, checking thresholds regarding appropriate data and carrying out calculations.'[717] When the verifier evaluates the operator's control activities and verifies the operator's data, it may 'use sampling methods […] provided that […] sampling is justified.'[718] In case the verifier finds a non-conformity or mistake in the operator's data, the operator is obliged to provide an explanation and the verifier has to decide on proper correction actions.[719] Pursuant to Article 21 of the Accreditation and Verification Regulation, the verifier is obliged to carry out site visits 'at one or more appropriate times during the verification process.' The purpose of these site visits is to be able to carry out verification activities such as the assessment of the monitoring devices and to interview employees of the operator.[720] The article of the Accreditation and Verification Regulation on site visits does not specify whether verifiers have

[712] Commission Regulation (EU) No 600/2012 Article 14, second paragraph; Commission Implementing Regulation (EU) 2018/2066 Article 14, paragraph.
[713] 'Inherent risk means the susceptibility of a parameter in the operator's […] report to misstatements that could be material, […] before taking into consideration the effect of any related control activities.' Commission Regulation (EU) No 600/2012 Article 3 (15); Commission Implementing Regulation (EU) 2018/2067 Article 3 (16).
[714] 'Control risk means the susceptibility of a parameter in the operator's […] report to misstatements that could be material […] and that will not be prevented or detected and corrected on a timely basis by the control system.' Commission Regulation (EU) No 600/2012 Article 3 (16); Commission Implementing Regulation (EU) 2018/2067 Article 3 (17).
[715] Commission Regulation (EU) No 600/2012 Article 15 (1); Commission Implementing Regulation (EU) 2018/2067 Article 15 (1).
[716] Commission Regulation (EU) No 600/2012 Article 15 (4); Commission Implementing Regulation (EU) 2018/2067 Article 15 (4).
[717] Commission Regulation (EU) No 600/2012 Article 16 (1); Commission Implementing Regulation (EU) 2018/2067 Article 16 (1).
[718] Commission Regulation (EU) No 600/2012 Article 20 (1); Commission Implementing Regulation (EU) 2018/2067 Article 20 (1).
[719] Commission Regulation (EU) No 600/2012 Article 20 (2); Commission Implementing Regulation (EU) 2018/2067 Article 20 (2).
[720] Commission Regulation (EU) No 600/2012 Article 21 (1); Commission Implementing Regulation (EU) 2018/2067 Article 21 (1).

to produce a report of the site visits. However, article 26 sets out that the results of the verification activities, such as site visits, must be included in the internal verification documentation.[721]

It appears that all information and documents produced by the verifier when verifying the operator's data would help the public to check compliance with the EU ETS Directive due to two reasons. First, this information seems to show whether the operator has, according to the verifier's assessment, correctly monitored its emissions. It is a crucial element in checking compliance with the EU ETS Directive, as the correct monitoring of emissions is the first step in the compliance cycle for which the operator and not a public authority is responsible. Second, information and documents produced by the verifier when controlling the operator's data provide an insight into the *modus operandi* of the verifier itself. To assess compliance, it seems crucial to understand the way verifiers do their job. Moreover, in some cases, the operator must provide additional information or justifications to the verifier. Access to this information and documents could be valuable for checking compliance with the EU ETS rules. The additional explanations that the operator must provide to the verifier in case the latter finds inconsistencies in the emission report are relevant to evaluate whether the operator has correctly reported its emissions. It may be worth examining instances where the verifier has already identified inconsistencies in the emissions report. However, in order to do so, it is necessary that the public has access to the explanations provided by the verifier. Moreover, when examining these issues, the public may be able to detect irregularities that point towards indications of collusion between the verifier and the operator. For example, operator and verifier could collude in the following way: The verifier identifies inconsistencies in the monitoring and reporting of emissions by the operator. As required by the Accreditation and Verification Regulation,[722] the verifier obtains explanations from the operator for those inconsistencies. Even though the explanation is not satisfactory, the verifier does not pursue the issue further and approves the emissions report as satisfactory.

Importantly, the verifier is obliged to document the outcomes of the whole verification process,[723] including the verification activities discussed above,[724] the analytical procedures

[721] Commission Regulation (EU) No 600/2012 Article 26 (1) (a); Commission Implementing Regulation (EU) 2018/2067 Article 26 (1) (a).
[722] Commission Regulation (EU) No 600/2012 Article 15 (4); Commission Implementing Regulation (EU) 2018/2067 Article 15 (4).
[723] Commission Regulation (EU) No 600/2012 Article 24 (f); Commission Implementing Regulation (EU) 2018/2067 Article 24 (f).
[724] Commission Regulation (EU) No 600/2012 Article 14; Commission Implementing Regulation (EU) 2018/2067 Article 14.

applied,[725] the verification of data supplied by the operator[726] and the verification of the correct application of the monitoring methodology[727] in the so-called internal verification documentation. This comprises 'all internal documentation that a verifier has compiled to record all documentary evidence and justification of activities that are carried out for the verification of an operator's […] report.'[728] More specifically, the internal verification documentation must include at least 'the results of the verification activities performed,[729] the strategic analysis, risk analysis and verification plan[730] [and] sufficient information to support the verification opinion.'[731] Thus, the internal verification documentation seems to comprise all the information that is produced throughout the verification process that would enable the public to unveil non-compliance with the EU ETS Directive and, consequently, would be highly relevant for the public when trying to examine compliance of individual EU ETS operators.

4.5.3. Independent review

After the verifier has concluded its work and has drafted a preliminary version of the verification report, it must submit it together with the internal verification documentation to an independent reviewer who must review the verification process in order to make sure that the verifier has carried out its work pursuant to the provisions of the Accreditation and Verification Regulation.[732] The independent review is however not a second verification. The independent review is intended to ensure that the verification has been carried out correctly according to the

[725] Commission Regulation (EU) No 600/2012 Article 15; Commission Implementing Regulation (EU) 2018/2067 Article 15.
[726] Commission Regulation (EU) No 600/2012 Article 16; Commission Implementing Regulation (EU) 2018/2067 Article 16.
[727] Commission Regulation (EU) No 600/2012 Article 17; Commission Implementing Regulation (EU) 2018/2067 Article 17.
[728] Commission Regulation (EU) No 600/2012 Article 3 (20); Commission Implementing Regulation (EU) 2018/2067 Article 3 (21).
[729] Commission Regulation (EU) No 600/2012 Article 26 (1) (a); Commission Implementing Regulation (EU) 2018/2067 Article 26 (1) (a).
[730] Commission Regulation (EU) No 600/2012 Article 26 (1) (b); Commission Implementing Regulation (EU) 2018/2067 Article 26 (1) (b).
[731] Commission Regulation (EU) No 600/2012 Article 26 (1) (c); Commission Implementing Regulation (EU) 2018/2067 Article 26 (1) (c).
[732] Commission Regulation (EU) No 600/2012 Article 25 (3); Commission Implementing Regulation (EU) 2018/2067 Article 25 (3).

applicable procedures and that 'due professional care and judgment has been applied.'[733] Hence, the independent review is not a review of the content of the verification but rather a measure to ensure that no procedural errors were made. However, the independent reviewer must be able to 'analyse the information provided to confirm the completeness and integrity of the [verification report], to challenge missing or contradictory information as well as to check data trails for the purpose of assessing whether the internal verification documentation is complete and provides sufficient information to support the draft verification report.'[734]

The term 'independent' suggests that the reviewer is an independent entity and is not in any way linked to the verifier itself. However, this is not specified anywhere in the Accreditation and Verification Regulation. Instead, it suggests the opposite. It is set out that the verifier must 'appoint an independent reviewer who shall not be part of the verification team.'[735] Moreover, Article 42 (5) states that 'a verifier shall not outsource the independent review.'[736] This indicates that independent reviewers are merely employees of the company performing the verification. This means that they are only independent in the sense that they were not part of the team that performed the verification. This suggests that the conflict of interest that arises because the operator pays the verifier for its verification services is not remedied by the independent review. It is merely a second check by the same entity – the company that performs the verification itself. During the independent review, no new information is produced, unless the independent reviewer finds that the verification has been carried out in a flawed way. If that was the case, this would also be of interest to the public when checking compliance with the EU ETS Directive. Where the independent reviewer finds that verification has not been carried out correctly, it would be relevant to know what the mistake of the verifier was because a mistake by the verifier could mean that the operator undercounted emissions without it being noticed by the verifier. However, there is no guarantee that, where the independent reviewer identifies mistakes in the verification report, these mistakes are recorded, as the Accreditation and Verification Regulation does not require this. If there were no records of such mistakes, for example because they were communicated orally, it would be hard to get access to information about these mistakes, since no records of them exist.

[733] Commission Regulation (EU) No 600/2012 Article 25 (3); Commission Implementing Regulation (EU) 2018/2067 Article 25 (3).
[734] Commission Regulation (EU) No 600/2012 Article 38 (3); Commission Implementing Regulation (EU) 2018/2067 Article 39 (3).
[735] Commission Regulation (EU) No 600/2012 Article 36 (3); Commission Implementing Regulation (EU) 2018/2067 Article 37 (3).
[736] Commission Regulation (EU) No 600/2012 Article 43 (5); Commission Implementing Regulation (EU) 2018/2067 Article 43 (5).

4.5.4. Verification report

After the independent reviewer has assessed the draft verification report as satisfactory, the verifier must issue the final verification report to the operator.[737] The verification report can indicate one of four possible findings. First, it can approve the emissions report.[738] Second, it can state that the emissions report contains material misstatements that have not been corrected before the issuance of the verification report.[739] Third, the verifier may indicate that it could not obtain enough evidence to express a verification opinion.[740] Lastly, the verification report may also state that there were too many non-conformities, so that the verifier was unable to conclude whether the emissions report was free from material misstatements.[741] The operator must submit the verification report together with the emissions report to the competent authority.[742] The Accreditation and Verification Regulation sets out that the verification report must include *inter alia:*

- the verification scope[743]
- the criteria based on which the operator's emissions report was verified[744]
- aggregated emissions per activity and per installation[745]
- the verification opinion statement[746]
- a description of any misstatements and non-conformities that were not remedied before the verifier issued the verification report[747]

[737] Commission Regulation (EU) No 600/2012 Article 27 (1); Commission Implementing Regulation (EU) 2018/2067 Article 27 (1).
[738] Commission Regulation (EU) No 600/2012 Article 27 (1) (a); Commission Implementing Regulation (EU) 2018/2067 Article 27 (1) (a).
[739] Commission Regulation (EU) No 600/2012 Article 27 (1) (b); Commission Implementing Regulation (EU) 2018/2067 Article 27 (1) (b).
[740] Commission Regulation (EU) No 600/2012 Article 27 (1) (c); Commission Implementing Regulation (EU) 2018/2067 Article 27 (1) (c).
[741] Commission Regulation (EU) No 600/2012; Commission Implementing Regulation (EU) 2018/2067 Article 27 (1) (b).
[742] Commission Regulation (EU) No 600/2012 Article 27 (2); Commission Implementing Regulation (EU) 2018/2067 Article 27 (2).
[743] Commission Regulation (EU) No 600/2012 Article 27 (3) (c); Commission Implementing Regulation (EU) 2018/2067 Article 27 (3) (c).
[744] Commission Regulation (EU) No 600/2012 Article 27 (3) (e); Commission Implementing Regulation (EU) 2018/2067 Article 27 (3) (e).
[745] Commission Regulation (EU) No 600/2012 Article 27 (3) (f); Commission Implementing Regulation (EU) 2018/2067 Article 27 (3) (g).
[746] Commission Regulation (EU) No 600/2012 Article 27 (3) (i); Commission Implementing Regulation (EU) 2018/2067 Article 27 (3) (k).
[747] Commission Regulation (EU) No 600/2012 Article 27 (3) (i); Commission Implementing Regulation (EU) 2018/2067 Article 27 (3) (l).

- the dates on which site visits were carried out and by whom[748]
- any instances of non-compliance with the Accreditation and Verification Regulation that were identified by the verifier[749]
- the names of the individuals that were involved in the verification process, i.e., the EU ETS lead auditor, the independent reviewer and, where applicable the EU ETS auditors.[750]

With regard to potential misstatements and non-conformities, the verifier is obliged to explain them in sufficient detail to make it possible to grasp 'the size and nature of the misstatements and non-conformities',[751] the reasons why the misstatements have a material effect or why not[752] and to which part of the monitoring or emissions report the misstatements or non-conformities relate.[753] Since the verification report contains detailed information on the results of the verification process as well as a justification for the result, it seems very valuable for the public when checking compliance with the EU ETS. It appears that together with the internal verification documentation, the information contained in the verification report would allow the public to reproduce the verification result and, in the course of doing so, to examine whether the verification has been carried out correctly and whether the verifier has come to the correct result.

4.6. Interim conclusions

It has become clear that much of the information that is produced during the compliance cycle can potentially be useful for the public when trying to check compliance with the EU ETS rules. In this section, some of the relevant information has been identified. Especially taken together, the information could allow the public to examine compliance with the EU ETS rules, at least to a certain extent. The relevant information identified in this section is:

[748] Commission Regulation (EU) No 600/2012 Article 27 (3) (k); Commission Implementing Regulation (EU) 2018/2067 Article 27 (3) (m).
[749] Commission Regulation (EU) No 600/2012 Article 27 (3) (m); Commission Implementing Regulation (EU) 2018/2067 Article 27 (3) (o).
[750] Commission Regulation (EU) No 600/2012 Article 27 (3) (q); Commission Implementing Regulation (EU) 2018/2067 Article 27 (3) (t).
[751] Commission Regulation (EU) No 600/2012 Article 27 (4) (a); Commission Implementing Regulation (EU) 2018/2067 Article 27 (4) (a).
[752] Commission Regulation (EU) No 600/2012 Article 27 (4) (b); Commission Implementing Regulation (EU) 2018/2067 Article 27 (4) (b).
[753] Commission Regulation (EU) No 600/2012 Article 27 (4) (c); Commission Implementing Regulation (EU) 2018/2067 Article 27 (4) (c).

- The greenhouse gas permit including the monitoring plan,
- the emissions report, including information on which parts have been indicated as being confidential by the operator
- the internal verification documentation, including
    - the results of the verification activities,
    - the strategic analysis and the verification plan
    - information supporting the verification opinion,
- the procedures for verification activities[754]
- the verification report, and
- Information that the operator has provided to the verifier[755]

However, there is also information that does not need to be recorded in the above-mentioned documents but that may be relevant for the public when checking compliance with the EU ETS Directive. Generally, the information listed above mostly covers the results of the monitoring and verification activities. It also includes a description of the monitoring process in the form of the monitoring plan. However, a description of the process by which the verifier came up with these results is missing. In that regard, it is important to keep in mind that the list above is not an exhaustive list. There may be more information that is relevant for checking compliance with the EU ETS. It is likely that by only analysing the law on the compliance cycle it may not be possible to identify all the information that would be relevant for checking compliance with the EU ETS. However, the information identified as being relevant in this chapter is a first step in identifying the information that is relevant for checking compliance with the EU ETS. Future research may investigate this issue further and complete the understanding of what information may be necessary for the public to investigate compliance with the EU ETS.

Moreover, it must be noted that even if the public had access to all the information examined in this section, it would only be possible to perform a procedural check. In other words, the public could only examine whether the operator followed all procedural requirements set out in the Monitoring and Report Regulation. A substantive test would not be

[754] Commission Regulation (EU) No 600/2012 Article 40 (1) sets out that 'a verifier shall establish, document, implement and maintain [...] procedures for verification activities.'; see also Commission Implementing Regulation (EU) 2018/2067 Article 41 (1).
[755] Pursuant to Commission Regulation (EU) No 600/2012 Article 10 (1) the operator must provide to the verifier inter alia a description of the data flow activities, the risk assessment, where applicable the sampling plan, records of modifications to the monitoring plan, all relevant correspondence with the competent authority and where applicable the approval of the competent authority for not carrying out site visits. see also Commission Implementing Regulation (EU) 2018/2067 Article 10 (1).

possible, since there is no way of either verifying the raw data based on which the total emissions are calculated, i.e., amount of fuel used or to test the device measuring the CO_{2e} concentrations in the flue gas. If the operator and the verifier were determined to cheat, they could simply base the emissions report on false information.[756] In that regard, it is curious that the Monitoring and Reporting Regulation leaves it up to operators to decide whether to monitor their emissions by calculating them or by actually measuring them. In the next chapter, it will be analysed whether the information that has been identified as relevant must be disclosed upon a request by the public.

5. Provisions on access to information in the EU ETS legislation

5.1. Introduction

In the previous section, some of the information that could be relevant for examining compliance of individual EU ETS operators has been identified. It seems likely that the Aarhus Convention and the Environmental Information Directive govern access to information related to the EU ETS, since the EU ETS is an instrument intended to protect the environment by reducing greenhouse gas emissions.[757] However, the EU ETS legislation itself also contains provisions on access to information. Therefore, before analysing whether the relevant information should be disclosed pursuant to the Aarhus Convention and the Environmental Information Directive, which will be done in chapter 4, it is necessary to examine these provisions and determine how they relate to the Environmental Information Directive.

The EU ETS Directive contains two provisions that touch upon access to information, Article 15a on the disclosure of information and professional secrecy and Article 17 on access to information. They are complemented by provisions of the Monitoring and Reporting Regulation and the Accreditation and Verification Regulation. This section analyses these provisions with a view to determining their meaning and to understanding how they relate to each other, to the Aarhus Convention and the Environmental Information Directive. Thus far, there has been almost no literature on Articles 17 and 15a. Nóbrega analyses them with a focus

[756] One possible way for the public to verify the accuracy of the data on which the emissions report is based could be to get access to information such as the total fuel bought. However, it is questionable whether the public could actually get access to such information in practice.
[757] An indication of this is that the EU ETS Directive is based on what is now Article 192 (1) TFEU which is the legal base for legislation intended to protect the environment.

on the shift of decision-making from the Member States level to the EU level between the second and the third trading phase[758] and Peeters and Müller briefly discuss them in the context of accessing information related to compliance with the EU ETS.[759] However, there is no literature that systematically analyses these two provisions with a view to determining the meaning and their relationship with each other.

5.2. Article 17: Access to information

Pursuant to Article 17 of the EU ETS Directive, all decisions regarding

> *the allocation of allowances, information on project activities in which a Member State participates or authorises private or public entities to participate, and the reports of emissions required under the greenhouse gas emissions permit and held by the competent authority shall be made available to the public in accordance with* [the Environmental Information Directive].[760]

That means that public authorities either have to actively make the information to which the article refers available or disclose it upon a request by a member of the public. Nóbrega found that 'Article 17 does not make it clear whether it is applicable to the active dissemination of information by authorities and/or to requests for information' and concluded that 'in the absence of more specific terminology, the provision is most likely applicable to both situations.'[761]

Interesting in this regard is the distinction that Article 17 makes between the allocation of allowances, project activities, and emission reports. In the case of the allocation of allowances, the Environmental Information Directive applies only to related 'decisions'. This suggests that not every piece of information that relates to the allocation of allowances is subject to the regime of the Environmental Information Directive. However, from the wording of article 17, it does not become clear what exactly the phrase 'decisions relating to' entails. In the case of the allocation of allowances, it seems logical that a decision by a public authority to allocate a

[758] Sandra Nóbrega, 'EU Climate Law Through the Lens of the Aarhus Convention - Access to Environmental Information and Public Participation in EU Climate Change Decision Making'' (Maastricht University 2020) 139–147.
[759] Peeters and Müller (n 46).
[760] 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 Article 17.
[761] Nóbrega (n 758) 140 f.

certain number of allowances to an operator would be covered. Nevertheless, 'relating to' suggests that the link to the allocation of allowances does not necessarily have to be very strong. Information on project activities in which a Member States participates or authorises private or public entities to participate also have to be made available pursuant to the Environmental Information Directive. Here, there is no element, such as the phrase 'decisions relating to', that limits the scope of information on project activities that have to be disclosed pursuant to the rules set out in the Environmental Information Directive.

Regarding the emissions reports, Article 17 sets out that 'the reports of emissions required under the greenhouse gas emissions permit and held by the competent authority, shall be made available to the public in accordance with [the Environmental Information] Directive.' Pursuant to Article 6 (6) of the EU ETS Directive, the greenhouse gas emissions permit shall describe the measures planned to report emissions in accordance with the Monitoring and Reporting Regulation. That regulation points out that 'emission reports held by the competent authority shall be made available to the public pursuant to the national legislation adopted to implement [the Environmental Information] Directive.'[762] Hence, it is clear that the EU legislator intended emissions reports to be accessible to the public after the annual compliance cycle. However, Article 71 of the Monitoring and Reporting Regulation adds that operators may indicate in their emissions report which information they consider commercially sensitive. However, simply because an operator flags parts of the emissions report as commercial or industrial information, it is not guaranteed that access to that information will always be refused. Ultimately, it is up to the public authority to decide whether to disclose the emissions report.[763]

[762] Commission Regulation (EU) No 601/2012 Article 71; Commission Implementing Regulation (EU) 2018/2066 Article 71.
[763] For a more detailed discussion on this see chapter 2, section 2.6.2.3 and chapter 4, section 5.

5.3. Article 15a: disclosure of information and professional secrecy

5.3.1. Introduction

Article 15a is titled 'Disclosure of information and professional secrecy'. It was not part of the original EU ETS Directive but was added only later by an amendment in 2009.[764] Article 15a was introduced by the European Parliament to 'ensure the application of rules governing financial instruments with regard to the trading of allowances in order to enhance business confidence and increase transparency.'[765] The article is made up of only two short paragraphs. Broadly speaking, the first one sets out an obligation to disclose certain information, whereas the second paragraph provides limitations to this obligation. The wording of Article 15a is relatively vague, which makes it difficult to determine its true meaning with certainty. Nevertheless, in this section, it is attempted to discuss possible interpretations of Article 15a. Moreover, it is discussed how Article 15a may relate to the access to environmental information regime set out by the Aarhus Convention and the Environmental Information Directive.

5.3.2. First paragraph

The first paragraph sets out that 'Member States and the Commission shall ensure that all decisions and reports relating to the quantity and allocation of allowances and to the monitoring, reporting and verification of emissions are immediately disclosed in an orderly manner ensuring non-discriminatory access.'[766] Article 15a is jointly addressed to Member States and the Commission.[767] Since monitoring, reporting and verification within the compliance cycle of the EU ETS is administered at the national level, it is the responsibility of the Member States to implement the obligation set out by Article 15a into their national legal systems. However, the Commission is still responsible for overseeing the proper functioning

[764] 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.
[765] Avril Doyle, 'Report on the Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/87/EC so as to Improve and Extend the Greenhouse Gas Emission Allowance Trading System of the Community (COM(2008)0016 – C6-0043/2008 – 2008/0013(COD))' (European Parliament 2008).
[766] 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 Article 15a.
[767] Peeters and Müller (n 233) 267.

of the EU ETS as a whole. In that regard, it may take decisions and hold reports that relate to the monitoring, reporting and verification of emissions. Thus, it seems that both the Commission and the Member States have to adhere to Article 15a to the extent that they adopted decisions and hold reports related to the monitoring, reporting and verification of emissions.

One question that arises is whether Article 15a sets out a passive or active obligation to disclose information. Does it oblige the European Commission and the authorities of the Member States to actively disclose information, or does it oblige them to disclose information upon receiving a request from the public? Nóbrega argues that Article 15a obliges Member States and the European Commission to actively disseminate the information referred to. She reaches this conclusion due to the fact that Article 15a uses the words 'immediately disclosed' and the lack of a reference to a request.[768]

In order to shed some light on this issue, it may be helpful to look at a few different language versions of Article 15a. The German language version is less vague than its English counterpart. It states that 'the Member States and the Commission ensure that all decisions and reports […] on the monitoring, reporting and verification of emissions are immediately *published, in order to ensure an orderly and non-discriminatory access to this information* [emphasis added]'.[769] The German version uses the word 'published' instead of 'disclosed'. This wording suggests that public authorities are under the obligation to actively publish decisions and reports related to monitoring, reporting and verification of emissions. This interpretation is supported by the fact that pursuant to the German language version, the decisions and reports shall be published 'in order to' ensure non-discriminatory access and not like the English language version 'ensuring'.

Furthermore, it is unclear what is meant by non-discriminatory access. It is possible to interpret the English language version in a way that when competent authorities disclose the information, they shall do so in a non-discriminatory way. Member States would correctly implement this provision by providing that there is only a passive obligation on public authorities to disclose information upon request and when doing so they have to treat all applicants in a non-discriminatory way. Pursuant to the German language version, this would

[768] Peeters and Müller (n 46) 267.

[769] 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 Article 15a, German original: German original: 'Die Mitgliedstaaten und die Kommission stellen sicher, dass alle Entscheidungen und Berichte über die [...] Überwachung, Berichterstattung und Prüfung der Emissionen umgehend veröffentlicht werden, um einen ordentlichen und diskriminierungsfreien Zugang zu diesen Informationen zu gewährleisten [emphasis added].'

not be in line with the Directive, since the publication of decisions and reports on monitoring, reporting and verification is intended to ensure that access to this information is non-discriminatory.[770] The French language version is worded in a similar way to the German language version, stating that 'decisions and reports concerning the […] monitoring, reporting and verification of emissions have to be *disseminated* immediately and *systematically in order to* guarantee non-discriminatory access to this information [emphasis added]'.[771] A systematic dissemination implies that public authorities have to actively disclose the information in question. The Portuguese[772] and Spanish[773] language versions are worded similarly to the French and German. Therefore, it seems that Article 15a puts an obligation on public authorities to actively disseminate decisions and reports on monitoring, reporting and verification of emissions.[774]

Furthermore, it is unclear what the term 'decisions and reports' entails. In the context of monitoring, reporting and verification of emissions it is likely that 'reports' includes the emissions report and the verification report. However, the expression 'relating to' suggests that the scope is broader and also includes other reports that have a link to monitoring, reporting and verification. The question arises how strong the link to monitoring, reporting and verification of emissions has to be in order for a report to fall within the ambit of Article 15a. A decision related to the monitoring, reporting, and verification of emissions could for example include the decision of a public authority to approve the monitoring plan of an installation.

When the wording of a directive is not entirely clear, it should be interpreted in a way as to make it 'consistent with the Treaty. […] Similarly, the primacy of international agreements concluded by the Community over provisions of secondary Community legislations means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.'[775] Therefore, the provisions of the EU ETS Directive, including Article 15a,

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[770] ibid German original: 'Die Mitgliedstaaten und die Kommission stellen sicher, dass alle Entscheidungen und Berichte über die [...] Überwachung, Berichterstattung und Prüfung der Emissionen umgehend veröffentlicht werden, um einen ordentlichen und diskriminierungsfreien Zugang zu diesen Informationen zu gewährleisten.'

[771] ibid Article 15a; French original French original: 'Les États membre et la Commission veillent à ce que l'ensemble et des rapport concernant […] la surveillances, la déclaration et la vérification des émission, soit immédiatement et systématiquement diffuse de manière à garantir un accès non discriminatoire à ces informations [emphasis added].'

[772] ibid Article 15a, Portuguese original:"Os Estados-Membros e a Comissão garantem a imediata divulgação, de uma forma ordenada e que assegure um acesso não discriminatório, de todas as decisões e relatórios relativos [...] à vigilância, comunicação de informações e verificação das emissões [emphasis added]."

[773] ibid Article 15a"Los Estados miembros y la Comisión garantizarán que todas las decisiones e informes relativos […] al seguimiento, la notificación y la verificación de las emisiones se divulguen inmediatamente de una manera ordenada por la que se garantice un acceso no discriminatorio a tal información [emphasis added]."

[774] Peeters and Müller (n 46) 267.

[775] *Case C-61/94 Commission of the European Communities v Federal Republic of Germany* [1996] para 52; *Case C-286/02 Bellio F.lli Srl v Prefettura di Treviso* [2004] para 33; *Case C-344/04 IATA and ELFAA* [2006] para 35.

have to be interpreted, as far as possible, in line with the Aarhus Convention. In that regard, 'the explanatory memorandum for the European Commission proposal expressly states that [the EU ETS] Directive […] is intended to be consistent with the Aarhus Convention.'[776] It states that 'the public should have access to information concerning the results of the monitoring, reporting and verification obligations […] in accordance with [the Environmental Information] Directive'[777] and that 'the proposed provisions are consistent with the Aarhus Convention.'[778]

The relevant provisions of the Aarhus Convention for interpreting Article 15a of the EU ETS Directive are Articles 4 and 5, since they set out the conditions for access to information. Article 4 is concerned with the passive right of information, which means that public authorities shall make environmental information available upon a request by a member of the public.[779] There are only two requirements, i.e., the information must be environmental, and it must be held by a public authority. Article 5 of the Aarhus Convention sets out an active right to information. Where there is an 'imminent threat to human health or the environment' public authorities must actively disseminate information 'which could enable the public to take measures to prevent or mitigate the harm arising from the threat and is held by a public authority.'[780] For the interpretation of Article 15a this means that provided that reports and decisions related to the monitoring, reporting and verification of emissions fall under the definition of environmental information, they have to be either (1) disclosed to the public upon request, or (2) actively disseminated by public authorities in case there is an imminent threat to human health or the environment. The wording of Article 15a, as analysed above, does not exclude one of the two options. However, in light of the nature of the information in question, decisions and reports related to the monitoring, reporting and verification of emissions, it is unlikely that the information could make it possible for the public to prevent or mitigate the harm from an imminent threat to human health or the environment. Therefore, it would not be contrary to the Aarhus Convention if Article 15a was interpreted as containing a passive obligation for public authorities, instead of a duty to actively disclose information. However, at the same time, the Aarhus Convention does not prohibit the parties to adopt provisions that go beyond the Aarhus Convention and provide broader access to environmental information.

[776] *Case C-524/09 Ville de Lyon v Caisse de dépôts et consignations* [2010] para 64.
[777] 'Explanatory Memorandum to the Commission Proposal for a Directive of the European Parliament and of the Council Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and Amending Council Directive 96/61/EC' (European Commission 2001) 581 final para 18.
[778] ibid.
[779] Aarhus Convention Article 4 (1).
[780] ibid Article 5 (1) (c).

Thus, the Aarhus Convention does resolve the issue whether Article 15a contains and active or passive duty to disclose information.

So far, it has been assumed that Article 15a sets out a concrete obligation, containing a set of rules that govern access to a specific set of information. However, given the broad wording of this article, an alternative interpretation could be that Article 15a only sets out a general aim that must be achieved by the Member States – immediate and non-discriminatory disclose of certain information. Member States would be free to choose how to achieve that aim. This goal could be attained, for example, by making access to the information referred to in Article 15a subject to the rules adopted to implement the Environmental Information Directive.

5.3.3. Second paragraph

Pursuant to the second paragraph of Article 15a, 'information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of the applicable laws, regulations or administrative provisions.'[781] It is unclear what professional secrecy means. It is not explained anywhere in the EU ETS Directive. As stated above, decisions and reports relating to the monitoring, reporting and verification of emissions will most of the times be held by national authorities. Therefore, it is likely that national authorities will have recourse to the definition of professional secrecy set out in their national law in order to determine when information is covered by professional secrecy.

The second paragraph states that 'information covered by professional secrecy may not be disclosed *to any other person or authority* [emphasis added].'[782] This seems to suggest that the national authority holding information which is covered by professional secrecy may not disclose it. This seems to provide an exception for information not to be published, where it is covered by professional secrecy. However, information that is covered by professional secrecy may be disclosed 'by virtue of the applicable laws, regulations or administrative provisions.'[783] It is unclear to what exactly reference is made here. Is it national or European law, or both? Nóbrega suggests that this reference to the applicable laws, regulations or administrative

[781] 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 Article 15a.
[782] ibid.
[783] 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.

provisions is an implicit reference to the Environmental Information Directive,[784] despite the fact that the term 'professional secrecy' is not mentioned in that directive. However, in case the information referred to in Article 15a constitutes 'environmental information', Nóbrega's conclusion seems convincing.[785] This conclusion also supports the interpretation that, instead of containing specific rules governing access to certain information, Article 15a sets out a general aim that Member States must achieve. The reference to the 'applicable laws, regulations and administrative provisions' may refer to the balancing act that public authorities must perform when considering whether to apply an exception.

Despite the fact that in section 4.3.2 it was cautiously concluded that Article 15a sets out an active duty to disclose information, it is worthwhile to recall the exceptions to the passive right of access to information set out in Article 4 (3) and (4) of the Convention.[786] Article 15a may not be interpreted as restricting the right to access to information to a greater extent than is allowed by the Aarhus Convention. It may however be less restrictive. As explained above, the interpretation of the term 'professional secrecy' is key. Construing the term 'professional' broadly as to include any professional activity, two of the restrictions set out in the Aarhus Convention could provide some guidance in this regard. Article 4 (4) permits public authorities to refuse a request where the disclosure of the requested information would adversely affect the confidentiality of the proceedings of public authorities.[787] Following the broad construction of the term 'professional', it can be argued that the proceedings of public authorities constitute professional activities. Moreover, Article 4 (4) provides that a request for environmental information may be refused, if the disclosure would adversely affect the confidentiality of commercial and industrial information.[788] Arguably, commercial and industrial activities constitute professional activities. Therefore, information that is generated in the course of these activities can be regarded as information that is potentially covered by professional secrecy. Thus, it can be argued that when applying the national legislation that implements Article 15a, public authorities may not interpret the concept of professional secrecy so that it restricts the right to access to reports and decisions related to the monitoring, reporting and verification of emissions to a greater extent that the grounds of refusal set out in Article 4 (4) (a) and (d) of the Aarhus Convention. In other words, the grounds of refusal in Article 4 (4) (a) and (d) serve as a benchmark for the application of Article 15a which may not be surpassed.

[784] Nóbrega (n 758) 143.
[785] This issue will be examined in chapter 4.
[786] See chapter 2, section 2.6.
[787] Aarhus Convention Article 4 (4) (a).
[788] ibid Article 4 (4) (d).

5.3.4. Interim conclusions

As has become clear, Article 15a is a highly interesting provision of the EU ETS Directive. It is worded in a relatively vague way, which gives rise to some uncertainty regarding its meaning and implications. Unfortunately, there has not been any case before the CJEU that deals with Article 15a. On the one hand, the analysis of different language versions of the article suggests that Article 15a puts an obligation on Member States to make sure that decisions and reports on monitoring, reporting and verification of emissions are actively disseminated. On the other hand, the implicit reference to the Environmental Information Directive and the grounds of refusal seems to indicate that Article 15a contains a passive right to access information.

In section 3 of this chapter, the information related to compliance with the EU ETS that is publicly available has been discussed. It is striking that the emissions report and the verification report were not among this information, despite the fact that Article 15a expressly refers to 'reports on reporting and verification'. One possible explanation may be that they were not published because they contain information covered by professional secrecy, the only exception that Article 15a provides. The term professional secrecy is not defined by the EU ETS Directive. Article 15a sets out that where information is covered by professional secrecy, it may only be accessed by virtue of the applicable laws, regulations and administrative provisions. This may be a reference to the Environmental Information Directive. The fact that the emissions report and verification report are not published could also be seen as an indication that Article 15a is not interpreted as containing a duty to actively disclose information in practice. Moreover, this supports the interpretation that instead of setting out a concrete obligation and a set of specific rules that govern access to a specific set of information, Article 15a merely sets out a general aim and Member States are free to choose how to attain that aim, for example by using the legislation adopted to implement the Environmental Information Directive to regulate access referred to in Article 15a.

Since secondary EU legislation as well as national legislation must be in line with international agreements to which the EU and the Member States are parties, as is the case with the Aarhus Convention, Article 15a and the national legislation implementing it must be interpreted as much as possible in light of the Aarhus Convention. Thus, it has been argued that the grounds of refusal set out in the Aarhus Convention serve as a benchmark for restricting access to information, which may not be surpassed when implementing and applying Article 15a.

5.4.What is the applicable regime?

5.4.1. Introduction

It has been explained that the EU ETS Directive contains two articles regulating access to information that is necessary to identify non-compliance with the EU ETS rules. Article 17 regulates, inter alia, access to the reports of emissions required under the greenhouse gas permit, while Article 15a is concerned with the disclosure of decisions and reports related to the monitoring, reporting and verification of emissions. Assuming that Article 15a sets out a stand-alone regime containing specific rules governing access to the emissions report, it seems that there is a certain overlap between these two articles.[789] Both regulate access to emissions reports. Hence, the question arises which one of the two articles applies regarding emissions reports. Another important question is how access to the information that is not specifically mentioned in the EU ETS Directive is regulated.

5.4.2. Article 15a v Article 17

5.4.2.1.Case C-524/09 Ville de Lyon

When trying to answer the question whether Article 15a or Article 17 governs access to the emissions report, it is worth having a closer look at the CJEU's reasoning in the *Ville de Lyon* case which was concerned with a similar issue. The City of Lyon had requested trading data, i.e. the volumes of the greenhouse gas emission allowances sold in 2005, as well as the dates of the transactions, from the Caisse des dépôts et consignations (the administrator of the French national registry).[790] The latter refused the request arguing that pursuant to the Registries Regulation,[791] it could only disclose this information after a five-year period had passed.[792] It

[789] *Joined Cases C-191/14, C-192/14, C-295/14 and C-391/14 to C-393/14 Borealis Polyolefine GmbH and OMV Refining & Marketing GmbH v Bundesministers für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft and others, Opinion of the Advocate General Kokott* (2015) published on the electronic Reports of Cases para 145.
[790] *Ville de Lyon* (n 776) para 29.
[791] Commission Regulation (EC) No 2216/2004 [of 21 December 2004 for a standardised and secured system of registries pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Decision No 280/2004/EC of the European Parliament and the Council [2004] OJ L 386/1].
[792] *Ville de Lyon* (n 776) para 30 f.

argued that the Environmental Information Directive does not govern access to trading data, since there is a specific access regime established by the Registry Regulation.[793] The City of Lyon brought an action before the Administrative Tribunal in Paris to set aside the decision to refuse access and to order the disclosure of the requested information. The Administrative Tribunal decided to stay the proceedings and asked the CJEU 'whether the reporting of trading data […] is governed by' the Environmental Information Directive or by [the EU ETS Directive and the Registries Regulation.[794]

The Court found that Article 17 is proof of the fact that the EU legislature integrated requirements on access to environmental information in the EU ETS Directive.[795] However, it noted that 'it did not thereby intend to make the reporting of all information […] having a connection with the implementation of [the EU ETS Directive] subject to the requirements of' the Environmental Information Directive.[796][797] The Court found that trading data, the information requested by the Ville de Lyon, did not fall within the scope of Article 17 of the EU ETS Directive, since that article did not refer to such trading data. Article 19 of the EU ETS Directive, however, does refer to trading data.[798] However, Article 19 does not refer to the Environmental Information Directive in the same way as Article 17 does. Therefore, the CJEU concluded that 'the EU legislature did not intend to make requests concerning trading data […] subject to the general provisions of [the Environmental Information Directive] but that […] it sought to introduce […] a specific, exhaustive scheme for public reporting and confidentiality of that data.'[799] Therefore, the Court's answer to the Administrative Tribunal's question was that a request for trading data falls only under the specific provision regulating access to information in the EU ETS Directive and the Registries Regulation. The reasoning of the CJEU seems to suggest that access to environmental information, at least in the realm of the EU ETS, is only governed by the Environmental Information Directive, if there is no provision specifically referring to the piece of information in question. Thereby, the Court applied the lex specialis doctrine.[800]

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[793] *ibid para 31.*
[794] *ibid para 34.*
[795] *ibid para 37.*
[796] ibid para 38.
[797] *Ville de Lyon* (n 776) para 38.
[798] *ibid para 39.*
[799] *ibid para 40.*
[800] Pursuant to the lex specialis doctrine, in full 'lex specialis derogate legi generali', where two conflicting provisions regulate the same issue, only the provision that is more specific regulates the issue, see Franz Bydlinski, *Juristische Methodenlehre Und Rechtbegriff* (Springer Verlag 1982) 465.

5.4.2.2.Lex specialis

What does this mean for the application of Article 15a and Article 17? Based on the wording of the two articles, one could argue that either one of them regulates access to emissions reports. Based on the CJEU's judgment in *Ville de Lyon* and the application of the *lex specialis* doctrine, the question that needs to be answered is whether one of the articles regulates a more specific situation than the other. At this point, it is useful to reiterate the exact wording of the two provisions. Article 15a states that '*Member States and the Commission shall ensure* that *all decisions and reports relating to* […] the monitoring, *reporting* and verification *of emissions* are immediately disclosed. [emphasis added]'[801] Article 17 states that '*reports of emissions required under the greenhouse gas emissions permit and held by the competent authority*, shall *be made available to the public in accordance with* [the Environmental Information] *Directive*. [emphasis added]'[802] When analysing which one of the two provisions is more specific, three elements are important, i.e., the addressee of the provision, the object of the provision, and the action required.

Regarding the addressee of the provisions, it can be noted that while Article 15a is specifically addressed to the Member States and the Commission, Article 17 does not have an express addressee. However, it states that the information it covers shall be made available in accordance with the Environmental Information Directive. Since this Directive is addressed to the Member States and regulates access to environmental information at the national level, Article 17 is addressed to the Member States. In that respect, Article 17 is more specific than Article 15a.

The object of Article 15a can be defined as 'all decisions and reports relating to […] the monitoring, reporting and verification of emissions', whereas the object of Article 17 is the 'reports of emissions required under the greenhouse gas emissions permit and held by the competent authority'. The fact that Article 15a refers to '*all* decisions and reports', which Article 17 does not do, already indicates that Article 15a is broader than Article 17. In addition, Article 15a covers all reports and decisions *relating to* monitoring, reporting and verification. As already pointed out above, the term 'relating to' indicates that the link between the decision or report on the one hand and monitoring, reporting or verification on the other does not have

[801] 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 Article 15a.
[802] ibid Article 17.

to be direct. Thus, not only do emissions reports potentially fall within the ambit of Article 15a, but also other reports and documents that are related to the monitoring, reporting and verification of emissions. Conversely, Article 17 only covers those reports of emissions that are required under the greenhouse gas permit and held by the competent authority. This formulation is narrower and only includes the emissions report itself but no other related documents.

The last element that is worth examining more closely, is the actions that the two provisions require. Article 15a prescribes that the information covered by it must 'be immediately disclosed in an orderly manner and ensuring non-discriminatory access'. As stated above, this wording is rather vague, as it is not specified according to which specific rules the information will be disclosed. The second paragraph of Article 15a merely points out that if the information is covered by professional secrecy it may not be disclosed except by virtue of the applicable laws, regulations or administrative provisions. Again, it is unclear to what laws, regulations or administrative provisions the article refers here. In contrast, Article 17 is very specific setting out that the information falling within its ambit must be disclosed pursuant to the provisions of the Environmental Information Directive. Therefore, it appears that Article 17 is more specific regarding the last element as well and it seems that pursuant to the *lex specialis* doctrine and the CJEU's reasoning in *Ville de Lyon* Article 17 regulates access to emission reports. For Article 15a this would mean that it regulates access to pieces of information related to the reporting of emissions other than the emission report. However, the uncertainty regarding how Article 15a regulates access to that information remains.

5.4.3. Information not specifically referred to in the EU ETS Directive

As has become clear in section 2 of this chapter, there are pieces of information other than the emissions report that are relevant for checking compliance with the EU ETS rules. These include the greenhouse gas permit including the monitoring plan, the internal verification documentation, the verification report, and information that the operator has provided to the verifier. If this information is contained in decisions or reports related to the monitoring, reporting or verification of emissions, then, according to the conclusions drawn in the previous section, Article 15a of the EU ETS Directive will govern access to it. With regard to the verification report, it seems that it is clear that it relates to the verification of emissions.

However, regarding the greenhouse gas permit, the internal verification documentation and other information, it is questionable whether they come within the ambit of Article 15a. The question arises how access to this information is regulated, since neither Article 15a, nor Article 17 refer to it.

To recall, the CJEU held that even though the EU legislature integrated requirements on public access to information in the EU ETS Directive, it did not 'intend to make the reporting of all information […] having a connection with the implementation of [the EU ETS Directive] subject to the requirements of 'the Environmental Information Directive.'[803] This could be interpreted as meaning that only the information specifically referred to in Article 17 is governed by the Environmental Information Directive. However, the argument in the *Ville de Lyon* case was that since there was a dedicated article in the EU ETS Directive which governed access to requested information, the more general Article 17 and consequently the Environmental Information Directive did not apply. This, however, does not necessarily mean that the Environmental Information Directive does not apply, when there is no article specifically regulating a certain type of information. On the contrary, it can be argued that the Environmental Information Directive is always applicable to environmental information, provided that no other specific rules exist. However, even where specific rules exist, these rules must be in conformity with the standards set by the Aarhus Convention. In other words, specific access to information regimes may not make access to environmental information more restrictive than allowed by the Aarhus Convention.

5.4.4. Interim conclusions on the applicable regime

The EU ETS Directive seems to resort to more than one regime for regulating access to information related to its implementation. Article 17 governs access to emission reports and sets out that access to the emissions report is governed by the Environmental Information Directive. The Monitoring and Reporting Regulation adds that the operator itself may indicate in the report which parts are to be treated as confidential and might thus not be disclosed to the public. Pursuant to Article 15a, all decisions and reports that are related to the monitoring, reporting and verification of emissions must be disclosed. Interestingly, Article 15a does not expressly refer to the Environmental Information Directive, which is illustrative for the

[803] *Ville de Lyon* (n 776) para 38.

vagueness of this article. Environmental information that falls neither within the ambit of Article 15a, nor Article 17 will be governed by the Environmental Information Directive as well, since there is no special regime applicable to such information. Pursuant to the *lex specialis* doctrine and the CJEU's reasoning in *Ville de Lyon,* it has been concluded that Article 17 regulates access to emission reports. Article 15a on the other hand regulates access to pieces of information related to the reporting of emissions other than the emission report as well as to information related to the monitoring and verification of emissions. However, it has been argued that Article 15a does not set out a concrete obligation and a specific set of rules governing access to the information referred to in Article 15a. Instead, it has been suggested that Article 15a only sets out a general aim that must be achieved by the Member States – immediate and non-discriminatory disclose of certain information. Member States would be free to choose how to achieve that aim. This goal could be attained, for example, by making access to the information referred to in Article 15a subject to the rules adopted to implement the Environmental Information Directive.

5.5. Interim conclusions

This section has examined the two provisions of the EU ETS Directive on access to information, Article 17 and Article 15a. It has been shown that the meaning of neither of the two articles is clear at first sight. Pursuant to Article 17, access to emissions reports is governed by the rules adopted by Member States pursuant to the Environmental Information Directive. However, operators may specify what information contained in the emission report they regard as confidential and, therefore, wish to have redacted before the report is disclosed to the public. The analysis of Article 15a has shown that its meaning cannot be determined with certainty. Its wording and the examination of multiple language versions seem to suggest that Article 15a stipulates that public authorities must actively disseminate decisions and reports related to the monitoring, reporting and verification. If these reports contain information that is covered by professional secrecy, a concept that needs to be defined by national law, they may not be disclosed, except where national law expressly allows it.

Since both Article 17 and Article 15a seem to set out rules on access to information related to the EU Emission Trading System, the question arose which article is applicable in which situation. This issue has been examined based on the *lex specialis* doctrine and the

interpretation of a similar issue by the CJEU in *Ville de Lyon.* It seems that, since it is more specific, Article 17 governs access to the emissions reports, while Article 15a governs access to all other information related to reporting, as well as access to information related to monitoring and verification of emissions. However, Article 15a sets out that where information is covered by professional secrecy, it may only be accessed by virtue of the applicable laws, regulations and administrative provisions. Provided that the information in questions constitutes environmental information, this may be interpreted as a reference to the Environmental Information Directive.

6. Conclusion

The question that this study aims to answer is to what extent and under which circumstances environmental information, regarding compliance and non-compliance that is held by public authorities and/or private verifiers, must be provided to members of the public upon request. With a view to answer that question, the aim of this chapter has been threefold – (1) explaining the compliance cycle of the EU Emission Trading System, (2) identifying the information that is relevant for checking compliance with the EU Emission Trading System, (3) determining what rules govern access to the relevant information.

In section 2, the five stages of the compliance cycle have been explained with a view to providing a basic understanding of its functioning. Section 3 has examined the information that is already publicly available. It has been shown that most of the information that can be accessed without submitting a request to a public authority is of aggregated nature and as such may serve as a starting point to learn about the EU ETS but falls short of enabling the public to examine possible instances of non-compliance. Therefore, it was necessary to examine what information is produced throughout the compliance cycle that is not readily available.

Section 4 has expanded upon the basic explanation of the compliance cycle and discussed specific elements of the compliance cycle in more detail. It has been explained that the compliance cycle is a system of self-monitoring and reporting in which the operator bears most of the responsibilities and a strong reliance on the verifier. Public authorities are responsible for issuing the greenhouse gas permit to operators, which they have to do if the operator fulfils certain conditions, and for cancelling the allowances that operators surrender after the end of a trading year. However, on a more general level, Member States and therefore the competent public authorities are responsible for ensuring the correct implementation and application of

the EU ETS Directive. In light of this, public authorities may perform additional controls. Next to the operator, the verifier has the most important role in the compliance cycle. After having monitored its emissions and having compiled the results of the monitoring process in the emissions report, the operator must submit the emissions report to the verifier who performs an in-depth analysis of the monitoring process in order to verify whether the emissions report is free from material misstatements.

Throughout the discussion of the compliance cycle, the information that is most relevant for checking compliance has been identified:[804]

- The greenhouse gas permit including the monitoring plan,
- the emissions report, including information which parts have been indicated as being confidential by the operator
- the internal verification documentation, including
    - the results of the verification activities,
    - the strategic analysis and the verification plan
    - information supporting the verification opinion, and
- the verification report
- information that the operator has provided to the verifier pursuant to Article 10 (1) of the Accreditation and Verification Regulation

In light of the main research question of this study,[805] the important question is, of course, whether this information must be made available to the public upon request. Since the EU ETS Directive comprises two articles on access to information, Article 15a and Article 17, it was necessary to determine whether one of these two articles governs access to the relevant information and how they relate to each other. Therefore, section 5 has analysed the two articles with a view to explaining their meaning and relationship. Article 17 seems to suggest that emission reports must be disclosed pursuant to the national legislation adopted to implement the Environmental Information Directive. However, next to reports relating to the monitoring and verification of emissions, Article 15a also refers to emission reports. Therefore, the question was which of the two articles should take precedence. Applying the reasoning of the Court in *Ville de Lyon* by analogy to the relationship between Article 17 and 15a resulted in

[804] It is likely that there is other information besides this that is relevant for checking compliance. For example, is it feasible that the operator has provided information to the verifier that is not included in the internal verification documentation.

[805] To what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS, that is held by governmental authorities and/or private verifiers, be provided to the public upon request and to what extent do governmental authorities and private verifiers provide such information in practice?

the conclusion that, since Article 17 is, in the context of emission reports, more specific than Article 15a, the former seems to govern access to emission reports.

A comparison of several language versions of Article 15a suggested that the article sets out that reports related to the monitoring, reporting and verification of emissions must be actively disclosed to the public if the information contained therein is not covered by professional secrecy, a concept that must be defined by national law. Information referred to in Article 15a that is covered by professional secrecy, may only be accessed by virtue of the applicable laws, regulations and administrative provisions. Consequently, the question is whether they may be accessed by virtue of the applicable laws, regulations and administrative provisions. If the information in question constitutes environmental information, it is possible that this is a reference to the Environmental Information Directive. This means that also the information referred to in Article 15a may fall under the access to information regime set out in the Environmental Information Directive.

Access to environmental information that is not mentioned in either of the two articles may also be governed by the Environmental Information Directive, provided that it constitutes environmental information. Since both Article 15a and Article 17, directly or implicitly, refer to the Environmental Information Directive, it is the main instrument governing access to the relevant information. Therefore, in the next chapter, it will be analysed whether the relevant information should be provided to the public upon request, according to the Environmental Information Directive.

CHAPTER IV – ACCESS TO INFORMATION RELATED TO COMPLIANCE WITH THE EU ETS ACCORDING TO THE ENVIRONMENTAL INFORMATION DIRECTIVE

1. Introduction

To answer the first part of the main research question of this thesis – to what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS be provided to the public upon request? – it was first necessary to identify what information is relevant for checking compliance with the EU ETS, which has been done in the previous chapter.[806] The EU ETS compliance cycle was analysed, and it was shown that the readily available information does not suffice to check whether individual operators comply with the EU ETS. Therefore, some of the information that allows the public to check compliance has been identified in the preceding chapter (in the following 'the relevant information').[807]

Moreover, the provisions on access to information that the EU ETS Directive contains, Articles 15a and 17, have been analysed in the previous chapter. It was concluded that since both Article 15a and Article 17, directly or implicitly, refer to the Environmental Information Directive, it is the main instrument governing access to the relevant information. This is where the current chapter picks up and examines whether the information that has been identified as relevant must be disclosed following a request from the public pursuant to the provisions of the Environmental Information Directive.

When determining whether certain information must be disclosed pursuant to the Environmental Information Directive, three central questions arise: (1) Does the relevant information constitute environmental information? (2) Are the entities that hold the relevant information public authorities? (3) Can access to the relevant information be refused based on

[806] The greenhouse gas permit including the monitoring plan, the emissions report, including information which parts have been indicated as being confidential by the operator, the internal verification documentation, including, the results of the verification activities, the strategic analysis and the verification plan, information supporting the verification opinion, and, the verification report, and the information that the operator has provided to the verifier pursuant to Commission Regulation (EU) No 600/2012 Article 10 (1); see also Commission Implementing Regulation (EU) 2018/2067 Article 10 (1).

[807] Nevertheless, it is necessary to stress that it is likely that there is other information that is relevant for checking compliance with the EU ETS. For example, is it feasible that the operator has provided information to the verifier that is not included in the internal verification documentation.

any of the grounds of refusal? The analysis in this chapter will be guided by these three central questions.

The Environmental Information Directive sets out that the public has the right to access environmental information upon request vis-à-vis public authorities. However, the definition of 'public authority' set out in the Environmental Information Directive is relatively broad as to include private entities under certain conditions.[808] As has been explained in the previous chapter, the relevant information is held partly by the national public authorities responsible for administering the EU ETS and partly by the verifier who is responsible for attesting that the operator's emissions report is free from material misstatements.[809] Since the verifier is formally a private entity, the second question that will be tackled in this chapter is whether the verifier constitutes a public authority pursuant to the definition set out in the Environmental Information Directive. As said, part of the relevant information is held by the national public authorities. However, since these bodies are governmental bodies, it is clear that they are 'public authorities' within the definition of the Environmental Information Directive.

If it is concluded that the relevant information constitutes environmental information and that the verifier is a public authority, the public must, in principle, be given access to the relevant information upon request. However, as has been explained in chapter 2,[810] there are several grounds of refusal that may be invoked by public authorities to refuse a request for environmental information. Therefore, the last question that will be dealt with in this chapter is whether access to the relevant information can be refused based on one of the grounds of refusal. As in chapter 2, not all of the grounds of refusal contained in the Environmental Information Directive will be discussed. Instead, only those grounds of refusal were consequently discussed in chapter 2 will be examined in this chapter.[811]

It is important to note that in this chapter, the three questions will be answered based on the analysis of the Environmental Information Directive in chapter 2. Thus, it will be an analysis exclusively based on EU law. The provisions of the Environmental Information Directive will be examined in light of the relevant case law and literature. Moreover, especially where there is little to no guidance by case law and literature, the three interpretative approaches that are also used by the CJEU will be used to interpret the Environmental Information Directive:

[808] See chapter 2, section 2.5.
[809] See chapter 3, section 3.
[810] See section 2.6.
[811] See chapter 2, section 2.6 for a more detailed explanation why some grounds of refusal were not considered in detail in this thesis.

linguistic arguments,[812] systemic arguments[813] and teleological arguments[814].[815] The CJEU's case law does not point towards a favoured approach.[816] Instead,

> *when interpreting a provision of EU law [,] the Court considers the wording of the provision, in the legal context and general scheme in which it occurs, including in particular the legislative measure containing the provision, with due regard to any relevant precedents and in the light of its purposes and objectives, including the system and objectives of the EU Treaties.*[817]

Therefore, when analysing whether the relevant information should be provided to the public according to the provisions of the Environmental Information Directive, arguments from all three groups of interpretative methods will be considered.

The Environmental Information Directive, like all EU directives, must of course be implemented into national legislation. Hence, all Member States must adopt legislation regulating the right to access environmental information. That legislation may regulate certain issues in more detail than the Environmental Information Directive or contain additional provisions regulating issues that the Directive left to national legislation. Moreover, it is possible that the national legislation contains certain provisions that are not in line with the provisions of the Environmental Information Directive. In light of this, the national legislation of Germany and the United Kingdom will be analysed in chapter 5.

The current chapter is structured along the lines of the three central questions set out above. The second section is dedicated to determining whether the relevant information constitutes environmental information. The third section deals with the question whether verifiers constitute public authorities pursuant to the definition set out in the Environmental Information Directive. In section 4, it is analysed whether a request for access to the relevant information may be refused on one of the grounds of refusal. In the fifth section, the rights of third parties

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[812] D Neil MacCormick and others (eds), 'Interpretation and Justification', *Interpreting Statues: A Comparative Study* (Routledge 2016) 512 f. explain that 'if a statutory provision is intelligible in the context of ordinary language, it ought […] to be interpreted in accordance with the meaning an ordinary speaker of the language would ascribe to it as its obvious meaning, unless there is sufficient reason for a different interpretation.'
[813] The systemic interpretation includes a range of approaches including contextual harmonisation, precedent, analogy, logical-conceptual, general principles and historical analysis.' ibid 513 f.
[814] 'if a general point and purpose are ascribable to a particular statutory provision or to the whole statute of which it forms part, the statutory provision ought, within limits, to be interpreted so that its application in concrete cases is compatible with the postulated point and purpose.' ibid 514.
[815] Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Oxford University Press 1993) 233 ff.; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2012) 283 provides a good explanation of the interpretative tools and their application by the CJEU.
[816] Beck (n 815) 282 f.
[817] ibid 283.

in the context of requests for environmental information will be examined. The sixth section concludes.

2. Environmental information

2.1. Introductory remarks

It has been explained in chapter 2,[818] that the definition of environmental information as set out in the Environmental Information Directive is very broad, however, not all-encompassing. Further, it has been explained that the Environmental Information Directive contains six categories[819] of environmental information. Not all of these categories are relevant when examining whether the relevant information constitutes environmental information. Therefore, only those categories that may potentially cover the relevant information[820] will be examined in this section. It appears that the only categories within which the relevant information may fall are 'measures and activities' and reports on the implementation of environmental legislation. As explained in chapter 2,[821] the term 'measures and activities' is a rather broad concept, encompassing all activities of a public authority, and potentially even all human activities. The relevant information is information on measures and activities carried out by competent authorities, operators and verifiers in the context of the EU ETS. Thus, it seems plausible that this information is information on measures and activities intended to protect the environment. However, this needs to be analysed in further detail. Furthermore, it could be that the emissions report and the verification report may constitute reports on the implementation of environmental legislation.

[818] See section 2.4.
[819] (1) Information on the state of the elements of the environment, (2) information on factors affecting or likely to affect the elements of the environment, (3) information on measures and activities affecting or likely to affect the elements and factors as well as measures or activities designed to protect those elements, (4) reports on the implementation of environmental information, (5) cost-benefit and other economic analysis and assumptions used within the framework of the measures and activities, (6) information on the state of human health and safety inasmuch they are or may be affected by the state of the elements of the environment, factors or measures or activities.
[820] The information that has been identified as relevant for checking compliance with the EU ETS is the greenhouse gas permit, including the monitoring plan, the emissions report, the internal verification documentation, including the results of the verification activities, the strategic analysis and the verification plan and information supporting the verification opinion, the verification report and the information that the operator has provided to the verifier pursuant to Commission Regulation (EU) No 600/2012 Article 10 (1).
[821] See chapter 2, section 5.3.

2.2. The greenhouse gas permit

The first piece of relevant information that will be analysed is the greenhouse gas permit. Every installation that falls within the ambit of the EU Emission Trading System must obtain a greenhouse gas permit in order to be allowed to emit greenhouse gases.[822] The permit contains, inter alia, a description of the activities and emissions of the installation, the monitoring plan, and reporting requirements.[823] The greenhouse gas permit neither constitutes information on environmental factors, nor information on reports on the implementation of environmental legislation. Therefore, the category of environmental information mentioned in the Environmental Information Directive that seems most relevant is the one covering 'measures […] and activities affecting or likely to affect the elements and factors [of the environment] as well as measures or activities designed to protect those elements'.[824] Thus, the following questions arise: first, is the greenhouse gas permit a measure or activity? Second, does the greenhouse gas permit affect or is it likely to affect the elements of the environment or the environmental factors? Or, as an alternative to the second question, is the greenhouse gas permit designed to protect the elements of the environment?

As has been concluded in chapter 2,[825] the broad definition of the term 'measures and activities' by the CJEU suggests that information on everything a public authority does is a measure or activity.[826] Since the permitting of industries is an activity carried out by a public authority,[827] it seems clear that the greenhouse gas permit is a measure or activity within the meaning of the Environmental Information Directive.

The next question is whether the greenhouse gas permit either affects or is likely to affect the elements of the environment or the environmental factors or in the alternative whether it is intended to protect the elements of the environment. The greenhouse gas permit as such does not have an immediate effect on the elements of the environment or the environmental factors, since the permit itself does not, for example, reduce emissions. The greenhouse gas permit

[822] 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 Article 4.
[823] ibid Article 6.
[824] 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 Article 2 (1) (c).
[825] See section 2.4.2.
[826] *Case C-321/96 Mecklenburg* (n 268) para 20.
[827] Pursuant to 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 Article 6 the competent national authority 'shall issue a greenhouse gas emissions permit.'

'gives permission to emit certain greenhouse gases'[828] but it does not limit how much of these gases can be emitted.[829] On the contrary, it gives the holder the right to pollute. However, it protects the environment in a mediate way, as it is part of a larger system - the EU ETS - that is intended to protect the environment. The EU ETS Directive is based on Article 192 (1) TFEU, the legal base for environmental measures. Legislation based on this article is intended to achieve the objectives set out in Article 191 (1) TFEU. The latter article lists the objectives of the EU's policy on the environment and includes, *inter alia*, the preservation and protection of the environment and the combat against climate change. In that regard, it has to be noted that the EU Emission Trading System 'aims to contribute to fulfilling the commitments of the [EU] and its Member States' under international law such as the Paris Agreement.[830] Thus, one can say that the underlying aim of the EU Emission Trading System is to reduce greenhouse gas emissions, thereby protecting the environment. The greenhouse gas permit is a vital element in the process of ensuring compliance with the rules of the EU Emissions Trading System. It is the entry ticket that every participant needs in order to take part in the system; without the permit, industries may not participate. Hence, it can be concluded that, since the greenhouse gas permit is a vital element of the EU Emission Trading System, it consequently is a measure that is intended to protect the environment. Therefore, the greenhouse gas permit constitutes environmental information pursuant to the Environmental Information Directive.

2.3. The emissions report

The emissions report is another crucial element of the compliance cycle. In the emissions report, the operator sets out how much greenhouse gas has been emitted by an installation in the preceding year.[831] The emissions report may fall within several of the relevant categories of environmental information.[832] It contains information on environmental factors such as

[828] Birgitte Egelund Olsen, 'The IPPC Permit and the Greenhouse Gas Permit', *EU Climate Change Policy - The Challenge of New Regulatory Initiatives* (Edward Elgar Publishing Limited 2006) 158. Since this publication, no major discussion of the greenhouse gas permit has taken place in the literature. This may be due to the fact that the legal provisions have not changed and there has not been case law on this issue.
[829] In theory, the amount of greenhouse gases that a permit holder can emit is only limited by the number of allowances.
[830] 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 Recital 5.
[831] ibid Article 14 (3).
[832] 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 Article 2 (1).

emissions, it may constitute information on measures or activities affecting or likely to affect the environment or it may constitute a report on the implementation of environmental legislation. However, the Monitoring and Reporting Regulation[833] which governs how operators must monitor and report their emissions,[834] provides that 'emission reports […] shall be made available to the public […] subject to national rules adopted pursuant to' the Environmental Information Directive.[835] This means that it is not necessary to check whether the emissions report falls under the definition of environmental information and that the public can in principle access emissions reports.[836] However, the same article[837] gives operators the right to 'indicate […] which information they consider commercially sensitive' in light of Article 4 (2) (d) of the Environmental Information Directive. Hence, it is only necessary to analyse whether it may be covered by this or another of the exceptions set out in the Environmental Information Directive and the national implementing legislation.[838] However, this does not preclude that any of the other grounds of refusal apply as well.

2.4. The internal verification documentation and the verification report

The internal verification documentation comprises 'all documentation that a verifier has compiled to record all documentary evidence and justification of activities that are carried out for the verification of an operator's [emissions] report.'[839] In particular, the internal verification documentation includes the results of the verification activities performed, the strategic

[833] 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 Article 15.
[834] ibid Article 14.
[835] Commission Regulation (EU) No 601/2012 Article 71; Commission Implementing Regulation (EU) 2018/2066 Article 71.
[836] In case where access is denied, the public should be able to enforce this right in court. 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 Article 6 (1).
[837] Commission Regulation (EU) No 601/2012 71; Commission Implementing Regulation (EU) 2018/2066 Article 71.
[838] See section 4 of this chapter.
[839] Commission Regulation (EU) No 600/2012 Article 3 (20); Commission Implementing Regulation (EU) 2018/2067 Article 3 (21).

analysis,[840] the risk analysis (analysis of the inherent risks[841] and the control activities[842]), the verification plan, evidence to support the verification opinion,[843] and the results of the independent review.[844] Thus, it can be said that the internal verification documentation provides in-depth insights into the ways the verifier arrived at its conclusion and a documentation of the activities carried out to determine whether the operator's emissions report is free from material misstatements.

The verification report is an essential document of the compliance cycle.[845] It is the assessment of the emissions report and is based on the internal verification documentation. The internal verification documentation and the verification report are inextricably linked, since the verifier reaches the verification opinion, in other words the decision whether or not to approve the emissions report, based on the insights recorded in the internal verification documentation. The internal verification documentation is the documentation of the various steps of the verification process based on which the verifier comes to a final judgment whether or not to approve the emissions report. Therefore, the internal verification documentation and the verification report complement each other when checking compliance with the EU ETS rules. Thus, the analysis of whether they constitute environmental information is conducted together.

Looking at the definition of environmental information set out in the Environmental Information Directive, the primary category of environmental information under which the internal verification documentation and the verification report may fall is 'measures and activities that have an effect on the elements of the environment or the environmental factors or that are intended to protect the environment'. As stated in section 2.2, in order to fall within this category, the information in question (1) must be a measure or activity and (2a) must affect or be likely to affect the elements of the environment or environmental factors, or (2b) must be intended to protect the elements of the environment.

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[840] The strategic analysis is an assessment of the nature, scale and complexity of the verification tasks. See Commission Regulation (EU) No 600/2012 Article 11 (1); Commission Implementing Regulation (EU) 2018/2067 Article 11 (1).
[841] Inherent risk refers to 'the susceptibility of a parameter in the operator's […] report to misstatements that could be material […] before taking into consideration the effect of any related control activities.' See Commission Regulation (EU) No 600/2012 Article 3 (15); Commission Implementing Regulation (EU) 2018/2067 Article 3 (16).
[842] 'Control activities means any acts carried out or measures implemented by the operator […] to mitigate inherent risks.' See Commission Regulation (EU) No 600/2012 Article 3 (11); Commission Implementing Regulation (EU) 2018/2067 Article 3 (12).
[843] Commission Regulation (EU) No 600/2012 Article 26 (1); Commission Implementing Regulation (EU) 2018/2067 Article 26 (1).
[844] Commission Regulation (EU) No 600/2012 Article 26 (2); Commission Implementing Regulation (EU) 2018/2067 Article 26 (2).
[845] See chapter 3, section 3.5 for an in-depth explanation of the compliance cycle.

As explained in chapter 2,[846] the term 'measures and activities' includes all activities of public authorities. The internal verification documentation and the verification report are activities carried out by the verifier. As will be explained in section 3 of this chapter, it is somewhat debatable whether the verifier is a public authority pursuant to the definition set out in the Environmental Information Directive. Therefore, whether or not the verifier is regarded as constituting a public authority also seems to affect the conclusion whether or not the internal verification documentation and the verification report constitutes a 'measure or activity' within the meaning of the Environmental Information Directive. If the verifier is not a public authority, its activities would also not constitute measures or activities, since they would not be activities of a public authority. However, it has been argued that information on measures and activities by natural or legal persons other than public authorities is possibly also included in the definition of environmental information.[847] That would mean that the internal verification documentation and the verification report constituted measures and activities within the meaning of the Environmental Information Directive, regardless of whether the verifier is considered to be a public authority.

Independently of which interpretation is followed, the internal verification documentation and the verification report would only constitute environmental information, if they either affected or were likely to affect the environment or if they were intended to protect the environment.

The verification activities recorded in the internal verification documentation include substantive tests of the analytical procedures, verification of data and checks of the monitoring methodology, data flow activities, documentation of the control activities, and mitigation of inherent and control risks.[848] All these activities are intended to control whether the emissions report is free from material misstatements and can be approved. The *raison d'être* of the verification process is to ensure that the operator does not report less emissions than actually occurred, intentionally or not, and consequently pollutes more than it pays for by surrendering allowances. Therefore, it can be argued that the ultimate goal of the verification process is to ensure compliance with the rules governing the EU Emission Trading System. Since the fundamental goal of the EU Emission Trading System is to protect the environment by decreasing greenhouse gas emissions, the verification activities are activities that serve the

[846] See section 2.4.2.
[847] See chapter 2, section 2.4.2.
[848] Commission Regulation (EU) No 600/2012 Article 14; Commission Implementing Regulation (EU) 2018/2067 Article 14.

protection of the environment. Consequently, as the documentation and the final conclusion of these activities, the internal verification documentation and the verification report can be regarded as environmental information pursuant to the Environmental Information Directive.

As an alternative to the category of environmental information covering measures and activities, the verification report may also constitute environmental information pursuant to the category covering reports on the implementation of environmental legislation. However, given that it has already been concluded that the verification report is a measure or activity that affects or is likely to affect the environment, this option will not be pursued any further.

2.5. Information provided by the operator to the verifier

During the verification process, the operator must provide certain information to the verifier in order to ensure that the latter can properly carry out the verification. The information that the operator must disclose to the verifier includes a description of the data flow activities,[849] the operator's risk assessment[850] and an outline of the overall control system, any modifications to the monitoring plan and all relevant correspondence with the competent authority.[851] The information provided by the operator to the verifier is not contained in one document. Instead, it is spread over several documents. Therefore, it is necessary to conduct a separate assessment for every piece of information that is mentioned in the article in order to determine whether it falls under the definition of environmental information.[852] Since the information the operator has to provide to the verifier does not include information on factors[853] likely to affect elements of the environment or reports on the implementation of environmental legislation, the only category pursuant to which the information provided by the operator to the verifier may constitute environmental information is the category covering measures or activities.

[849] The term data flow activities refers to 'activities related to the acquisition, processing and handling of data that are needed to draft an emissions report from primary source data.' See Commission Regulation (EU) No 600/2012 Article 3 (25); Commission Implementing Regulation (EU) 2018/2067 Article 3 (26).
[850] The risk assessment is an assessment of the inherent risk (susceptibility of a parameter in the emissions report to misstatements before taking into account control activities) and the control risk (susceptibility of a parameter in the emissions report to misstatements that could not be prevented or detected and corrected by the control system) Commission Regulation (EU) No 601/2012 Article 3 (9) & (10) and Article 58 (2) (a).
[851] Commission Regulation (EU) No 600/2012 Article 10 (1); Commission Implementing Regulation (EU) 2018/2067 Article 10 (1).
[852] This illustrates the enormous amount of work that requests for environmental information may cause for public authorities.
[853] Such factors include inter alia substances, energy, noise, radiation, waste, emissions, discharges and other releases into the environment.

Regarding this category, the crucial question is whether the measure or activity affects or is likely to affect the environment, or whether it is intended to protect the environment. It is difficult to provide a conclusive answer to this question. With regard to all information that the operator must provide to the verifier, the following argument can be raised: all information regarding which the legislator, and for the more detailed rules such as the Monitoring and Reporting Regulation and the Accreditation and Verification Regulation the Commission, deemed it necessary to set out that the operator must provide it to the verifier can be regarded as being intended to protect the environment, simply due to the fact that this information is required for the verification process. Since verification itself is intended to protect the environment, information that is necessary for carrying out verification can also be regarded as being intended to protect the environment. In opposition to this argument, one could contend that if taken to the extreme, all information that is remotely related to the EU ETS could be considered environmental information.

In the context of the question when a measure or activity is likely to affect the environment, the CJEU has stressed that the definition of environmental information should be interpreted broadly,[854] however, that this does not mean that 'all information [...] which has a connection, however minimal, with one of the environmental factors' constitutes environmental information.[855] Information on measures and activities constitute environmental information because the measure or activity is likely to affect the environment or intended to protect the environment. However, the question arises how likely is likely enough? At least where it is more likely than not that a measure or activity has an effect on the environment, information on that measure or activity should be considered environmental information. Nevertheless, it is unclear where the line should be drawn and there is no case law on this matter yet.[856] Regardless of which line of argument is followed, it is worthwhile examining whether the individual items of information that the operator must submit to the verifier constitute information on measures or activities that affect or are likely to affect the environment or are intended to protect the environment. In the following each item is considered in turn.

[854] *Case C-266/09 Stichting Natuur en Milieu* (n 271) para 59.
[855] *Glawischnig* (n 268) para 25.
[856] At least not from the CJEU.

2.5.1. Data flow activities

Data flow activities are 'activities related to the acquisition, processing and handling of data that are needed to draft an emissions report from primary source data.'[857] The operator must have in place written procedures for data flow activities for the monitoring and reporting of greenhouse gases. The written procedures for data flow activities must *inter alia* identify the primary data sources,[858] explain 'each step in the data flow from primary data to annual emissions'[859] and 'the relevant processing steps related to each specific flow activity including the formulas and data used to determine the emissions.'[860] As pointed out above, the category of environmental information under which information on data flow activities fall is most likely 'measures and activities'. In chapter 2, it was explained that there is a narrow and a wide interpretation of the term 'measures and activities.'[861] Pursuant to the narrow interpretation, data flow activities do not constitute measures and activities, since they are carried out by a formally private party – the operator – and not by a public authority. However, pursuant to the broader definition of the term 'measures and activities', including any human activity, data flow activities constitute 'measures and activities' within the meaning of the Environmental Information Directive.

Assuming that the data flow activities are measures and activities, they must affect or be likely to affect the environment or be intended to protect the environment in order to constitute environmental information. Given the uncertainty regarding the question when a measure or activity is likely to affect the environment or intended to protect the environment described in the previous section, it is appropriate to look at this issue from a teleological perspective. The concrete question that arises is: What is the aim of the EU ETS Directive and can the data flow activities, in light of this aim, be regarded as being intended to protect the environment or as being likely to affect the environment?

[857] Commission Regulation (EU) No 601/2012 Article (25); Commission Implementing Regulation (EU) 2018/2066 Article 3 (26).
[858] Commission Regulation (EU) No 601/2012 Article 57 (2) (b); Commission Implementing Regulation (EU) 2018/2066 Article 58 (2) (b).
[859] Commission Regulation (EU) No 601/2012 Article 57 (2) (c); Commission Implementing Regulation (EU) 2018/2066 Article 58 (2) (c).
[860] Commission Regulation (EU) No 601/2012 Article 57 (2) (d); Commission Implementing Regulation (EU) 2018/2066 Article 58 (2) (d).
[861] See chapter 2, section 5.3.

To determine the aim of a measure, it is accepted to look at its articles as well as its preamble.[862] Article 1 of the EU ETS Directive clearly states that the EU ETS is intended to protect the environment by gradually reducing greenhouse gas emissions.[863] The preamble of the Monitoring and Reporting Regulation explains that in order to achieve this aim, a robust monitoring, reporting and verification system is indispensable.[864] Therefore, it lays down rules for the monitoring and reporting of greenhouse gas emissions. As stated above, the data flow activities are 'activities related to the acquisition, processing and handling of data that are needed to draft an emissions report from primary source data.'[865] The Monitoring and Reporting Regulation states that this data is *necessary* for drafting emissions reports. This suggests that, without this data, it would not be possible to compile an emissions report. Therefore, given that the emissions report is intended to protect the environment by setting out how much has been emitted by a given installations and consequently how many allowances the operator must surrender and given that the data flow activities are absolutely necessary to file the emissions report, it seems likely that information on the data flow activities can be seen as information on measures or activities intended to protect the environment. Therefore, information on data flow activities constitutes environmental information.

2.5.2. Risk assessment and control systems

The operator must assess how susceptible its emissions report is to material misstatements before as well as after taking into consideration the effect of any control activities.[866] The susceptibility before taking into consideration the effect of any control activities is called inherent risk,[867] while the emission report's susceptibility after taking into consideration the

[862] *Case C-275/98 Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri* [199AD] para 30; *Case C-66/99 D Wandel GmbH v Hauptzollamt Bremen* [2001] paras 47-49; *Case C-400/00 Club-Tour, Viagens e Turismo SA v Alberto Carlos Lobo Gonçalves Garrido* [2002] paras 13-16; Beck (n 815) 191.
[863] 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 Article 1.
[864] Commission Regulation (EU) No 601/2012 Recital 1.
[865] ibid Article 3 (25); Commission Implementing Regulation (EU) 2018/2066 Article 3 (26).
[866] Commission Regulation (EU) No 601/2012 Article 58 (2); Control activities are measures carried out by the operator to mitigate inherent risks. Commission Regulation (EU) No 600/2012 Article 3 (11).
[867] Commission Regulation (EU) No 601/2012 Article 3 (9); Commission Implementing Regulation (EU) 2018/2066 Article 3 (9).

effect of control activities is called control risk.[868] Together the operator's assessment of the inherent risk and of the control risk is called the risk assessment. In order to ensure that the emissions report does not contain misstatements and adheres to all monitoring and reporting requirements, the operator must set up an effective control system that is capable of mitigating the inherent and control risk.[869]

Again the question is whether the risk assessment and the control system either are likely to affect the elements of the environment or the environmental factors or are intended to protect the environment. It can be argued that the risk assessment and the control system are intended to protect the environment since they are intended to 'ensure that the annual emissions report […] does not contain any misstatements.'[870] As already pointed out several times, it is highly important that the emissions report is free from material misstatements, since otherwise, operators might report less emissions than actually occurred.[871] Consequently, operators would surrender less allowances than they should have, and the overall effectiveness of the EU Emission Trading System could be impaired. Therefore, they play a key role in ensuring that operator's emissions reports are free from misstatements and consequently in ensuring the overall effectiveness of the EU Emission Trading System. Thereby, the risk assessment and the control system contribute to achieving the overall aim of the EU ETS – protecting the environment by gradually reducing greenhouse gas emissions. Thus, the risk assessment and the control system seem to be intended to protect the environment. Therefore, there is good reason to argue that they constitute environmental information pursuant to the Environmental Information Directive.

[868] Commission Regulation (EU) No 601/2012 Article 3 (10); Commission Implementing Regulation (EU) 2018/2066 Article 3 (10).
[869] Commission Regulation (EU) No 601/2012 Article 58 (1); Commission Implementing Regulation (EU) 2018/2066 Article 59 (1).
[870] Commission Regulation (EU) No 601/2012 Articles 58 (1) & 59 (1); Commission Implementing Regulation (EU) 2018/2066 Articles 58 (1) & 59 (1).
[871] See chapter 1, section 4.

2.5.3. Modifications to the monitoring plan

Where the operator has modified the monitoring plan[872] at any point throughout the reporting period, it must provide a record of all modifications to the verifier.[873] The record of the modifications must contain:

> *'(a) a transparent description of the modification;*
>
> *(b) a justification for the modification;*
>
> *(c) the date of notification of the modification to the competent authority;*
>
> *(d) the date of acknowledgment, by the competent authority,*[874] *of the receipt of notification [...] and the date of the approval;*[875]
>
> *(e) the starting date of implementation of the modified monitoring plan.'*[876]

As with the data flow activities, the risk assessment and the control system, the crucial question is whether the modifications to the monitoring plan are likely to affect the environment or whether they are intended to protect the environment. The EU ETS Directive sets out that an operator must modify the monitoring plan where it intends to change the nature or the functioning of the installations or extend or reduce its capacity.[877] The Monitoring and Reporting Regulation specifies that the monitoring plan must be modified inter alia where new emissions occur, the availability of the data that is necessary to compile the emissions report changes, it has been found that the data collected according to the current monitoring plan is

[872] The original monitoring plan is included in the greenhouse gas permit, see 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 Article 6 (2) (c).
[873] Commission Regulation (EU) No 600/2012 Article 10 (1) (h).
[874] Given that the approval of the public authority is require, the information on the modification of the monitoring plan is also in the hands of the public authority. This means that this information can also be requested from the public authorities.
[875] Where public authorities must make a decision that may have significant effects on the environment, the question arises whether this decision falls under the public participation requirements set out in Article 6 of the Aarhus Convention. To analyse whether this is actually the case here would go beyond the scope of this thesis. However, it should be noted that, unlike the Industrial Emissions Directive, the EU ETS legislation (EU ETS Directive, Monitoring and Reporting Directive and Accreditation and Verification Directive) does not prescribe any public consultation measure in this case.
[876] Commission Regulation (EU) No 601/2012 Article 16 (3).
[877] 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 Article 7.

incorrect, a change in the monitoring plan would improve the accuracy of the reported data, or the current monitoring plan is not in line with the Monitoring and Reporting Regulation.[878]

The situations in which modifications to the monitoring plan are mandatory indicate that such modifications are likely to have an effect on the environment. Two examples may illustrate this. First, where new emissions occur, an effect on the environment is certain, since more emissions occur within the limits of the installation than before. Second, where the data collected according to the current monitoring plan turns out to be incorrect, it is likely that a modification will have an effect on the environment.[879] For example, where the modification of the monitoring plan reveals that the installation actually had been emitting more than the incorrect data suggested, the operator will either have to reduce its emissions or buy more allowances to make up for the difference.[880] In case the operator opts for the second option these allowances cannot be used by other operators who will have to reduce their emissions.[881]

Alternative to arguing that the modifications to the monitoring plan are likely to have an effect on the environment, it could also be argued that the modifications to the monitoring plan are intended to protect the environment. The monitoring plan itself is intended to protect the environment by ensuring that the operators monitor their emissions correctly and can surrender an adequate number of allowances. Improving the accuracy of the monitoring plan or correcting mistakes therein serves the same aim as the monitoring plan. Therefore, information on modifications of the monitoring plan are environmental information within the meaning of Article 2 (1) (c) of the Environmental Information Directive and should in principle be disclosed upon a request by the public.

[878] Commission Regulation (EU) No 601/2012 Article 14 (2); Commission Implementing Regulation (EU) 2018/2066 Article 14 (2); See also 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 Article 14 (3).
[879] A retroactive correction of data in the emissions report may have severe consequences. As explained in chapter 3, section 2.6, surrendering not enough allowances should automatically result in the imposition of a fine of EUR 100 per excess tonne of CO2(e). See 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 Article 16.
[880] As explained in chapter 3, section 1, for each tonne of CO2(e) operators must surrender one allowance after the end of the year. Thus, where they do not have enough allowances to cover their emissions, they can either reduce their emissions or buy more allowances.
[881] See chapter 3, sections 1 and 2 for a detailed explanation of the EU ETS.

2.5.4. Relevant correspondence with the competent authority

According to Article 10 (1) of the Accreditation and Verification Regulation, the operator must provide the verifier with 'all relevant correspondence with the competent authority, in particular information related to the notification of modifications of the monitoring plan.'[882] Operators are obliged to notify the competent public authority of any significant modifications to the monitoring plan immediately and of any non-significant changes until the end of the calendar year. This information contained in the notifications overlap with the information on modifications discussed in the previous section. Therefore, the same argumentation as with modifications of the monitoring plan can be applied, meaning that this information is environmental information.

However, the exchange on the modifications of the monitoring plan is not the only correspondence between operator and competent public authority. The Monitoring and Reporting Regulation sets out various other instances in which the operator must communicate with the competent public authority. Generally, these relate to the monitoring of emissions. Therefore, in a similar line of argument as with information on the modification of monitoring plans, it can be argued that these communications are intended to protect the environment. Three examples may illustrate this.

2.5.4.1. Emissions factor

The first example relates to the calculation of emissions under the standard methodology.[883] In principle, the operator must calculate its emissions per source stream by multiplying the activity data[884] with the corresponding emission factor[885] which is expressed as tonnes of CO_2

[882] Commission Regulation (EU) No 600/2012 Article 10 (1) (k); Commission Implementing Regulation (EU) 2018/2067 Article 10 (1) (n).
[883] Commission Regulation (EU) No 601/2012 Article 24; Commission Implementing Regulation (EU) 2018/2066 Article 24.
[884] The emissions factor is 'average emission rate of a greenhouse gas relative to the activity data of a source stream assuming complete oxidation for combustion and complete conversion for all other chemical reactions.' See Commission Regulation (EU) No 601/2012 Article 3 (1); Commission Implementing Regulation (EU) 2018/2066 Article 3 (1).
[885] The emissions factor is 'average emission rate of a greenhouse gas relative to the activity data of a source stream assuming complete oxidation for combustion and complete conversion for all other chemical reactions.' See Commission Regulation (EU) No 601/2012 Article 3 (13); Commission Implementing Regulation (EU) 2018/2066 Article 3 (13).

per terajoule.[886] However, the competent authority may allow that the emission factors is expressed as tonnes of CO_2 per tonne or per normal cubic metre.[887] It must be noted that it is extremely hard to assess whether such a change is likely to have an effect on the environment.[888] However, the monitoring methodology is a core element of the monitoring process. The monitoring of emissions is intended to protect the environment by determining how much a specific installation emitted in a given year, so that the operator of that installation can surrender sufficient allowances, thereby ensuring that the EU ETS reaches its overall aim of protecting the environment by reducing greenhouse gas emissions. Therefore, changes to the monitoring methodology should be regarded as being intended to protect the environment and communications on such changes, especially where the competent public authority must give its consent, should be regarded as information on a measure or activity that is intended to protect the environment.

2.5.4.2. Uncertainty thresholds

The second example relates to the uncertainty thresholds that operators must apply when monitoring emissions. The uncertainty thresholds indicate the margin of error that operators have when monitoring their emissions. The uncertainty thresholds are divided into tiers. The most common tiers are: tier 1 (± 7.5%), tier 2 (± 5%), tier 3 (± 2.5%) and tier 4 (± 1.5%).[889] However, depending on the activity, different uncertainty thresholds may apply. Generally, category A installations[890] must use the highest tier referred to in Annex V of the Monitoring and Reporting Regulation.[891] For most activities carried out by a category A installation, Annex V sets out that either tier 1 or 2 applies. This means that the operator has an uncertainty

[886] Commission Regulation (EU) No 601/2012 Article 24; Commission Implementing Regulation (EU) 2018/2066 Article 24.
[887] Whenever there is a decision by a public authority potentially may have effects on the environment, the question arises whether public participation is required pursuant to Article 6 of the Aarhus Convention. However, in this case, given the absence of a express provision prescribing public participation, it seems that the public does not need to be involved in this decision-making process. See Commission Regulation (EU) No 601/2012 Article 24; Commission Implementing Regulation (EU) 2018/2066 Article 24.
[888] Without the proper technical knowledge – knowledge that lawyers rarely possess.
[889] Commission Regulation (EU) No 601/2012 Annex V, Table 1; Commission Implementing Regulation (EU) 2018/2066 Annex V, Table 1.
[890] Commission Regulation (EU) No 601/2012 Article 19 (2) (a); Commission Implementing Regulation (EU) 2018/2066 Article 19 (2) (a).
[891] Commission Regulation (EU) No 601/2012 Article 26 (1) (a); Commission Implementing Regulation (EU) 2018/2066 Article 26 (1) (a).

threshold of either ± 7.5% or ± 5%. Category B[892] and C installations[893] must use the highest tier referred to in Annex II, which is generally tier 4, meaning that the uncertainty threshold is ± 1.5%. Thus, usually, the more an installation emits, the lower its uncertainty threshold.

However, where the operator demonstrates to the public authority that applying the applicable tier is technically not feasible or would result in unreasonable costs, it may apply a lower tier than required.[894] A higher uncertainty threshold means that a high margin of error is allowed. Allowing the operator to apply a lower tier is likely to have an effect on the environment, since a higher uncertainty threshold may result in more emissions that are not accounted for and for which in the end no allowances will be surrendered. In 2017, more than 1.7 billion tonnes of $CO_{2(e)}$ were verified.[895] On such a scale, the difference between uncertainty thresholds of 1.5%, 5% and 7.5% makes a considerable difference in absolute numbers. Even for a single installation, the effect can be considerable. As pointed out above, installations are divided into groups according to their total annual emissions of $CO_{(2)}$. The group with the highest emissions are installations with emissions of more than 500,000 tonnes per year.[896] An installation that emits 500,000 tonnes usually must apply an uncertainty threshold of 5% which gives it a margin of ± 25,000 tonnes of $CO_{2(e)}$. If it was allowed to apply the highest uncertainty threshold of 7.5%, it would have a margin of ± 37,500 $CO_{2(e)}$. Thus, an installation that applies an uncertainty threshold of 7.5% instead of 5%, could, in an extreme case, emit 12,500 tonnes of $CO_{2(e)}$ more without having to surrender allowances for those emissions. Consequently, applying a different tier can be regarded as constituting a measure or activity that is likely to affect the environment. Therefore, information on the application of a different tier, such as the correspondence between operator and competent authority, can be regarded as environmental information within the meaning of the Environmental Information Directive.

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[892] Installations with average verified emissions of more than 50 000 and equal to or less than 500 000 tonnes of of CO2(e); Commission Regulation (EU) No 601/2012 Article 19 (2) (b); Commission Implementing Regulation (EU) 2018/2066 Article 19 (2) (b).

[893] Installations with average verified emissions of more than 500 000 tonnes of CO2(e); Commission Regulation (EU) No 601/2012 Article 19 (2) (c); Commission Implementing Regulation (EU) 2018/2066 Article 19 (2) (c).

[894] it is not explicitely state whether the public authority must approve the application of a lower tier, however, the wording of Article 26 strongly suggests this. Moreover, it would be strange if the operator could make changes to the monitoring plan without prior approval of the public authority, given that the public authority must approve the original monitoring plan. Commission Regulation (EU) No 601/2012 Article 26; Commission Implementing Regulation (EU) 2018/2066 Article 26.

[895] 'EU Emissions Trading System (ETS) Data Viewer — European Environment Agency' <https://www.eea.europa.eu/data-and-maps/dashboards/emissions-trading-viewer-1> accessed 13 December 2021.

[896] Commission Regulation (EU) No 601/2012 Article 19 (2) (c); Commission Implementing Regulation (EU) 2018/2066 Article 19 (2) (c).

2.5.4.3. Measuring device is out of order and surrogate data

The third example concerns the malfunctioning of a measuring device. Where an operator has chosen a measurement-based monitoring methodology and a measuring device has been out of order for more than five consecutive days, the operator must inform the competent authority without undue delay and suggest adequate measures to remedy the situation.[897] Moreover, the operator must fill the data gap by determining the missing emissions by means of an appropriate estimation method.[898] The obligation to inform the public authority about data gaps and to fill them with surrogate data is intended to ensure that all emissions that actually occur are accounted for at the end of the year. By making sure that the reported emissions are accurate, this measure contributes towards ensuring that the EU ETS achieves its overall aim – reducing greenhouse gas emissions. In light of this, it is clear that the obligation to inform the public authority of data gaps and fill them with surrogate data is intended to protect the environment. Consequently, it is a measure that is intended to protect the environment and therefore, information on this measure is environmental information within the meaning of Article 2 (1) (c) of the Environmental Information Directive.

2.6. Interim conclusions

This chapter is dedicated to answering the question whether, according to the Environmental Information Directive, the relevant information should be disclosed following a request from the public. Answering this question entails a three-step analysis: (1) Determining whether the relevant information is environmental information, (2) determining whether the bodies that hold the relevant information constitute public authorities, and (3) analysing whether any of the grounds of refusal apply. This section has been dedicated to answering the first of these questions. It has been concluded that the greenhouse gas permit and the emissions report clearly come within the ambit of the definition of environmental information. With regard to the internal verification documentation and the verification report it cannot be concluded with certainty whether they constitute environmental information. The

[897] Commission Regulation (EU) No 601/2012 Article 45; Commission Implementing Regulation (EU) 2018/2066 Article 45.
[898] Commission Regulation (EU) No 601/2012 Article 65; Commission Implementing Regulation (EU) 2018/2066 Article 66.

main reason why a conclusion could not be drawn is that it is unclear how strong the link between a certain measure or activity and the environment must be for information on that measure or activity to constitute environmental information.

Notwithstanding these uncertainties, it has been argued that it is likely that the internal verification documentation and the verification report constitute environmental information. The same is the case regarding the information provided by the operator to the verifier. The Environmental Information Directive sets out that measures and activities constitute environmental information if they are either likely to affect the environment or if they are intended to protect the environment. What has become clear throughout this section is that where information is part of a system that is intended to protect the environment, such as the EU ETS, one can always make a case for the information being intended to protect the environment, simply as a consequence of being part of that system. Especially considering whether a certain measure is intended to protect the environment from a teleological perspective, i.e. in light of the overall aim of the legislative instrument of which it forms part, reinforces this line of argumentation.

In light of the fact that the CJEU has, on the one hand, consistently ruled that the concept of environmental information must be interpreted broadly, but, on the other hand, pointed out that it is not all-encompassing, the question arises where the line should be drawn. In other words, when precisely is a measure likely to affect the environment or intended to protect the environment? Are all measures or activities that are part of a larger system that is intended to protect the environment, such as the EU ETS, automatically measures that are intended to protect the environment? From a teleological perspective, it seems convincing that a measure that is part of such a larger system which is intended to protect the environment contributes in one way or another to achieving that aim, should be regarded as being intended to protect the environment itself. Nevertheless, it is difficult to give an abstract answer to that question. In the absence of any guidance documents by the European Commission[899] or any clarification by the legislator, it would be highly welcome if the CJEU provided more guidance on this question. Until a case on this issue arises, it will be relevant to see how national legislation has implemented the definition of environmental information and how national courts have interpreted the national legislation implementing the Environmental Information Directive.[900]

[899] An extensive search on the website of the European Commission has yielded that no such guidance documents seem to exist.
[900] See chapter 5, section 3.

3. Public Authorities

3.1. Introductory remarks

After having analysed whether the relevant information constitutes environmental information, the second issue that must be examined when determining whether the relevant information should be disclosed upon a request from the public, is whether the entities that hold the relevant information are public authorities within the meaning of the Environmental Information Directive. The reason is that the right to access environmental information applies only *vis-à-vis* public authorities, not private entities. However, in chapter 2, section 2.5, it has been explained that the definition of public authorities set out in the Environmental Information Directive is relatively broad and comprises three categories, two of which set out circumstances in which private entities can also constitute public authorities.

The relevant information is held partly by the national authorities responsible for administering the EU ETS and partly by verifiers. Thus, it must be examined whether these two bodies constitute public authorities. With regard to the competent national authorities, it is clear that they come within the definition of public authorities set out in the Environmental Information Directive. Therefore, this section will focus exclusively on analysing whether verifiers qualify as public authorities pursuant to the definition set out in the Environmental Information Directive. Moreover, since the first category of public authorities encompasses only governmental authorities, such as ministries or city councils, and verifiers are typically private entities, it is clear that verifiers are not public authorities pursuant to the first category. Hence, the focus of the analysis will be whether verifiers qualify as public authorities pursuant to the second or third category.

It should be noted that the European Commission seems to be of the opinion that verifiers are not public authorities. In its guidance document on the relationship between the Accreditation and Verification Regulation and the harmonised standard,[901] it explains that verifiers should, in principle, not disclose any information obtained during the verification

[901] Pursuant to Commission Regulation (EU) No 600/2012 Annex II, the harmonised standard pursuant to Regulation (EC) No 765/2008 concerning requirements for greenhouse gas validation and verification bodies for use in accreditation or other forms of recognition applies. Regulation (EC) No 765/2008 defines a harmonised standard as a standard adopted by one of the European Standardisation bodies. The Commission published a Communication (O.J. C 149/1, 25.05.2012) in which it determined that EN ISO 14065 is the harmonised standard for EU ETS verifiers. Consequently, National Accreditation Bodies must use this standard to assess verifiers.

process.[902] However, it remarks that where information is in the hands of the competent public authority or the national accreditation body, the Environmental Information Directive could require disclosure to the public.[903] The Commission only refers to the case where the information is in the hands of the competent public authority or the national accreditation body, not the verifier. Thereby it implies that the verifier is not covered by the Environmental Information Directive. Of course, this is only the Commission's view and does not mean that the verifier is not a public authority according to the applicable law.

In this context, Case T-185/19 *Public.Resource.Org*[904] should be mentioned. This case concerned a request for access to documents held by the European Commission. The applicant had requested access to harmonised standards approved by the European Committee for Standardisation. The European Committee for Standardisation is an entity governed by private law and is one of the European standardisation organisations that are officially recognised by the Standardisation Regulation as providers of European standards.[905] It is an association of the national standardisation bodies of 33 European countries and serves as 'a platform for the development of European standards and other technical documents on various types of products, materials, services, and processes.'[906] Under the 'New Approach' which was introduced in the 1980s, the EU legislator determines essential requirements of a product and upon a request by the European Commission, one of the European Standardisation Organisations develops the more detailed standard. The European Commission, then, publishes a reference to the standard in the Official Journal.[907]

In *Public.Resource.Org*, the applicant had addressed its request to the European Commission since the latter holds the document with the harmonised standard developed by the European Committee for Standardisation. The European Commission denied the request and the applicant appealed against that decision before the General Court. The Court found that

[902] European Commission, 'The Accreditation and Verification Regulation - Relation between the AVR and EN ISO 14065' 9.
[903] ibid This guidance document was unanimously endorsed by the representatives of the member States at the meeting of the Climate Change Committee on 19 September 2012 and published in the Official Journal of the EU and it explicitly states that it represents the views of the European Commission.
[904] *T-185/19 Public.Resource.Org* (n 518). Appealed in Case C-588/21 Public.Resource.Org and Right to Know v Commission and Others.
[905] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council 2012 (OJ L 316/12).
[906] European Commission, 'Key Players in European Standardisation' <https://ec.europa.eu/growth/single-market/european-standards/key-players-european-standardisation_en> accessed 27 January 2022.
[907] Eliantonio and Cauffman (n 28) 4.

the Commission correctly refused access to the harmonised standard since disclosure would have had adverse effects on the protection of copyrights and commercial and industrial information.

The General Court also briefly touches upon the question of whether standardisation bodies act as public authorities when adopting standards.[908] It finds that 'it is in no way apparent from the provisions governing the European standardisation system that, in the standards development process, [a standardisation body] acts as a public authority by performing public functions which are not subject to any commercial interests.'[909] On first sight, this case and the court's findings seem relevant for the question whether verifiers constitute public authorities, as it is yet another area of EU law in which private actors are involved in public functions.[910] One could argue that in light of the General Court's finding that the European Committee on Standardisation is not a public authority, it would be likely to reach a similar conclusion with regard to verifiers. However, the situation of verifiers and standardisation bodies is different in several aspects and, therefore, the conclusion of the General Court in *Public.Resource.Org* cannot be applied to the analysis of whether the EU ETS verifiers is a public authority.

First, it must be noted that verifiers and standardisation bodies, while both being legal persons governed by private law, have very different origins. Standardisation bodies were introduced bottom-up by private actors and the EU only stepped in later to protect the internal market and competition.[911] Verifiers, on the other hand, were introduced by the EU legislator as a new construct specifically designed for the EU ETS[912] and the legislator decided to introduce third-party verification to the EU ETS compliance cycle.

Second, *Public.Resource.Org* arose in the context of a request for access to documents held by the European Commission according to the Access to Documents Regulation.[913] This regulation governs access to documents held by EU institutions and agencies. As has been

[908] *T-185/19 Public.Resource.Org* (n 518) paras 68-72.
[909] ibid para 70.
[910] For a more detailed account see '"Part of EU Law", But Only Partially: The Issue of the Accessibility of Harmonised Standards, by Annalisa Volpato' (*REALaw*, 6 October 2021) <https://realaw.blog/2021/10/06/part-of-eu-law-but-only-partially-the-issue-of-the-accessibility-of-harmonised-standards-by-annalisa-volpato/> accessed 22 November 2021.
[911] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council recital 14.
[912] Explanatory Memorandum European Commission, Proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowances trading within the Community and amending Council Directive 96/61/EC 2001 [OJ C E/33] Section 16.
[913] Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents 2001.

explained, access to the relevant information held by the verifiers is governed by the Environmental Information Directive. Even though these two pieces of legislation are related, since they both govern access to documents/information, they are distinct from each other in several important aspects. First, while the Access to Documents Regulation governs access to documents *at the EU level*, the Environmental Information Directive regulates access to environmental information held by *national authorities*. Second, and even more importantly, unlike the Access to Documents Regulation, which is addressed directly at EU institutions and agencies,[914] the Environmental Information Directive sets out an open definition of public authorities, which resembles the approach in the Aarhus Convention. The question in this study is whether private parties such as the verifier fit into this open definition of public authorities. However, this question was only marginally touched upon by the Court in *Public.Resource.Org*.[915]

Third, the situation of the case in *Public.Resource.Org* is quite different from the situation of the EU ETS verifier. *Public.Resource.Org* concerned access to a harmonised standard on the safety of toys.[916] As previously stated, harmonised standards are drawn up and held by standardisation bodies and are not publicly available (they must usually be acquired for a charge). Subsequently, a reference to the harmonised standards is published in the Official Journal of the EU but not the harmonised standard itself. Companies acquire the harmonised standard and design their products, in this case, toys, in accordance with the harmonised standards. By adhering to the harmonised standard, they comply with the laws on the safety of toys. The situation of the verifier is different. The operator is obliged to have its emissions report verified by an accredited verifier. The verifier is accredited by one of the national accreditation bodies according to a harmonised standard and verifies the emissions report according to the rules set out in the Accreditation and Verification Regulation.[917] Thus, comparing (a) access to the harmonised standard on the safety of toys with (b) access to information collected in the course of verification held by the verifier would be a distorted comparison. Hence, the situation at issue in *Public.Resource.Org* was different from the one examined in this section, which makes it difficult to use the conclusions of the General Court in that case in this context.[918]

[914] ibid Article 2 (3).
[915] *T-185/19 Public.Resource.Org* (n 518) paras 68–72.
[916] ibid 2.
[917] See chapter 3, section 2.5 for a more detailed explanation of the accreditation of verifiers.
[918] However, if the question was whether the harmonised standard applicable to verifiers must be disclosed, the findings of the Court would most likely be more relevant.

Notwithstanding the limited use of the findings of the General Court for the analysis of whether verifiers are public authorities under the Environmental Information Directive and the Aarhus Convention, it is striking that standards drafted by a private party with which certain products must comply are not publicly available.[919] The ruling in *Public.Resource.Org* may indicate that the General Court generally has a rather restrictive view on private parties being categorised as public authorities when performing public tasks. However, it should be kept in mind that the General Court adjudicated specifically in light of the legal framework of standardisation.[920] Moreover, this stands in contrast to the deliberately wide definition of the concept of 'public authority' as set out in the Arhus Convention[921] and the indication of the CJEU's judgment in *Fish* Legal, which was decided by a Grand Chamber.[922] Thus, this view is rather speculative and, again, the situation of the verifier is quite different from that of standardisation bodies. On the other hand, it is interesting to see that the General Court found that harmonised standards form part of EU law and that consequently, it has jurisdiction to give preliminary rulings concerning the interpretation of such a harmonised standard.[923] Thus, the General Court seems to bring standard-setting, an originally private activity, into the public law sphere.

3.2. Category 2: bodies with public administrative functions

The second category of public authorities comprises 'any natural or legal person performing public administrative functions.'[924] As explained in chapter 2, the CJEU set out that there are two criteria that an entity needs to fulfil in order to qualify as a public authority pursuant to Article 2 (2) (b) of the Environmental Information Directive.[925] First, an entity must be entrusted with the performance of a service that is in the public interest. Second, for the

[919] Further academic debate discussing whether the position of the general Court holds up in light of the Aarhus Convention is necessary. Moreover, it is important to note that the appeal is pending before the CJEU (Case C588/21 P).
[920] See *T-185/19 Public.Resource.Org* (n 518) para 70 where the General Court states that 'it is in no way apparent from the provisions governing the European standardisation system that, in the standards development process, CEN acts as a public authority by performing public functions which are not subject to any commercial interests.' .
[921] Ebbesson (n 12) 74.
[922] *Fish Legal* (n 157).
[923] *Case C-613/14 James Elliott Construction Limited v Irish Asphalt Limited* [2016] para 40 & 47.
[924] 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 Article 2 (2) (b).
[925] Chapter 2, section 2.5.2.

purpose of performing this service, the entity must be 'vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.'[926] It should be explored to what extent the judgments provided by the CJEU shed light on the question whether the verifier is a public authority.

The first question is whether verifiers carry out a service that is in the public interest. The service that the verifier performs is the verification of emissions reports. In a contribution on which this chapter builds, Peeters and Müller argue that the verification of emissions reports constitutes a service in the public interest, since it contributes to the enforcement of legislation that is intended to protect the environment.[927] The enforcement of legislation in general, as well as the protection of a public good, such as the environment, can be considered to be in the public interest.[928] Moreover, the Accreditation and Verification Regulation posits that verification is to be performed in the public interest.[929] Therefore, it seems safe to say that verification is a service whose performance is in the public interest.

The second question is whether the verifier has special powers to perform the verification of emissions reports that go beyond the powers that are characteristic for the rules applicable to relations between private persons. From the outset, it must be said that there are good arguments for and against the claim that verifiers' powers go beyond the rules normally applicable to the relations between private parties. On the one hand, one could make the argument that verifiers do possess special powers,[930] since they have the capacity to audit operators (they have, for example, the power to perform site visits).[931] Moreover, through their verification opinion, verifiers determine whether operators are allowed to surrender allowances.[932] Even though, competent national authorities are ultimately responsible for the proper administration of the EU ETS, including ensuring that operators surrender the correct number of allowances, it would make little sense if emissions reports were verified twice, once by the verifier and once by the public authority. Illustratively, there is no provision in the

[926] *Fish Legal* (n 157) para 52.
[927] Peeters and Müller (n 46) 273.
[928] *Case 240/83 Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] para 13.
[929] Commission Regulation (EU) No 600/2012 Article 7 (3); Commission Implementing Regulation (EU) 2018/2067 Article 7 (3).
[930] Peeters and Müller (n 46) 273 f.; Mathias N Müller, 'Reflecting on the EU Emission Trading System: Directive 2003/4/EC as a Tool to Learn from the Successes and Failures of the EU ETS', *Environmental Law for Transitions to Sustainability* (Intersentia 2021) 121.
[931] Commission Regulation (EU) No 600/2012 Article 21; Commission Implementing Regulation (EU) 2018/2067 Article 21.
[932] 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 Article 12 (3) and Article 15, third paragraph.

Accreditation and Verification Regulation obliging competent public authorities to perform checks of verified emissions reports. Also in practice, public authorities rely to a large extent on the verification opinion and do not perform thorough checks of the emissions report.[933] Moreover, verification cannot be carried out by just anybody. Instead, verifiers must be accredited by a national accreditation body in order to be eligible to verify emissions reports pursuant to the EU ETS. Furthermore, it should be taken into account that operators are obliged to have their emissions reports verified.[934] Verification is a tool for enforcing environmental legislation to which all operators are subject. This may suggest that the power to verify is indeed a special power that goes beyond the powers that are characteristic for the rules applicable to relations between private persons.

On the other hand, there are several arguments suggesting that verifiers do not have any special powers to perform verification. The first argument relates to the source of verifiers' powers. According to the CJEU 'only entities which, by virtue of a legal basis specifically defined in the national legislation which is applicable to them, are empowered to perform public administrative functions' fall within the second category of public authorities.[935] However, any natural or legal person may become a verifier simply by applying for accreditation to any of the national accreditation bodies.[936] Thus, it could be questioned whether verifiers are empowered to perform the verification activities by virtue of a legal basis specifically defined by national law. Instead, they are empowered through their accreditation by a national accreditation body. However, such an interpretation would not be in line with the aim of Article 2 (2) (b) of the Environmental Information Directive to define public authorities in functional terms.[937] According to such a functional definition of the concept of public authority, it should not matter how an entity acquired public administrative tasks but only the fact it possesses them. In the same vein, the CJEU has stated that entities are public authorities within the meaning of Article 2 (2) (b) of the Environmental Information Directive where they 'are entrusted, under the legal regime which is applicable to them' with performing public administrative functions.[938] Thus, it seems that it is not necessary that powers are transferred by a legal act onto a specific entity.

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[933] See Annex 1.
[934] 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 Article 15, first paragraph.
[935] *Fish Legal* (n 157) para 48.
[936] Commission Regulation (EU) No 600/2012 Article 45 (1); Commission Implementing Regulation (EU) 2018/2067 Article 46 (1).
[937] *Fish Legal* (n 157) para 52.
[938] *ibid.*

Another issue related to the source from which the special powers stem is the question whether it matters that the verifiers' powers stem from EU law instead of national law. The CJEU explained in *Fish Legal* that a body has public administrative functions where it is vested with special powers *under national law.*[939] Assuming that the powers of verifiers are indeed special powers, the reference of the CJEU to national law gives rise to the question whether this means that verifiers do not qualify as public authorities, since their powers stem from EU law – the Accreditation and Verification Regulation – instead of national law. A purely linguistic interpretation of the phrase 'public administrative functions under national law' suggests that only bodies whose public administrative functions stem from national law are public authorities within the meaning of Article 2 (2) (b) of the Environmental Information Directive. However, to exclude bodies on which special powers have been conferred by EU law from the definition of public authorities would go against the overall aim of the Aarhus Convention and the Environmental Information Directive.[940] Therefore, from a teleological perspective, the phrase 'public administrative functions under national law' should be understood as including special powers conferred on the entity in question by EU law. This is supported by the fact that, in its proposal for the Environmental Information Directive, the European Commission observed that environmental tasks are increasingly outsourced to private companies that do not form part of the public sector but that the underlying rationale of the definition of public authorities 'is that public access to environmental information should not be affected by a delegation of' responsibilities to private bodies.[941]

A third argument against the verifier being a public authority is that a verifier only acquires the power to audit an operator, if the two parties conclude a verification contract. Thus, the operator gives its consent to being audited. For example, a verifier does not have the power to show up on the doorstep of an operator and demand to enter in order to carry out a site visit. It is necessary that the operator and verifier in question have concluded a verification contract beforehand. The Accreditation and Verification Regulation does not specify whether the verifier has this power even after the conclusion of the verification contract. It simply states that the 'operator shall provide the verifier access to its sites.'[942] The wording of this provision – shall provide access – could either mean that the operator must provide the verifier access to

[939] *ibid para 56.*
[940] Aarhus Convention Preamble; 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 recital 9.
[941] Commission of the European Communities (n 391) 9 f.; Bünger and Schomerus (n 50) 65.
[942] Commission Regulation (EU) No 600/2012 Article 21 (2); Commission Implementing Regulation (EU) 2018/2067 Article 21 (2).

its premises at any moment the latter decides to show up, or that the two parties agree on a date when the site visit is to be conducted. However, given that the two parties enter into a contractual relationship, it seems more likely that they agree on a date. Moreover, even though operators are obliged to have their emissions reports verified, they are under no obligation to contract a specific verifier. Nevertheless, given that, as pointed out above, it is obligatory for operators to have their emissions reports verified,[943] one could argue that the collective of verifiers has special powers to perform verification, as one of them will perform, for example, a site visit.

In light of these considerations, it does not seem possible to give a definitive answer to the question whether verifiers constitute public authorities pursuant to the second category of public authorities as set out in the Environmental Information Directive. While it seems safe to say that the verification of emissions reports is a task that is in the public interest, the contentious question is whether verifiers have special powers to perform that task. As explained in this section, there are valid arguments for and against the position that the EU ETS verifier has such special powers and consequently constitutes a public authority within the meaning of the Environmental Information Directive. However, based on the assessment in this section, it seems that the arguments in favour of the position that verifiers are bodies carrying out public administrative functions slightly outweigh those against this position. However, until a judgment by the CJEU answers this question, this conclusion remains speculative.

This discussion will be continued in chapter 5, where the particularities of national law on access to environmental information will be examined. It will be interesting to see whether national law has set out a more precise definition of public administrative tasks that makes it possible to determine with more certainty whether verifiers are bodies carrying out public administrative tasks. Alternatively, verifiers may also constitute public authorities pursuant to the third category set out tin the Environmental Information Directive. This option will be explored in the next section.

[943] 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 Article 15, first paragraph.

3.3. Category 3: other bodies

Next to bodies with public administrative functions, natural or legal persons also constitute public authorities if they have 'public responsibilities or functions, or [provide] public services, relating to the environment under the control of a body or person falling within' the first or second category of public authorities.[944] Thus, the verifier would qualify as a public authority pursuant to this provision, where all of the following three conditions were fulfilled. First, the verifier must carry out a public service. Second, the service must relate to the environment. Third, the verifier must be under the control of an entity that is a public authority pursuant to the first or second category. As explained in chapter 2, the Environmental Information Directive does not provide a definition of the crucial terms of this category – public service, relation to the environment, under control.[945] However, as explained in the previous section, the verification of emissions reports can be considered to be a public service, since it serves the public interest by contributing to the enforcement of environmental law. Since it is contributing to the enforcement of *environmental* law, it can also be assumed that verification relates to the environment. The question that remains is whether verifiers are under the control of a public authority pursuant to the first or second category.

The CJEU determined that an entity is under the control where it 'does not determine in a genuinely autonomous matter the way in which it performs the functions in the environmental field which are vested in it, since an entity which qualifies as public authority pursuant to the first or second category exerts 'decisive influence on the entity's action in that field.'[946] One could argue that there is no public authority that exerts decisive influence of the verifier's activities, since verifiers are mostly private companies that are not accountable to any public authority.[947] The verifier's independence from national accreditation bodies is even stipulated in the Accreditation and Verification Regulation.[948]

However, in the case of the verifier, it is important to remember that the CJEU also pointed out that the fact that an entity is a commercial company does not mean that it is not a public authority. Instead, where that company is 'subject to a specific system of regulation'[949] that involves

[944] ibid Article 2 (2) (c).
[945] See section 2.5.3.
[946] *Fish Legal* (n 157) para 68.
[947] Müller (n 930) 126.
[948] Commission Regulation (EU) No 600/2012 Article 57 (1); Commission Implementing Regulation (EU) 2018/2067 Article 57 (1).
[949] *Fish Legal* (n 157) para 70.

> *a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to [the environment] with which they are entrusted […] it may follow that those entities do not have genuine autonomy vis-à-vis the State.*[950]

For determining whether the verifier must be regarded to be under the control of a public authority the following question arises: is the legal framework regulating verification sufficiently precise to conclude that verifiers do not have genuine autonomy vis-à-vis the State with regard to verification?

In that regard, it must be noted that the legislation regulating verification is primarily the Accreditation and Verification Regulation.[951] It sets out the aim of verification – ensuring that emissions reports are free from material misstatements. However, it goes far beyond that. As explained in chapter 3,[952] the Accreditation and Verification Regulation sets outs in detail the different steps of the verification process that a verifier has to follow when verifying an emissions report.[953] Several examples may illustrate this.

First, the Accreditation and Verification Regulation sets out the pre-contractual obligations of the verifier. The verifier must evaluate the risks inherent to verifying the emissions report, it must review the information supplied by the operator, it must assess whether the engagement falls within the scope of its accreditation, it must assess whether it has the competence, personnel and resources required for the verification and it must determine the time needed to properly carry out the verification.[954] Second, at the beginning of the verification, the verifier must evaluate the nature, scale and complexity of the verification and to that end carry out a strategic analysis. Third, the verifier must draft a verification plan setting out the control activities necessary to carry out the verification.[955] Fourth, the Accreditation and Verification Regulation stipulates the procedures according to which the verifier must analyse the data submitted by the operator to assess their plausibility and completeness.[956]

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[950] *ibid para 71.*
[951] Commission Regulation (EU) No 600/2012; Commission Implementing Regulation (EU) 2018/2067.
[952] See section 3.5.
[953] Commission Regulation (EU) No 600/2012 prescribes that the verifier must inter alia analyse the inherent risk and the control activities, draw up a verification plan (the Regulation also prescribes the contents of the verification plan), verify the data in the emissions report, verify whether the operator has correctly applied the monitoring methodology and carry out site visits.
[954] ibid Article 8 (1); Commission Implementing Regulation (EU) 2018/2067 Article 8 (1).
[955] Commission Regulation (EU) No 600/2012 Articles 13 & 14; Commission Implementing Regulation (EU) 2018/2067 Articles 13 & 14.
[956] Commission Regulation (EU) No 600/2012 Article 15; Commission Implementing Regulation (EU) 2018/2067 Article 15.

Thus, while the way in which the verifier conducts its day-to-day business is not influenced by the state, the degree of detail with which the verification of emissions reports is regulated may be an indication that the legal framework regulating verification is particularly precise, so that verifiers do not have genuine autonomy vis-à-vis the state with regard to exercising their verification activities. This would mean that verifiers are under the control of a public authority. Thus, it can be said that while on first sight one might think that verifiers are not public authorities because they are private legal persons, upon a closer look one can come to the conclusion that verifiers are public authorities, since the applicable legal framework is particularly tight, so that the verifier does not have genuine autonomy regarding how it exercises its task.

Unfortunately, the CJEU has given very little guidance on the possibility that an entity is under the control of a public authority where it is subject to a particularly tight legal framework. Therefore, this conclusion should be taken with a grain of salt. It is necessary that the CJEU clarifies the circumstances in which a legal framework can be considered sufficiently precise so that entities subject to that legal framework are considered to be under the control of the state within the meaning of article 2 (2) (c) of the Environmental Information Directive. In the absence of clarification by the CJEU, it can be insightful to analyse how the element of control has been implemented into national law and is applied by national courts. Therefore, this issue will be taken up again in chapter 5.[957] However, it would be problematic if verifiers would constitute public authorities according to the law of one Member States but not according to the law of another.

3.4. Interim conclusions

This section has tackled the second of the three questions that are essential when determining whether the relevant information must be disclosed to the public upon request: are the entities holding the relevant information, in particular the verifiers, public authorities? The analysis in this section has shown that, even though, or maybe precisely because the Environmental Information Directive's definition of public authorities is relatively broad so as to include private natural or legal persons in a range of circumstances, it cannot be determined with certainty whether the verifier actually qualifies as a public authority, even though it

[957] See chapter 5, section 4.

appears that the arguments for the position that the verifier is a public authority slightly outweigh the arguments against that position. With regard to the second category of public authorities, the primary reason why it is not possible to come to a conclusive answer is that it could not be determined with certainty whether verification can be considered to be a public *administrative* task, since it is unclear whether verifiers' powers can be considered to be special powers beyond those that result from the rules applicable to situations between persons governed by private law. Regarding the third category of public authorities, it could not be determined with certainty whether verifiers are under the control of a public authority pursuant to the first or second category. From a teleological perspective, it would make sense if verifiers were considered public authorities but it remains to be seen whether this will be confirmed by the CJEU in the future. While national law implementing the right to access environmental information must of course be in line with the provisions of the Environmental Information Directive, the way the two concepts – public *administrative* tasks and under the control – have been implemented and are applied at national level may help to shed some light on their meaning. Therefore, in chapter 5,[958] these two issues will be examined by analysing national legislation and case law.

However, despite the fact that it could not be determined with certainty whether verifiers qualify as public authorities, there is some evidence that supports the assumption that they are. In light of the conclusion that a large part of the relevant information constitutes environmental information and indications that verifiers are public authorities, the public should, in principle, be given access to the relevant information upon request.

4. Grounds of refusal

4.1. Introductory remarks

In the previous sections of this chapter, it has been analysed whether the relevant information constitutes environmental information and whether the verifier is a public authority pursuant to the Environmental Information Directive. It has been concluded that at least a substantial part of the relevant information can be considered environmental information and that, even though it cannot be determined with certainty, there are at least good arguments for

[958] See chapter 5, section 4.

the position that verifiers are public authorities. Given these conclusions, the relevant information should, in principle, be provided to the public upon request. However, as has already been explained in chapter 2, the right to access environmental information is not absolute. The Environmental Information Directive sets out several grounds based on which a public authority may refuse a request for environmental information.[959] As stated in chapter 2,[960] Member States enjoy a considerable degree of freedom, since the Environmental Information Directive does not oblige them to implement the grounds of refusal into their national legislation. It has already been explained in chapter 2 that not all grounds of refusal are potentially relevant for the information examined in this study. In this section, it will be analysed whether the competent national authority and the verifier may refuse a request for access to the relevant information based on the grounds of refusal discussed in chapter 2. If this is the case, then using the right to access environmental information to learn about non-compliance would be limited, since access to the relevant information could be lawfully denied.

However, not all of the grounds analysed in chapter 2 will be discussed in this chapter. The aim of this thesis is to examine to what extent the public can access information on the compliance with the EU ETS. Naturally, where a public authority does not hold any of the relevant information, it will also not be able to disclose it. Hence, this ground of refusal will not be examined further.[961] Moreover, it will also not be examined whether a request for access to the relevant information could be refused because it is formulated in too general a manner. The reason is that if a public authority considers that a request is formulated in too general a manner, it must assist the applicant in specifying the request.[962] Thus, even if the national competent authorities or the verifier regarded the request for the relevant information as too general, they would have to assist in reformulating it, so that it is clear what information is sought. Therefore, this ground of refusal should not lead to a refusal of the request as such.

[959] See chapter 2, section 2.6
[960] See chapter 2, section 7.1.
[961] However, it must be noted that where a public authority is addressed with a request for environmental information that it does not hold, it must refer the applicant to the public authority that holds the requested information. See chapter 2, section 2.6.1.1. for a more detailed discussion,
[962] See chapter 2, section 7.2.1.

4.2. Manifestly unreasonable

The Environmental Information Directive sets out that a public authority may refuse a request where it is manifestly unreasonable. As has been explained in chapter 2,[963] a request is manifestly unreasonable, where it is clear that answering the request would not serve any of the aims of the Environmental Information Directive, such as creating greater awareness of environmental issues[964] or enhancing the implementation of legislation,[965] or where it 'could involve the public authority in disproportionate costs or effort or would obstruct or significantly interfere with the normal course of its activities.'[966] It should be noted that an applicant is not obliged to state the reasons why she is requesting access to environmental information. Thus, if a public authority intends to refuse a request for environmental information based on this ground, it is up to the public authority to prove that the request is manifestly unreasonable.[967]

Answering a request for information relevant for checking compliance with the EU ETS would serve the aims of the Environmental Information Directive. The rationale of the requests for the relevant information is to uncover potential instances of non-compliance and, consequently, to contribute to the correct application of environmental law, to check the correct functioning of public authorities and verifiers and thereby to contribute to upholding the rule of law.[968] Moreover, it is not apparent that answering a request for information that is relevant for checking compliance would involve disproportionate costs or efforts for the public authority addressed with the request. Therefore, it seems that access to information relevant for checking compliance with the EU ETS is difficult to refuse based on this ground.

4.3. Internal communications of public authorities

Internal communications of public authorities have been defined as 'any document intended to be addressed to someone, regardless of its content, and which has not yet left the sphere of'

[963] Section 7.2.2.
[964] 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 recital 1.
[965] Aarhus Convention.
[966] Commission of the European Communities (n 391) 13.
[967] Götze and Engel (n 146) 172; Reidt and Schiller (n 146) §8, para 56.
[968] However, it should be kept in mind that applicants are not obliged to provide a reason for their request. 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 Article 3 (1).

a public authority.[969] The greenhouse gas permit, the emissions report, the verification report and the information that the operator has provided to the verifier cannot constitute internal communications, since they were communicated from one actor to another. The greenhouse gas permit is issued by the competent national authority to the operator. The emissions report and the verification report are sent by the operator to the competent national authority; and the information that the operator has provided to the verifier also does not fit the definition of internal communication of public authorities.

Thus, the only element of the information relevant for checking compliance with the EU ETS that may be covered by this ground of refusal is the internal verification documentation. Even though the name suggests otherwise, the internal verification documentation is not purely internal. It is 'all internal documentation that a verifier has compiled to record all documentary evidence and justification of activities that are carried out for the verification of' an emissions report.[970] Pursuant the Accreditation and Verification Regulation, the verifier must draft the internal verification documentation in a way that the national accreditation body can evaluate whether the verifier has carried out the verification in accordance with that Regulation.[971] That implies that the national accreditation body has access to the internal verification documentation. Moreover, the competent authority can request the verifier to provide access to the internal verification documentation.[972] Thus, the internal verification documentation is not only intended for the verifier, but also for other parties. In light of the above, it seems that none of the information that is relevant for checking compliance with the EU ETS which has been identified in chapter 3 is potentially covered by the ground of refusal protecting internal communications of public authorities. As already stated in chapter 3,[973] there may of course be other information[974] that is relevant for checking compliance with the EU ETS and that may qualify as internal communications of public authorities.

[969] Commission Regulation (EU) No 600/2012; Commission Implementing Regulation (EU) 2018/2067.
[970] Commission Regulation (EU) No 600/2012; Commission Implementing Regulation (EU) 2018/2067.
[971] Commission Regulation (EU) No 600/2012 Article 26 (2); Commission Implementing Regulation (EU) 2018/2067 Article 26 (2).
[972] Commission Regulation (EU) No 600/2012 Article 26 (3); Commission Implementing Regulation (EU) 2018/2067 Article 26 (3).
[973] See chapter 3, section 6.
[974] For example, is it feasible that the operator has provided information to the verifier that is not included in the internal verification documentation.

4.4. Confidentiality of the proceedings of public authorities

The Environmental Information Directive allows public authorities to refuse a request if the disclosure of the requested information would have adverse effects on the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law.[975] As explained in chapter 2,[976] it is up to the Member States to set out what proceedings are covered by confidentiality.[977] Therefore, whether access to the relevant information can be refused based on this ground of refusal depends on national law.[978]

In this context, it is interesting to note that Article 41 (3) of the Accreditation and Verification Regulation points out that the verifier shall keep all information obtained during the verification confidential.[979] This suggests that verifiers are obliged to refuse access to the information they obtained throughout the verification process. Given that there are strong arguments for the position that verifiers are public authorities, this article stands in stark contrast to the Environmental Information Directive, which only allows information to be kept confidential where one of the grounds of refusal applies. Consequently, the question arises how this apparent conflict between two provisions of EU law can be resolved?

Article 290 (1) of the TFEU sets out that 'a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend non-essential elements of the legislative act.' Delegated acts are supposed to have the word 'delegated' in their titled.[980] The Accreditation and Verification Regulation does not have the word 'delegated' in its titled. However, Article 15 of the EU ETS Directive, which authorises the European Commission to adopt the Accreditation and Verification Regulation, sets out that it shall be designed to amend non-essential elements of the EU ETS Directive.[981] In light of the fact that Article 290 of the TFEU sets out that delegated acts are intended to supplement or amend certain non-essential elements of the parent act and that the EU ETS Directives provides

[975] *Glawischnig* (n 268) Article 4 (2) (a).
[976] See section 2.6.2.1.
[977] In *Case C-204/09 Flachglas Torgau* (n 417) para 65, the CJEU explained that it was not necessary to give the term 'proceedings of public authorities' an EU-wide uniform meaning. Instead, the confidentiality of the proceedings of public authorities was given where national law contained a general rule according which the confidentiality of the proceedings of public authorities is a ground for refusing access toe environmental information, provided that national law clearly defines the concept of 'proceedings'.
[978] See chapter 5, section 5.
[979] Commission Regulation (EU) No 600/2012 Article 41 (1); Commission Implementing Regulation (EU) 2018/2067 Article 42 (3).
[980] Treaty of the Functioning of the European Union Article 290 (3).
[981] 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.

that the Accreditation and Verification Regulation is intended to amend certain of its non-essential elements, it seems safe to say that the Accreditation and Verification Regulation is a delegated act.

In this context, it is interesting to note that the successor of the Accreditation and Verification Regulation is an implementing act. This is indicated by the fact that it is titled 'Commission Implementing Regulation 2066/2018'. Ziller notes that there is a clear hierarchy between legislative and delegated acts. The latter may not amend essential elements of the former, otherwise their provisions may be declared invalid.[982][983] In other words, the European Commission may not exceed the mandate given to it by the legislative act when designing the delegated act. The European Commission's mandate for the Accreditation and Verification Regulation is set out in Article 15 of the EU ETS Directive, which states that the European 'Commission shall adopt a regulation for the verification of emissions reports based on the principles set out in Annex V'. Neither Article 15 itself, nor Annex V of the EU ETS Directive touch upon the confidentiality of information related to verification. On the one hand, one could argue that, since neither Article 15 nor Annex V speak of the confidentiality requirements regarding information related to verification, the Commission overstepped the boundaries of its mandate. However, on the other hand, it could also be argued that Article 41 (3) does not amend *essential* elements of the EU ETS Directive by setting out that the verifier must keep the information obtained during the verification process confidential. This could mean that the Commission did not overstep the boundaries of its mandate. As will be explained in further detail in section 4.6.3 of this chapter, such a case of potentially conflicting norms of EU law must be assessed in light of the hierarchy of norms of EU law. With a view to avoid repetition, it shall suffice to say at this point that delegated acts, such as the Accreditation and Verification Regulation, rank lower than secondary legislation, such as the Environmental Information Directive, and international agreements to which the EU and the Member States are part, such as the Aarhus Convention.[984] Therefore, provisions of delegated acts must be interpreted in line with such secondary legislation and international agreements as much as possible.

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[982] Jacques Ziller 'Hierarchy of Norms, Hierarchy of Sources and General principles in European Union Law' in Ulrich Becker, Armin Hatje, Michael Potacs, Nina Wunderlich (eds.) *Verfassung und Verwaltung in Europa: Festschrift für Jürgen Schwarze zum 70. Geburtstag,* Baden-Baden: Nomos, 2014, 343.

[983] Jacques Ziller, 'Hierarchy of Norms, Hierarchy of Sources and General Principles in European Union Law' in Ulrich Becker and others (eds), *Verfassung und Verwaltung in Europa: Festschrift für Jürgen Schwarze zum 70. Geburtstag* (Nomos 2014) 343.

[984] Damian Chalmers, Gareth Davies and Gorgio Monti, *European Union Law* (Cambridge University Press 2010) 100; Kieran Bradley, 'Legislation in the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014) 109; Ziller (n 983) 343.

Ultimately this is a matter to be decided by the CJEU and it has already demonstrated that it is willing to declare provisions of delegated acts related to the EU ETS invalid. For example, in *Schaefer Kalk*, the CJEU found an article of the Monitoring and Reporting Regulation to be invalid, since the Commission overstepped the limits of its mandate by altering an essential element of the EU ETS Directive.[985] But it should be noted that restricting access to information related to the verification of emissions reports seems to run against the overall goal of the Environmental Information Directive – to provide broad access to environmental information. Even more so when considering that it has been concluded above that information related to the verification constitutes environmental information.[986]Another question is whether this information should be kept confidential after the verification procedure has ended. With regard to the exception that public authorities do not have to provide environmental information when they are acting in a legislative capacity, the CJEU has held that this exception may not be exercised 'where the legislative process in question has ended.'[987] Similarly, it could be argued that where specific proceedings of a public authority have ended, it should not be possible to refuse access to information on those proceedings based on this ground of refusal, although, it is not excluded in certain niche cases. Overall, based on the arguments presented, it seems unlikely that the relevant information can be refused based on this ground of refusal.

4.5. The course of justice

In chapter 2,[988] it has been explained that public authorities may refuse a request for environmental information, if disclosure of that information would have adverse effects[989] on the course of justice or the ability of a public authority to conduct a criminal or disciplinary investigation and that public authorities must refuse a request where disclosure of the requested information would impede the ability of a person to receive a fair trial.

With regard to the information identified as relevant for checking compliance with the EU ETS identified in chapter 3, it can be said that, in principle, it is possible that access thereto is

[985] *Case C-460/15 Schaefer Kalk GmbH & Co KG v Bundesrepublik Deutschland* [2017] paras 42 & 49.
[986] See sections 2.4 and 2.5.
[987] *Case C-204/09 Flachglas Torgau* (n 417) para 58.
[988] Section 2.6.2.2.
[989] In chapter 2, section 7.3.2, In the context of this ground of refusal, the term 'adverse effects' has been interpreted as meaning that the disclosure of the requested information would impede one of the elements of the right to receive a fair trial, may impede the impartiality of the Court or the ability of the responsible authorities to conduct a criminal or disciplinary investigation.

refused based on this ground. The relevant information may be relevant for a court case or an investigation of criminal or disciplinary nature. For example, there may be investigations of alleged collusion between a verifier's employee and the employee of an operator. Parts of the relevant information, such as the internal verification documentation, may also be relevant for that investigation. As long as this investigation is ongoing, disclosure of that information may have adverse effects on the course of justice or a person's ability to receive a fair trial. However, whether this ground of refusal may be applied depends very much on the specific circumstances and must be examined on a case-by-case basis. On a more general level, it can only be concluded that, in principle, it is possible that access to the relevant information is refused based on this ground.

In the context of the question whether access to information on compliance with the EU ETS can be refused based on the ground that disclosure would have adverse effects on the course of justice, it is important to recall the overall rationale of this study. As pointed out in the introduction, one of the underlying assumptions of this investigation is that by accessing the relevant information, the public may identify non-compliance with the EU ETS and thereby supplement the enforcement activities of public authorities and other actors. If public authorities are very active, this could also result in more court cases, since the more public authorities investigate the more non-compliance they will detect and bring non-compliant actors to court. This could, at least in the short to middle term, result in the interesting scenario that the more actively public authorities enforce the EU ETS, the less information is available and vice versa, the less public authorities enforce the EU ETS, the more information should be available. However, in the long term, operators will of course notice that public authorities enforce the EU ETS more strictly, which would presumably result in more compliance. In light of the overall rationale of this study, this is of course to be welcome, as it would reduce the need for enforcement efforts by the public.

4.6. Confidentiality of commercial and industrial information

According to Article 4 (2) (d) of the Environmental Information Directive, public authorities may refuse a request for environmental information where disclosing the requested information would have adverse effects on the confidentiality of commercial and industrial information. A prerequisite for applying this ground of refusal is that either EU or national law

provide for the confidentiality of such information. As pointed out in chapter 2,[990] the term commercial and industrial information is not defined by the Environmental Information Directive and has not been interpreted by the CJEU. One possible definition may be found in the Trade Secrets Directive, which defines a trade secret, a term that includes commercial and industrial information,[991] as information (1) that is not generally known or accessible, (2) that has commercial value because it is a secret and (3) that has been subject to reasonable efforts to keep it secret.[992] In any case, to apply this ground of refusal, the confidentiality of commercial or industrial information must be provided for by EU or national law. However, this section only examines whether EU law provides for the confidentiality of the relevant information. Whether the relevant information enjoys confidentiality pursuant to national law will be analysed in chapter 5.[993]

4.6.1. The greenhouse gas permit

None of the provisions on the greenhouse gas permit mention that it should be kept confidential.[994] Moreover, it does not seem that the information contained in the greenhouse gas permit comes within the possible definition of commercial and industrial information set out above. As explained, the first criterion is that the information may not be generally known or easily accessible. However, it appears that the information contained in the greenhouse gas permit is relatively easily accessible. Procedures for greenhouse gas permits under the EU ETS must be coordinated with the procedures for permits under the Industrial Emissions Directive.[995] Member States may choose to have in place a single procedure under both schemes or to have separate systems for issuing greenhouse gas permits and industrial emission permits.[996] The Industrial Emissions Directive prescribes that Member States must ensure that

[990] See section 7.3.3.
[991] Roland Reinfeld, *Das Neue Gesetz Zum Schutz von Geschäftsgeheimnissen* (Verlag CH Beck oHG 2019) 8.
[992] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure Article 2 (1).
[993] See chapter 5, section 5.
[994] As pointed out before, with regards to the greenhouse gas permit, the question arises whether public participation measures pursuant to Aarhus Convention Article 6 are required.
[995] 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 Article 8; Industrial Emissions Directive Article 9.
[996] Birgitte Egelund Olsen, 'The IPPC permit and the greenhouse gas permit' in Kurt Deketelare & Marjan Peeters *EU Climate Change Policy – The Challenge of New Regulatory Initiatives* (Cheltenham: Edward Elgar, 2006), p. 160.

the competent public authority publishes the Industrial Emissions permit and the reasons on which the decision to grant the permit is based.[997] Given that the information that an operator must provide when applying for an Industrial Emissions permit 'tends to include the same information' that is required for applying for a greenhouse gas permit, it seems that regardless of whether the procedures are joined or not, the information contained in the greenhouse gas permit is already publicly available as a result of the Industrial Emissions Directive's requirement of public consultation and the fact that the information in the two permits is largely the same. Therefore, it seems that EU law does not provide for the confidentiality of the greenhouse gas emissions permit and that access to it cannot be refused based on the ground that disclosure would have adverse effects on the confidentiality of commercial and industrial information.[998]

4.6.2. The emissions report

In the context of the question whether the confidentiality of the relevant information is provided for by EU law, Article 71 of the Monitoring and Reporting Regulation should be briefly mentioned. It sets out that access to emissions reports is governed by the Environmental Information Directive. In that regard 'operators may indicate in their report which information they consider commercially sensitive.'[999] This could be interpreted in two ways. First, it could mean that operators determine which information in the emissions report is to be treated as confidential and will consequently not be disclosed to the public. However, another interpretation could be that the operator can merely flag what information it would prefer to be treated as confidential but that this serves as a mere indication and it is up to the public authority to decide whether that information should actually be treated as confidential. The wording of the article ('operators *may indicate* in their report which information *they consider* commercially sensitive') supports the second interpretation. In that vein, operators could simply reduce the workload for the competent public authority by flagging the information they

[997] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC Article 24 (2).
[998] Naturally, operators could still highlight certain parts of the greenhouse gas permit as confidential and ask the public authority not to disclose it. But it would be up to the public authorities and ultimately the courts to decide.
[999] Commission Regulation (EU) No 601/2012 Article 71; Commission Implementing Regulation (EU) 2018/2066 Article 71.

regard as commercially sensitive. If the emissions report was requested, the public authority would only have to check whether the flagged information is sensitive and, if so, whether there is an overriding public interest in disclosure, while the rest of the information can simply be disclosed. Of course, the danger is that the operator flags a lot of information as confidential.

Regardless of which interpretation of Article 71 of the Monitoring and Reporting Regulation is followed, information contained in the emissions report can be refused based on the ground that disclosure would have adverse effects on the confidentiality of commercial and industrial information. It must be evaluated on a case-by-case basis whether disclosure would have adverse effects.[1000]

4.6.3. Information related to verification

The Accreditation and Verification regulation prescribes that a 'verifier shall safeguard the confidentiality of information obtained during the verification in accordance with the harmonised standard referred to in Annex II.'[1001] This seems to indicate that, in principle, all information which the verifier obtains throughout the verification process is protected by confidentiality, unless specified otherwise. With regard to the information relevant for checking compliance with the EU ETS that was identified in chapter 3, this would include the internal verification documentation, the verification report and the information that that operator has provided to the verifier. However, the verification report has a special standing, since, as explained in chapter 3, Article 15a of the EU ETS Directive may be interpreted as meaning that verification reports must be disclosed upon request. Thus, the verification report seems to be excluded from the ambit of this ground of refusal.

Similarly to the ground of refusal protecting the confidentiality of the proceedings of public authorities, the question arises whether Article 41 (3) of the Accreditation and Verification Regulation conflicts with the Environmental Information Directive. As has been explained throughout this thesis, it is the aim of the Environmental Information Directive to provide broad access to environmental information and to that end only to allow a request for environmental information to be refused where one of the grounds of refusal apply which shall be interpreted restrictively. Provided that the verifier is a public authority, the provision that verifiers may not

[1000] See chapter 5, sections 5.2 and 5.3 for a detailed analysis when this is the case.
[1001] Commission Regulation (EU) No 600/2012 Article 41 (3) The harmonised standard referred to in Annex II is EN ISO 14065. See Commission Implementing Regulation (EU) 2018/2067 Article 41 (3).

disclose any of the information obtained throughout the verification process stands in sharp contrast to the provisions of the Environmental Information Directive.

In the hierarchy of norms of the EU legal order, legislative acts, such as the EU ETS Directive, rank higher than delegated acts, such as the Accreditation and Verification Regulation.[1002] The delegated act 'must respect the conditions and limitations of the enabling provisions of' the legislative act.[1003] If it goes beyond the delegation set out in the legislative act, it 'is deemed ultra vires and may be annulled.'[1004] In this case, the enabling provision is Article 15 of the EU ETS Directive, which provides that 'the Commission shall adopt a regulation for the verification of emissions reports.' However, it seems that the literature has not considered the triangular situation present here, in which a delegated act stands in contrast with a legislative act other than the one that delegated the power in the first place. In light of the fragmented nature of EU environmental law on the one hand and the horizontal nature of the Environmental Information Directive on the other, it is conceivable that there are other acts of EU environmental law that contain provisions that stand in contrast with the Environmental Information Directive.

In any case, given that all legislative acts rank higher than delegated acts, it would make little sense if delegated acts could entail provisions that go against the provisions of a legislative act that is not the delegating legislative act. Therefore, Article 41 (3) of the Accreditation and Verification Directive should be interpreted in such a way that it does not collide with the Environmental Information Directive. Moreover, international agreements to which the EU as well as the Member States are part, such as the Aarhus Convention, are binding upon the EU itself and the Member States.[1005] The CJEU has pointed out on various occasions that such agreements form an integral part of the EU legal order.[1006] In the hierarchy of norms, international agreements rank below the treaties and general principles but above secondary legislation. Consequently, secondary legislation as well as delegated acts must be interpreted in conformity with such agreements.[1007] Therefore, Article 41 (3) of the Accreditation and Verification Regulation must not only be interpreted in line with the Environmental Information Directive but also in line with the provisions on access to environmental information of the Aarhus Convention.

[1002] Chalmers, Davies and Monti (n 984) 100; Bradley (n 984) 109; Ziller (n 983) 343.
[1003] Bradley (n 984) 109.
[1004] ibid.
[1005] Treaty of the Functioning of the European Union Article 216 (2).
[1006] *Case 181/73 Haegeman* (n 549) para 5; *Demirel* (n 549) para 7; *Case C-321/97 Andersson* (n 549) para 26.
[1007] Alina Kaczorowska-Ireland, *European Union Law* (Routledge 2016) 128.

A possible interpretation that could reconcile Article 41 (3) of the Accreditation and Verification Regulation with the Environmental Information Directive and the Aarhus Convention is that a verifier must safeguard the confidentiality of information obtained during the verification procedure, in so far as it is not obliged to disclose it by a legislative act, such as the Environmental Information Directive. However, it should be noted that Article 41 (3) is worded rather straightforwardly ('the verifier *shall* safeguard the confidentiality of information obtained during verification'). In light of this wording, it seems relatively hard to reconcile this provision with the Environmental Information Directive. If the CJEU also found that it was not possible to interpret Article 41 (3) of the Accreditation and Verification Regulation in a way that is in line with the Environmental Information Directive and the Aarhus Convention, it would need to declare Article 41 (3) invalid.[1008]

The Aarhus Convention Compliance Committee found that where the Aarhus Convention does not explicitly regulate a certain issue, parties are free to adopt legislation on that issue.[1009] However, 'any such regulation should be done in a way that does not frustrate the objective of the Convention or conflict with its provisions.'[1010] Thus, it could be argued that since the Aarhus Convention, in principle, allows the refusal of requests for information, parties may set out rules regulating the circumstances in which this is the case. However, given that the Aarhus Convention obliges public authorities to weigh the public interest in non-disclosure against the public interest in disclosure,[1011] it seems to go against the Aarhus Convention to provide, as the Accreditation and Verification Regulation does,[1012] that information related to verification must always be kept confidential. However, the CJEU has stated that the findings of the Aarhus Convention Compliance Committee are not binding upon the parties[1013] and 'as of 2019, has

[1008] The CJEU has already shown that it is willing to declare invalid provisions of the Accreditation and Verification Regulation's sister act, the Monitoring and Reporting Regulation. See *Case C-460/15 Schaefer Kalk GmbH & Co. KG v Bundesrepublik Deutschland* (n 985) para 49.
[1009] *Findings and Recommendations with regard to compliance by Turkmenistan with the obligations under the Aarhus Convention in the case of Act on Public Associations (Communication ACCC/C/2004/05 by Biotica (Republic of Moldova))* [2005] para 20 This particular case (ECE/MP.PP/C.1/2005/2/Add.) concerned the limitation of the territorial field of operation with respect to nation-wide organisations in Turkmenistan which are required to have a rather large membership of 500 member. The Aarhus Convention Compliance Committee found that the Aarhus Convention 'does not exclude the possibility for Parties to regulate and monitor to a certain degree Activities of non-governmental organizations within their jurisdiction, and that there is no requirement in it to either regulate or de-regulate activities of non-registered organizations. Thus, the matter is within the sovereign power of each Party. However, any such regulation should be done in a way that does not frustrate the objective of the Convention or conflict with its provisions.'
[1010] *ibid para 20.*
[1011] Aarhus Convention Article 4 (4).
[1012] Commission Regulation (EU) No 600/2012 Article 41 (3); Commission Implementing Regulation (EU) 2018/2067 Article 41 (3).
[1013] *Case T-12/17 Mellifera eV, Vereinigung für wesensgemäße Bienenhaltung v European Commission* [2018] para 86.

never cited the [Aarhus Convention Compliance] Committee's rulings as sources of law.'[1014] Therefore, the relevance of the findings of the Aarhus Convention Compliance Committee are of limited relevance for the resolution of the conflict between provisions of the Environmental Information Directive and the Accreditation and Verification Regulation.

4.7. Intellectual property

As explained in chapter 2, the term intellectual property is quite broad and entails several sub-categories.[1015] In order to answer the question whether a request for access to the relevant information can be refused based on the ground that it would have adverse effects on intellectual property rights, it must be determined whether the relevant information qualifies as intellectual property. The CJEU has pointed out that the existence and scope of intellectual property rights, their protection and exceptions to that protection 'are not subject of either harmonising provisions or international provisions to which the European Union or its Members States are bound.'[1016] Therefore, intellectual property rights continue to be defined by national law of the Member States.

Nevertheless, at a more general level, it can be said that a few categories of intellectual property can be excluded from this analysis, since the relevant information does not fit into them. First, geographical indications can be excluded, since they only exist with regard to agricultural products and agriculture is not a sector included in the EU ETS.[1017] Moreover, it seems that intellectual property rights would also not be negatively affected if the relevant information contained trademarks. The reason is that trademarks are signs that mark goods as the goods of a certain undertaking. As such they are already public. Intellectual property rights would only be violated if a trademark was used to mark a product that was not actually produced by the company owning the trademark. Third, patents can be excluded. By patenting an invention, the owner gets exclusive rights over it, meaning that nobody may use, produce or sell the invention without the owner's permission. However, the patent is publicly available in order to contribute to public knowledge and boosting further research and development.[1018]

[1014] Samvel (n 234) 231.
[1015] Patents, designs, trademarks, geographical indications and copyright.
[1016] *T-185/19 Public.Resource.Org* (n 518) 40.
[1017] 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 Annex I.
[1018] St Albans City & District Council (n 459) 4;

Thus, it seems that access to the relevant information cannot be refused based on the argument that it contains information on a patented invention, since patents are already publicly available. Finally, it seems unlikely that access to the relevant information can be refused based on the argument that a design right would be violated. Design rights protect the way something looks or feels and 'entitle the right holder to control the commercial protection, importation and sale of products with the protected design.'[1019] However, disclosing information about the design, as with the patent, does not violate the design right. Hence, it appears that if the relevant information contained information on design rights, access to it could not be refused based on the argument that intellectual property rights would be violated.

Therefore, it seems that the only category of intellectual property rights which may cover the relevant information is copyright. If a certain work is protected by copyright, the owner has the right to stop anyone from copying or using a work without permission. It seems that most of the relevant information is not protected by copyright. The greenhouse gas permit contains a description of the activities carried out at and the emissions from the installation in question. The monitoring plan contains general information about the installation and a detailed description of the monitoring methodology that was applied. The emissions report contains information identifying the installation and the results of the monitoring process.[1020] The verification report sets out, inter alia, the scope of the verification, the verification opinion statement, a description of any identified misstatements and non-conformities and any issues of non-compliance with the Monitoring and Reporting Regulation.[1021] It is not apparent that any of this information is protected copyright.

Pursuant to Article 10 (1) of the Accreditation and Verification Regulation, the operator must provide the verifier with a relatively large amount of information.[1022] The only item that is listed in this article with regard to which it seems that it could be protected by copyright are the procedures for data flow activities and control activities. It is feasible that the operator has created a special procedure for data flow activities and control activities that involves a computer programme specifically created for this purpose. Such a computer programme may be protected by copyright and, if that is the case, a request for access to the procedures for data

[1019] ibid 10;
[1020] 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 Annex IV, Part A.
[1021] Commission Regulation (EU) No 600/2012 Article 27 (3); Commission Implementing Regulation (EU) 2018/2067 Article 27 (3).
[1022] See chapter 3, section 3.5.2 for a more detailed discussion.

flow activities and control activities may be refused if the copyright owner does not give her consent.

4.8. Confidentiality of personal data

It has been explained in chapter 2 that a public authority may, in principle, refuse a request for environmental information, where the information contains personal data.[1023] Parts of the relevant information may also contain personal information. The procedures for verification[1024] do not seem to contain personal data. However, the greenhouse gas permit[1025] contains the name and contact details of the operator's employees responsible for the monitoring plan and the emissions report[1026] contains the name and the contact detail of the operator's employees responsible for the reporting of the emissions as well as the contact person of the verifier. The verification report contains the names of the EU ETS lead auditor and the independent reviewer.[1027] Moreover, the information provided by the operator to the verifier may also contain personal data of the EU ETS lead auditor and the independent review and it may also comprise relevant correspondence with the competent authority, which can also contain personal data, such as email addresses or names.

In principle, access to this information may be refused based on the ground protecting personal data. However, the public authority must separate the personal data from the rest of the information which must be disclosed.[1028] Separating personal data seems to be relatively easy, as names, email addresses or any other personal data can simply be blacked out and the rest of the information can be disclosed. It can be debated whether the personal data such as

[1023] See chapter 2, section 2.6.2.4. To recall, the GDPR defines personal data as 'any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.' General Data Protection Regulation Article 4 (1).
[1024] Commission Regulation (EU) No 600/2012 Article 40; Commission Implementing Regulation (EU) 2018/2067 Article 41.
[1025] 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 Article 6.
[1026] Commission Regulation (EU) No 601/2012 Annex X; Commission Implementing Regulation (EU) 2018/2066 Annex X.
[1027] Commission Regulation (EU) No 601/2012 Article 27 (3) (q); Commission Implementing Regulation (EU) 2018/2066 Article 27 (3) (t).
[1028] 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 Article 4 (4).

the names of the EU ETS auditors and independent reviews is actually relevant information itself. It seems that to check an isolated instance of non-compliance, it should not really matter who the specific auditor or independent reviewer was, as long as the rest of the relevant information is disclosed. However, in case non-compliance is discovered, it could be relevant to know who the EU ETS auditor and the independent reviewer were, since it could be interesting to investigate whether these individuals have verified and reviewed more emissions reports, which is likely, since it is their job. If this non-compliance was not due to an honest mistake but due to collusion between verifier and the operator, it could be argued that the names of the individuals involved are particularly relevant, since there is a chance that this instance of collusion is not an isolated incidence.

4.9. Restrictions on the use of the grounds of refusal

Where one of the grounds of refusal seems to apply, the corresponding information may not automatically refused. There are certain limitations to the application of the grounds of refusal. First, it should be kept in mind that directives set out a binding result but leave it to national legislation to determine how to achieve that goal.[1029] Thus, in principle Member States are free to choose how to achieve the goals set out in the Environmental Information Directive. Second, it should be reiterated that the wording of the Aarhus Convention and the Environmental Information Directive does not oblige Member States to implement the grounds of refusal into their national legislation. The Aarhus Convention states that 'a request for environmental information *may* be refused'[1030] and the Environmental Information Directive sets out that 'Member States *may* provide for a request for environmental information to be refused'[1031] where one of the grounds of refusal applies. Moreover, even where national legislation implements all grounds of refusal, national public authorities enjoy a margin of appreciation, as they must always weigh the public interest in disclosure against the interests served by non-disclosure.[1032]

[1029] Bradley (n 984) 104; Kaczorowska-Ireland (n 1007) 131; Margot Horspool and Matthew Humphreys, *European Union Law* (Oxford University Press 2012) 105; Chalmers, Davies and Monti (n 984) 99; Treaty of the Functioning of the European Union Article 288.
[1030] Aarhus Convention Article 4 (3) & (4).
[1031] 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 Article 4 (1) & (2).
[1032] See chapter 2, section 7.1.

4.9.1. The public interest test

In chapter 2,[1033] it has been explained that when relying on the grounds of refusal, public authorities must take into account the public interest served by disclosure and weigh it against the interests served by non-disclosure.[1034] So far, neither the literature nor the CJEU has set out guidance as to how the public interest test should be conducted. The CJEU has only determined that it must be performed in every individual case.[1035] Therefore, it seems almost impossible to determine whether a particular interest in keeping the information relevant for checking compliance with the EU ETS confidential outweighs the public interest in disclosure. Consequently, it will be examined in chapter 5,[1036] whether national courts or legislatures have developed criteria on how the public interest test should be conducted with a view to determining whether the public interest in disclosure outweighs any of the interests protected by the grounds of refusal that apply to the relevant information.

4.9.2. Information on emissions into the environment

One instance in which the public interest in disclosure is presumed to outweigh interests protected by refusing access to information is where the request relates to information on emissions into the environment.[1037] It has been explained in chapter 2[1038] that the term 'information on emissions into the environment' must be interpreted broadly as encompassing all emissions, discharges and releases into the environment[1039] but that it is limited to actual or foreseeable emissions, thus excluding hypothetical emissions.[1040] Therefore, to the extent that the relevant information constitutes information on emissions into the environment, access to

[1033] See chapter 2, section 2.6.1.
[1034] 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 Article 4 (2), penultimate sentence.
[1035] It could be that when weighing the public interest in disclosure against the interest in non-disclosure, public authorities should also consider proportionality. However, so far, the CJEU has only set out that the public interest test must be conducted in each individual case but not what it exactly entails. *Case C-266/09 Stichting Natuur en Milieu* (n 271) para 56.
[1036] See section 5.
[1037] 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 Article 4 (2), last sentence.
[1038] See section 2.6.1.
[1039] *Bayer CropScience and De Bijenstichting* (n 275) para 75.
[1040] *ibid para 77.*

that information may not be refused based on the argument that disclosure would adversely affect the confidentiality of the proceedings of public authorities, the confidentiality of commercial and industrial information or the confidentiality of personal data. Hence, it must be determined whether (parts of) the relevant information constitutes information on emissions into the environment.

The greenhouse gas permit must contain *inter alia* a description of the emissions from the installations. It seems this is not a description of hypothetical emissions, since an operator would not have a reason to apply for a greenhouse gas permit if it did not intend to actually emit greenhouse gases. Instead, it seems likely that the description of the emissions from the installation is a description of foreseeable emissions and that consequently, it constitutes information on emissions into the environment.

The emissions report contains the total emissions of an installation and the activity data. On the one hand, with regard to the total emissions, it seems obvious that this constitutes information on emissions into the environment. Activity data, on the other hand, does not appear to be information on emissions into the environment. To recall, 'activity data means the data on the amount of fuels or materials consumed or produced by a process as relevant for the monitoring methodology.'[1041] While such information undeniably has a link to emissions into the environment, such a link appears not to be sufficient to qualify the information as information on emissions into the environment. As the CJEU has pointed out, not all 'information containing any kind of link, even direct, to emissions into the environment' constitutes information on emissions into the environment.[1042] Consequently, it seems that activity data does not constitute information on emissions into the environment. Therefore, of the information contained in the emissions report, only the information on total emissions constitutes information on emissions into the environment.

The internal verification documentation mainly contains the results of the verification activities, the strategic analysis, the risk analysis and the verification plan.[1043] None of this seems to constitute information on emissions into the environment. The same appears to be the

[1041] Commission Regulation (EU) No 601/2012 Article 3 (1); Commission Implementing Regulation (EU) 2018/2066 Article 3 (1).
[1042] *Case T-545/11 RENV, Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe), supported by Kingdom of Sweden v European Commission, supported by Federal Republic of Germany, European Chemical Industry Council, Association européenne pour la protection des cultures, CropLife International AISBL, CropLife America Inc, National Associtation of Manufacturers of the United States of America, American Chemistry Council Inc and European Crop Care Association* [2018] para 58.
[1043] Commission Regulation (EU) No 600/2012 Article 26; Commission Implementing Regulation (EU) 2018/2067 Article 26.

case for the procedures for verification activities[1044] and for the majority of the information that the operator must provide to the verifier.[1045] The information that the operator must provide to the verifier also includes the greenhouse gas permit and the emissions report. As pointed out above, parts of these documents constitute information on emissions into the environment. This means that the information that the operator must provide to the verifier does not constitute information on emissions into the environment with the exception of specific parts of the greenhouse gas permit and the emissions report.

The information contained in the verification report does not constitute information on emissions into the environment with the exception of the aggregated emissions per activity carried out at the installation in question.[1046]

The fact that most of the relevant information does not constitute information on emissions into the environment means that access to this information can, in principle, be refused based on the grounds protecting the confidentiality of the proceedings of public authorities, the confidentiality of commercial and industrial information and the confidentiality of personal data. Thus, where the disclosure of this information would have adverse effects on the confidentiality of the proceedings of public authorities, the confidentiality of commercial or industrial information or the confidentiality of personal data, a request in this respect could be refused, unless there is an overriding public interest in disclosure.

4.10. Interim conclusions

This section has dealt with the third and last essential issue that needs to be examined when determining whether the relevant information should be disclosed to the public upon request.

[1044] Commission Regulation (EU) No 600/2012 Article 40; Commission Implementing Regulation (EU) 2018/2067 Article 41.
[1045] Commission Regulation (EU) No 600/2012 Article 10; Commission Implementing Regulation (EU) 2018/2067 Article 10.
[1046] Commission Regulation (EU) No 600/2012 Article 27 (3) sets out the contents of the verification report: (a) name of the operator, (b) the objective of the verification, (c) the scope of the verification, (d) a reference to the operator's emissions report, (e) the criteria used to verify the emissions report, (f) aggregated emissions per activity, (g) the reporting period, (h) the responsibilities of the operator or aircraft operator, (i) the verification opinion statement, (j) a description of any identified misstatements and non-conformities, (k) the dates on which site visits were carried out any by whom, (l) information on whether site visits were waived and the reasons therefore, (m) any issues of non-compliance with Regulation 601/2012, (n) if applicable, information on the method for conservative estimation, (o) where applicable, a description of changes to the capacity, activity level and operation of installation which might have an impact on the allocation of allowances, (p) where applicable, recommendations for improvements, (q) the names of the EU ETS lead auditor, the independent reviewer and any EU ETS auditor, (r) the date and signature by an authorised person on behalf of the verifier, including his name. Commission Implementing Regulation (EU) 2018/2067 See Article 27.

After concluding in section 2 that the relevant information constitutes environmental information and in section 3 that the entities holding the relevant information may constitute public authorities, it was necessary to analyse whether access to the information that has been identified as relevant in chapter 3 can be refused based on the grounds of refusal set out in the Environmental Information Directive. Firstly, it should be kept in mind that Member States are not obliged to implement any of the grounds of refusal into their national legislation, since both the Aarhus Convention and the Environmental Information Directive only stipulate that requests *may* be refused, where any of the grounds of refusal apply. A second general conclusion from this analysis is that with regard to some of the grounds of refusal, it was not possible to determine in a general way whether they may be relied upon to refuse access to the relevant information. In some cases,[1047] the reason is that there has neither been any case law by the CJEU, nor any opinion by the ACCC interpreting these grounds of refusal. Therefore, it will be interesting to see how they have been implemented and are applied in practice at the national level. With regard to other grounds of refusal,[1048] it is impossible to determine whether public authorities can rely on them to refuse access to environmental information, as it will depend on the specific circumstances of each individual case. For example, disclosing the relevant information may have adverse effects on the course of justice in certain cases, but that is not to say that it will do so in all cases. Therefore, the only conclusion that is possible to draw is that, with regard to these grounds of refusal, public authorities may in principle rely on them but only where the specific circumstances of the case allow them to do so. Consequently, the implementation and application of the grounds of refusal in question, in the context of national law, will be examined in more detail in the next chapter in order to analyse whether national legislation and case law provide the clarification that is necessary to determine whether access to the relevant information can be refused on these grounds.

Regarding other grounds of refusal, it was possible to come to more concrete conclusions. First, it has been shown that it seems unlikely that the access to the relevant information could be refused based on the ground that the request is manifestly unreasonable or that the request concerns internal communication of a public authority. Furthermore, it has become clear that access to a lot of the relevant information relating to verification could be refused based on the argument that disclosure of this information would have adverse effects on the confidentiality of commercial and industrial information. It has been concluded that the greenhouse gas permit

[1047] Confidentiality of the proceedings of public authorities
[1048] The course of justice, intellectual property rights

cannot be refused based on this ground of refusal, since EU law does not provide for its confidentiality. However, with regard to the emission report, it has been determined that access to it can, in principle, be refused based on this ground of refusal. This is illustrated by the fact that the Monitoring and Reporting Regulation even expressly states that operators may mark information in the emissions report as confidential commercial or industrial information. The information related to verification has proven to be a complicated case. As already stated in chapter 3,[1049] the verification report has a special standing and should be disclosed upon request. Regarding the remainder of the information relating to verification, there seems to be a conflict between the provisions of the Accreditation and Verification Regulation on the one hand and the Environmental Information Directive on the other. It has been concluded that a possible interpretation to reconcile the two acts is that verifiers must safeguard the confidentiality of information obtained during the verification procedure, in so far as it is not obliged to disclose it by a legislative act, such as the Environmental Information Directive.

With regard to the ground of refusal protecting personal data, it has been shown that parts of the relevant information definitely contain personal data. However, it has been concluded that this should not result in a refusal of the entire document containing the personal data. Since personal data can be easily separated from the remaining document by redacting it, it should be possible to disclose the rest of the information.

Finally, it was determined that only a small part of the relevant information possibly constitutes information on emissions into the environment. Consequently, access to most of the relevant information may be refused based on the grounds of refusal. However, with regard to all grounds of refusal, it must be borne in mind that before refusing a request, public authorities must balance the public interest in disclosure against the interest in non-disclosure. Since there has been little guidance by the CJEU on this topic, it will be interesting to see how national courts have approached this issue, which will be done in chapter 5.

5. Rights of third parties

The previous sections of this chapter have analysed whether the information that has been identified as relevant in chapter 3 should be made available upon request by the public. So far, this analysis has exclusively focussed on the right of the public to request information and the

[1049] See chapter 3, section 5.3.

conditions under which public authorities must disclose the requested information. However, given that a substantial part of the information that has been identified as relevant in chapter 3 is information on a third party – the operator of EU ETS installations - ,[1050] the question arises what rights operators have, in case a request for environmental information that is related to their installations is submitted to the public authority.[1051]

The Environmental Information Directive sets out that Member States may provide that third parties which have been incriminated by the disclosure of the requested environmental information may also have access to courts to challenge the decision of the public authority. Thus, the Environmental Information Directive leaves it up to the Member States to grant rights to third parties, or not.

However, Article 41 of the Charter of Fundamental Rights of the European Union (CFREU) sets out the right to good administration which 'includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken.'[1052] The provisions of the CFREU primarily apply to the EU institutions. However, Article 51 (1) of the CFREU makes clear that Member States are also bound by its provisions when implementing EU law and, consequently, must respect the rights and principles set out in the Charter. In its jurisprudence on the right to be heard, the CJEU has made clear that this right as set out in the CFREU is generally applicable,[1053] which means that all natural and legal person, regardless of their nationality or seat, benefit from the right set out in Article 41 of the CFREU.[1054] The Court pointed out that fundamental rights, such as the right to be heard, 'must be observed [...] in the course of proceedings [...] which may directly and individually affect the undertaking concerned and entail adverse consequences for them.'[1055] Thus, the right to be heard also stems from the general principle that a person whose interest are perceptibly affected

[1050] In the context of this thesis, i.e., a member of the public requested information from a public authority, the operator can be considered a third party, since the requested information concerns that operator.
[1051] It should be noted that 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 Article 4 (2) (g) is not relevant in this context, since it only protects the interests of parties who supplied information to the public authority on a voluntary basis. The operator however is obliged to provide the information identified as relevant to the public authority and the verifier.
[1052] Charter of Fundamental Rights of the European Union Article 41.
[1053] Paul Craig, *EU Administrative Law* (Oxford University Press 2018) 525.
[1054] Jens Hillebrand Pohl, 'The Right to Be Heard in European Union Law and the International Minimum Standard – Due Process, Transparency and the Rule of Law' (2018) 2018 CERiM Online Paper Series 7.
[1055] *Case C-49/88 Al-Jubail Fertilizer (Samad) and Saudi Arabian Fertilizer Company (Safco) v Council of the European Communities* [1991] para 15; *Case 17/74 Transocean Marine Paint Association v Commission of the European Communities* [1974] para 15; *Case 85/76 Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] para 9.

by a decision taken by a public authority must be given the opportunity to make his point of view known.[1056]

The main rationale for the existence of the right to be heard is therefore the adverse effect that an administrative decision may have on an individual party.[1057] Consequently, the 'right to be heard applies whenever an individual measure is taken that affects the person concerned adversely.'[1058] In this context, adversely affected means that the decision in question significantly affects the interests of the party in question.[1059] The purpose of the right to be heard is that the person concerned should have the possibility of influencing the decision and ensuring that the outcome involves the appropriate balancing of the public interest and the individual interests of the person concerned.[1060] Therefore, the right to be heard entails two sub-rights: the right to be informed and the right to inform. Pursuant to the former, natural and legal persons concerned must be informed and be given all information that is necessary to effectively express their views.[1061] According to the second, a public authority must receive and examine the comments provided by affected natural and legal persons. In that regard, there is no formality requirement, both written and oral observations are accepted by the Court.[1062]

Coming back to the concrete context of this thesis and the question what rights operators enjoy when requests for information relating to their installations are submitted to a competent public authority, it seems that operators enjoy the right to be heard, provided that the decision of the public authority is capable of adversely affecting the operator in question. It seems plausible that the decision whether to disclose the requested information that relates to the operator can negatively affect the operator, especially where one of the grounds of refusal potentially applies, since these are intended to prevent adverse effects. For example, where the request relates to information which contains trade secrets or other information whose disclosure may be detrimental to the operator, it appears that the public authority is obliged to give the operator the opportunity to voice its opinion on whether the information can be

[1056] Pranvera Beqiraj, 'The Right to Be Heard in the European Union – Case Law of the Court of Justice of the European Union' (2016) 1 European Journal of Multidisciplinary Studies 265.
[1057] Joana Mendes, 'Participation and Participation Rights in EU Law And' in Herwig CH Hofman and Alexander H Türk (eds), *Legal Challenges in EU Administrative Law – Towards an Integration Administration* (Edward Elgar Publishing Limited 2009) 264.
[1058] Hillebrand Pohl (n 1054) 7.
[1059] *Case C-32/95 P Commission of the European Communities v Lisrestal - Organização Gestão de Restaurantes Colectivos Ldª, Gabinete Técnico de Informática Ldª (GTI), Lisnico - Serviço Marítimo Internacional Ldª, Rebocalis - Rebocagem e Assistência Marítima Ldª and Gaslimpo - Sociedade de Desgasificação de Navios SA* [1996] para 21.
[1060] *Case T-236/02 Luigi Marcuccio v European Commission* [2011] para 115.
[1061] *Case T-36/91 Imperial Chemical Industries plc v Commission of the European Communities* [1995] para 69.
[1062] Hillebrand Pohl (n 1054) 11.

disclosed. This conclusion is supported by the fact that, in the context of access to information held by EU institutions, the CJEU has held that the EU institutions must act with due diligence and provide the undertakings concerned with the opportunity to effectively make known their views during the administrative procedure.[1063]

Given that the right to be heard has the function of defence, giving anticipated procedural protection to affected parties, it takes place before judicial review.[1064] When receiving a request for information, the conduct of the public authority will most likely be as follows. First it will ask affected parties, such as the verifiers for their opinion. Then, it will make a decision and inform the affected party thereof and give it a period to appeal against the intended decision. Finally, the decision is formally implemented. Therefore, it seems likely that operators, as affected third parties, will be able to challenge the decision of public authorities to disclose the requested information, subject to national standing requirements.

6. Conclusions

This chapter has been dedicated to examining whether the public should be given access to the relevant information pursuant to rules set out in the Environmental Information Directive. To that end, section 2 has analysed whether the relevant information constitutes environmental information, section 3 has examined whether the bodies that hold the relevant information come within the definition of public authorities and section 4 has evaluated whether access to the relevant information may be refused based on any of the grounds of refusal.

In section 2, it has become clear that the category of environmental information that is the most fitting for the relevant information is 'measures and activities affecting or likely to affect the elements of the environment and the environmental factors or intended to protect the environment.' It became clear that the greenhouse gas permit and the emissions report most likely constitute such measures. Despite the fact that there were some doubts as to whether this is also the case for the internal verification documentation and the verification report, the arguments that these also constitute environmental information seem to prevail. The issue is even less clear with regard to the information provided by the operator. The main take-away from the analysis in section 2 has been that where information that relates to a system that is intended to protect the environment, as is the case with the EU ETS, it is relatively easy to

[1063] *C-458/98 P Industrie des poudres sphériques v Council of the European Communities* [2000] para 99.
[1064] Mendes (n 1057) 264 See chapter 5, section 6.3 for a discussion of the review process.

argue that such information constitutes environmental information, due to that connection. However, given that the definition of environmental information is not all-encompassing, the question arises whether any information related to such a system is environmental information, or whether the link between the information in question and the system must be of a certain strength. Since there is no case law on this issue yet, it is hard to determine what criteria should be taken into account when assessing whether there is a sufficiently strong link between a certain piece of information and the system that is intended to protect the environment to which the information relates. From a teleological perspective, it seems convincing that a measure that is part of a such a larger system which is intended to protect the environment contributes in one way or another to achieving that aim, should be regarded as being intended to protect the environment itself. In the absence of any guidance documents by the European Commission[1065] or any clarification by the legislator, it would be highly welcome if the CJEU provided more clarification on this issue. Until a case on this issue arises, it will be relevant to see how national legislation has implemented the definition of environmental information and how national courts have interpreted the national legislation implementing the Environmental Information Directive, which will be done in chapter 5.[1066]

The question whether the bodies that hold the relevant information – the competent national authorities and the verifiers – constitute public authorities has focused on the verifier, since it is clear that the competent national public authorities are public authorities within the meaning of the Environmental Information Directive. Given that verifiers are formally private entities, the answer to the question whether the verifier is a public authority was not entirely clear. With regard to both categories of public authorities set out in the Environmental Information Directive which cover private entities, unclear elements persist and make it difficult to determine with certainty whether verifiers constitute public authorities. With regard to the second category of public authorities, the question that could not be answered with certainty was whether the powers verifiers have when verifying emissions reports can be considered to be special powers that go beyond those which result from the rules applicable to relations between persons of private law. Regarding the third category of public authorities, it could not be determined with certainty whether verifiers are under the control of a public authority pursuant to the first or second category. In light of the uncertainties that persist with regard to the definition of public authorities set out in the Environmental Information Directive,

[1065] As stated before, an extensive search on the website of the European Commission has yielded that no such guidance documents seem to exist.
[1066] See chapter 5, section 3.

a preliminary ruling by the CJEU clarifying this issue would be most welcome. In the absence of such a judgment and guidance by other institutions such as the European Commission, it could be interesting to see how national courts have dealt with issue in practice. Therefore, this issue will be taken up again in chapter 5.

The analysis whether access to the relevant information can be refused based on any of the grounds of refusal has yielded mixed results. Regarding some of the grounds of refusal, it was not possible to determine whether they may be applied to the relevant information, while for some it was. Ironically, the reason why it was not possible with regard to some of the grounds was that it would have been necessary to actually have access to the relevant information in order to make that assessment. This is quite interesting and points towards the imbalance of power or information asymmetry between the applicant and the recipient of a request for environmental information. Given the lack of case law by the CJEU and the fact that the literature has not paid much attention to the grounds of refusal, it was not possible to determine, at least with regard to parts of the grounds of refusal, whether they could be relied upon to refuse access to the relevant information. In light of this, it could be helpful to examine how national legislation has regulated the grounds of refusal, how the grounds of refusal are applied in practice at the national level how and national courts deal with the grounds of refusal. Therefore, in the next chapter, this issue will be taken up again.

Finally, this chapter has investigated the rights of third parties in the context of requests for environmental information. It became clear that, even though neither the Aarhus Convention, nor the Environmental Information Directive touch upon this issue, third parties, such as operators to which the information that is being requested relates, have the right to be heard, before the information is disclosed. It will be interesting to see whether national legislation that implements the Environmental Information Directive sets out more concrete requirements.

With regard to all three elements of the right to access environmental information that have been analysed in this chapter (environmental information, public authorities and grounds of refusal), it is striking that there are many issues that are unclear and require explanation and clarification by the CJEU. In the same vein, many of these issues are also not sufficiently researched by the literature.

CHAPTER V – ACCESS TO INFORMATION RELATED TO COMPLIANCE WITH THE EU ETS ACCORDING TO THE NATIONAL LAW OF GERMANY AND THE UNITED KINGDOM

1. Introduction

The overall question that this study aims to answer is *to what extent and in which circumstances environmental information related to compliance and non-compliance with the EU ETS that is held by governmental authorities and/or private verifiers must be provided to the public upon request?* In order to answer this question, chapter 2 has analysed the Aarhus Convention and the Environmental Information Directive with a view to understanding what the right to access environmental information entails. In chapter 3, the EU ETS compliance cycle has been discussed and the most relevant information for checking compliance of individual actors with the EU ETS legislation was identified (in the following 'the relevant information').[1067] In chapter 4, the conclusions from the two preceding chapters were combined and it was analysed whether, pursuant to the Environmental Information Directive, the relevant information should be disclosed to the public upon request.

Concerning some of the information, such as the greenhouse gas permit, the conclusion was that it must be disclosed. However, for other information a definitive conclusion could not be drawn. The main reasons for this were that (1) it was not always crystal-clear whether the relevant information could be considered environmental information; (2) it is not certain if the verifier constitutes a public authority, although it was argued that verifiers should be considered public authorities, and (3) it was not possible to determine whether some of the grounds of refusal apply. These uncertainties were partly a result of the discretion that the Environmental Information Directive leaves to Member States with regard to the implementation of the right to access environmental information and partly due to the lack of interpretation of central concepts of the right to access environmental information by the CJEU. However, discretion is of course not unlimited and Member States still need to comply with the Aarhus Convention

[1067] The information that was identified as relevant was the greenhouse gas permit, the emissions report, the internal verification documentation, the verification report and the information that the operator has provided to the verifier pursuant to Commission Regulation (EU) No 600/2012 Article 10 (1); Commission Implementing Regulation (EU) 2018/2067 Article 10 (1).

and the Environmental Information Directive when implementing the right to access environmental information.

This chapter builds on the discussion in chapter 4 and examines whether the relevant information must be disclosed upon request pursuant to national law. More specifically, this chapter looks at Germany and the United Kingdom and aims to answer the following questions: (1) to what extent and how have the national legislators in Germany and the United Kingdom used their discretion when implementing the right to access environmental information? (2) Are those parts of the national legislation that Germany and the United Kingdom have adopted which are relevant for determining whether the relevant information can be accessed in line with the Environmental Information Directive and the Aarhus Convention? (3) Should the relevant information be disclosed upon request pursuant to the national legislation of Germany and the United Kingdom?

As will be explained in further detail below, the United Kingdom has left the EU on 31 January 2020. Thus, the UK is no longer a Member State and does not have to comply with EU law and is not bound by the judgments of the CJEU. Nevertheless, it is still relevant to analyse how the right to access environmental information has been implemented in the United Kingdom. As will be discussed in more detail in chapter 6,[1068] the year on which the empirical part of the research focuses is 2017. Then, the United Kingdom was still a Member State and consequently it was still bound by EU law. However, the fact that the United Kingdom has left the EU brings the unique opportunity for future research to build upon the findings of this study and to analyse and compare the law of a state that is a Member State and one that has recently ceased to be one. Moreover, while EU law has ceased to apply to the United Kingdom, it is still a party to the Aarhus Convention. Thus, British law must still be in line with the provisions of the Aarhus Convention.

As in chapter 4, the analysis in this chapter is structured along the lines of the three main concepts of the right to access environmental information – environmental information, public authorities and the grounds of refusal. Based on the analysis in chapter 4, it was not possible, to determine the limits of the concept of environmental information. The issue was that, where information relates to a system that is intended to protect the environment, as is the case with the EU ETS, it is relatively easy to argue that such information constitutes environmental information, simply as a consequence of that connection. However, given that the definition of environmental information is not all encompassing, the question arises whether all information

[1068] See chapter 6, section 1

related to such a system is environmental information, or whether the link between the information in question and the system must be of a certain strength. In light of the absence of any guidance of the CJEU on this issue, specifically concerning the EU ETS, it will be examined whether national legislation and national case law have touched upon and clarified this issue.

The analysis of whether the verifier constitutes a public authority according to the Environmental Information Directive, in chapter 4, did not yield conclusive results. Even though, or maybe precisely because the Environmental Information Directive's definition of public authorities is relatively broad, as to include private natural or legal persons in a range of circumstances, it could not be determined with certainty whether the verifier actually qualifies as a public authority. However, the arguments for the position that the verifier is a public authority seem to slightly outweigh the arguments against that position. There were two questions in particular that could not be resolved. (1) Can verification be considered a public *administrative* task, and (2) are verifiers under the control of a public authority? Regardless of the answers to these questions, it was concluded in chapter 4 that, especially from a teleological perspective, it would make sense if verifiers were considered public authorities, given that they play such a central role in the compliance cycle of the EU ETS. While national law implementing the right to access environmental information must of course be in line with the provisions of the Environmental Information Directive, the way the two concepts (public *administrative* tasks and under the control of a public authority) have been implemented and are applied at national level may help to shed some light on their precise meaning. Therefore, this chapter will focus on determining whether, according to national law, verification can be considered a public administrative task and whether verifiers are under the control of a public authority.

Purely based on the analysis of the Environmental Information Directive and the applicable case law of the CJEU, it was not possible to determine whether all of the grounds of refusal could be used by public authorities (including verifiers) to refuse access to parts of the relevant information. Therefore, this chapter will examine whether national legislation and case law can shed some light on this issue. In that regard, not all grounds of refusal that were discussed in chapter 4 will also be examined in this chapter. The focus will lie on the grounds of refusal protecting (1) the confidentiality of proceedings of public authorities, (2) the confidentiality of commercial and industrial information and (3) intellectual property. Concerning the other

grounds of refusal examined in chapter 4,[1069] it was already determined that they, most likely, can[1070] or cannot[1071] be used to refuse access to the relevant information. Thus, a discussion of their implementation in national law would not add much.

In addition to the three central concepts of the right to access environmental information, this chapter will look at two additional elements of the right of access to environmental information that are essential to its exercise in practice. First, the national provisions regulating the charges that a public authority may levy for answering a request and, second, the possibilities of review that are available to an applicant who considers that her request has been wrongly refused or inadequately dealt with. These two procedural elements are highly important for the exercise of the right to access environmental information. The potential charges can have a considerable influence on how accessible information actually is in practice and the review procedures give applicants the power to challenge the decisions of public authorities.

The discussion in this chapter is structured as follows: in the second section, the discretion that Member States enjoy when implementing directives in general and the Environmental Information Directive in particular will be examined. The third section will provide a brief overview of the national legislation of Germany and the United Kingdom governing the right to access environmental information. Section 4 will discuss the concept of environmental information in national law, and it will be analysed whether the parts of the relevant information with regard to which doubts persist constitute environmental information pursuant to national legislation. In section 5, the definition of 'public authorities' ,as set out in national law, will be discussed and it will be analysed whether the verifier comes within the ambit of that definition. The sixth section discusses the grounds of refusal and examines whether access to the relevant information may be refused on those grounds. Section 7 discusses two procedural requirements, charging for providing environmental information and the procedures for reviewing a decision of a public authority. Section 8 concludes.

[1069] Manifestly unreasonable (chapter 4, section 4.2.), internal communications of public authorities (chapter 4, section 4.3.), the course of justice (chapter 4, section 4.5.) and the confidentiality of personal data (chapter 4, section 4.8.).
[1070] Confidentiality of personal data, the course of justice
[1071] Manifestly unreasonable, internal communications of public authorities.

2. Discretion given to Member States

2.1. Member States' discretion when implementing Directives

Article 288 of the TFEU sets out that directives 'shall be binding, as to the result to be achieved, [...] but shall leave to the national authorities the choice of form and methods.' More concretely, this means that directives often leave discretion of Member States or require them to define certain concepts. Moreover, there is one way in which national measures may go beyond the limits set out in directives that are based on Article 192 (1) TFEU: Article 193 TFEU, which will be discussed in further detail below,[1072] allows Member States to adopt measures that are more stringent than those set out by a directive that has Article 192 TFEU as its legal base. While Article 193 TFEU is, together with Article 114 (4) TFEU, the only way for a Member States to go beyond the limits of a directive, the possibilities that Article 193 TFEU offers are wider than those in Article 114 TFEU.[1073]

Each directive grants a certain degree of discretion to Member States leaving them room to manoeuvre. But can the discretion awarded to Member States be identified? Discretionary provisions can be defined in contrast to prescriptive provisions. They leave it to Member States to choose between alternative ways of transposing the directive in question.[1074] This is often indicated by words or phrases such as 'may' or 'without prejudice to the right of the Member States to...'[1075] Non-discretionary provisions do not provide alternatives but contain

[1072] Section 2.2. below discusses Article 193 TFEU, which gives Member States the possibility to go beyond the level of environmental protection set out by a directive.

[1073] Leonie Reins, 'Where Eagles Dare: How Much Further May EU Member States Go Under Article 193 TFEU?' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Limited 2020) 23 f. finds that 'the environmental law guarantee under Article 193 seems easier to apply than the one under Article 114(5) TFEU'. Moreover, she points out that the more stringent 'protective measures under Article 193 TFEU include, for example, the possibility of extending the scope of application of a particular Union standard, such as stricter emission standards or water quality standards established under the Water Framework Directive; passing of stricter thresholds; the establishment of more stringent procedural requirements, such as reporting and monitoring requirements; the establishment of a list of additional substances or activities to be regulated; the removal of exceptions established under an EU measure and the setting of earlier time limits.'

[1074] Josephine Marna-Rose Hartmann, 'A Blessing in Disguise?! Discretion in the Context of EU Decision-Making, National Transposition and Legitimacy Regarding EU Directives' (2016) 95 <http://hdl.handle.net/1887/43331>; Robert Thomson, 'Time to Comply: National Responses to Six EU Labour Market Directives Revisited' (2007) 30 West European Politics 995 <https://doi.org/10.1080/01402380701617407> accessed 13 December 2021.

[1075] Sacha Prechal, *Directives in EC Law* (Second Edition, Oxford University Press 2006) 43; Hartmann (n 1074) 95.

requirements that prescribe a certain course of action that Member States need to follow.[1076] Usually, the word 'shall' indicates such a non-discretionary provision.[1077]

Some authors distinguish between different forms of discretion. Hartmann,[1078] for instance, talks about legislative and administrative discretion, while Veltkamp[1079] discerns discretion and leeway in implementation. In the context of this study, it makes sense to distinguish between legislative and administrative discretion. In that regard, legislative discretion refers to the discretion awarded by primary and secondary EU law (primarily Article 288 TFEU and the text of the directive in question) to the Member States when transposing the directive into national law.[1080] In other words, legislative discretion is the freedom enjoyed by national legislators when designing national legislation implementing EU directives. Administrative discretion, on the other hand, denotes the discretion of national authorities that apply the directive in practice, 'once factors that further determine the use of legislative discretion at the national level have been taken into account.'[1081] Thus, administrative discretion refers to the leeway awarded to public authorities that apply legislation on a day-to-day basis. These public authorities must apply the national law that has been adopted to implement an EU directive as closely as possible to the provisions of that directive. Naturally, the more administrative discretion is awarded to the public authorities, the more important is this obligation.[1082] Otherwise the danger would arise that the way in which national public authorities apply national law is inconsistent with the EU directive.

In sections 3 - 7, it will be examined how Germany and the United Kingdom have implemented the Environmental Information Directive and how they have made use of the legislative discretion provided by Article 288 TFEU and the Directive itself, when transposing the right to access environmental information into their national legislation. Moreover, elements of the right to access environmental information with regard to which national

[1076] Hartmann (n 1074) 95.
[1077] ibid.
[1078] ibid 33.
[1079] BM Veltkamp, 'Implementatie van EG-milieurichtlijnen in Nederland' (Universiteit van Amsterdam 1998) 20 <https://scholar.google.com/scholar_lookup?title=%5BImplementation+of+EU+environmental+directives+in+the+Netherlands%5D&author=Veltkamp%2C+B.M.&publication_year=1998> accessed 13 December 2021.
[1080] Hartmann (n 1074) 34.
[1081] Asya Zhelyazkova, 'Complying with EU Directives' Requirements: The Link between EU Decision-Making and the Correct Transposition of EU Provisions' (2013) 20 Journal of European Public Policy 707 <https://doi.org/10.1080/13501763.2012.736728> accessed 13 December 2021; Asya Zhelyazkova and René Torenvlied, 'The Time-Dependent Effect of Conflict in the Council on Delays in the Transposition of EU Directives' (2009) 10 European Union Politics 693 f. <https://doi.org/10.1177/1465116508099760> accessed 13 December 2021; Hartmann (n 1074) 34.
[1082] Prechal (n 1075) 66.

authorities enjoy administrative discretion will be highlighted with a view to setting the scene for chapter 6, in which the exercise of the right to access environmental information in practice will be examined.

2.2. Discretion when implementing the Environmental Information Directive

The Environmental Information Directive both contains discretionary as well as non-discretionary provisions. Most of the non-discretionary provisions are concerned with setting out the basic definitions of the right to access environmental information, such as the public's right to access environmental information upon request,[1083] the definitions of environmental information[1084] and public authorities.[1085] Other descriptive provisions relate to the restriction of the grounds of refusal, for instance, the obligation to interpret the grounds of refusal restrictively,[1086] to carry out the public interest test[1087] and the emissions rule[1088].[1089]

The Environmental Information Directive also contains several provisions that leave discretion to Member States. These relate, for the most part, to limitations of the right to access to environmental information. For instance, Article 4 (1) and (2) which lists the grounds based on which a request for environmental information can be refused sets out that 'Member States *may* provide for a request for environmental information to be refused' [emphasis added] if one of the grounds of refusal apply.[1090] Thus, Member States are not obliged to implement these grounds of refusal in their national legislation. Similarly, Article 2 (1) provides that

[1083] 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 Article 3 (1) states that 'Member States shall ensure that public authorities are required [...] to make available environmental information held by them or for them to any applicant at his request and without having to state an interest' [emphasis added].
[1084] ibid Article 2 (1) states that 'environmental information shall mean ...' [emphasis added].
[1085] ibid Article 2 (2) states that 'public authority shall mean ...' [emphasis added].
[1086] ibid Article 4, penultimate paragraph sets out that 'the grounds of refusal [...] shall be interpreted in a restrictive way' [emphasis added].
[1087] ibid sets out that 'In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal.'
[1088] ibid sets out that 'Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.'
[1089] Other provisions of the 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 include Article 3 (3) which states that if a request is too general, public authorities shall as soon as possible ask the applicant to specific the request and help her to do so, Article 3 (4) which sets out that public authorities shall make the requested information available in the form and format requested by the applicant, and Article 3 (4) which obliges the public authority to provide reasons when refusing a request for environmental information.
[1090] ibid.

'Member States *may* provide that [the definition of public authorities] shall not include bodies or institutions when acting in a judicial or legislative capacity.'[1091] Hence, it is up to the Member States to decide whether to include such bodies in the definition of public authorities.

In addition to the provisions of the directive itself, Article 193 TFEU is relevant in the context of discretion of Member States when implementing a directive. Article 193 TFEU states that 'the protecting measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.' Thus, Article 193 TFEU permits Member States to go beyond the provisions of directives, which have Article 192 as their legal base.[1092] The main features of Article 193 shall be briefly discussed.[1093]

As evident from the wording of the article, there are three conditions that a measure adopted pursuant to Article 193 TFEU must fulfil. (1) The level of protection pursued by the national measure must be higher than the level of protection pursued by the EU measure. In other words, the national measure may not be less stringent than the EU directive.[1094] (2) The national measure must be in line with the Treaties, as well as other secondary legislation.[1095] In this regard, it is the obligation of the Member State that adopted a more stringent measure to prove that the envisaged measure is compatible with the Treaties.[1096] (3) The more stringent measure must be notified to the Commission. However, the CJEU has pointed out that the failure to notify such measures to the Commission does not make them unlawful.[1097]

In the context of the discussion of the discretion that the Environmental Information Directive awards to Member States when implementing the right to access environmental information upon request, this means that Member States are free to adopt more stringent measures, even where the Environmental Information Directive uses non-discretionary articles. In other words, Member States are free to provide broader access to environmental information than envisaged by the Environmental Information Directive. Concretely, this could be achieved by restricting the use of the grounds of refusal or extending the definition of environmental information or of public authorities.

[1091] ibid.
[1092] Reins (n 1073) 22.
[1093] For a more detailed diuscssion see Reins (n 1073).
[1094] *Case C-194/01 Commission of the European Communities v Republic of Austria* [2004] para 39.
[1095] Langlet and Mahmoudi (n 32) 103.
[1096] Reins (n 1073) 23.
[1097] *Case C-2/10 Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia* [2011] 52.

2.3. Consistent interpretation

The discretion Member States enjoy when implementing the right to access environmental information is limited by their obligation to interpret national legislation in consistence with EU law.[1098] This principle, which is also known as indirect effect, first arose in the *Von Colson* case, in which the CJEU pointed out that 'national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph' of what is now Article 288 TFEU.[1099] The CJEU explained that the principle of consistent interpretation is 'inherent in the system of the Treaty' and stems from the obligation of Member States to 'take any appropriate measure, general or particular, to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.'[1100] The *Von Colson* case was concerned with interpreting national legislation consistently with the particular directive it was implementing. When interpreting national law consistently with a directive that the national law implements, national authorities must not only take into account the wording of the individual provisions of the directive in question, but also take into account its overall aim.[1101]

However, national legislation must not only be interpreted in consistence with the particular directive it is implementing but with the entirety of EU law.[1102] The CJEU made clear it that the principle of consistent interpretation is a 'free-standing principle in its own right.'[1103] Thus, not only national law that has been adopted specifically for the implementation of a concrete EU act 'but all national law of whatever legal force, including the national constitution, adopted prior or subsequently to the EU law source in question' must be interpreted in accordance with EU law.[1104] Furthermore, the duty to interpret national law consistently with EU law does not

[1098] Horspool and Humphreys (n 1029) 171; Dorota Leczykiewicz, 'Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability' in Damian Chalmers and Anthony Amull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 219.
[1099] *Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] para 26.
[1100] Treaty of the European Union Article 4 (3); *Case C-160/01 Karen Mau v Bundesanstalt für Arbeit* [2003] para 34; *Joined Cases Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] para 114; Kaczorowska-Ireland (n 1007) 342 f.
[1101] Prechal (n 1075) 184.
[1102] Michael Bobek, 'The Effects of EU Law in the National Legal Systems' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Third Edition, Oxford University Press 2020) 168; Damian Chalmers and Adam Tomkins, *European Union Public Law: Text and Materials* (1st edition, Cambridge University Press 2007) 390.
[1103] Chalmers and Tomkins (n 1102) 390.
[1104] Bobek (n 1102) 170.

only lie on national courts but on *all* national authorities.[1105] The reason is that implementing EU law does not only entail adopting national legislation. It is also necessary to actually realise the result in practice.[1106]

The concept of consistent interpretation is also relevant for the analysis whether the relevant information must be disclosed upon a request by the public according to the national law of Germany and England. National legislation, especially legislation that has been adopted specifically to implement the Environmental Information Directive, must be interpreted, as far as possible, in light of the wording and purpose of the Environmental Information Directive. As will become clear in section 5 of this chapter, this obligation is also highly relevant in the context of determining whether verifiers constitute public authorities pursuant to the national law of Germany and the United Kingdom.

3. The national implementing legislation of Germany and of the United Kingdom

3.1. The German Federal Environmental Information Act (UIG)

In 1994, Germany adopted the Umweltinformationsgesetz 1994[1107] (in the following 'Federal Environmental Information Act 1994') in order to comply with the old Environmental Information Directive,[1108] the predecessor of the current Environmental Information Directive.[1109] Germany struggled with the implementation because the Verwaltungsverfahrensgesetz (in the following 'Federal Administrative Procedure Act')[1110] is characterised by a traditionally limited public access to documents,[1111] only granting access to documents to actors involved in the administrative procedure in question and even to them only under special circumstances.[1112] This stood in sharp contrast to the old Environmental

[1105] ibid 169; Paul Craig and Grainne de Búrca, *EU Law Texts, Cases, and Materials* (5th Edition, Oxford University Press 2011) 202; See also Chalmers, Davies and Monti (n 984) 295; Kaczorowska-Ireland (n 1007) 343; *Case C-218/01 Henkel KGaA* [2004] para 60.
[1106] Prechal (n 1075) 190.
[1107] Umweltinformationsgesetz (n 422).
[1108] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (n 201).
[1109] Guckelberger (n 146) 378.
[1110] Verwaltungsverfahrensgesetz [in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 5 Absatz 23 des Gesetuzes vom 21. Juni 2019 (BGBl. I S. 846) geändert worden ist].
[1111] Guckelberger (n 146) 378; Christian Schrader, 'Europäische Anstöße Für Einen Erweiteren Zugang Zu (Umwelt-) Informationen' (1999) 18 Neue Zeitschrift für Verwaltungsrecht 40.
[1112] Guckelberger (n 146) 378.

Information Directive, which set out that environmental information had to be disclosed to anyone without having to prove an interest.[1113] In light of the signing of the Aarhus Convention and the subsequent adoption of the current Environmental Information Directive at EU level, Germany revised the Federal Environmental Information Act in 2004.[1114]

Due to the fact that Germany is a federal state, the situation of how access to environmental information is regulated is more complex than in centralised states.[1115] There are 17 access to environmental information acts, one for the federal level and one for each of the federal states, which differ regarding the technical implementation.[1116] Baden-Württemberg, for example, has incorporated the right to access environmental information into its Environmental Administration Act,[1117] other federal states have adopted separate Access to Environmental Information Acts[1118] or they refer to the Federal Environmental Information Act[1119].[1120] Despite these differences in the implementation of Directive, there is a wide-ranging congruency between the laws on state-level due to the fact that both federal and state legislators have to comply with the provisions of the Aarhus Convention and the Environmental Information Directive.[1121]

3.2. The British Environmental Information Regulations (EIR)

In 1992, the British Parliament passed the Environmental Information Regulations 1992 in order to implement the Environmental Information Directive 1990.[1122] This marked a preliminary climax of a continuous process of possibilities to access environmental information. Up until 1972, when the second report of the Royal Commission on Environmental Pollution was published, the flow of environmental information from

[1113] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (n 201).
[1114] Umweltinformationsgesetz (n 422).
[1115] Guckelberger (n 146) 379.
[1116] Bünger and Schomerus (n 50) 75.
[1117] Gesetz zur Vereinheitlichung des Umweltverwaltungsrechts und zur Stärkung der Bürger- und Öffentlichkeitsbeteiligung um Umweltbereich 2015.
[1118] Bavaria, Hesse, Saarland, Saxony, Thuringia.
[1119] Umweltinformationsgesetz des Landes Brandenburg 2007 §1; Umweltinformationsgesetz für das Land Bremen 2014 §1 (2); Gesetz über den Zugang zu Umweltinformationen in Hamburg 2005 §1 (2); Landes-Umweltinformationsgesetz Mecklenburg-Vorpommern 2006 §3; Gesetz zur Regelung von Umweltinformationen im Lande Nordrhein-Westfalen 2007 §2; Umweltinformationsgesetz des Landes Sachsen-Anhalt 2006 §1 (3).
[1120] Guckelberger (n 146) 379.
[1121] ibid 379 f.
[1122] 'EXPLANATORY NOTE to the Environmental Information Regulations 1992' <https://www.legislation.gov.uk/uksi/1992/3240/note/made> accessed 13 December 2021.

authorities to the public was limited by specific statutes.[1123] The report urged to 'increase the availability and flow of information.'[1124] The ratification of the Aarhus Convention by both the EU and all its Member States marked another climax in the process of making environmental information more easily accessible. The Aarhus Convention and the Environmental Information Directive are implemented by the Environmental Information Regulations 2004.[1125] They are interlinked with the general access to information law, the Freedom of Information Act, in as much as they use parts of the latter's definition of the concept of public authority,[1126] as well as its enforcement and appeals provisions.[1127] The main aim of the Environmental Information Regulations 2004 is to 'give people a right of access to information about activities of public authorities that relate to or affect the environment unless there is a good reason for them not to have the information.'[1128]

On 23 June 2016, the United Kingdom voted to leave the EU.[1129] This was undoubtedly a caesura in the EU's history, since it had not been thought possible that a Member State would ever leave the EU. Yet, on 31 January 2020, the United Kingdom officially left the EU.[1130] There has been a vast array of literature discussing the consequences of Brexit for the EU, the UK and their relationship.[1131] Brexit did not have any immediate consequences for this study, since it is the year 2017 that is the focus of the analysis and in 2017 the United Kingdom had not formally left the EU. Nevertheless, the question arises what Brexit means for the right to access environmental information. According to Article 50 (3) TFEU, once the withdrawal agreement entered into force, which it did on 31 January 2020, the Treaties would cease to

[1123] William Wilcox, 'Access to Environmental Information in the United States and the United Kingdom' (2001) 23 Loyola of Los Angeles International and Comparative Law Review 145 f. <https://digitalcommons.lmu.edu/ilr/vol23/iss2/1>.
[1124] Great Britain Royal Commission on Environmental Pollution, *Second Report : Three Issues in Industrial Pollution* (HM Stationery Office 1972) 3.
[1125] Davis (n 146) 51.
[1126] The Environmental Information Regulations 2004 [No 3391] Regulation 2 (2) (b).
[1127] ibid Regulation 18 (1).
[1128] 'Guide to the Environmental Information Regulations' (1 December 2021) 5 <https://ico.org.uk/for-organisations/guide-to-the-environmental-information-regulations/> accessed 13 December 2021 The Guide is a guidance document published by the Information Commissioner's Office that explains to those working for a public authority and deal with environmental information on a daily basis how the Information commissioner's Office interprets the Environmental Information Regulations 2004 by giving practical examples and answering frequently asked questions (see p. 3 of the Guide). Given that the Information Commissioner is the second level of administrative review – after the public authority with which they have filed their request – that applicants have recourse to, but whose decisions do not set precedent and can be challenged before the Upper Tribunal, the Guide is not legally binding but merely provides an overview of the current practice.
[1129] Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017) 1.
[1130] ibid.
[1131] Federico Fabbrini (ed), *The Law &Politics of Brexit* (Oxford University Press 2017); Oonagh E Fitzgerald and Eva Lein, *Complexity's Embrace: The International Law Implications of Brexit* (CIGI 2018); Charlie Clutterbuck, *Bittersweet Brexit: The Future of Food, Farming, Land and Labour* (Pluto Press 2017).

apply to the United Kingdom.[1132] However, since the withdrawal agreement introduced an 11-month transition period, there were no immediate material changes visible on 31 January 2020.[1133] However, since then the 11-month transition period has elapsed and Brexit is formally concluded.

Much EU legislation on the environment originates from international environmental agreements. Now that Brexit is concluded, it is likely that international obligations will become more important in environmental matters, as a large set of international obligations will continue to be applicable to the UK.[1134] This is also the case for the Aarhus Convention. As long as the United Kingdom is a party to the Aarhus Convention, it will remain bound by it.[1135] Of course, that is not to say that nothing will change at all. There are some elements of the right to access environmental information with regard to which the Environmental Information Directive goes beyond the Aarhus Convention.[1136] The Environmental Information Directive provides 'stronger and more immediate obligations' than the Aarhus Convention.[1137] But even after Brexit, non-compliance with the provisions of the Aarhus Convention can still be tested by the public by submitting a communication to the Aarhus Convention Compliance Committee.[1138] Nevertheless, 'the hard, enforceable edge that EU law provides to the Aarhus Convention's provisions' are lost and consequently domestic standards may be lowered as a consequence of changing the domestic legislation that was adopted to implement the Environmental Information Directive.[1139] However, so far, the United Kingdom seems to be set on maintaining the Environmental Information Regulations as they are.[1140]

Leaving the EU also means that the United Kingdom will no longer be part of the EU ETS. As a consequence, the United Kingdom has set up its own emissions trading system,[1141] the UK ETS, which resembles the EU ETS to a large extent.[1142] Moreover, the United Kingdom

[1132] See also Paul Craig, 'The Process: Brexit and the Anatomy of Article 50' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017) 61.
[1133] Fabbrini (n 1129) 28.
[1134] Colin T Reid, 'The Future of Environmental Governance in the (Dis-)United Kingdom' in Andrea Biondi, Patrick Birkinshaw and Maria Kendrick (eds), *Brexit: The Legal Implications* (Kluwer Law International BV 2019) 248 f.
[1135] A Cardesa-Salzmann and others, 'The Implications of Brexit for Environmental Law in Scotland' (Scottish Universities Legal Network on Europe (SULNE) 2016) Technical Report 9 <http://dspace.stir.ac.uk/handle/1893/24816> accessed 13 December 2021.
[1136] See chapter 2, sections 5 and 6.
[1137] Reid (n 1134) 248 f.
[1138] Uzuazo Etemire, 'Critical Thoughts on the Implications of Brexit for Procedural Environmental Rights in the United Kingdom' (2017) 8 Revista Catalana de Dret Ambiental 4 f.
[1139] Cardesa-Salzmann and others (n 1135) 10.
[1140] Etemire (n 1138) 6.
[1141] The Greenhouse Gas Emissions Trading Scheme Order 2020 (No 1265).
[1142] UK Government, 'The Future of UK Carbon Pricing - UK Government and Devolved Administrations' Response' para 21

government has expressed its interest in linking its national ETS to the EU ETS in the future.[1143] However, at this stage, it is unclear whether the two systems will indeed be linked. Regardless of whether the two systems will be linked, it will be interesting for future research to investigate the relationship between the EU ETS and the UK ETS. Apart from that, it should be borne in mind that once greenhouse gases have been emitted, they stay in the atmosphere for a long time. Therefore, it makes sense to check compliance with view to ensuring that there have not been emissions that were unaccounted for.

4. The concept of 'Environmental Information' in national law

4.1. Introduction

In chapter 4,[1144] it became clear that the most relevant category of environmental information that may cover the relevant information is 'measures and activities affecting or likely to affect the environment' as set out in Article 2 (1) (c) of the Environmental Information Directive. Therefore, in this section, only the implementation of this category into the national law will be examined.[1145] The main question concerning the concept of environmental information that the previous chapter left unanswered is under what circumstances a measure or activity is considered to be likely to affect the environment or to be intended to protect the environment. It was discussed that where a measure or activity is part of a system that is intended to protect the environment, such as the EU ETS, one can easily argue that the measure or activity is intended to protect the environment, simply as a consequence of being part of that system. However, the question arose whether information, which relates to such a measure or activity that is part of a system that is intended to protect the environment, such as the EU ETS, is automatically likely to affect the environment as a result of this link; or whether the link to that system must be of a certain strength. This question could not be answered based on the analysis of the Aarhus Convention, the Environmental Information Directive and its interpretation by the CJEU. Therefore, this section examines the national legislation of

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/889037/Government_Response_to_Consultation_on_Future_of_UK_Carbon_Pricing.pdf>.

[1143] ibid para 2.

[1144] See chapter 4, section 2.

[1145] For a discussion of the implementation of the other categories see for example Müller (n 146).

Germany and the United Kingdom and its interpretation by the competent national courts with a view to answering this question.

4.2. The definition of 'environmental information' in the German UIG

4.2.1. Analysis of the law

As explained in chapter 2,[1146] the Environmental Information Directive sets out that the definition of environmental information includes 'measures […] and activities affecting or likely to affect the elements' of the environment and environmental factors 'as well as measures or activities designed to protect those elements.'[1147] The corresponding provision of the Federal Environmental Information Act states that the term 'environmental information' includes all data on 'measures and activities that (a) affect or are likely to affect the elements of the environment or the environmental factors, or (b) are intended to protect the elements of the environment.'[1148] As explained below, the two options are not the same but are closely related.

The Bundesverwaltungsgericht (in the following 'Federal Administrative Court') has decided that, given the deliberately vague wording and the purpose of the Federal Environmental Information Act[1149] the term 'measures and activities' must be construed widely.[1150] In light of this interpretation, the literature on the Federal Environmental Information Act suggests that, the term 'measures and activities' should be understood as encompassing every human activity, regardless of its cause, aim or purpose. This interpretation was subsequently adopted by the Higher Administrative Court of Nordrhein-Westfalen as well.[1151] This does not come as a surprise, since the corresponding provision of the Environmental Information Directive has been interpreted in a similar way by the CJEU two years earlier in a case that had been referred by a German court.[1152] This does not change the

[1146] See section 2.4.2.
[1147] 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 Article 2 (1) (c).
[1148] Umweltinformationsgesetz (n 422) §2 (3) (1).
[1149] Creating transparency regarding environment issues between the public and the state
[1150] *Judgement from 25 March 1999 - 7 C 2198* [1999] BVerwG 7 C 21.98 13; For a comment on this case in German see Ludger Rademacher, 'Deutsche Rechtssprechung in Völkerrechtlichen Fragen 1999' 2001 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht para 84.
[1151] Götze and Engel (n 146) para 83; Reidt and Schiller (n 146) §2, para 43; *8 A 3358/08* (Oberverwaltungsgericht NRW) para 70.
[1152] *Case C-321/96 Mecklenburg* (n 268) para 20 See chapter 2, section 2.4.2.

understanding of the concept of 'measures and activities' up to this point. It was already pointed out in chapter 2 that this concept is very broad[1153] and it was concluded in chapter 4, that all of the elements of the relevant information constitute information on a measure or activity.

However, as pointed out above, to constitute environmental information, a measure or activity must have either (a) an effect on the elements of the environment or environmental factors, or (b) be intended to protect the elements of the environment. Determining when this is the case has been left to the authority making the decision in each individual case.[1154] In the German literature, it is argued that the threshold for a measure or activity to be considered as being likely to have an effect on the elements of the environment or the environmental factors should be rather low. More specifically, it has been suggested that a measure or activity is likely to have an effect on the environment already where it has the potential to have an effect on the environment[1155] and it does not matter whether the (potential) effects on the environment are positive, neutral or negative.[1156] However, a potential effect on the environment must be sufficiently probable; in other words, it cannot be purely hypothetical.[1157] This means that as soon as a measure or activity is capable of having an effect on the elements of the environment or the environmental factors, in one way or another, and it is not overly unlikely that such an effect actually materialises, information on that measure qualifies as environmental information.

The Federal Environmental Information Act sets out that information on a measure or activity also constitutes environmental information, where the measure or activity is intended to protect the environment. The question arises under what circumstances a measure or activity is considered to be intended to protect the environment. According to the Federal Administrative Court, the essential criterion is whether the aim of a measure or activity is *intended* to protect the environment.[1158] It has been argued that it is not necessary that a measure or activity actually has a protective effect; instead, it is sufficient that the activity or measure *is capable* of having such an effect.[1159] Further, it is irrelevant whether the activity or measure protects the environment in a mediate or immediate way.[1160] However, there needs to be a sufficiently strong link between the measure or activity and the envisaged protection of the

[1153] See section 2.4.2.
[1154] This is an example of administrative discretion, as discussed in section 2 of this chapter
[1155] Götze and Engel (n 146) 85; Reidt and Schiller (n 146) §2, para 44.
[1156] Götze and Engel (n 146) 86.
[1157] *8 A 3358/08* (n 1151) para 70.
[1158] *Judgement from 25 March 1999 - 7 C 21.98* (n 1150) 14.
[1159] Götze and Engel (n 146) 86; Reidt and Schiller (n 146) §2, para 45.
[1160] Götze and Engel (n 146) 86; Reidt and Schiller (n 146) para 45.

environment[1161] but the protection of the environment does not necessarily have to be the main purpose of the measure or activity.[1162]

In this context, a closer look at the reasoning of the Federal Administrative Court in the case *7 C 2.09*[1163] may be valuable. This case concerned, inter alia, the question whether a decision to allocate a certain number of EU ETS allowances for free constituted a measure that was intended to protect the environment.[1164] It was clear that such a decision was a measure, however, it was disputed whether it was intended to protect the environment. The Federal Administrative Court took the view that the German Emissions Trading Act[1165] and the Allocation Act 2007,[1166] the legislation implementing the EU ETS Directive, were inextricably linked and together constituted a closed system, which contributed to the protection of elements of the environment, air and atmosphere, by creating economic incentives to reduce greenhouse gas emissions.[1167] The Federal Administrative Court explained that the question whether the allocation decision was intended to protect the environment could not be answered by looking at the allocation of allowances in an isolated manner. Instead, the decisive factor was the overall aim of the entire EU ETS, which is environmental protection. Therefore, the Federal Administrative Court decided that the allocation decision constituted a measure intended to protect the environment.[1168] Thus, a measure or activity is intended to protect the environment, even if it is not capable of doing so on its own but is part of a system that aims at protecting the environment.[1169]

4.2.2. Application of the law

In chapter 4, it was questioned whether parts of the relevant information, constitute environmental information.[1170] To a certain extent, this was the case for the internal verification

[1161] Götze and Engel (n 146) §2, para 45.
[1162] Reidt and Schiller (n 146) §2, para 45.
[1163] *Judgment from 24 September 2009 - 7 C 209* [2009] BVerwG 7 C 2.09 The parties involved in this case were anonymised.
[1164] ibid.
[1165] Treibhausgas-Emissionshandelsgesetz vom 21. Juni 2011 (BGBl. I S. 1475), das zuletzt durch Artikel 2 des Gesetzes vom 8. August 2020 (BGBl. I S. 1818) geändert worden ist 2011.
[1166] Zuteilungsgesetz 2007 vom 26. August 2004 (BGBl. I S. 2211), das zuletzt durch Artikel 130 der Verordnung vom 19. Juni 2020 (BGBl. I S. 1328) geändert worden ist 2004.
[1167] *Judgment from 24 September 2009 - 7 C 2.09* (n 1163) para 29.
[1168] ibid para 32.
[1169] It is noteworthy in this context that the allocation of allowances gives actually the opportunity to emit. Each allowances represents the right to emit one tonne of $CO_{2(e)}$.
[1170] See chapter 4, section 2.

documentation and the verification report. However, particularly concerning the information that the operator provided to the verifier, it was questioned whether it constitutes environmental information. The reason was that, while this information could potentially have an effect on the elements of the environment or on environmental factors, the link between the information in question and the effect seemed relatively weak. However, in light of the wording of the Federal Environmental Information Act and its interpretation by German courts and the literature, it seems that these doubts can be cleared up, either because the relevant information constitutes information on an activity or measure that has or is likely to have an effect on the environment or because it is information on an activity or measures that is intended to protect the environment.

As explained above, the threshold for a measure or activity to be considered to affect or to be likely to affect the environment is relatively low. It was determined in chapter 4,[1171] that all information contained in the internal verification documentation, the verification report and the information submitted by the operator to the verifier is information on the verification of emissions reports. Thus, the question is first whether verification is a measure or activity and, if so, whether verification affects or is likely to affect the environment. The term 'measures and activities' has been defined as including any human activity.[1172] Verification is carried out by people[1173] and therefore constitutes a measure or activity. It is intended to ensure that emissions reports are free from material misstatements and, consequently, that operators surrender the correct number of allowances.

As explained in detail before,[1174] if verification was done improperly and mistakes in the emissions reports were not detected, operators would surrender fewer allowances than necessary. Even if only a handful operators surrendered fewer allowances than required, their demand for allowances would inevitably decrease. Pursuant to the law of supply and demand, a lower demand for allowances naturally leads to a decrease in their price.[1175] This would make it cheaper to pollute for all operators, even those who comply with the rules. Thereby, the incentive to lower emissions is weakened for all operators.[1176] The consequence of non-compliance could be that the overall objective of the EU ETS – reducing emissions through a decreasing cap – would not be achieved, both due to a decrease of allowances prices and non-

[1171] See chapter 4, section 2.
[1172] See section 3.2.1 above.
[1173] It could be that more and more verification tasks will be carried out automatically or by artificial intelligence.
[1174] See chapter 1, section 4.
[1175] McAllister (n 39) 1199.
[1176] Driesen (n 41) 333.

reported emissions.[1177] Moreover, where the EU ETS is operating at full capacity, i.e. all allowances are being used, already the smallest amount of unreported emissions would mean that the EU ETS does not achieve its aim of reducing overall emissions. Verification is intended to prevent such a scenario from happening and, consequently, it is likely to have an effect on the elements of the environment, i.e. air and atmosphere, as well as the environmental factors, i.e., emissions. Therefore, it can be concluded that information on the verification, including the internal verification documentation, the verification report and the information submitted by the operator to the verifier, constitutes environmental information within the meaning of the Federal Environmental Information Act.

The definition of environmental information also includes information on a measure or activity that is intended to protect the environment. Thus, as an alternative to arguing that the information related to verification constitutes environmental information because it is information on measures or activities that affect or are likely to affect the elements of the environment or the environmental factors, it is worth examining whether this information constitutes information on a measure or activity that is intended to protect the environment. It has been demonstrated that all of the information constitutes information on a measure or activity – verification. Therefore, the decisive question that remains is whether verification is intended to protect the environment. Throughout chapter 3, it has been shown that the EU ETS compliance cycle, including the verification of greenhouse gas emissions, is inextricably linked to the EU ETS and forms an integral part of it. Following the reasoning of the Federal Administrative Court in *7 C 2.09*, set out above, information related to the verification of greenhouse gas emissions constitutes environmental information because the EU ETS is a system that is aimed at protecting the environment by providing economic incentives to reduce greenhouse gas emissions and the measures envisaged to enforce that system, such as verification, are inextricably linked to that system.

After the analysis in chapter 4,[1178] some doubts remained whether some of the relevant information constituted 'environmental information'.[1179] In light of the analysis in this section, it is clear that this information can be considered environmental information pursuant to the Federal Environmental Information Act, as it clearly constitutes information on a measure or activity which is likely to affect the environment and which is intended to protect the

[1177] McAllister (n 39) 1200.
[1178] See chapter 4, section 2.
[1179] In particular the internal verification documentation, the verification report and the information submitted by the operator to the verifier.

environment. In this context, it is noteworthy that, in German law, the threshold that needs to be surpassed for a measure or activity to be considered to be likely to affect the environment is relatively low. Thus, the definition of 'environmental information' in German law is broader than in the Environmental Information Directive.[1180] Since the information related to verification is environmental information, the public should, in principle, be given access to that information pursuant to German law, if it is held by a public authority and that none of the grounds of refusal apply.

4.3. The definition of 'environmental information' in the UK EIR

4.3.1. Analysis of the law

The provision of the Environmental Information Regulations that implements the category of 'environmental information' on 'measures and activities contains a dynamic reference to the Environmental Information Directive. It states that

> *"environmental information" has the same meaning as in Article 2(1) of the [Environmental Information] Directive, namely any information in written, visual, aural, electronic or any other material form on (c) 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 (a) and (b) as well as measures designed to protect those elements.*[1181]

Thus far, there has not been any case law setting out an abstract definition of 'measures and activities'. However, in *DECC v IC and Henney*,[1182] the First-Tier Tribunal implied that these terms must be interpreted broadly as to include a broad range of issues; this is also in line with the interpretation of the terms by the CJEU in *Mecklenburg*.[1183] In the case law on the concept

[1180] This is in line with EU law, since even such a broader a definition went beyond the Environmental Information Directive itself, it would still be possible in accordance with Article 193 TFEU. However, it would go beyond the scope of this study to conduct an extensive analysis whether the criteria of Article 193 TFEU are fulfilled. Thus, far, there has not been such an analysis in the literature.
[1181] The Environmental Information Regulations (n 1126) regulation 2 (1).
[1182] *The Department for Energy and Climate Change v The Information Commissioner and AH* [2015] UK Upper Tribunal UKUT 0671 (AAC).
[1183] *Case C-321/96 Mecklenburg* (n 268) 20.

of 'measures and activities affecting the environment',[1184] it was not contested whether something was a 'measure or activity', rather whether a measure or activity relates to the environment. Therefore, it seems that the term 'measures and activities' can be interpreted similarly broadly as pursuant to the German Federal Environmental Information.

The terms 'affect' and 'likely to affect' have not been interpreted by the courts. However, the Information Commission's Office[1185] has provided some explanation of the meaning of these terms and there have been a few cases in which the provision quoted above has been applied in practice, which may contribute to a better understanding of these concepts. The Information Commissioner's Office explained that while 'affecting' implies that there was an effect in the past or that there is an effect on the environment that is still present,[1186] 'likely to affect' means that there is a likelihood that there would be an effect on elements of the environment or environmental factors, if the measure in question was implemented.[1187] For a measure or activity to be likely to affect the elements of the environment or the environmental factors it is however not necessary that the likelihood of the effect is more probable than not, yet, it must be substantially more than remote.[1188] It is however unclear what precisely 'more than remote' means.

In the *Mersey Tunnel Users Association* case, the Information Tribunal dealt with the question whether information on tolling of a new bridge came within the definition of environmental information.[1189] Mersey Tunnels Users Association (the applicant) had requested this information from the Halton Borough Council (the defendant). While the defendant did not contest that the building of a bridge had considerable effects on the environment, it refused the request for information arguing that this information did not constitute environmental information because tolling only had a remote effect on the environment.[1190] The applicant argued that the imposition of a toll constitutes a measure that is likely to affect environmental factors, since a toll is likely to affect the amount of traffic on the

[1184] *The Department for Energy and Climate Change v The Information Commissioner and AH* (n 1182); *Mersey Tunnels Users Association v Information Commissioner and Halton Borough Council* [2009] Information Tribunal EA/2009/0001; *Imogen Bickford-Smith v The Information Commissioner and the Rural Payments Agency, as Agent of DEFRA* [2010] First-Tier Tribunal EA/2010/0032; *London Borough of Southwark v The Information Commissioner, Lend Lease (Elephant and Castle) Limited and Adrian Glasspool* [2014] First-Tier Tribunal EA/2013/0162.
[1185] See section 6.3 for further elaboration on the Information Commissioner.
[1186] Information Commissioner's Office, 'What Is Environmental Information? (Regulation 2(1)) - Environmental Information Regulations' para 33.
[1187] ibid para 34.
[1188] ibid.
[1189] *Mersey Tunnels* (n 1184) para 35.
[1190] ibid paras 11-14.

bridge and therefore the amount of emissions.[1191] The Information Tribunal found that 'although the scope of environmental information is wide, there are limits to it and that the question of remoteness must be considered.'[1192] In this particular case, the Information Tribunal concluded that since tolling is an integral part of the project and its viability, since without the expected revenue from tolling, the bridge would not have been built, information on tolling constituted information on a measure that was likely to affect the elements of the environment or the environmental factors.[1193] Thus, it seems that the Information Tribunal takes a similar approach to the Federal Administrative Court in *7 C 2.09*. It must be borne in mind that judgments of the Information Tribunal do not set precedents in the British legal system. However, in a later judgment, the Upper Tribunal discussed this case and stated that the 'decision that the disputed information was "environmental information" seems eminently sustainable on the facts'[1194] and named the approach the 'bigger picture argument'.[1195] Therefore, where a certain measure or activity is an integral part of a system which, as a whole, affects or is likely to affect the environment, information on that measure or activity will be environmental information, even though the measure or activity on its own does not affect the environment. However, the information in question must have more than a 'minimal connection' to the measure or activity that affects or is likely to affect the environment.[1196]

Unfortunately, the Information Commissioner's Office does not provide much guidance on the meaning of the term 'protecting the environment'. It merely gives an example of a measure that is intended to protect the environment: a regulation to determine fishing quotas, since it is 'designed to protect biological diversity and its components (the balance between the species of fish in the sea in specified areas).'[1197] Moreover, there has not been any case law in which the British courts have interpreted the term 'protecting the environment'. However, given the wording and the example that the Information Commissioner's Office provide, it seems that the decisive element is the intention or objective of a given measure or activity, not the actual effect of the measure in practice. The argumentation of the First-Tier Tribunal seems to support

[1191] ibid para 66.
[1192] ibid para 65.
[1193] ibid para 69.
[1194] *The Department for Energy and Climate Change v The Information Commissioner and AH* (n 1182) para 42.
[1195] ibid para 60.
[1196] *Andrew Green v Information Commissioner and Department for Transport* [2014] First-Tier Tribunal EA/2014/0014 para 17 (c).
[1197] Information Commissioner's Office, 'What Is Environmental Information? (Regulation 2(1)) - Environmental Information Regulations' (n 1186) para 38.

this interpretation.[1198] However, the Tribunal did not discuss this issue in much detail. Therefore, it remains to be seen whether this interpretation will be confirmed and elaborated upon by future case law.

4.3.2. Application of the law

Having examined the definition in the Environmental Information Regulations, it will now be examined if the doubts regarding the question whether the relevant information constitutes environmental information that remained after the analysis in chapter 4 can be cleared up. More specifically, it will be examined whether the internal verification documentation, the verification report and the information that the operator provides to the verifier constitutes information on measures or activities that (1) either affect or are like to affect the environment or (2) are designed to protect the environment. In chapter 4, it was explained that given the broad definition of the term 'measures and activities', it seems that all of the relevant information comes within that concept. As pointed out in section 4.3.1., in the case law that touches upon 'environmental measures and activities', the issue was not whether something constituted a measure or activity but rather whether it affected or was likely to affect the environment or whether it was designed to protect the environment. Therefore, the following analysis will focus on the question whether the part of the relevant information that is related to verification is information on a measure or activity that affects or is likely to affect the elements of the environment or the environmental factors or is designed to protect those elements.

As explained in section 4.3.1., British case law has established the 'bigger picture approach' that is very similar to the approach adopted by the German Federal Administrative Court. This approach purports that where a certain measure or activity is an integral part of a system, which, as a whole, affects or is likely to affect the environment, information on that measure or activity is considered environmental information. Applying this 'bigger picture approach' to the case of the internal verification documentation, the verification report, and the information the operator provides to the verifier, a very similar line of argumentation to the German approach applies. It can be argued that the EU ETS as a whole is a measure that affects or is likely to

[1198] *The Mayor and Burgesses of the London Borough of Haringey v The Information Commissioner* [2017] First-Tier Tribunal EA/2016/0170 para 25.

affect the environment, by reducing greenhouse gas emissions over time. The verification of emissions reports is arguably an integral part of the EU ETS, since it contributes to the enforcement of the system and ensures that operators submit the correct number of allowances. Without proper verification of emissions reports, the EU ETS would not function properly. The internal verification documentation, the verification report and the information provided by the operator to the verifier are all information on the verification process. Thus, just like the information on the tolling of a bridge in *Mersey Tunnel Users Association* was information on a measure that was likely to affect the environment because tolling was an integral part of the bridge, information on verification is information on a measure that is likely to affect the environment, since verification can be considered an integral part of the EU ETS.

Alternatively, it can also be argued that information on verification is environmental information, since verification is a measure or activity that is designed to protect the elements of the environment. As explained in the previous section, it appears that the decisive element for a measure or activity to be considered as being designed to protect the environment is whether its objective or intention is to protect the environment. The objective of the verification of emissions reports is to ensure the 'correct and effective reporting of greenhouse gas emissions by the operator'[1199] which is essential for the proper functioning of the EU ETS. As explained in chapter 1,[1200] mistakes in the emissions reports, accidental or intentional, can potentially have serious consequences for the effectiveness of the EU ETS. Verification is a measure that is intended to detect and remedy such mistakes. Thus, verification can be considered to be aimed at protecting the environment. Consequently, information on verification can be considered information on a measure that is intended to protect the environment and therefore, the internal verification documentation, the verification report and the information that the operator submits to the verifier constitute environmental information pursuant to the Environmental Information Regulations.

4.4. Interim conclusions

It has become clear that the way in which the national courts in Germany and England have interpreted the concept 'measure or activity affecting or likely to affect the environment or

[1199] Commission Regulation (EU) No 600/2012 recital 15.
[1200] See chapter 1, section 1.

intended to protect the environment' is very similar. In both jurisdictions, a 'bigger picture approach' or 'closed system approach' was adopted, according to which a measure relates to the environment even where it does not do so itself (and even allows emitting greenhouse gases), but is an essential part of a bigger system that relates to the environment. As a consequence of being part of that bigger system, information on the individual measure constitutes environmental information. Thus, the uncertainties that remained after the analysis in chapter 4 can be cleared up and it can be concluded that the information with regard to which it could not be determined with certainty whether it constitutes environmental information pursuant to the Environmental Information Directive, should be considered environmental information pursuant to the national legislation of Germany and England.

In light of the overall research question of this study, this means that the relevant information must in principle be disclosed upon a request by the public. However, it must still be determined whether the entities that hold the relevant information, more specifically the verifier, qualifies as a public authority, and whether any of the grounds of refusal could potentially be relied upon to refuse access to the relevant information. These two issues will be analysed in the following sections.

5. The concept of 'public authority' in national law

5.1. Introduction

In chapter 2, it was explained that the Environmental Information Directive comprises three categories of public authorities – (1) governmental bodies, (2) private entities with public administrative functions, and (3) private entities with public functions that relate to the environment and which are under the control of a public authorities pursuant to (1) or (2). In chapter 4, it was attempted to analyse whether verifiers may fall within one of those categories. Given that verifiers are usually private companies, it was clear that they may only come within the second or third category of the definition of public authorities. The CJEU has provided some guidance on how the wording of the definition of public authorities in the Environmental Information Directive must be interpreted. However, there has not been a judgment on whether EU ETS verifiers are public authorities. With regard to the second category, the CJEU has set out that an entity is considered to perform public administrative functions where it has been entrusted with the performance of a service that is in the public interest and for this purpose

has been 'vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.'[1201] However, the CJEU left it to national courts to determine whether the applicable national legislation conferred such special powers on a given entity.[1202]

With regard to the third category, the CJEU explained that an entity is 'under the control' where it 'does not determine in a genuinely autonomous matter the way in which it performs the functions in the environmental field which are vested in it, since' an entity which qualifies as public authority pursuant to the first or second category exerts 'decisive influence on the entity's action in that field.'[1203] Moreover, the CJEU has explained that an entity may also be considered to be under the control of a public authority where it is subject to a 'particularly precise legal framework which lays down a set of rules determining the way in which [it] must perfom the public functions related to' the environment which it performs.[1204] Again, as with the second category, it is up to the national courts to determine in each case put before them, whether the entity in question is actually under the control of a public authority.

Despite the fact that the CJEU gave these two crucial concepts of the definition of public authorities an EU-wide meaning, it was not possible to determine whether verifiers, as introduced by the EU ETS Directive, qualify as public authorities pursuant to the Environmental Information Directive. However, in chapter 4, it was concluded that the arguments in favour of the verifier constituting a public authority appear to slightly outweigh the arguments against this position.[1205] The main questions that were left unanswered in this regard were whether verification can be considered a 'public *administrative* task' and whether verifiers can be considered to be under the control of a public authority. In light of these uncertainties and the fact the CJEU has not yet considered whether EU ETS verifiers are public authorities, in this section, the definition of public authorities in the German Federal Environmental Information Act and the British Environmental Information Regulations and their respective interpretation by the national courts will be examined. Also with a view to determine whether the verifiers qualify as public authorities pursuant to the national law of Germany and the United Kingdom. Regardless, of the outcome of this analysis, given that the verifier is an actor introduced by EU law, ultimately a preliminary question will have to be

[1201] *Fish Legal* (n 157) para 52.
[1202] ibid para 55.
[1203] ibid para 68.
[1204] ibid 71.
[1205] See chapter 4, section 3.

submitted to the CJEU to clarify this issue. However, until then, national law may provide useful insights.

5.2. The definition of 'public authority' in the German UIG

5.2.1. General remarks

In contrast to the Aarhus Convention and the Environmental Information Directive, the Federal Environmental Information Act does not use the term public authority. Instead, it refers to 'bodies that have an obligation to disclose information' (informationspflichtige Stelle).[1206] This difference in terminology does not necessarily mean that the two terms are different in substance. It may even reflect the fact that not only governmental bodies may be obliged to disclose environmental information, but also private bodies. To avoid any confusion, in the following, the term 'public authority' will be used when referring to 'informations pflichtige Stelle'. The Federal Environmental Information Act sets out two categories of public authorities, the first of which appears to subsume the first two categories set out in the Environmental Information Directive. It states that the government and 'other entities of public administration' are under the obligation to disclose environmental information.[1207] The second category of the Federal Environmental Information Act covers 'natural or legal persons governed by private law, to the extent that they perform public tasks or services which relate to the environment […] and are under the control of the federal government or of a legal person governed by public law which is under the supervision of the federal government.'[1208]

[1206] Umweltinformationsgesetz (n 422) §2 (1).
[1207] ibid §2 (1) (1).
[1208] ibid §2 (2) (2) German original: 'Informationspflichtige Stellen sind natürliche oder juristische Personen des Privatrechts, soweit sie öffentliche Aufgaben wahrnehmen oder öffentliche Dienstleistungen erbringen, die im Zusammenhand mit der Umwelt stehen […] und dabei der Kontrolle des Bundes oder einer unter Aufsicht des Bundes stehenden juristischen Person des öffentlichen Rechts unterliegen.'

5.2.2. Other entities of public administration

It is noteworthy, that the German legal literature, thus far, does not seem to have examined the relevance of the CJEU's 2013 judgment in *Fish Legal*[1209] for the Federal Environmental Information Act. It appears that there have not been any cases in which German courts applied the guidance given by the CJEU with regard to the concept of 'public administrative functions' and that there is no literature touching upon the question what precisely 'special powers beyond those which result from the normal rules applicable in relations between persons governed by private law' could mean in the national context.

Therefore, it is worthwhile to look at the definition of 'public authorities' in German administrative law. The Federal Administrative Procedures Act defines 'public authorities' (Behörden) as all bodies that carry out tasks of public administration.[1210] The Federal Administrative Court has decided that a body of public administration can both be a body governed by public law and a body governed by private law.[1211] Thus, similar to the Environmental Information Directive, public authorities are defined on the basis of their function,[1212] rather than their organisational structure.[1213] Pursuant to jurisprudence, the term 'public authority' has to be interpreted widely, encompassing all bodies which exist independently from changes in its staff, have ample organisational autonomy, carry out tasks of public administration and are empowered to exercise these tasks in their own name (action with external effect).[1214] It is irrelevant whether the body in question is specifically denoted as a public authority or not.[1215] Formally private bodies that have been entrusted with carrying out specific sovereign functions are called 'Beliehene' (entrusted bodies).[1216] The term 'beleihen' (in this context entrust) entails that a function is transferred to the body in question but that the transferring body does not it give up altogether. A body is entrusted with the performance of public administrative functions through a legislative act, a decree based on a legislative act, an

[1209] *Fish Legal* (n 157).
[1210] Verwaltungsverfahrensgesetz (n 1110) §1 (4).
[1211] *7 C 504* (Bundesverwaltungsgericht) para 20.
[1212] Paul Stelkens, Heinz Joachim Bonk and Michael Sachs, *Verwaltungsverfahrensgesetz* (Verlag CH Beck oHG 2018) 246; Utz Schliesky, '§1 Anwendungsbereich', *Verwaltungsverfahrensgesetz (VwVfG)* (Carl Heymanns Verlag 2010) 101.
[1213] Stelkens, Bonk and Sachs (n 1212) 203.
[1214] Ulrich Ramsauer, *Verwaltungsvefahrensgesetz* (Verlag CH Beck oHG 2000) 81; Stelkens, Bonk and Sachs (n 1212) 202; Schliesky (n 1212) 101.
[1215] Ramsauer (n 1214) 81; Stelkens, Bonk and Sachs (n 1212) 203; Schliesky (n 1212) 101.
[1216] *3 C 3509* (Bundesverwaltungsgericht) para 21; Schliesky (n 1212) 103.

administrative act or a public contract.[1217] A unique feature of entrusted bodies that distinguishes them from other entities that have been contracted by a public authority to carry out a certain task is that they have the power to take administrative decisions themselves.[1218]

There has been some discussion whether entrusted bodies fall under the definition of public authorities pursuant to the definition set out in the Federal Environmental Information Act.[1219] However, it seems that given the interpretation of the term 'public administrative functions' by the CJEU in *Fish Legal*, these doubts can be cleared up. As the CJEU stated, a body carries out public administrative functions where it has 'special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.'[1220] Concerning the power of entrusted bodies to issue administrative decisions in their own name that have external effect, Götze and Engel convincingly argue that this power fulfils the criterion of going beyond the normal rules applicable in private law situations.[1221] Therefore, it seems likely that an entrusted body is a public authority pursuant to §2 (1) (1) of the Federal Environmental Information Act.[1222]

Thus, it appears that the concept of 'entrusted body' is practically congruent with the concept of 'natural or legal person performing public administrative functions' referred to in the Environmental Information Directive. Hence, in light of the overall research question of this thesis,[1223] it must be examined whether verifiers qualify as entrusted bodies. It seems unlikely that this is the case due to several reasons. First, the literature on entrusted bodies suggests that where a public authority entrusts parts of its functions, it does so only onto a single entity, not to a previously undefined group of entities.[1224] In case of verification, it is not one entity to which this task is transferred. It is not even clear beforehand which entities will

[1217] Johann Bader and Michael Ronellenfitsch, *VwVfG: Verwaltungsverfahrensgesetz Mit Verwaltungs-Vollstreckungsgesetz Und Verwaltungszustellungsgesetz* (Verlag CH Beck oHG 2016) §1, para 73.
[1218] Götze and Engel (n 146) 57; Bader and Ronellenfitsch (n 1217) §1, para 72.
[1219] In favour: Thomas Schomerus and Sabine Clausen, 'Informationspflichten Privater Nach Dem Neuen Umweltinformationsgesetz Am Beispiel Der Exportkreditversicherung' (2005) 12 Zeitschrift für Umweltrecht 578; Reidt and Schiller (n 146) UIG §2, para 6; Against: Jürgen Fluck, Fischer Kristian and Mario Martini, *Informationsfreiheitsrecht Mit Umweltinformations- Und Verbraucherinformationsrecht IFG/UIG/VIG/IWG/GeoZG* (rehm Verlag 2020) §2 UIG, para 65.
[1220] *Fish Legal* (n 157) para 56.
[1221] Götze and Engel (n 146) 57.
[1222] ibid 56; Günther Kiefer, 'Regelungsbedarf Und Gestaltungsspielräume Bei Der Beleihung' (2009) 12 Zeitschrift für Landes- und Kommunalrecht Hessen/Rheinland-Palfs/Saarland 442; Ruttloff Marc, 'Gestaltende Und Verwaltende Legislativorgane – Zum Anspruch Auf Zugang Zu Informationen Nach Abschluss Des Gesetzgebungsverfahrens' (2013) 11 Neue Zeitschrift für Verwaltungsrecht 702.
[1223] To what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS be provided to the public upon request?
[1224] Stelkens, Bonk and Sachs (n 1212) §1, para 249; Bader and Ronellenfitsch (n 1217) §1, para 71.

actually carry out verification, since any natural or legal person can become a verifier but can also stop being verifiers, in case they lose their accreditation.[1225]

Second, as explained above, entrustment means that a public authority transfers parts of its functions onto a private entity. Importantly, this implies that the public authority has the function itself in the first place and then outsources the performance of that function. In the context of verification, the question is who is this public authority that transfers its powers on the verifier? As mentioned in chapter 3,[1226] natural or legal persons become verifiers by means of accreditation by the national accreditation body of a Member State. Where the national accreditation body finds that the natural or legal person applying for accreditation is competent to perform the verification of emissions reports, it issues an accreditation certificate allowing the entity in question to perform the verification of emissions reports.[1227] Thus, it seems that the national accreditation body would be the public authority that transfers parts of its functions onto the verifier. However, the national accreditation bodies only accredit verifiers and do not have the power to verify emissions reports themselves and consequently the accreditation of verifiers cannot be seen as the transfer of the power to verify.

Third, the literature on entrusted bodies suggests that the public authority that outsources a certain function always retains a certain control over the private entity onto which it has transferred parts of its functions.[1228] However, the Accreditation and Verification Regulation explicitly states that national accreditation bodies must be fully independent from verifiers.[1229]

One could argue that the Accreditation and Verification Regulation entrusts the verifier with the verification of emissions reports and that thereby the EU legislator has transferred special powers to verifiers. However, it is unclear whether in the German legal system, assigning the responsibility to verify emissions reports to verifiers would suffice to classify them as entrusted bodies.

In light of these considerations, it appears unlikely, however not impossible, that verifiers can be considered to constitute entrusted bodies and consequently are public authorities pursuant to § 2 (1) (1) of the Federal Environmental Information Act. The question that follows

[1225] See chapter 3, section 3.5.
[1226] Section 3.5.1.
[1227] Regulation (EC) No 765/2008 [of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 O.J L 218/30] Article 5 (1).
[1228] Bader and Ronellenfitsch (n 1217) §1, para 72; Stelkens, Bonk and Sachs (n 1212) §1, para 246; Götze and Engel (n 146) 56.
[1229] Commission Implementing Regulation (EU) 2018/2066 Article 56 (1).

from this and which will be examined in the next section is whether they may constitute public authorities pursuant to § 2 (1) (2).

5.2.3. Other entities

As stated above,[1230] the Federal Environmental Information Act sets out that natural or legal persons that are governed by the rules of private law constitute public authorities in as much as they carry out public duties or public services in relation to the environment and are subject to the control of the federal government or a legal person governed by public law which is under the supervision of the federal government.[1231] There are four essential elements or questions to this definition: (1) what are natural and legal persons governed by private law? (2) when is a task considered to be 'public'? (3) when does a public task relate to the environment? (4) when is a body under the control of the federal government or a legal person governed by public law, which is under the supervision of the federal government? As was pointed out in chapter 3, most verifiers are limited liability companies. There are also some that are registered associations. In either case, they are legal persons governed by private law. In chapter 4, it was concluded that verification could be considered a 'public task that relates to the environment'. The only question that could not be answered conclusively was whether verifiers are under the control of a public authority. Therefore, the focus of this subsection will be to answer that question. It will not be analysed whether verification is a public task that relates to the environment, since this question has already been answered affirmatively in the context of the discussion in chapter 4.[1232]

The Federal Environmental Information Act stipulates in § 2 (1) (2) that to qualify as a public authority a natural or legal person must be under the control of the federal government or of a legal person governed by public law which is under the supervision of the federal government.[1233] The Federal Environmental Information Act sets out a conclusive definition of the element of control.[1234] Therefore, Götze and Engel question whether the Federal

[1230] See section 5.2.1. of this chapter.
[1231] Umweltinformationsgesetz (n 422) §2 (1) (2).
[1232] See chapter 4, section 3.3.
[1233] Geiger (n 146) 464; Reidt and Schiller (n 146) §2, para 24.
[1234] Götze and Engel (n 146) §2, para 54; Elfeld (n 153) 95.

Environmental Information Act covers all cases of control envisaged by the Environmental Information Directive and they seem to have a point.[1235]

According to the Environmental Information Directive, control can be exerted by governmental bodies (category 1) as well as natural or legal persons carrying out public administrative functions (category 2). Pursuant to the Federal Environmental Information Act, apart from the federal government, control can only be exerted by a legal person but not a natural person. In contrast, the Environmental Information Directive expressly states that control can be exerted by both natural and legal persons.[1236] Since there has not been any case law on this issue, it seems that, in practice, it is a scenario that does not occur often. At the same time, the fact that there have not been any court cases does not necessarily mean that this difference between the Environmental Information Directive and the Federal Information Act has not led to instances where access to information has been wrongly refused. It is simply unclear how serious this problem actually is. Moreover, the wording of the Federal Environmental Information Act suggests that a legal person can only exert control where it is (1) governed by public law and (2) is under the supervision of the federal government itself. The Environmental Information Directive however does not mention either of these two limitations. Thus, it seems that the doubt by Götze and Engel, whether the Federal Environmental Information Act covers all instances of control that the Environmental Information Directive covers, is justified. For instance, the case where a natural person exerts control does not seem to be covered.

However, it is necessary to look at the actual definition of the term 'control' set out in the Federal Environmental Information Act. A natural or legal person is subject to control, first, if it is *subject to special duties or has special rights* when performing a public task or service,[1237] and, second, where the federal state or a legal person governed by public law, which is under the supervision of the federal state together or alone, immediately or mediately, (a) own the majority of its capital, (b) hold the majority of its shares, or (c) can appoint more than half of the members of the administrative board, supervisory board or the management board.[1238] The focus of this section is the first form of control (special rights or duties), as the second case

[1235] Götze and Engel (n 146) §2, para 54.
[1236] 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 Article 2 (2) (c).
[1237] Umweltinformationsgesetz (n 422) §2 (2) (1); Mario Martini and Matthias Damm, 'Der Zugang Der Öffentlichkeit Zu Hochauflösenden Satellitenbildern' (2014) 3 Neue Juristische Wochenschrift 132; Guckelberger (n 146) 386; Schomerus and Clausen (n 1219) 579.
[1238] Umweltinformationsgesetz (n 422) §2 (2) (2); Martini and Damm (n 1237) 132; Guckelberger (n 146) 386; Schomerus and Clausen (n 1219) 579.

covers a purely factual state that leaves little room for interpretation. Consequently, in practice it should be possible to determine relatively easily whether the given criteria are fulfilled.

The use of the word 'special' suggests that simply because a certain activity is regulated by law does not suffice to satisfy this criterion.[1239] Otherwise, the result would be that virtually all economically active entities would be considered to be subject to special rights or duties, since almost all economic activities are regulated in one way or another. An example of special rights and duties, that the Federal Environmental Information Act provides, is the existence of an obligation to contract[1240] (Kontrahierungszwang) and the compulsory connection and usage[1241] (Anschluss- und Benutzungszwang).[1242] The literature sees this as an indication that the German legislator aimed primarily at covering rights and duties that are governed by public law with this provision.[1243] Therefore, it is doubtful whether rights and duties agreed upon in a contract, such as a contract between an operator and a verifier, constitute special rights and duties within the meaning of the Federal Environmental Information Act.[1244] Götze and Engel observe that a different interpretation would not be in line with the underlying rationale of the Federal Environmental Information Act, putting an obligation to disclose environmental information on private companies to which certain public functions have been outsourced in the course of privatisation efforts. They explain that in cases of privatisation, the state usually retains possibilities of control, mainly in the form of standardising connection and usage obligations or conclusion of domination agreements (Beherrschungsvertrag),[1245] in order to guarantee that the private company provides the public task satisfactorily.[1246]

[1239] Götze and Engel (n 146) 69; Fluck, Kristian and Martini (n 1219) §2 UIG, para 210; Reidt and Schiller (n 146) §2 UIG, para 25.

[1240] In German law, contrary to the general principle of freedom to contract (conclusion and content of a contract can be freely decided by the parties) there are certain circumstances in which a party is obliged to conclude a contract. See Klaus Weber, *Creifelds Kompakt, Rechtswörterbuch* (4th Edition, Verlag CH Beck oHG 2021) 'Kontrahierungszwang'; For example, a company with a dominant market position will usually be under an obligation to contract, see Jan Busche and Claudia Schubert, *Münchener Kommentar Zum Bürgerlichen Gesetzbuch*, vol Band 1 Allgemeiner Teil §§ 1-240 (Franz Jürgen Säcker and others eds, 8th Edition, Verlag CH Beck oHG 2021) § 535, para 6.

[1241] According to the German Gemeindeordnung (Municipal Code), municipalities have the right to regulate the use of public services. Residents have the right to use these public services. However, municipalities may oblige residents to use certain public services such as the public sewage system, garbage collection and road cleaning services (Anschlusszwang) and to use certain public facilities, such as the municipal slaughterhouse (Benutzungszwang); see Weber (n 1240) 'Anschluss und Benutzungszwang'.

[1242] Umweltinformationsgesetz (n 422) §2 (2) (1).

[1243] Götze and Engel (n 146) 69; Fluck, Kristian and Martini (n 1219) §2 UIG, para 215.

[1244] Fluck, Kristian and Martini (n 1219) §2 UIG, para 215; Elfeld (n 153) 96; Reidt and Schiller (n 146) §2 UIG, para 25; Götze and Engel (n 146) 69.

[1245] A domination agreement (Beherrschungsvertrag) is a contract between companies through which the management of one company is transferred to another company; see Weber (n 1240) 'Beherrschungsvertrag'.

[1246] Götze and Engel (n 146) 70.

However, this interpretation of the element of control seems to exclude a certain group of cases. Instead of privatising an already existing task, it is feasible that the state, in the course of setting up new regulatory systems, creates tasks of a type which would traditionally be carried out by the state, but which the legislator chooses to assign to a private entity. According to the interpretation of Götze and Engel, the entity carrying out such a task would not be considered to be under the control of a public authority, if the legislator chooses not to give the state the power to standardise connection and usage obligations or to conclude a domination agreement. However, control could also be exercised in different ways than the ones set out by the Federal Environmental Information Act. As explained in chapter 4,[1247] the CJEU itself set out in *Fish Legal* that, where a private company is subject to a specific system of regulation which is particularly precise and lays down 'a set of rules determining the way in which such companies must perform the public functions related to' the environment and which *may* include 'administrative supervision intended to ensure that those rules are in fact complied with,' the company may not be genuinely autonomous from the state, even if the State is not involved in the day-to-day business.[1248] In light of this, it seems that the implementation of the term 'under the control of a public authority' in the Federal Environmental Information Act and its interpretation by the literature is slightly narrower than the interpretation of the term in the Environmental Information Directive and its interpretation by the CJEU. Therefore, Götze and Engel's suspicion that the Federal Environmental Information Act does not cover all cases of control that are envisaged by the Environmental Information Directive appears to be correct. This would also mean that the verifier cannot be considered to be under the control of a public authority and consequently would not constitute a public authority. In light of the tentative conclusion that the verifier can be considered to be under the control according to the Environmental Information Directive, this conclusion could mean that German law incorrectly transposes the Directive. However, whether this is actually the case requires a more detailed look, which will follow below.

As pointed out in section 2.3 of this chapter, Member States are obliged to interpret their national legislation as much as possible in consistence EU law, especially where the national law has been adopted to implement a certain piece of EU law (in this case, the Federal Environmental Information Act is implementing the Environmental Information Directive). Given the lack of case law, it seems that this issue has never arisen before. It might even be

[1247] See chapter 4, section 3.3.
[1248] *Fish Legal* (n 157) para 71.

that verifiers have never received a formal request pursuant to the Federal Environmental Information Act. Consequently, the national authorities (including national courts) never had the opportunity to interpret the definition of 'control' in the Federal Environmental Information Act in consistence with the counterpart in the Environmental Information Directive. Therefore, the ensuing question is whether the Federal Environmental Information Act can be interpreted in a way that would be consistent with the Environmental Information Directive, in particular the definition of 'control' as defined by the CJEU, so that the verifier can be considered to be under the control.

As explained in chapter 4,[1249] the CJEU has set out that an entity can be considered to be under the control of a public authority, where it is subject to a particularly precise legal framework that lays down a set of rules determining the way in which the entity must perform its functions.[1250] It was argued that, pursuant to this definition of control, the verifier might be considered to be under the control of the public authority, since the Accreditation and Verification Regulation sets out in a detailed manner, the way in which the verifier has to perform its function. As stated above, the definition of control set out in the Federal Environmental Information Act is exhaustive.[1251] The question is whether the definition of control as set out in the Federal Environmental Information Act (being subject to special rights and duties) can be interpreted in such a way that it would include the situation where a body that is subject to a particularly precise legal framework would be considered to have special rights or duties.

It should be recalled that the CJEU stated that a body may be considered to be under the control of a public authority where it is subject to 'a particularly precise legal framework which lays down *a set of rules determining the way in which such companies must perform the public functions* related to [the environment] with which they are entrusted' [emphasis added].[1252] Furthermore, as explained in section 2.3, national law must be interpreted as much as possible in consistence with EU law and the overall aim of the directive it is transposing.[1253] In light of this, one could argue that the reference to special rights and duties in the Federal Environmental Information Act is very similar to what the CJEU calls 'a set of rules determining the way in which' the public functions relating to the environment must be performed. The Accreditation and Verification Regulation is directly applicable in Germany, therefore, it is not possible to

[1249] Section 3.3.
[1250] *Fish Legal* (n 157) 70.
[1251] Götze and Engel (n 146) 68.
[1252] *Fish Legal* (n 157) 71.
[1253] Providing wide access to environmental information.

look at German law in an isolated manner, when examining whether the verifier is under the control of a public authority according to German law. Hence, the following conclusion can be drawn. If the Accreditation and Verification Regulation constituted a particularly tight legal framework and consequently the verifier was under the control of a public authority pursuant to the Environmental Information Directive, the Accreditation and Verification Regulation should also be considered to set out special rights and duties for verifiers when they perform the verification, so that verifiers would also be considered to be under the control pursuant to the Federal Environmental Information Act. This would mean that verifiers perform a public service that relates to the environment and are under the control of a public authority. Consequently, verifiers could be considered public authorities, pursuant to the Federal Environmental Information Act and they would be obliged to disclose environmental information upon request.

However, on the contrary, it could also be argued that verifiers acquire their special rights and duties only upon concluding a verification contract with an operator.[1254] As already explained in chapter 4,[1255] doubts can be raised whether rights and duties acquired by contract should be considered 'special' within the meaning of §2 (2) (1) of the Federal Environmental Information Act, since everyone could acquire such rights and duties by concluding a contract in that regard. This would mean that verifiers are not under the control of a public authority pursuant to the Federal Environmental Information Act. Consequently, they would not be considered to be public authorities which would mean that they are not bound by the Federal Environmental Information Act, and also not under an obligation to disclose environmental information upon request.

It has become clear that the question whether verifiers are public authorities, particularly the question whether they are under the control of a public authority, is a difficult question to answer. When solely looking at the definition of 'under control' as set out in the Federal Environmental Information Act, it seems that verifiers are not under the control and consequently do not constitute public authorities. However, when taking into account that (1) it was tentatively concluded in chapter 4 that verifiers may be considered to be under the control pursuant to the Environmental Information Directive and (2) that national law should be, as much as possible, interpreted in line with the EU legislation it is implementing, it is possible to interpret the Federal Environmental Information Act in such a way that verifiers can be

[1254] For example, a verifier cannot simply come to any operator's premises and carry out a site visit.
[1255] See chapter 4, section 3.2.

considered to be under the control of a public authority. However, this conclusion should be taken with a grain of salt, as there is no guarantee. There is no guarantee that the CJEU will consider the Accreditation and Verification Regulation to constitute a 'particularly precise' legal framework or that German courts would interpret the Federal Environmental Information Act in this way. The main take-away should be that there is a way to interpret German law, so that verifiers constitute public authorities. It is strongly recommended that if this issue was tabled before a German court, a preliminary question would be submitted to the CJEU for clarification. Alternatively, the German court could also interpret German law consistently with the Environmental Information Directive. However, a preliminary ruling by the CJEU would be preferable, as it would provide more certainty and be applicable EU-wide.

5.3. The definition of 'public authority' in the UK EIR

5.3.1. Public authorities according to the EIR and their interpretation

The Environmental Information Regulations set out four categories of public authorities: (1) government departments, (2) any other body listed in Schedule 1 to the Freedom of Information Act, (3) any other body or person that carries out public administrative functions and (4) any other body or person that is under the control of a person within (1), (2) or (3) and has public responsibilities, public functions or provides public services that relate to the environment. As was explained in the previous chapter,[1256] the verifier is clearly not a governmental authority. Moreover, verifiers are also not listed in Schedule 1 to the Freedom of Information Act. Therefore, verifiers may only constitute public authorities pursuant to category (3) or (4). By now, it has become clear that concerning the question whether the verifier is a public authority because it carries out public administrative functions, the crucial element is the definition of the term 'administrative'. Alternatively, the verifier may also constitute a public authority where it has public functions that relate to the environment and is under the control of a public authority (4). With regard to this category, the most contentious element has been the definition of the phrase 'under control'. Hence, this section will focus on these two elements.

[1256] See chapter 4, section 3.

5.3.2. Bodies or person carrying out functions of public administration

As explained in chapter 2, the term 'functions of public administration' was interpreted by the CJEU in *Fish Legal*. The case arose due to a request for a preliminary ruling from the UK Upper Tribunal, which dealing with the question whether certain water companies were public authorities according to the Environmental Information Regulations. The CJEU explained that when examining whether a natural or legal person performs public administrative functions, 'it should be examined whether those entities are vested, under national law which is applicable to them, with special powers beyond those which result from the normal rules applicable to relations between persons governed by private law.'[1257] Subsequently, the Upper Tribunal applied the guidance by the CJEU to the case before it and developed what it called the 'special powers test'.[1258] It set out that, pursuant to the CJEU's judgment, national courts need to compare the powers that have been conferred on the body in question and the powers that result from the rules of private law.[1259] In that regard, the essential question is whether a body's powers confer on it a practical advantage relative to the rules of private law.[1260] In this context, the term 'powers' is very broadly understood as 'the ability to do something that is conferred by law.'[1261]

To determine whether a body's powers give it a practical advantage relative to the powers of private law, it is necessary to understand what the rules of private law are. As an example, the Upper Tribunal referred to the rules of contract and property. Under private law, parties can, within certain limitations, shape their contracts according to their wishes and 'choose which rights of property to create from those recognised by law.'[1262] This includes the power to refuse, to engage or to agree. Thus, in essence private law is based on consent of the parties involved. In the case before it, the Upper Tribunal found that the water companies had special powers including the power to access private property not owned by them without the consent of the owner[1263] and the power to prohibit the use of water for watering private gardens or washing private cars.[1264] Thus, on a more abstract level, 'special powers' seem to be powers

[1257] *Fish Legal* (n 157) para 56.
[1258] *Fish Legal v Information Commissioner, United Utilities plc, Yorkshire Water Services Ltd and the Secretary of State for the Environment, Food and Rural Affairs* [2015] Upper Tribunal GIA/0979/2011 para 102.
[1259] ibid para 119.
[1260] ibid para 106.
[1261] ibid para 104.
[1262] ibid para 121.
[1263] ibid para 125.
[1264] ibid para 126.

that allow a party to do something unilaterally for which under the normal rules applicable in relations between persons of private law the consent of the other party would be required.

In light of this, the question concerning verifiers is whether they can use the powers linked to the verification of emissions reports without the consent of the operator. Several provisions of the Accreditation and Verification Regulation indicate that there is a contract between the verifier and the operator. Article 8 is titled 'Pre-contractual obligations' and sets out the verifiers' obligations before accepting a 'verification engagement'.[1265] Article 9 sets out that the 'verification contract' must contain the arrangements for charges for additional time in case the time originally allocated to verification is insufficient.[1266] Finally, Article 11 stipulates that the verifier shall collect and review information to assess whether the time allocation indicated in the verification contract is correct.[1267] In light of this, it is clear that the operator hires a verifier by means of a contract in which the rights and duties of the two parties are laid out.

The Accreditation and Verification Regulation sets out the powers of a verifier, which include, for example, the power to perform a site visit on the operator's premises. One the one hand, it could be argued that this is not comparable to the power to access property to which the Upper Tribunal referred to in *Fish Legal*,[1268] since the verifier only acquires the power to perform a site visit, or any of the verification activities for that matter, upon the conclusion of the verification contract. This would suggest that the verifier does not have 'special powers that go beyond those which result from the normal rules applicable in relations between persons governed by private law.'[1269] Following this line of argumentation would mean that verifiers are not bodies performing functions of public administration and are not public authorities pursuant to regulation 2 (2) (c) of the Environmental Information Regulations.

On the other hand, one could also zoom out and, instead of looking at a single verifier, look at all verifiers as an entity. Since operators are obliged to have their emissions reports verified, they must necessarily contract with a verifier. Therefore, if we look at all verifiers as a group, that group has 'special powers that go beyond those which result from the normal rules applicable in relations between persons governed by private law', since it is guaranteed that one of the verifiers will be contracted. If this line of argumentation was followed, verifiers would be bodies performing public administrative functions and therefore constitute public authorities within the meaning of the Environmental Information Regulations.

[1265] Commission Regulation (EU) No 600/2012 Article 8 (1).
[1266] ibid Article 9 (2).
[1267] ibid Article 11 (2).
[1268] *Fish Legal (UK)* (n 1258) para 125.
[1269] *Fish Legal* (n 157) para 56.

It is hard, if not impossible, to predict, which line of argument a British court would follow if such a case would be brought before it, since there is no case law apart from *Fish Legal*.[1270] However, it is interesting to see that there is an interpretation of British law that would mean that verifiers have public administrative tasks. As with the analysis based on the Environmental Information Directive in chapter 4,[1271] none of the possible interpretations is clearly more convincing than the other. Consequently, the question whether verifiers are bodies carrying out public administrative tasks cannot be answered with certainty. As already mentioned in the context of the discussion of German law,[1272] ultimately a preliminary ruling of the CJEU would have been necessary. However, following Brexit, British court cannot submit preliminary questions to the CJEU anymore and the UK is not participating in the EU ETS anymore.[1273] However, a finding of the Aarhus Convention Compliance Committee might shed some light on this issue.

5.3.3. Bodies under the control of a public authority

Similar to the Environmental Information Directive, the Environmental Information Regulations state that bodies or persons that are under the control of a public authority and have public tasks relating to the environment are public authorities. As already explained before,[1274] the crucial question is whether verifiers can be considered to be under the control of a public authority, since it is relatively likely that verification is a public task relating to the environment. Therefore, in this section, it will only be examined whether the verifier can be considered to be under the control of a public authority within the meaning of the Environmental Information Regulations. Despite the fact that the UK is not bound by the Environmental Information Directive and its interpretation by the CJEU since Brexit has been concluded, they can still serve as a means of interpretation for the (not yet amended) law examined in this study. The Environmental Information Directive implements the first pillar of the Aarhus Convention and the CJEU's judgments are highly influential in the area of access to environmental information.

[1270] *Fish Legal* (n 157).
[1271] See chapter 4, section 3.2.
[1272] See section 5.2.2. of this chapter.
[1273] However, as explained in section 3.2. of this chapter, the UK will set up its own ETS that greatly resembles the EU ETS and also comprises a compliance cycle, including verifiers.
[1274] See chapter 4, section 3.4 and chapter 5, section 4.1.

To recall, according to the CJEU an entity is under the control of a public authority, where it 'does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority […] is in a position to exert decisive influence on the entity in that field.'[1275] Based on this guidance, the Upper Tribunal set out a test to check whether an entity is under the control of another public authority concluding that this 'test is a demanding one that few commercial enterprises will satisfy.'[1276] According to the Upper Tribunal, a distinction must be made between 'the functions that a body performs and the manner in which it performs them.'[1277] One difficulty with the control test is that influence may be exercised in very subtle ways. Already the 'existence of power [to exert influence] may be sufficient to direct the manner in which a [body] performs its functions', without it being necessary that influence has actually been actively exercised.[1278] Nevertheless, the Upper Tribunal points out that it does not suffice to show that there is the potential for influence. Instead, there needs to be an actual impact on the body's decision-making.[1279] Elaborating on the degree of influence, the Upper Tribunal pointed out that it is not enough to show that the body in question is not autonomous in a couple of marginal aspects. Contrary, it is neither necessary that it is completely autonomous in every aspect of their business.[1280] In other words, 'being subject to a degree of influence is not incompatible with a [body] having genuine autonomy in its decision-making.'[1281] Thus, 'autonomy has to be judged not by reference to absolute liberty, but against the normal background radiation of the constraints that limit the freedom of action for every business.'[1282]

Consequently, as the Information Commissioner points out, the control test would not be satisfied where a public authority merely regulates a body, instead it must control how this body performs its functions in practice.'[1283] This suggests that a body is not a public authority, only because it is subject to a regulatory framework. Many sectors are regulated quite heavily, and individual businesses can even be shut down for violating the regulatory framework. However, where public authorities or regulators do not have any impact on the way the companies comply with the rules of the regulatory framework, the control test would not be

[1275] *Fish Legal* (n 157) para 68.
[1276] *Fish Legal (UK)* (n 1258) para 155.
[1277] ibid para 133.
[1278] ibid para 135.
[1279] ibid.
[1280] ibid 135.
[1281] ibid para 144.
[1282] ibid para 141.
[1283] Information Commissioner's Office, 'Public Authorities under the EIR' para 27.

satisfied.[1284] Even if a public authority can adopt regulations that require a body to take a specific line of action, the control test would not be satisfied. The body in question needs to be under the control of the public authority 'at all times in respect of its public functions, not just when the business is failing to perform them appropriately.'[1285]

This interpretation by the Information Commissioner is quite interesting. It seems to go against the interpretation of 'control' by the CJEU who determined that where a company is subject to a specific system of regulation that 'involves a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to environmental management with which they are entrusted […] it may follow that those entities do not have genuine autonomy vis-à-vis the state, even if the latter is [not] in a position […] to determine their day-today management.'[1286] It should however be noted that the decisions by the Information Commissioner do not set precedent and can be challenged in court.[1287] Thus, while they can be a useful source to consult when interpreting access to information laws, they should not be taken as an absolute truth. Moreover, the Upper Tribunal has interpreted the guidance by the CJEU as meaning that it is not necessary that the control impacts the performance of the functions 'at the lowest level of day-to-day management.'[1288]

Similarly to the German Federal Environmental Information Act discussed previously,[1289] it appears that the definition of control, as set out in the Environmental Information Regulations and interpreted by the courts and the Information Commissioner, is narrower than the definition set out in the Environmental Information Directive and its interpretation by the CEJU. While, pursuant to the Environmental Information Directive, an entity is considered to be under the control of a public authority where it is subject to a particularly tight legal framework, this is not the case pursuant to the Environmental Information Regulations. In chapter 4,[1290] it was concluded that verifiers are not directly controlled by another public authority but that the legislative framework governing verifiers could be considered particularly tight, so that verifiers could be considered to be under the control of a public authority. Thus, similarly to the discussion of the element of control as set out in the German Federal Environmental Information Act, the question is whether the Environmental Information Regulations and their

[1284] ibid para 31.
[1285] ibid para 32.
[1286] *Fish Legal (UK)* (n 1258) para 70 f.
[1287] The Environmental Information Regulations (n 1126) regulation 57 (1) & (2).
[1288] *Fish Legal (UK)* (n 1258) para 133.
[1289] See section 5.2.3. of this chapter.
[1290] See chapter 4, section 3.3.

interpretation by the British courts can be interpreted in a way that is consistent with the Environmental Information Directive and its interpretation by the CJEU.

According to the Upper Tribunal, the decisive element is 'whether in practice the companies operate in a genuinely autonomous manner in the provision of the services that relate to the environment.'[1291] This interpretation of the term control seems compatible with the CJEU's views that an entity can be considered to be under the control of a public authority where it is subject to 'a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to [the environment] with which they are entrusted.'[1292]

As already stated before,[1293] thus far, there has not been any judgment in which the CJEU specifies when a legal framework can be considered particularly precise. Moreover, British courts have not used this argument in the context of determining whether an entity is under the control of a public authority pursuant to the Environmental Information Regulations. In chapter 4,[1294] some arguments why the Accreditation and Verification Regulation may be considered to constitute such a 'particularly tight legal framework' were already discussed and they will not be repeated here. To properly determine whether the legislation regulating the verifier can be considered to constitute such a particularly tight legal framework, more guidance by the CJEU would be required, however, following Brexit, British courts are no longer in a position to submit preliminary questions to the CJEU. Nevertheless, in the context of the question whether the verifiers can be considered to be under the control pursuant to the Environmental Information Regulations, it can be concluded that it seems that the criterion of 'a particularly tight legal framework' is compatible with the definition of control as set out in the Environmental Information Regulations. Thus, if the arguments supporting that the Accreditation and Verification Regulation is a particularly tight legal framework were accepted, verifiers could be considered as being under the control of a public authority. Consequently, they would constitute public authorities pursuant to the Environmental Information Regulations, since it was already established that their service (verification of emissions reports) is a public service that relates to the environment. This would mean that they were under an obligation to disclose environmental information upon request.

[1291] *Fish Legal (UK)* (n 1258) para 136.
[1292] *Fish Legal* (n 157) para 71.
[1293] See chapter 4, section 3.3.
[1294] See chapter 4, section 3.3.

However, as already stated in the context of the discussion whether verifiers can be considered to be under control pursuant the German Federal Environmental Information Act, it needs to be stressed that this is a speculative conclusion, since there is very little guidance on this issue by the CJEU. Again, the main take-away from this section should be that the definition of control as set out in the Environmental Information Regulations can be interpreted consistently with the Environmental Information Directive. More guidance by the CJEU would be necessary in this regard. At the same time, it should be recalled that since the United Kingdom has left the EU, it is no longer bound by the judgments of the CJEU.

5.4. Reflections on the verifier as public authority

In this section, it has been analysed whether the verifier constitutes a public authority pursuant to the German Federal Environmental Information Act and the English Environmental Information Regulations. The analysis in chapter 4,[1295] had shown that it is unlikely that verifiers perform public administrative functions, within the meaning of the Environmental Information Directive. In the current section, the same conclusion has been reached concerning the national law of Germany and the United Kingdom. With regard to the Federal Environmental Information Act, it has been shown that the crucial question is whether an entity is an entrusted body. The analysis in this chapter has shown that it appears unlikely that this is the case for the verifier. Concerning the English Environmental Information Regulations, the crucial element is whether the entity in question has special powers that go beyond those which result from the normal rules applicable in relations between persons governed by private law. There are strong arguments why the verifier's power ought not to be seen as such special powers. The main reason is that the fact that verifiers only acquire their powers upon concluding a verification contract with an operator. However, there are also arguments supporting the view that verifiers' powers are special powers. Nevertheless, it seems rather unlikely that verifiers constitute public authorities pursuant to this category; however, it is not completely excluded.

It seems more likely that verifiers constitute public authorities pursuant to the third category of public authorities. It had already been established in chapter 4 that it is very likely that verification is a public task that relates to the environment according to the Environmental

[1295] See chapter 4, section 3.2.

Information Directive.[1296] Therefore, the analysis in this section has focused on the most interesting element of the analysis whether verifiers constitute public authorities: are verifiers under the control of a public authority. When analysing the Environmental Information Directive in chapter 4, it was explained that the CJEU considers an entity to be under the control of a public authority where, it is subject to a particularly tight legal framework.

The fact that the German Federal Environmental Information Act sets out an exhaustive definition of control which does not mention that being subject to a particularly tight legal framework can mean that the body in question is under the control of a public authority, seems to suggest that German law is narrower than the interpretation of the Environmental Information Directive by the CJEU. However, it was concluded that it is possible to interpret the German Federal Environmental Information Act in a way, so that verifiers can be considered to be under the control of a public authority. Compared to the definition set out in the German Federal Environmental Information Act, the definition in the British Environmental Information Regulation allows more room for interpretation, since it is not an exhaustive definition. Therefore, if the legislation governing verification of emissions reports was interpreted as constituting a particularly precise legal framework according to the Environmental Information Directive, it should be possible to interpret the Environmental Information Regulations in the same way.

However, this is a very tentative conclusion, as it remains to be seen (1) whether the CJEU would consider the legislation regulating verifiers (mainly the Accreditation and Verification Regulation) as a particularly tight legal framework and (2) whether German and British courts interpret their national law in a way so that verifiers can be considered to be under the control of a public authority. A judgment by the CJEU clarifying the definition of public authorities, in particular the definition of control is therefore necessary. Such a judgment could also clarify what criteria must be fulfilled so that a legal framework is considered 'particularly precise'. For now, it can only be concluded that both the German Federal Environmental Information Act and the English Environmental Information Regulations can be interpreted in a way that would result in verifiers being considered to be under the control of a public authority, which would mean that they are public authorities and would have to disclose environmental information, unless one of the grounds of refusal applies.

[1296] See chapter 4, section 3.3.

6. The grounds of refusal under national law

6.1. Introduction

Having established that the relevant information most likely qualifies as environmental information and that verifiers may constitute public authorities, it is necessary to examine whether a public authority may rely on any of the exceptions to refuse a request for the relevant information. In chapter 2,[1297] the relevant grounds of refusal, as set out in the Aarhus Convention and the Environmental Information Directive, were discussed. Given the focus of this thesis (information related to compliance with the EU ETS), not all grounds of refusal were discussed in detail, since, with regard to some of them, it seemed unlikely that they apply to such information. The discussion in chapter 4,[1298] focussed on the following grounds of refusal: the public authority does not hold the information, the request is manifestly unreasonable, the request is formulated in too general a manner, the request concerns internal communications of public authorities and disclosure of the requested information would adversely affect the confidentiality of proceedings of public authorities, the course of justice, the confidentiality of commercial and industrial information, intellectual property and personal data.

In chapter 4,[1299] it was analysed whether public authorities that hold information that would be relevant for the public to check compliance with the EU ETS could rely on the grounds of refusal as set out in the Environmental Information Directive to refuse requests for the relevant information. One conclusion of that analysis was that it seems unlikely that the access to the relevant information could be refused based on the ground that the request is manifestly unreasonable or that the request concerns internal communication of a public authority. Furthermore, it has become clear that access to much of the relevant information relating to verification may be refused based on the argument that disclosure of this information would have adverse effects on the confidentiality of commercial and industrial information. Concerning the ground of refusal protecting personal data, it has been shown that parts of the relevant information definitely contain personal data. However, it has been concluded that this should not result in a refusal of the entire document in question, since personal data can be easily separated from the remaining document by redacting it. Therefore, it should be possible to disclose the rest of the information.

[1297] See chapter 2, section 2.6.
[1298] See chapter 4, section 4.
[1299] See chapter 4, section 4.

However, with regard to other grounds of refusal, such as the grounds of refusal protecting the course of justice and intellectual property rights, it was impossible to determine whether public authorities can rely on them to refuse access to the relevant information, since it could not be determined for a certain type of document, such as the internal verification documentation, whether its disclosure could have adverse effects on the course of justice or intellectual property rights in general. Instead, it depends on the specific circumstances of each case whether disclosure could cause negative effects. Moreover, there are grounds of refusal, such as the confidentiality of the proceedings of public authorities, concerning which it was not possible to determine whether they could be used to refuse access to the relevant information. Part of the reason is that there has not been any case law at EU level on this ground of refusal. Therefore, it largely depends on how this ground of refusal is applied at the national level and how national courts have interpreted it.[1300]

In light of these findings and the uncertainty that remains with regard to some of the grounds of refusal, this section analyses how they have been implemented and are applied at the national level. This analysis will not consider all of the grounds of refusal examined in the previous chapter. Since it was already determined that it is unlikely that requests for the relevant information could be refused based on the ground that the request is manifestly unreasonable or that it concerns internal communications of a public authority, the implementation and application of those grounds of refusal at the national level will not be examined. Further, the grounds of refusal protecting the course of justice and intellectual property rights will not be discussed in more detail in this section, as it depends on the specific circumstances of each individual case whether disclosure of the information in question may have adverse effects on the course of justice or intellectual property rights. However, it is impossible to determine whether the relevant information, in general, may have such an effect. Instead, this section will focus on those grounds of refusal regarding which uncertainty persists. In particular, it will be examined how Germany and England have implemented and how public authorities in those two countries are applying the following grounds of refusal: the confidentiality of proceedings of public authorities and the confidentiality of commercial and industrial information.

[1300] This is another example of administrative discretion that national authorities enjoy.

6.2. The grounds of refusal in the German UIG

6.2.1. Confidentiality of proceedings of public authorities

The Federal Environmental Information Act sets out that public authorities[1301] may refuse a request for environmental information, if disclosing the information would have adverse effects on the confidentiality of the proceedings of public authorities.[1302] The term proceedings has been interpreted as covering all processes of internal expression of opinions and formation of will that are related to the decision-making process of public authorities.[1303] There is no consensus in the literature whether this ground of refusal is intended to protect the deliberations within a single public authority or between several public authorities, or both.[1304] However, given that several public authorities might be involved in a certain decision-making process, it would seem counterintuitive if this ground of refusal allowed a request to be refused if only one public authority is involved but not if more than one public authority is involved. Consequently, this ground of refusal would cover consultations within a single public authority and between several public authorities.[1305] However, purely factual statements, such as expert assessments, are not covered by this ground of refusal.[1306]

The Federal Administrative Courts points out that the decisive factor in determining whether access to environmental information may be refused based on this ground is whether the fact that information could be disclosed to the public has the potential to affect the willingness of individuals that are part of the public authority involved in the decision-making process to voice their opinions.[1307] Therefore, the possibility to refuse access to environmental information does not cease with the end of the decision-making process.[1308] However, the fact that the decision-making process has ended and the time that has passed since are part of the criteria that need to be taken into account by a public authority when considering whether it is

[1301] Including private entities carrying out public administrative tasks and private entities carrying out public tasks relating to the environment that are under the control of a public authority.
[1302] Umweltinformationsgesetz (n 422) §8 (1) (2).
[1303] Götze and Engel (n 146) 161; Reidt and Schiller (n 146) §8 UIG, para 21.
[1304] Götze and Engel (n 146) 161 suggest that this ground of refusal protects both deliberations within a single public authority as well as deliberations between several public authorities; Reidt and Schiller (n 146) §8 UIG, para 20; Karg (n 146) para 33 suggest that this ground of refusal only applies to deliberations within a single public authority.
[1305] Thus, if the verifier is considered to be a public authority, also consultations between the national authority responsible for administering the EU ETS and verifiers.
[1306] *Anspruch auf Informationen nach dem Umweltinformationsgesetz* [1998] Oberverwaltungsgericht Schleswig 4 L 139–98, 18:6 Neue Zeitschrift für Verwaltungsrecht.
[1307] *BVerwG 7 C 712* (Bundesverwaltungsgericht) para 29 The CJEU has not yet touched upon this issue.
[1308] ibid para 28.

appropriate to refuse access to environmental information based on this ground of refusal.[1309] In that regard, Götze and Engel observe that, in light of the obligation to interpret the grounds of refusal restrictively, it seems that after the end of a decision-making procedure, access to environmental information can only be refused based on this ground in exceptional circumstances.[1310]

In light of this, given that this thesis examines access to information related to compliance with the EU ETS from the year 2017, it seems highly unlikely that this ground of refusal may be relied upon to refuse the relevant information. However, if this was not the case, it should be examined (1) whether any of the relevant information includes opinions and or views (as opposed to being just factual information), (2) whether it is part of a deliberations process of a public authority and (3) whether individuals involved in the decision-making process would refrain from voicing their opinions due to the fact that they know that their view might be disclosed to the public at a later stage.

Finally, it is interesting to note that Götze and Engel observe that, given the provision's heading (protection of public concerns), it appears that this ground of refusal may only be relied upon by governmental bodies and bodies of public administration but only to a very limited extent by private natural or legal persons that qualify as public authorities pursuant to the Federal Environmental Act.[1311] Since, it has been concluded in section 4 that it is very unlikely that the verifier is regarded as a 'public administrative body' under German law, this would mean that verifiers could not rely on this ground of refusal, if they constituted public authorities, which would broaden access to environmental information.

6.2.2. Commercial and industrial information

The Federal Environmental Information Act provides that a request for environmental information must be refused where granting the request would mean that trade and business secrets would be disclosed.[1312] The Gesetz zum Schutz von Geschäftsgeheimnissen[1313] (Act on the Protection of Business Secrets) regulates the confidentiality of trade secrets in more detail.

[1309] ibid para 30.
[1310] Götze and Engel (n 146) 162.
[1311] ibid 163.
[1312] Umweltinformationsgesetz (n 422) §9 (1) (3).
[1313] Gesetz zur Umsetzung der Richtlinie (EU) 2016/943 zum Schutz von Geschäftsgeheimnissen vor rechtswidrigem Erwerb sowie rechtswidriger Nutzung und Offenlegung 2019.

In principle, trade and business secrets may not be disclosed, unless disclosure is provided by law (e.g. the Federal Environmental Information Act[1314]).[1315] A piece of information constitutes a trade secret where it fulfils five cumulative criteria, which will be discussed in more detail in this section. First, it may not be generally known or easily accessible to people that usually come into contact with the kind of information in question. Second, the information must have economic value. Third, it is information that is protected by adequate measures to keep it confidential. Fourth, there must be a justified interest in keeping the information confidential.[1316] A fifth criterion is not explicitly mentioned but is implied in the term *business* secrets, i.e., the information must relate to an undertaking.

The Federal Environmental Information Act sets out that before a public authority takes the decision whether to disclose information that might be commercial or industrial information protected by confidentiality, it must hear the undertaking concerned.[1317] The Act specifies that an undertaking should be regarded as being concerned, where it has designated information that it submitted to the public authority as confidential.[1318] However, the fact that an undertaking has designated information as being confidential does not mean that the information is automatically protected by the ground of refusal and will not be disclosed. Even where the undertaking in question designates the information in question as confidential, the conditions for the ground of refusal set out above must still be fulfilled.[1319] Concerning the ground of refusal set out in the Federal Environmental Information Act, the Federal Administrative Court has decided that it is not necessary that the requested information itself is a business or industrial secret but that it is already sufficient that the requested information allows drawing inferences on business and industrial secrets.[1320] However, it is contested how strong the link between the information in question needs to be.[1321] It has been argued that the threshold which must be reached is that the undertaking in question is able to demonstrate that the disclosure of the requested information is going to have adverse effects on competition and entails the disclosure of commercial and industrial secrets.[1322] Although the burden of proof is

[1314] Reinfeld (n 991) 69.
[1315] Gesetz zur Umsetzung der Richtlinie (EU) 2016/943 zum Schutz von Geschäftsgeheimnissen vor rechtswidrigem Erwerb sowie rechtswidriger Nutzung und Offenlegung (n 1313) §§3 & 4.
[1316] ibid §2 (1).
[1317] Umweltinformationsgesetz (n 422) §9 (1), second sentence.
[1318] ibid § 9 (1), third sentence.
[1319] Götze and Engel (n 146) 196.
[1320] *7 C 2 09* (Bundesverwaltungsgericht) para 55; Götze and Engel (n 146) 196; Reidt and Schiller (n 146) §9 UIG, para 24.
[1321] Ramsauer (n 1214) 417.
[1322] Götze and Engel (n 146) 196.

on the undertaking, it is not necessary that it can demonstrate with absolute certainty that there will be an effect on competition and that commercial and industrial secrets will be revealed. Since it is a prediction, there is always a certain degree of uncertainty involved.[1323]

The criterion that the information is not generally known or easily accessible to people that usually come into contact with this kind of information deserves some further clarification. Information is generally known where the average member of the professional circle in question possesses the information or where it is known to the public at large.[1324] Information is easily accessible where the professional circles in question can access the information without significant hurdles, for example by accessing public registers or by reading research publications.[1325] However, where people in the relevant professional circles can access the information only with a significant investment of time, effort, costs and/or skill, the information is not deemed easily accessible.[1326] The circle of people that the provision refers to must be determined on a case-by-case basis. If the information was of a rather technical nature, the circle of people that the provision refers to would be the average professional circle in the area in question.[1327]

With regard to the information that would be relevant for checking compliance with the EU ETS, it has already been determined in chapter 3[1328] that none of it is known to the public at large; otherwise, it would not be necessary to request it from the competent public authority and the verifier. It can also be questioned whether the relevant information can be considered easily accessible. It is unknown whether an average member of the respective professional circle could easily access the relevant information. It is not even clear what the respective professional circle is. One could argue that the respective professional circle broadly includes everyone whose work is related to the monitoring, reporting and verification of greenhouse gases. However, it seems unlikely that for example someone who works at a verifying company can easily access the emissions report, the internal verification documentation or the procedures for verification activities held by another verifying company. Therefore, it appears that the relevant information is not generally known within the meaning of the Act on the Protection of Business Secrets.

[1323] ibid; Karg (n 146) §9 UIG, para 25a.
[1324] Helmut Köhler and others, *Gesetz Gegen Den Unlauteren Wettbewerb: UWB Mit GeschGehG, PAnbV, UKlaG, DL-InfoV* (39th edn, 2021) §2, para 27.
[1325] ibid §2, para 28.
[1326] ibid §2, para 37; Reinfeld (n 991) 28 f.
[1327] Köhler and others (n 1324) §2, para 33.
[1328] See chapter 3, section 4.

The next criterion is that the information must have economic value. This is the case where the information has actual or potential value or where the disclosure would have adverse economic effects for the owner of the information. Moreover, it is necessary that there is a link between the economic value and the fact that the information is being kept a secret.[1329] In light of the aims of the Trade Secrets Directive,[1330] which is implemented into German law by the Act on the Protection of Business Secrets, the provision that the information must have economic value must be interpreted broadly. There is not a specific benchmark that has to be reached, which means that even information that only has a low economic value can be protected.[1331] According to the Trade Secrets Directive, the information in question must have actual or potential value.[1332] This is the case where it has a measurable market value. Neither the Trade Secrets Directive, nor the Act on the Protection of Business Secrets provide any indication of how the value of information is determined. A possible indication could be the price that would be paid for the information if it was sold.[1333] Information has potential value where it is expected that it will have a measurable market value. An example is raw data that only becomes valuable where it is processed in a certain way or combined with other data. Moreover, research data can have a potential value, even if it will only be marketed in the future. However, data does not have potential value where its economic processing is unlikely in light of the normal procedures.[1334] Pursuant to the Trade Secrets Directive, the value must be of commercial nature.[1335] That means that information with ideational value is not protected.[1336] In addition, information has economic value where disclosure of the information would have adverse economic effects for the owner of the information. Disclosure could for example adversely affect scientific or technical potential, business or financial interests, strategic position or competitiveness.[1337]

In light of this, there are feasible scenarios in which at least parts of the relevant information has economic value, for example because disclosure could have adverse effects on the business or financial interests, the strategic position or competitiveness. The relevant information is largely information on the operators and their installations. It could be that if such information was disclosed to a competitor (who also enjoy the right to access environmental information),

[1329] Köhler and others (n 1324) §2, para 40; Reinfeld (n 991) 32 f.
[1330] Directive (EU) 2016/943.
[1331] Köhler and others (n 1324) §2, para 41.
[1332] Directive (EU) 2016/943 recital 15.
[1333] Köhler and others (n 1324) §2, para 42.
[1334] ibid §2, para 43; Reinfeld (n 991) 33.
[1335] Directive (EU) 2016/943 Article 2 (1) (b).
[1336] Köhler and others (n 1324) §2, para 32.
[1337] ibid §2, para 33.

this competitor could draw inferences from this information on the mode of production of the operator and would gain a competitive advantage. Thus, it seems that the relevant information does have an economic value, since its disclosure could hurt the financial or business interests of the operator.

The third criterion is that the owner of the information must have in place measures protecting the confidentiality of the information in question. Whether adequate measures that protect the information in question are in place must be assessed on a case-by-case basis. Consequently, it is not possible to determine whether this criterion is fulfilled with regard to the relevant information in general. The different measures of all verifiers, if they exist, aimed at protecting the confidentiality of the confidential information would need to be assessed. However, this would go beyond the scope of this section. Nevertheless, it is still useful to briefly examine the requirements that measures must fulfil in order to be considered adequate.

The most important factor is whether the measures are reasonable from the perspective of the owner of the information. It is not necessary to have in place the highest possible degree of protection.[1338] In contrast, the benchmark of what is an adequate measure should not be excessive, since this would be detrimental to small and medium enterprises that do not have the same financial resources as large companies to put in place protective measures[1339].[1340] The literature recommends a three-tier classification of information into secret information (highest level of protection), important information (mid-level protection) and sensitive information (lowest level of protection).[1341] However, companies are free to differentiate in any way.[1342] Organisational measures include the creation and maintenance of company structures that serve the protection of confidential information and the instruction of employees, as well as monitoring and control of the adherence to protective measures.[1343] Personnel measures comprise not only access restrictions of employees but also their education and sensitisation.[1344] Legal measures can be contractual secrecy obligations. This includes secrecy obligations in employment contracts as well as business-to-business contracts. Moreover,

[1338] ibid §2, para 51; Reinfeld (n 991) 35.
[1339] Protective measures typically encompass the stocktaking and classification of information, organisational, personnel, legal, technical and enforcement measures.
[1340] Köhler and others (n 1324) §2, para 35.
[1341] Matthias Damm and Jochen Markgraf, 'Das Neue Gesetz Zum Schutz von Geschäftsgeheimnissen' [2019] Neue Juristische Wochenschrift 1776; Stefan Maaßen, '„Angemessene Geheimhaltungsmaßnahmen" Für Geschäftsgeheimnisse' [2019] Gewerblicher Rechtsschutz und Urheberrecht 356.
[1342] Köhler and others (n 1324) §2, para 56; Reinfeld (n 991) 35.
[1343] Köhler and others (n 1324) §2, para 58; Reinfeld (n 991) 34, 49.
[1344] Köhler and others (n 1324) §2, para 59.

companies and/or employees may be obliged to comply with codes of conduct.[1345] Technical measures to protect business secrets include access restrictions through passwords and encryptions in case of data or, in case of physical items, a secure storage.[1346] Finally, enforcement measures include all efforts that make it possible to legally enforce an illegal breach of confidentiality, such as digital watermarks.[1347]

The fourth criterion is that there must be a justified interest in keeping the information confidential. This criterion was introduced to prevent companies from declaring random information as business secrets in order to, for example, hinder the efforts of employee representatives or journalists.[1348] Interestingly, it is questionable whether this criterion is compatible with the Trade Secrets Directive, since there is no corresponding provision in the directive.[1349] Only recital 14 states that the definition of business secrets should 'be construed so as to cover know-how, business information and technological information where there is both a legitimate interest in keeping them confidential and a legitimate expectation that such confidentiality will be preserved.'[1350] Provisions that implement Union law may not go against the Union act they implement and must be interpreted in light of that act.[1351] Thus, the criterion that there must be a justified interest in keeping the information confidential must be interpreted in a way so that it is in line with the Trade Secrets Directive as well as the Environmental Information Directive.[1352] The Trade Secrets Directive intends a wide protection of business secrets.[1353] Consequently, the criterion that there must be a justified interest must be interpreted broadly. The opinion of the individual owner of the information in question is not important. Rather, a justified interest is given where there is an economic interest in keeping the information confidential. If the information has an economic value for the owner, usually there will be a justified interest. A legitimate interest is only not present, where in the individual circumstances, there are no plausible, protection-deserving and economically reasonable reasons for keeping the information confidential.[1354] Given that a justified interest in keeping

[1345] ibid §2, paras 60-62; Reinfeld (n 991) 50.
[1346] Köhler and others (n 1324) §2, para 63; Reinfeld (n 991) 49 f.
[1347] Köhler and others (n 1324) §2, para 64.
[1348] ibid §2, para 73; Reinfeld (n 991) 35ff.
[1349] Köhler and others (n 1324) §2, para 74.
[1350] Directive (EU) 2016/943.
[1351] See section 2.3 of this chapter.
[1352] Köhler and others (n 1324) §2, para 76.
[1353] One might think that there is a potential conflict with the Environmental Information Directive because of this. However, the Trade Secrets Directive states that it 'does not affect the application of Union or national rules that require the disclosure of information, including trade secrets, to the public or public authorities. [...] Such rules include, in particular, rules on the disclosure by [...] national apublic authorities of business-related information they hold pursuant to [...] Directive 2003/4/EC.' Directive (EU) 2016/943 recital 11.
[1354] Köhler and others (n 1324) §2, para 77.

the information confidential is given where the information has economic value for the owner, and that it was already established that the relevant information may have an economic value for the operator, it seems likely that the operator can be considered to have a legitimate interest in keeping the relevant information confidential.

With regard to the legitimate interest criterion, it is important to note that it is not fulfilled in case the information in question relates to an illegal activity or status. Formally, such information could fulfil all the criteria to constitute a business secret. It is likely that such information is not generally known or easily accessible. Moreover, the information has economic value since the company would face adverse effects, if it would become public. Therefore, it is also likely that there are measures in place ensuring its confidentiality. Nevertheless, it would be contradictory if the Act on the Protection of Business Secrets would protect information that violate other laws.[1355] For example, a piece of information that indicates a price agreement contrary to competition law is not a protected business secret. It would be counter-productive, if the legal order penalises such price agreements while at the same time it provides protection to information that would reveal them. Such a situation would lead to the absurd situation that someone who discloses information, thereby revealing illegal price agreements, would face sanctions because she violated the confidentiality of the information. Consequently, the actors that made illegal price agreements could claim damages from the person who disclosed the information pursuant to the Act on the Protection of Business Secrets.[1356]

The last criterion is that the information in question must relate to an undertaking. This criterion is fulfilled where the information in question relates to an existing or future business activity.[1357] However, there is no relation to an undertaking where the information owner has a legitimate interest in keeping the information in question confidential but where the information is of a purely private nature and cannot be used in a business context. In principle, information on the private life of a person does not relate to an undertaking. However, where private circumstances are of immediate relevance for business activities, such information can relate to an undertaking. An example of this would be the health of the CEO of a company.[1358] In case of the relevant information, it is clear that it relates to an undertaking, since operators and in most cases, verifiers are commercial undertakings.

[1355] ibid §2, para 79; Reinfeld (n 991) 26.
[1356] Köhler and others (n 1324) §2, para 80; Reinfeld (n 991) 26.
[1357] Köhler and others (n 1324) §2, para 83.
[1358] ibid §2, para 84.

Interestingly, literature suggests that the definition of business secrets should be interpreted broadly.[1359] This seems to stand in sharp contrast to the principle that grounds based on which a request for access environmental information must be interpreted restrictively.[1360] As explained in chapter 4 and discussed in further detail in section 6.4 below, in the context of the public interest test, the public interest served by disclosure must be weighed against the interest served by non-disclosure. However, a broad interpretation of the definition of business secrets would mean that more information potentially comes within the ambit of this concept and could consequently be refused on the ground that its disclosure would have adverse effects on the confidentiality of commercial and industrial information. So far, there has been neither any case law nor any literature on this apparent conflict.

One possible solution to this conflict could be the following. In the hierarchy of norms, international agreements, such as the Aarhus Convention, form a sui generis category and are thus separate from primary and secondary law. As the CJEU has pointed out numerous times, international agreements concluded by the EU prevail over secondary legislation.[1361] Thus, in the hierarchy of norms, the Aarhus Convention ranks higher than the Trade Secrets Directive. Given that the Trade Secrets Directive states that it should not affect the application of legislation that requires the disclosure of information, a solution to the above-described conflict could be that the definition of 'trade secrets' is interpreted broadly only insofar as it does not limit the access to environmental information as prescribed by the Aarhus Convention and legislation implementing it. Nevertheless, a judgment by the CJEU to interpret the interrelationship between these two directives and the relationship between the concept of trade secrets and the ground of refusal protecting commercial and industrial information would be highly beneficial.

[1359] ibid §2, para 13.
[1360] 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 Article 4 (2), confirmed by the CJEU in *Case C-266/09 Stichting Natuur en Milieu* (n 271) para 52; *Case C-71/10 Office of Communications v Information Commissioner* [2011] para 22; *Bayer CropScience and De Bijenstichting* (n 275) para 56.
[1361] See for example *Case C-61/94 Commission v Germany* (n 775) para 52; *Case C-311/04 Algemene Scheeps Agentuur Dordrecht BV v Inspecteur der Belastingdienst - Douanedistrict Rotterdam* [2006] para 25; *Case C-308/06 Intertanko* (n 548) para 42.

6.3. The grounds of refusal in the UK EIR

6.3.1. Confidentiality of proceedings of public authorities

The Environmental Information Regulations set out that public authorities 'may refuse to disclose information [if] its disclosure would adversely affect the confidentiality of the proceedings of […] any […] public authority.'[1362] According to the Information Commissioner, the term 'proceedings' can cover a wide range of actions, but within the meaning of the Environmental Information Regulations, a certain degree of formality is required.[1363] This would mean that the term does not cover every decision or meeting of a public authority but includes inter alia 'formal meetings to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision-making powers; and legal proceedings.'[1364] Gibbons suggests an even narrower interpretation of the term 'proceedings', arguing that the term 'only cover[s] the most formal proceedings of public bodies, such as closed council committee meetings.'[1365]

The Environmental Information Regulations provide that a public authority can only use this ground of refusal if the confidentiality of the particular proceeding in question is stipulated by law.[1366] This part of the provision supports the interpretation that to fall under the term 'proceedings' the activity in question must have a certain degree of formality, thereby preventing public authorities from arbitrarily refusing requests for information by deciding that particular proceedings are confidential.[1367] The Upper Tribunal stressed that it is essential that this exception is not about the confidentiality of the requested information. Instead, the decisive element is whether (a) the proceedings in question are confidential, (b) 'whether the confidentiality of the proceedings [is] provided by law' and (c) whether disclosing the requested information would adversely affect the proceedings in question.[1368]

Concerning the question whether access to the relevant information can be refused based on this ground, it must first be determined what the 'proceedings' in question are. With regard to the greenhouse gas permit, this would be the permitting procedure of the competent public

[1362] The Environmental Information Regulations (n 1126) regulation 12 (5) (d).
[1363] Information Commissioner's Office, 'Confidentiality of Proceedings' para 8.
[1364] ibid.
[1365] Gibbons (n 146) 7.
[1366] The Environmental Information Regulations (n 1126) regulation 12 (5) (d).
[1367] *Chichester District Council v The Information Commissioner and Friel [2012] UKUT 491 (AAC)* (UKUT (AAC)).
[1368] ibid.

authority and with regard to the information related to verification,[1369] the applicable procedure is the verification process. The ensuing question is whether these proceedings are confidential under statute, the common law of confidence or contract. In England, the Environment Agency is responsible for the permitting procedure.[1370] The Environment Act 1995 established the Environment Agency,[1371] but did not set out whether its proceedings or parts thereof shall be confidential. Moreover, the Greenhouse Gas Emissions Trading Scheme Regulations,[1372] which implement the EU ETS Directive into English law do not set out that the permitting procedure is confidential. Thus, it does not seem that there is any statute providing for the confidentiality of the permitting procedure of the Environment Agency. Consequently, it appears that access to the greenhouse gas permit cannot be refused based on this ground of refusal, since the confidentiality of the permitting procedure is not provided by law.

Concerning the verification procedure, it was already concluded in chapter 4[1373] that it seems that, pursuant to the Accreditation and Verification Regulation,[1374] verifiers are obliged to refuse access to the information they obtained throughout the verification process.[1375] However, it has been explained that this provision seems to be in conflict with the Environmental Information Directive. However, this conflict may be resolved by interpreting this provision of the Accreditation and Verification Regulation as meaning that information on verification must be kept confidential in so far as it is not obliged to disclose it by a legislative act, such as the Environmental Information Directive.

[1369] The internal verification documentation, the procedure for verification activities, the verification report and the information provided by the operator to the verifier.
[1370] According to the UK's response to the questionnaire submitted pursuant to Article 21 of the EU ETS Directive, the Environment Agency is the main body dealing administering the EU ETS in the United Kingdom.
[1371] An Act to provide for the establishment of a body corporate to be known as the Environment Agency and a body corporate to be known as the Scottish Environment Protection Agency; to provide for the transfer of functions, property, rights and liabilities to those bodies and for the conferring of other functions on them; to make provision with respect to contaminated land and abandoned mines; to make further provision in relation to National Parks; to make further provision for the control of pollution, the conservation of natural resources and the conservation or enhancement of the environment; to make provision for imposing obligations on certain persons in respect of certain products or materials; to make provision in relation to fisheries; to make provision for certain enactments to bind the Crown; to make provision with respect to the application of certain enactments in relation to the Isles of Scilly; and for connected purposes 1995 s 1 (1).
[1372] The Greenhouse Gas Emissions Trading Scheme Regulations [No. 3038].
[1373] See section 4.4.
[1374] Commission Regulation (EU) No 600/2012 (n 67) Article 40 (3).
[1375] See chapter 4, section 4.4.

6.3.2. Commercial and industrial information

6.3.2.1. Four criteria

The Environmental Information Regulations provide that public authorities can refuse a request for environmental information if disclosure would adversely 'affect the confidentiality of commercial and industrial information where such confidentiality is provided by law to protect a legitimate economic interest.'[1376] The Information Tribunal has established a four criteria test to determine whether these conditions are fulfilled. (1) The information in question must be of commercial or industrial nature, (2) its confidentiality must be provided by law, (3) the confidentiality protects a 'legitimate economic interest' and (4) disclosing the information would have adverse effects on the confidentiality.[1377] It is interesting to see that these criteria overlap, to a certain extent, with the criteria set out under German law. In both jurisdictions, the information must be of a commercial nature or have economic value and there must be a justified interest in keeping the information confidential. However, the second criterion under English law (confidentiality must be provided by law) is narrower than what is required by German law (the information may not be generally known and there must be adequate measures in place to keep it confidential).

6.3.2.2. Commercial and industrial information

Information is of commercial or industrial nature where it relates to the sale or purchase of goods and services (commercial) or where it relates to the methods of production or raw materials (industrial).[1378] The greenhouse gas permit (which includes the monitoring plan)

[1376] The Environmental Information Regulations (n 1126) regulation 12 (5) (e).
[1377] *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* [2010] First-Tier Tribunal EA/2010/0012 para 8.
[1378] Charles Brasted, 'Freedom of Information: Commercially Sensitive Information' paras 15-17 <https://uk.westlaw.com/Document/I71355A70363711E3A992EF40A40CDEE4/View/FullText.html?listPageSource=185ca0ab1e13008fe9825e4524cea5bc&navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa5000001781783ba6ca992d584%3Fppcid%3D90978aabb06e462dac01f7d6e7d2e59b%26Nav%3DRESEARCH_COMBINED_WLUK%26fragmentIdentifier%3DI71355A70363711E3A992EF40A40CDEE4%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&list=RESEARCH_COMBINED_WLUK&rank=1&sessionScopeId=9c7eb54e372e29efe62720e3a33a5a2c3e4a703b99e788cc337d668a29d866fa&ppcid=90978aabb06e462dac01f7d6e7d2e59b&originationContext=Search%20Result&transitionType=SearchItem&contextData=(sc.Search)> accessed 9 March 2021.

mainly sets out the monitoring and reporting obligations of the operator. This information does not seem to fit the definition of commercial and industrial information. However, the permit also contains a description of the activities and emissions from the installations.[1379] Since the activities that fall within the ambit of the EU ETS are almost all related to the production of goods and service,[1380] it seems that this part of the greenhouse gas permit constitutes commercial or industrial information. The emissions report seems to be a similar case.[1381] A large part of the information contained therein does not seem to qualify as commercial or industrial information, as it relates neither to the production of goods and services, nor to the methods of production or raw materials. However, the emissions report[1382] contains some information that may qualify as industrial information, such as the activity data, carbon content of source streams, biomass combusted and amounts and energy content of bio liquids and biofuels combusted.[1383] Concerning the relevant information related to verification (the internal verification documentation, the procedures for verification activities and the information that the operator has provided to the verifier) it is clear that it is detailed information on the verification. The verification of emissions reports is a service provided by the verifier to the operator for which the verifier is remunerated by the operator. Thus, information on the verification relates to the provision of services. Thus, it seems that a part of the relevant information constitutes commercial or industrial information.

6.3.2.3. Confidentiality is provided by law

The second criterion is that the confidentiality of the information in question must be provided by law. The confidentiality can either be provided by statute, derived by the common

[1379] The Greenhouse Gas Emissions Trading Scheme Regulations (n 1372) Schedule 4, section 2 (c); 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 Article 6 (2) (b).
[1380] 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 Annex I.
[1381] To recall, the emissions report is a special case, since the Monitoring and Reporting Regulation allows the operator to indicate which parts it considers to be confidential. Nevertheless, the public authority must still check whether the indicated parts actually constitute confidential information.
[1382] In chapter 3, section 5, it was argued that the wording of the EU ETS Directive suggests that the emissions report should be actively disclosed. However, it does not appear that the competent public authorities actively disclose the emissions report in practice.
[1383] Commission Regulation (EU) No 601/2012 Annex X; Commission Implementing Regulation (EU) 2018/2066 Annex X.

law of confidence, or set out in a contract.[1384] Chapter 1 of the Greenhouse Gas Emissions Trading Scheme Regulations regulates the greenhouse gas permit.[1385] Neither the provisions of the Greenhouse Gas Emissions Trading Scheme Regulations, nor the corresponding provisions in the EU ETS Directive set out that the greenhouse gas permit is to be treated confidentially. With regard to the emissions report, as has been explained in chapter 4,[1386] the Monitoring and Reporting Regulation sets out that when submitting their emissions reports to the competent authority, operators may indicate which parts they consider to constitute commercial and industrial information and which consequently should be treated as confidential.[1387] However, it was concluded[1388] that the public authority would still need to check whether the information is actually protected by confidentiality, in order to prevent operators from marking everything as confidential, thereby preventing the public from accessing the emissions report. Nonetheless, as will become clear below, the fact that the operator has the opportunity to mark information as constituting confidential commercial and industrial information could be important in the context of the common law of confidence. Finally, concerning the information related to verification, the Accreditation and Verification Regulation sets out that 'verifiers shall safeguard the confidentiality of information obtained during the verification.'[1389] As already pointed out in chapter 4,[1390] there are doubts whether this provision is fully in line with the EU ETS Directive and the Environmental Information Directive. It was proposed that one possible solution that could reconcile Article 41 (3) of the Accreditation and Verification Regulation with the Environmental Information Directive could be that a verifier must safeguard the confidentiality of information obtained during the verification procedure, in so far as it is not obliged to disclose it by a legislative act, such as the Environmental Information Directive. In the context of this section, this could mean that Article 41 (3) provides for the confidentiality of the information related to verification. However, this confidentiality is not absolute and must be weighed against the public interest in disclosure, where the information in question is requested.[1391]

[1384] Brasted (n 1378) para 58.
[1385] The Greenhouse Gas Emissions Trading Scheme Regulations (n 1372) regulations 9-14.
[1386] Section 4.6.
[1387] Commission Regulation (EU) No 601/2012 Article 71; Commission Implementing Regulation (EU) 2018/2066 Article 71.
[1388] See chapter 4, section 4.6.
[1389] Commission Regulation (EU) No 600/2012 Article 41 (3); Commission Implementing Regulation (EU) 2018/2067 Article 42 (3).
[1390] See chapter 4, section 4.6.3.
[1391] See section 6.4. of this chapter.

As pointed out above, confidentiality may also be provided by the common law of confidence. Thus, the question is whether the information whose confidentiality is not provided by statute – the greenhouse gas permit - or with regard to which it is at least questionable whether it is – the emissions report - is protected by the common law of confidence. The law of confidence was defined by the High Court of Justice in *Coco v A.N. Clark (Engineers) Limited*.[1392] In this case, the High Court set out that two elements are required for a breach of confidence. First, the information must have the necessary quality of confidence, which means essentially that the information may not be publicly known.[1393] Second, the information must have been imparted in circumstances importing an obligation of confidence. The High Court explained that the 'reasonable man' test should be applied. This means that where the average reasonable human being would realise that information is being given to her in confidence, this criterion is fulfilled.[1394]

It has already been established in chapter 3 that none of the relevant information is already commonly known or publicly available.[1395] Hence, the first criterion of the common law of confidence is fulfilled. The second criterion requires that the information must have been imparted in confidence. As explained above, the operator may mark those parts of the emissions report that it regard as confidential when submitting it to the competent authority. Thus, it seems marking information as confidential satisfies the 'reasonable man' test laid down by the High Court in *Coco v A.N. Clark (Engineers) Limited*, as a reasonable man would know that information that is marked as confidential should be treated as such. Thus, the confidentiality of the commercial and industrial information is provided under the common law of confidence. However, concerning the greenhouse gas permit the situation is not that clear. There is no provision that specifically allows the operator to mark information contained in the permit as confidential. However, there is also no provision that specifically prohibits operators from marking information in the greenhouse gas permit as confidential. Nevertheless, it should also be kept in mind that it was concluded in chapter 4 that in case of coordinated permitting procedures, the greenhouse gas permit would need to be made public.[1396] In light of these considerations, it seems unlikely that the confidentiality of the greenhouse gas permit is protected by law; however, a final conclusion cannot be drawn. It is also feasible that only parts of the greenhouse gas permit are declared to be protected by confidentiality.

[1392] *Coco v AN Clark (Engineers) Limited* (High Court of Justice (Chancery Division)).
[1393] ibid 420.
[1394] ibid 421.
[1395] See chapter 3, section 4.
[1396] See section 4.6.

Thus, the relevant information whose confidentiality is provided by law is the information in the emissions report that the operator marked as confidential, and the information related to verification. However, this does not mean that this information cannot be disclosed. It is still necessary to determine whether the keeping this information confidential serves a legitimate economic interest.

6.3.2.4. Legitimate economic interest

The third criterion is that if the requested information was disclosed, a legitimate economic interest would be harmed.[1397] According to the Information Commissioner's Office, the term 'legitimate economic interest' may refer to the position of an economic actor in the relevant market, making sure 'that competitors do not gain access to commercially valuable information,' securing one's position to negotiate or avert damage to reputation.[1398] When assessing whether an economic interest is harmed, a public authority will take into account how sensitive the information in question is, the nature of the potential harm, the timing of the request and whether information is still current.[1399] Moreover, the First-Tier Tribunal pointed out that it is not sufficient that the disclosure *might* cause harm. Instead, it must be more likely than not that harm occurs.[1400]

The ensuing question is whether a legitimate economic interest would likely be harmed, if the information in the emissions report marked as confidential by the operator and the information related to verification was disclosed. As was already explained in section 6.2.2., the relevant information is largely information on the operators and their installations. It could be that if such information was disclosed to a competitor (who also enjoy the right to access environmental information), this competitor could draw inferences from this information on the mode of production of the operator and would gain a competitive advantage. Thus, concerning the information related to verification that is held by the verifier, it seems likely that the confidentiality is protecting a legitimate economic interest. With regard to the information in the emissions report marked as confidential by the operator, it may vary from

[1397] The Environmental Information Regulations (n 1126) regulation 12 (5) (e); *Bristol City Council* (n 1377) para 8.
[1398] Information Commissioner's Office, 'Confidentiality of Commercial or Industrial Information' 38.
[1399] Information Commissioner's Office, 'Confidentiality of Proceedings' (n 1363) 33.
[1400] *Peter Higham v Information Commissioner and Cornwall Council* [2016] First-Tier Tribunal EA/2015/0078 para 20.

case to case which information is marked as confidential. Therefore, it is impossible to say whether disclosing it would actually adversely affect a legitimate economic interest, without knowing the concrete information.

6.3.2.5. Adverse effects on confidentiality

The final criterion is whether the confidentiality will be adversely affected by disclosure. It seems that this criterion is usually fulfilled where the other three criteria are fulfilled. As the First-Tier Tribunal concluded in *Bristol City Council* if information is not publicly known and its confidentiality is provided by law to protect a legitimate economic interest 'it must follow that disclosure [of that information] would adversely affect confidentiality.'[1401] Since, the information related to verification fulfils the first three criteria, it is almost certain that it will also fulfil the fourth criteria. Therefore, access to that information can, in principle, be refused based on the ground that disclosure would have adverse effects for the confidentiality of commercial or industrial information.

6.4. The public interest

As explained in chapter 2,[1402] public authorities may only refuse a request for environmental information, where the public interest in disclosure does not outweigh the interest protected by the applicable ground of refusal.[1403] Public authorities must perform this public interest test in each individual case.[1404] As explained in chapter 4,[1405] thus far, there has not been any case law at EU level that set out how public authorities should conduct the public interest test. However, at national level, there has been some literature and case law which may shed some light on this issue.

[1401] *Bristol City Council* (n 1377) para 64; Brasted (n 1378) para 64.
[1402] See chapter 2, section 2.6.1.
[1403] Aarhus Convention Article 4 (4); 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 Article 4, last paragraph.
[1404] *Case C-266/09 Stichting Natuur en Milieu* (n 271) para 56.
[1405] See section 4.9.

Both the German and English legal literature have observed that since neither the public interest in disclosure, nor any interest in non-disclosure are mathematically quantifiable, public authorities need to conduct an argumentative assessment to determine which interest weighs more in a given situation.[1406] The underlying rational of the public interest test is that even where a ground of refusal applies, environmental information may still be disclosed, provided that the public interest in disclosure outweighs the interest protected by keeping the requested information confidential. German literature and the Information Commissioner agree that this necessitates that the applicant demonstrably pursues an interest that goes beyond the general public interest in accessing environmental information, which is already presumed by the fact that applicants do not have to give any reasons when requesting environmental information.[1407] If the general public interest in access to environmental information was sufficient, the public interest in disclosure would always outweigh other interests and it would not be necessary to perform a balancing test in each individual case.[1408]

The personal interest of the applicant in accessing the information is, as such, also irrelevant for the balancing test,[1409] but it has been suggested that it may give an indication for the existence of an overriding public interest.[1410] To determine whether an overriding public interest in disclosure exists, the public authority should consider whether disclosure of the requested information is in line with the aims of the Environmental Information Directive – contributing to greater awareness of environmental matters, a free exchange of view, more effective participation by the public in environmental decision-making and to a better environment.[1411] Consequently, it should be examined in each individual case whether the applicant is primarily acting in her own interests and a potential benefit for environmental protection is only circumstantial, or whether one of the aims of the Environmental Information Directive is the primary objective of the request.[1412] In this regard, it should also be taken into

[1406] Reidt and Schiller (n 146) §8 UIG, para 48; Estelle Dehon, 'Defining the Public Interest' (2016) 12 Freedom of Information Journal 2; Information Commissioner's Office, 'How Exceptions and the Public Interest Test Work in the Environmental Information Regulations' para 66 This is another example of administrative discretion referred to in section 2.1 of this chapter.
[1407] Reidt and Schiller (n 146) §8 UIG, para 47; Karg (n 146) §8 UIG, para 6; Götze and Engel (n 146) 169; *7 C 2. 09* (n 1320) para 62; Information Commissioner's Office, 'How Exceptions and the Public Interest Test Work in the Environmental Information Regulations' (n 1406) para 33.
[1408] Reidt and Schiller (n 146) §8 UIG, para 47; Götze and Engel (n 146) 169.
[1409] Reidt and Schiller (n 146) §8 UIG, para 49; Karg (n 146) §8 UIG, para 7; *Roger Woodford v Information Commissioner* [2010] First-Tier Tribunal EA/2009/0098 para 34.
[1410] Karg (n 146) §8 UIG, para 7.
[1411] 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 recital 1; Götze and Engel (n 146) 169; Day (n 146) 277.
[1412] Götze and Engel (n 146) 169 f.; *7 C 2. 09* (n 1320) para 63.

account whether disclosing the requested information would actually benefit the purpose pursued by the applicant.[1413]

The German literature observes that the public interest test entails an incentive for the applicant to explain her interest in accessing the requested information, to make the public authority aware of a public interest in disclosure. This stands in sharp contrast to the provision that the applicant does not need to provide reasons for her requesting the information.[1414] However, simply because the applicant does not explain why there is a public interest in the disclosure of the requested information, does not mean that the public authority can assume that there is no outweighing public interest in disclosure. Instead, public authorities are obliged to consider the public interest in disclosure on their own initiative.[1415] Thus, where an applicant challenges the decision of a public authority, a court may find that the public authority did not properly consider a certain public interest in disclosure and revert the decision to refuse the request.

As the public interest in disclosure, the grounds of refusal do not have a given weight. Instead, this must be determined on a case-by-case basis.[1416] When determining the weight of the interest in non-disclosure, the interest itself must be taken into account, as well as the kind and degree of envisaged negative effects in case of disclosure.[1417] Moreover, it can be taken into account how likely it is that the envisaged negative effects actually occur.[1418] Where more than one ground of refusal applies, they may be weighed together against the public interest in disclosure.[1419] Moreover, the public authority should take into account whether the ground of refusal only applies temporarily, for example until the end of a court procedure in case of the ground of refusal protecting the course of justice. Where this is the case, it is usually not too much to ask to delay the disclosure.[1420]

[1413] Götze and Engel (n 146) 170; *7 C 2. 09* (n 1320) para 63.
[1414] Karg (n 146) §8 UIG, para 8; Götze and Engel (n 146) 148 & 169.
[1415] Verwaltungsverfahrensgesetz (n 1110) §24 (2); Karg (n 146) §8 UIG, para 9.
[1416] Reidt and Schiller (n 146) §8 UIG, para 48; Götze and Engel (n 146) 169; Information Commissioner's Office, 'How Exceptions and the Public Interest Test Work in the Environmental Information Regulations' (n 1406) para 66.
[1417] Reidt and Schiller (n 146) §8 UIG, para 48; Götze and Engel (n 146) 169; Information Commissioner's Office, 'How Exceptions and the Public Interest Test Work in the Environmental Information Regulations' (n 1406) para 59.
[1418] Reidt and Schiller (n 146) §8 UIG, par 48; Götze and Engel (n 146) 169; Information Commissioner's Office, 'How Exceptions and the Public Interest Test Work in the Environmental Information Regulations' (n 1406) para 58.
[1419] Reidt and Schiller (n 146) §8 UIG, para 48; *Case C-71/10 Office of Communications v Information Commissioner* (n 1360) para 32.
[1420] Reidt and Schiller (n 146) §8 UIG, para 50; Dehon (n 1406) 2; Information Commissioner's Office, 'How Exceptions and the Public Interest Test Work in the Environmental Information Regulations' (n 1406) para 62.

Given that a public authority must conduct the public interest test on a case-by-case basis, taking into account the specific circumstances of the particular case before it, it appears to be impossible to determine, in a general way, whether the public interest served by disclosure of the relevant information outweighs the interests served by maintaining any of the applicable exceptions. Determining possible public interests that are served by disclosure and interests served by maintaining an exception might be feasible, however, without the specific circumstances of the case, it seems hardly possible to attach a relative weight to the different interests. One a possible overriding public interest could be to ensure the proper application of environmental law, such as the EU ETS Directive.

As set out in chapter 4,[1421] where a request concerns information on emissions into the environment, an overriding public interest is automatically presumed. It was determined that the bigger part of the relevant information,[1422] most likely, does not qualify as information on emissions into the environment. Only the greenhouse gas emissions permit and the emissions report contain some information that may be categorised as information on emissions into the environment. However, since this issue was already discussed in chapter 4, it will not be discussed in further detail at this point.

6.5. Reflections on grounds of refusal

This section has dealt with the question whether access to any of the relevant information could be refused pursuant to either the German Federal Environmental Information Act or the British Environmental Information Regulations. The analysis has built on the findings in chapter 4, where it was examined whether access to the relevant information could be refused according to the Environmental Information Directive. One of the main conclusions of the analysis in chapter 4 was that it is difficult to determine whether public authorities may rely on one of the grounds of refusal without knowing the specific circumstances of a given case. Consequently, the analysis in this section was aimed at analysing whether the national law of Germany and England and their interpretation by national courts provide more guidance in this regard. In particular, this section has focused on analysing the grounds of refusal protecting the

[1421] See section 4.9.2.
[1422] See chapter 3, section 4 for an analysis what information is relevant for checking compliance with the EU ETS.

confidentiality of proceedings of public authorities and of commercial and industrial information.

Concerning the German Federal Environmental Information Act, it was concluded that the ground of refusal protecting the proceedings of public authorities only protects ongoing proceedings. Since this thesis looks at information on the year 2017,[1423] it was concluded that this ground of refusal may, in principle, not be relied upon to refuse access to the relevant information. Under English law, there is not such a temporal criterion. Instead, the question is whether the confidentiality of the proceedings in question is provided for by law. This is only the case for the verification procedure. Regarding the ground of refusal protecting the confidentiality of commercial and industrial information, both German and English law set out several, largely overlapping, criteria that must be fulfilled before a public authority can rely on this ground of refusal. It has been determined that the information held by the verifier seems to satisfy the criteria set out in German law as well as English law. Consequently, it was concluded that public authorities (including the verifier) may, in principle, rely on this ground to refuse access to the relevant information relating to verification. However, when receiving a request for this information, the verifier is still obliged to disclose information on emissions into the environment[1424] and to perform the public interest test.

Next to the grounds of refusal themselves, this chapter has also discussed the public interest test. In chapter 4, it was explained that little guidance by the CJEU and literature on the Environmental Information Directive exist regarding the question how public authorities should conduct this test. Thus, it was interesting to see that at the national level, at least in Germany and England, case law as well as literature provides some guidance. However, similarly to some of the grounds of refusal, it proved difficult to examine whether, in case of the relevant information, the public interest in disclosure outweighs the interest keeping the relevant information confidential. The primary reason for this is that public authorities must apply the criteria of the public interest test to each individual case. For instance, the public interest in disclosure of the internal verification documentation may outweigh the interests of the operator in keeping this information confidential in one case but not in another, since the circumstances of each operator and each request are different. Therefore, it is hardly possible to draw general conclusions whether the public interest in disclosure of the relevant information

[1423] See chapter 6, section 1.

[1424] As explained in chapter 4, section 4.9, where environmental information is information on emissions into the environment, access may not be refused based on the grounds protecting the confidentiality of proceedings of public authorities, the confidentiality of commercial and industrial information, the confidentiality of personal data and the protection of the environment to which the information relates.

outweighs the interests served by not disclosing them. In light of the fact that there has not been any guidance by the CJEU regarding how the public interest test needs to be conducted and that the results of the public interest test may vary from operator to operator, it will be particularly interesting to see whether the empirical study discussed in the next chapter may provide insights into how the public interest test is conducted in practice.

7. Relevant procedural requirements

7.1. Introductory remarks

In chapter 2,[1425] several of the procedural requirements that need to be observed by public authorities when answering a request for environmental information have been discussed. Public authorities must, for example, provide the information in the form requested by the applicant[1426] and they must do so within certain time limits.[1427] Moreover, where they apply one of the grounds of refusal, they are under the obligation to separate the information that is covered by the ground of refusal and disclose the remainder of the information that is not covered by any of the grounds of refusal.[1428] Further, when (partially) refusing a request, they must explain to the applicant the reasons for the (partial) refusal.[1429] These requirements are set out in a very similar wording in the Aarhus Convention, the Environmental Information Directive, the German Federal Environmental Information Act and the British Environmental Information Regulations. However, there are other requirements with regard to which the Aarhus Convention and the Environmental Information Directive leave more discretion to

[1425] See section 2.7
[1426] Aarhus Convention Article 4 (1) (b); 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 Article 3 (4); Umweltinformationsgesetz (n 422) §3 (2); The Environmental Information Regulations (n 1126) regulation 6.
[1427] Aarhus Convention Article 4 (2); 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 Article 3 (2); Umweltinformationsgesetz (n 422) §3 (3); The Environmental Information Regulations (n 1126) regulation 5 (2).
[1428] Aarhus Convention Article 4 (6); 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 Article 4 (4); Umweltinformationsgesetz (n 422) §5 (3); The Environmental Information Regulations (n 1126) regulation 12 (11).
[1429] Aarhus Convention Article 4 (7); 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 4 (5); Umweltinformationsgesetz (n 422) §5 (1); The Environmental Information Regulations (n 1126) regulation 14 (3).

Member States. This includes the issue of charging for answering requests and the procedure for reviewing decisions of public authorities. Both of these issues can potentially have a considerable influence on the exercise of the right to environmental information in practice. For instance, if public authorities charge high prices for answering requests, this may render the right to access environmental information ineffective by discouraging potential applicants to even submit a request. Similarly, a review mechanism that exclusively relies on courts may involve high legal costs for applicants that consider that their request has been inadequately dealt with. Such costs may discourage applicants to appeal against the decision, which could tilt the power imbalance between applicant and public authority even more towards public authorities.[1430] Therefore, the specific arrangements by Germany and England relating to these two issues will be discussed in this section.

7.2. Charges that may be levied

7.2.1. General remarks

Both the Aarhus Convention and the Environmental Information Directive set out that public authorities may ask applicants to pay a 'reasonable price' for providing the requested environmental information.[1431] However, accessing public registers must always be free of charge[1432] and, where they intend to make a charge, public authorities must provide the applicant with a list of applicable charges.[1433] The CJEU has touched upon the charges that public authorities may levy for supplying environmental information in two cases. Interestingly, these two cases involved Germany and the United Kingdom. Pursuant to the CJEU's ruling in *East Sussex City Council*,[1434] the imposition of a charge for supplying environmental information is subject to two conditions. First, the calculation of the charge may

[1430] In this context, it should be taken into account that applicants are not always individuals. For instances, requeststst for environmental information may also be submitted by environmental NGOs, which tend to have more (financial) resources at their disposal.
[1431] Aarhus Convention Article 4 (8); 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 Article 5 (2).
[1432] 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 Article 5 (1).
[1433] Aarhus Convention Article 4 (8); 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 Article 5 (3).
[1434] *Case C-71/14 East Sussex* (n 536).

only be based on factors related to supplying the information.[1435] Second, the charge may not exceed a reasonable amount.[1436] The CJEU set out that a charge is reasonable where (1) it does not deter the applicant from exercising her right to access environmental information and (2) does not 'restrict the right of access to information.'[1437] In *Commission v* Germany, the CJEU explained that when assessing whether a charge is reasonable, it is necessary to consider the economic situation of the applicant[1438] and that consequently the charge may 'not exceed the financial capacity of the person concerned, [and may] not in any event appear objectively unreasonable.'[1439]

7.2.2. Applicable charges in Germany

§12 of the Federal Environmental Information Act sets out that public authorities may, in principle, levy charges for supplying environmental information, except where the information is communicated orally, the request is a simple inquiry, or the applicant examines the information at the premises of the public authority.[1440] In accordance with the CJEU's judgment in *Commission v Germany,*[1441] the Federal Environmental Information Act prescribes that a public authority must determine the charge,[1442] so that it does not hinder applicants from making use of their right to access environmental information.[1443] The Decree on Charges for Environmental Information sets out the precise charges that public authorities may levy when

[1435] ibid para 29.
[1436] ibid.
[1437] *Case C-217/97 Commission of the European Communities v Federal Republic of Germany* (n 486) para 47.
[1438] Taking the individual economic situation of the applicant into account is an interesting approach. It may give rise to the question how feasible it is in practice. Does this oblige public authorities to check the economic capabilities of the applicant? If so, what would such a check entail? Numerous questions pop up, which cannot be discussed here because it would go beyond the scope of this section. It is also interesting to not that the literature has not discussed this issue. There is some literature discussing Case C-71/14 East Sussex, however, this issues is not discussed. See for example Mariolina Eliantonio and Franziska Grashof, 'C-71/14, East Sussex County Council v Information Commissioner, Property Search Group, Local Government Association (Judgment of 6 October 2015) - Case Note' (2016) 9 Review of European Administrative Law. In its decision, the national court (First-Tier Tribunal) also did not touch upon the issue that the economic situation of the applicant must be taken into account.
[1439] *Case C-71/14 East Sussex* (n 536) para 43.
[1440] Umweltinformationsgesetz (n 422) §12 (2).
[1441] *Case C-217/97 Commission of the European Communities v Federal Republic of Germany* (n 486) para 47. This case concerned infringement proceedings against Germany for failing to fulfil its obligations under Council Directive 90/313/EEC (the predecessor of the Environmental Information Directive), in particular, the definition of public authorities, the obligation to partially disclose information where possible and the charges that may be levied.
[1442] This is another example of the administrative discretion that public authorities enjoy when applying the right to access environmental information in practice.
[1443] Umweltinformationsgesetz (n 422) §12 (2).

answering requests.[1444] Moreover, the Decree on Charges for Environmental Information stipulates that charges may be waived where this is appropriate in light of the public interest or reasons of equity.[1445] In case an applicant withdraws her request for environmental information or the public authority refuses the request, no charges may be levied.[1446]

The Decree on Charges for Environmental Information distinguishes between two categories of charges. Public authorities may levy charges for (A) providing information (Gebühren)[1447] and for (B) producing duplicates of documents (Auslagen).[1448] Both categories comprise sub-categories.[1449] Where both charges for providing the information and for producing duplicates of documents apply, the individual costs are added up but may not exceed the maximum of 500 euros.[1450] There are three tiers of charges for providing information (A.1). The first tier (A.1.1) applies to requests that can be answered orally or in a simple written way, including the provision of a small number of duplicates. Public authorities may not charge any costs for requests of this category.[1451] For answering requests that fall in the second tier (A.1.2), public authorities may levy charges up to 250 euros. It comprises comprehensive written replies, including the provision of duplicates.[1452] The third tier (A.1.3) applies to written replies that entail the provision of duplicates, where the compilation of the information is exceptionally labour-intensive, especially where there is a lot of information that has to be redacted to protect public or private interests. For answering a request that falls in the third category public authorities may charge up to 500 euros.[1453]

The question arises whether the charges set out in the Decree on Charges for Environmental Information satisfy the criteria set out by the CJEU in *East Sussex* – (1) the calculation of the charge may only be based on factors related to supplying the information and (2) the charge

[1444] Umweltinformationsgebührenverordnung [in der Fassung der Bekanntmachung vom 23. August 2001 (BGBl. I S. 2247), die zuletzt durch Artikel 2 Absatz 40 des Gesetzes vom 7. August 2013 (BGBl. I S. 3154) geändert worden ist].
[1445] ibid §2. This could be a reference to the fact that public authorities must take into acount the economic situation of the applicant when calculating the charge.
[1446] ibid §3.
[1447] ibid Annex A. Gebühren refers to the charge that a public authority may levy for providing the service (disclosing information).
[1448] ibid Annex B. Auslagen refers to the charge that a public authority may levy to cover the costs for photocopying etc.
[1449] The first category is divided into (A.1) the supply of information, (A.2) the issuance of duplicates, (A.3) the inspection on site, (A.4) any measure taken pursuant to §7 (2) of the Federal Environmental Information Act, and (A.5) the active dissemination of environmental information by a public authority. The second category comprises three sub-categories, i.e. (B.1) production of paper duplicates, (B.2) production of duplicates on other media or copies of movies, and (B.3) special packaging and transportation).
[1450] Umweltinformationsgebührenverordnung (n 1444) §1 (2).
[1451] ibid Annex A, Nr 1.1.
[1452] ibid Annex A, Nr. 1.2.
[1453] ibid Annex A, Nr. 1.3.

must be reasonable. All of the charges that public authorities in Germany may levy directly relate to supplying information.[1454] The more interesting question is whether the charges that German public authorities may levy are reasonable. To recall, the CJEU has set out two conditions that a charge must fulfil in order to be reasonable: (1) it may not have a deterrent effect on the applicant and (2) it may not restrict the right of access to information.[1455] The CJEU pointed out that when assessing whether the charge has a deterrent effect on the applicant, the economic situation of the applicant and the public interest in disclosing the information must be taken into account. Since the economic situations of applicants may differ considerably, it must be assessed on a case-by-case basis whether the charge has a deterrent effect.[1456]

Overall, it appears that the German implementing legislation is formally in line with the Aarhus Convention and the Environmental Information Directive. It sets out in detail the charges that may be levied and the conditions under which they apply, provides that accessing public registers is for free,[1457] and costs for providing paper copies of documents seem to be reasonable, as they correspond to the copying costs in copy shops[1458] and public libraries.[1459] Moreover, the costs that a public authority may charge for answering requests are only based on factors related to supplying the information. As stated above, the question whether the costs are reasonable must be answered on a case-by-case basis.[1460] However, the fact that answering simple requests including the provision of few duplicates is free and that there is a maximum amount a public authority may charge can be seen as an indication that the costs that a public authority can charge are reasonable. 500 Euros is, nonetheless, a considerable amount of money and it cannot be ruled out that this amount may deter some applicants from accessing environmental information. However, whether applicants are actually deterred in practice, also depends on the application of the Decree on Charges for Environmental Information by public

[1454] Comprehensive written replies to a request (A.1.2) and redacting information to protect public or private interest (A.1.3) is directly linked to supplying information. The same holds true for the issuance of duplicates (A.2).
[1455] *Case C-71/14 East Sussex* (n 536) para 40.
[1456] Please see chapter 6, section 5.1.5. for a discussion of a concrete case.
[1457] Umweltinformationsgesetz (n 422) §12 (1).
[1458] Copyshop Zentrale, 'S/W Kopien Und Ausdrucke' <https://copyshop-zentrale.de/s-w-kopien-ausdrucke/> accessed 2 March 2021; Aachener Kopierladen, 'Kopieren, Zeitungen Und Bürobedarf' <https://aachener-kopierladen.jimdofree.com/kopieren-zeitungen-und-b%C3%BCro-bedarf/> accessed 2 March 2021; Kopierladen, 'Ausdruck in s/w Und Farbe' <https://www.kopierladen-berlin.de/ausdrucke-online-bestellen/farbdrucke-und-sw-drucke-online-bestellen-in-berlin.html> accessed 2 March 2021.
[1459] Stadtbibliothek Stuttgart, 'Drucken Innerhalb Der Stadtbibliothek Am Mailänder Platz' <http://www1.stuttgart.de/stadtbibliothek/bvs/actions/profile/view.php?id=207#Druckkosten> accessed 2 March 2021; Universität zu Köln, 'WLAN, Kopieren, Scannen, Drucken, Speichern' <https://www.ub.uni-koeln.de/lernen_arbeiten/arbeitenusb/tech/index_ger.html> accessed 2 March 2021.
[1460] It should be recalled that public authorities are always free not to make a charge.

authorities, since the amount of 500 Euros is only an absolute maximum; public authorities have the discretion to charge less.

7.2.3. Applicable charges in the United Kingdom

Regulation 8 (1) of the Environmental Information Regulations allows public authorities to levy charges for making available environmental information upon request.[1461] However, a public authority may not charge an applicant for providing access to any public register or lists of environmental information, or for letting the applicant examine environmental information at the premises of the public authority.[1462] Moreover, a charge may not exceed a reasonable amount.[1463] Finally, public authorities are obliged to publish and provide the applicant with a list of the charges, and 'information on the circumstances in which a charge may be made or waived.'[1464] As already pointed out in the previous section, the CJEU has stipulated that when calculating the charge for supplying information, a public authority may not take into account the cost of maintaining a database. However, the public authority is allowed to include, in the charge, the fixed costs 'attributable to the time that the staff of the public authority' spent to answer the requests, if the overall amount charged to the applicant does not exceed a reasonable amount.[1465] Interesting in this regard is that 'the [Information] Commissioner strongly discourages public authorities from charging for staff time spent considering the application of any exceptions and redacting excepted information [as this] could result in charges which are objectively unreasonable to pass on to the requestor.'[1466]

Unlike the Freedom of Information Act[1467] and in contrast to the German Federal Environmental Information Act, the Environmental Information Regulations do not refer to a decree that sets out a comprehensive list of the different categories of costs that a public authority may charge. Instead, it implies that public authorities must determine their own

[1461] 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 Article 5 (1).
[1462] The Environmental Information Regulations (n 1126) regulation 8 (2).
[1463] ibid rgulation 8 (3).
[1464] ibid regulation 8 (8).
[1465] *Case C-71/14 East Sussex* (n 536) para 45.
[1466] Information Commissioner's Office, 'Charging for Environmental Information (Regulation 8)' para 16.
[1467] The general access to information act of the United Kingdom.

charges and publish a schedule thereof.[1468] The provisions of the Freedom of Information Act and its Fees Regulation[1469] seem to be used as guidance for public authorities when compiling their list of costs. They provide that a public authority may refuse a request for information, if the costs for answering the request exceeds GBP 600, provided that the public authority is listed in Part 1 of Schedule 1 to the Freedom of Information Act, or GBP 450 for any other public authority.[1470] However, it must be stressed that the Freedom of Information Act and its Fees Regulation are not binding in the context of access to *environmental* information. Thus, a request for environmental information may not simply be refused where answering would cost more than GBP 600. This is also illustrated by the fact that public authorities have set out different, although similar charges.[1471] If answering a request would result in disproportionate costs for the public authority, it may consider refusing the request based on the ground that the request is manifestly unreasonable.[1472]

Interestingly, the Environment Agency, the public authority that was established 'to protect and improve the environment'[1473] and is responsible for issues such as climate change, environmental permits, energy efficiency, environmental risk management, and land management,[1474] does not have a table of charges available on its website. Even an inquiry via a phone call did not resolve the issue. The author called the number of the Environment Agency for general inquiries and asked for an overview of charges that the Environment Agency levies for answering requests for environmental information pursuant to the Environmental Information Regulations. While the officer was eager to help, the link[1475] that she sent via email

[1468] The Environmental Information Regulations (n 1126) regulation 8 (8) states that a 'public authority shall publish and make available to applicants (a) a schedule of its charges. [emphasis added]' The word 'its' implies that each public authority has its own table of charges.
[1469] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 [No 3244].
[1470] Freedom of Information Act, section 12 (1) & (2); The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, regulation 3.
[1471] The St Albans City & District Council charges an hourly rate of 25 – 33 GBP where it takes more than two hours to reply to a request St Albans City & District Council (n 459); A different example is the Dudley Metropolitan Council. For requests which cost less than 450 GBP, it only charges for the disbursements. If the costs for replying to a request exceed 450 GBP, the applicant is charged for the full costs for answering the request, including staff costs for compiling the information and disbursements costs Dudley Metropolitan Borough Council, 'Environmental Information Regulations Guidance' <https://www.dudley.gov.uk/residents/environment/environmental-information-regulations-guidance/> accessed 14 December 2021.
[1472] See chapter 4, section 4.2.
[1473] Environment Agency, 'About Us' (*GOV.UK*) <https://www.gov.uk/government/organisations/environment-agency/about> accessed 14 December 2021.
[1474] Environment Agency, 'Services and Information' <https://www.gov.uk/government/organisations/environment-agency/services-information> accessed 14 December 2021.
[1475] Environment Agency, 'Environment Agency Fees and Charges' (*GOV.UK*) <https://www.gov.uk/guidance/environment-agency-fees-and-charges> accessed 14 December 2021.

subsequent to the inquiry does not contain any information on costs that may be charged for answering requests for environmental information. It should however be noted that the Environmental Information Directive does not oblige public authorities to publish a general table of charges. Only where a request is made and public authorities plan to make a charge, must they provide such information to the applicant.[1476] However, the Environmental Information Regulations set out that public authorities must publish a schedule of its charges.[1477]

7.2.4. Reflections on charging for environmental information

In light of the above, it appears that despite the guidance by CJEU, there is a discrepancy between how the costs are regulated in Germany and England. While German legislation clearly sets out the costs in a table of charges applicable to all federal applicable authorities, English public authorities can and must determine their charges themselves. Generally, from the perspective of applicants, the approach taken by Germany seems to be favourable. The applicable charges are clear beforehand and can be taken into account by applicants when considering making a request. At the same time, public authorities still have a certain degree of flexibility within the tiers that the German Decree on Charges for Environmental Information defines. Nonetheless, it can still be questioned whether the maximum amount that German federal authorities may charge, 500 Euros, is high enough to potentially deter prospective applicants from making a request. Concerning the UK, the fact that a case (*East Sussex*) arose in which the charges levied by a public authority were found to be unreasonable indicates that there are instances in which public authorities overcharge for supplying environmental information. This is another indication that a centralised approach, as in Germany, is to be preferred, since where charges are centrally determined, public authorities have less room to overcharge. However, it is uncertain how serious this problem is.

[1476] 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 Article 5 (3).
[1477] The Environmental Information Regulations (n 1126) regulations 8 (8).

7.3. Rights of third parties

In chapter 4,[1478] it was explained that the Environmental Information Directive leaves it up to Member States to provide whether affected third parties have access to review procedures against the decision of public authorities to provide access to environmental information. It was explained that the Charter of Fundamental Rights of the EU obliges Member States to give operators, as third parties that may be affected by requests for environmental information relating to them, the chance to be heard before the decision to disclose the information is made and to appeal against that decision.

7.3.1. Rights of third parties under German law

In German law, the Administrative Procedures Act (Verwaltungsverfahrensgesetz) regulates the rights of third parties in administrative procedures. It sets out that before adopting an administrative decision, public authorities must hear parties that may be affected by the decision.[1479] The Administrative Procedures Act does not set out time limits within which parties concerned must provide their input to the public authority. However, the public authorities may set out a period when informing the party concerned.[1480] After a public authority has formally adopted a decision, a party concerned that does not agree with the decision may challenge that decision before an administrative court according to the Administrative Court Procedures Act.[1481]

7.3.2. Rights of third parties under UK law

Interestingly, neither the Environmental Information Regulations, nor the Freedom of Information Act mention rights of third parties. However, the Freedom of Information Act sets out that the Secretary of State must publish a code of practice providing guidance to public authorities dealing with requests for environmental information.[1482] In particular, this code of

[1478] See chapter 4, section 5.
[1479] Verwaltungsverfahrensgesetz (n 1110) §§13 (2) & 28 (1).
[1480] ibid §31 (2).
[1481] ibid §79.
[1482] Freedom of Information Act 2000 section 45 (1).

practice must touch upon the 'consultation of persons to whom the information requested relates or [...] whose interests are likely to be affected by the disclosure of information.'[1483] This code of practice is also relevant for the Environmental Information Regulations.[1484] Of course, it is not legally binding for public authorities but it provides guidance on how public authorities should handle requests for information.[1485] The code of practice acknowledges that there may be circumstances in which public authorities should consult third parties before answering requests for information. In particular, where the disclosure of the requested information is likely to affect the interests of a third party or where the requested information relates to an entity who is not the applicant or the public authority.[1486] The code of practice notes however, that public authorities are not obliged to consult third parties and that they are not obliged to accept their views when consulted, since it is ultimately up to the public authority to make the decision.[1487] Lastly, the code of practice recommends that public authorities give third parties an advance notice of the decision they are intending to adopt.[1488]

The question arises whether third parties can challenge the decision of public authorities or, more concretely, in the context of this study, whether operators can challenge the decision of a public authority to disclose requested information? Bell has summarised and discussed the case law on standing in English administrative law.[1489] She explains that there are several approaches to determining whether a party has standing to challenge an administrative decision. She finds that 'what counts as a 'sufficient interest' alters depending on legislative and administrative context. The courts […] continue to resist the idea that there is a *singular approach* to standing which applies in all challenges.'[1490] However, she points out that where the applicant can demonstrate that a decision affects "her interests in a sufficient way", she should be permitted to challenge it.[1491] Applying this logic to the question at hand, it seems safe to say that where information relating to an EU ETS operator is requested by the public and the public authority holding the information, after consulting the operator, decides to

[1483] ibid section 45 (2) (c).
[1484] The Environmental Information Regulations (n 1126) regulation 16 (6) (c).
[1485] 'Section 45 – Code of Practice, Request Handling' (11 November 2021) <https://ico.org.uk/for-organisations/section-45-code-of-practice-request-handling/> accessed 14 December 2021.
[1486] Cabinet Office, 'Freedom of Information - Code of Practice' 17 <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>.
[1487] ibid.
[1488] ibid.
[1489] Joanna Bell, *The Anatomy of Administrative Law* (Hart Publishing 2020).
[1490] ibid 184.
[1491] ibid 207.

disclose the information, the operator should have standing to challenge the decision of the public authority.

7.4. Reviewing a decision of a public authority

7.4.1. Introductory remarks

As explained in chapter 2,[1492] pursuant to the Environmental Information Directive, Member States must have in place a two-step procedure to review decisions related to requests for environmental information. Any applicant who is of the opinion that her request has been inadequately dealt with must have the possibility to ask for administrative review and to challenge the decision of public authorities in court. Member States have implemented this in different ways. Particularly Great Britain has taken an interesting approach that goes beyond the Directive. As already explained in chapter 2,[1493] the possibility to ask for the review of a decision is a central element of the right to access environmental information. Therefore, in this section, the mechanisms to review a decision of a public authority that are available to the public in Germany and the United Kingdom are examined.

7.4.2. The review process under German law

§6 (1) of the Federal Environmental Information Act sets out the review procedures applicable to decisions or omission of public authorities. Section 1 stipulates that disputes about access to environmental information fall in the jurisdiction of administrative courts (*Verwaltungsrechtsweg*). Thus, the jurisdiction to review decisions by a formally private body that qualifies as a public authority pursuant to the Federal Environmental Information Act lies with the administrative courts.[1494] Usually, ordinary courts have jurisdiction over disputes between private natural and legal persons.[1495] Apart from the jurisdiction of the administrative

[1492] See section 2.8.
[1493] See section 8.6
[1494] Verwaltungsgerichtsordnung [in der Fassung der Bekanntmachung vom 19. März 1991 (BGBl. I S. 686), die zuletzt durch Artikel 7 des Gesetzes vom 12. Juli (BGBl. I S. 1151) geändert worden ist] §40 (1); Götze and Engel (n 146) 132.
[1495] Götze and Engel (n 146) 132.

courts, the Federal Environmental Information Act distinguishes between the review of decisions taken by, on the one hand, governmental bodies and bodies of public administration and, on the other hand, private bodies qualifying as public authorities pursuant to the Federal Environmental Information Act. This is interesting in the context of this thesis. As explained in chapter 3,[1496] the relevant information is partly held by governmental authorities and party by the verifiers. In section 5.2., it was explained that the verifier might be considered to constitute a private body qualifying as a public authority pursuant to the Federal Environmental Information Act. This means that the review process for requests for the relevant information submitted to governmental authorities is different from the requests submitted to verifiers.

The administrative review of decisions taken by governmental bodies and bodies of public administration is governed by §§ 68 to 73 of the *Verwaltungsgerichtsordnung* (Administrative Court Procedures Act).[1497] Applicants must inform the public authority that answered the request of their objections against the decision within one month after receiving the decision in writing (letter, email) or in person.[1498] To recall, the Environmental Information Directive provides that the administrative review procedure must be expeditious. In that regard, it is interesting to note that neither the Federal Environmental Information Act, nor the Administrative Court Procedures Act set out a time limit within which they need to review their decision. Therefore, it has been suggested that the time limits for answering requests set out in § 3 (3) of the Federal Environmental Information Act should serve as guidance in this regard.[1499] This seems logical, since it would be odd if a public authority took longer to review a decision than to take the original decision. At the end of the administrative review procedure, the public authority must inform the applicant of its decision in writing and in case it decides that the applicant's objection was not or only partly justified, it must provide reasons.[1500] Only after having had recourse to the administrative review procedure, may the applicant challenge the decision before an administrative court.[1501]

The procedure for challenging the decisions of private bodies that qualify as public authorities pursuant to the Federal Environmental Information Act is largely the same as for governmental bodies and bodies of public administrative nature. However, it is not governed by the Administrative Court Procedures Act but the Environmental Information Act.

[1496] See chapter 3, section 4.
[1497] Verwaltungsgerichtsordnung (n 1494).
[1498] ibid §70 (1).
[1499] Götze and Engel (n 146) 132; Reidt and Schiller (n 146) §6 UIG, para 7.
[1500] Verwaltungsgerichtsordnung (n 1494) §73.
[1501] Umweltinformationsgesetz (n 422) §6 (2); Verwaltungsgerichtsordnung (n 1494) §68 (1); Götze and Engel (n 146) 134.

Applicants may ask the same body that answered the request in writing to review its decision and the body has one month to reply.[1502] Doubts have been raised whether this time limit is likely to be effective in practice, since the Federal Environmental Information Act does not envisage any sanctioning in case this time limit is not adhered to.[1503] In cases in which the applicant has an interest in accessing the requested information quickly, the lack of consequences in case the one-month time limit is not adhered to may be a barrier to the effective exercise of the right to access environmental information, since there is little incentive for bodies to answer within the time limit. However, unlike in the case of the review of a decision by a governmental authority or a body of public administration, the administrative review procedure is not a prerequisite for challenging a decision by a private body that qualifies as a public authority pursuant to the third category set out in Federal Environmental Information Act before a court.[1504] Therefore, applicants may challenge the decision of the body in question in court simultaneous to submitting a request for administrative review.[1505] However, given that court procedures usually take time, it is questionable whether taking this route would result in a quicker decision than asking for administrative review.

7.4.3. The review process under UK law

The Environmental Information Regulations provide that 'applicants may make representations to a public authority […] if it appears to the applicant that the authority has failed to comply' with its obligations.[1506] As with Germany, the initial request for review is submitted to the same public authority, which answered the original request. Applicants must do so in writing within forty working days after they became aware of the public authority's decision. In the majority of cases, the forty working days start on the day the applicant receives the decision, however, the Information Commissioner[1507] advises public authorities to 'exercise

[1502] Umweltinformationsgesetz (n 422) §6 (4) It may seem curious that the request for review is submitted to the same entity. However, this is fully in line with the Aarhus Convention and the Environmental Information Directive. The Environmental Information Directives specifically states that at the first level of review may be carried out by the same public authority that originally processed the request. ; Aarhus Convention Article 9 (1); 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 Article 6 (1).
[1503] Götze and Engel (n 146) 137; Fluck, Kristian and Martini (n 1219) §6 UIG, para 31; Reidt and Schiller (n 146) §6 UIG, para 15.
[1504] Umweltinformationsgesetz (n 422) §6 (3).
[1505] Götze and Engel (n 146) 136; Fluck, Kristian and Martini (n 1219) §6 UIG, para 31.
[1506] The Environmental Information Regulations (n 1126) regulation 11 (1).
[1507] The role of the Information Commissioner will be explained in more detail below.

a degree of flexibility […] where the exact date on which the requester became aware of a breach cannot easily be established.'[1508] The public authority must review the objection as well as any additional evidence presented by the applicant and decide whether it has complied with its obligations under the Environmental Information Regulations.[1509] This internal review must be free of charge[1510] and the public authority must notify the applicant of its decision as soon as possible and in no case later than 40 working days.[1511] However, the Information Commissioner states that in most cases public authorities should be able to provide the applicant with its decision within 20 working days and the Information Commissioner advises public authorities to send the applicant 'an acknowledgement specifying the target date for a response.'[1512]

The Information Commissioner has set out six criteria that characterise a good review procedure. (1) The public authority should thoroughly re-examine the original decision and the request for environmental information should be handled.[1513] (2) 'It should be genuinely possible to have a previous decision amended or reversed.'[1514] (3) The internal review should include a review of the public interest test that was carried out in the course of the original decision-making process.[1515] (4) The internal review should be conducted by an employee of the public authority who is senior to the one that handled the original request. If that is not possible, the internal review should be carried out by someone who is trained in handling such issues.[1516] (5) The internal review procedure should only have a single stage and be clear and straightforward.[1517] (6) The internal review procedure must be expedient and quickly produce a decision for the applicant.[1518]

The Environmental Information Regulations set out that the enforcement and appeal provisions of the Freedom of Information Act also apply in the context of the Environmental Information Regulations.[1519] An applicant who is not satisfied with the outcome of the internal review and who has exhausted all internal review procedures[1520] may apply to the Information

[1508] Information Commissioner's Office, 'Internal Reviews under the EIR' para 8.
[1509] The Environmental Information Regulations (n 1126) regulation 11 (3).
[1510] ibid.
[1511] ibid regulation 11 (4).
[1512] Information Commissioner's Office, 'Internal Reviews under the EIR' (n 1508) para 12.
[1513] ibid para 15.
[1514] ibid.
[1515] ibid.
[1516] ibid.
[1517] ibid.
[1518] ibid.
[1519] The Environmental Information Regulations (n 1126) regulation 18 (1).
[1520] Freedom of Information Act 2000 (n 1482) section 50 (2).

Commissioner 'for a decision whether [the] request for information […] has been dealt with in accordance' with all the requirements set out in the Environmental Information Regulation.[1521] The Information Commissioner must issue a decision notice to both the applicant and the public authority.[1522] In the decision notice, the Information Commissioner explains whether the complaint was justified and, if applicable, what actions the public authority must take to comply with its obligations under the Environmental Information Regulations.[1523] Moreover, it must contain detailed information about the right of appeal.[1524] Both the applicant and the public authority may appeal against the Information Commissioner's decision before the First-Tier Tribunal[1525] and against the First-Tier Tribunal's decision to the High Court of Justice.[1526] However, if the public authority does not appeal and the Information Commissioner finds that the public authority has not complied with its decision notice, the Information Commissioner may refer the matter immediately to the High Court which deals with the public authority 'as if it had committed a contempt of court.'[1527]

7.4.4. Reflections on the review mechanism

This section has shown that the review mechanisms available to the public in England are more favourable for applicants than in Germany. With regard to the question whether the public can use the right to access environmental information to access the relevant information in Germany, it must be distinguished between information held by the national authority responsible for the EU ETS and information held by the verifier. As pointed out before, the relevant information is held partly by the competent national authority and partly by the verifier. The competent national authority is a governmental body and consequently the review of its decisions is governed by the Administrative Court Procedures Act. In contrast, the review

[1521] ibid section 50 (1).
[1522] ibid section 50 (3) (b). It is interesting to note that neither the Freedom of Information Act nor the Environmental Information Regulations set out time limits within which the Information Commissioner must make a decision.
[1523] ibid section 50 (4).
[1524] ibid section 50 (5).
[1525] ibid section 57 (1).
[1526] ibid section 59 (a).
[1527] ibid section 54 (3).

of decisions of private bodies qualifying as public authorities, such as the verifier,[1528] is governed by the provisions of the Federal Environmental Information Act.

The British Environmental Information Regulations do not differentiate between categories of review procedures for the different categories of public authorities. Thus, competent authorities and verifiers alike must have in place an administrative review procedure. However, in England, applicants have at their disposal an additional level of review – the complaint procedure of the Information Commissioner. From the perspective of the public, this is a very welcome addition to the review mechanism, as it offers applicants the possibility to have the decision of a public authority reviewed by an impartial third party free of charge. Moreover, the Information Commissioner may bring a case before the High Court where it finds that a public authority does not comply with its decisions. In light of the fact that the administrative review is conducted by the same authority that took the original decision, albeit by another employee, and that court procedures can involve considerable costs,[1529] an extra possibility to have the decisions of public authorities reviewed by an impartial third party free of charge seems highly beneficial.

7.5. Conclusions on procedural requirements

This section has discussed several procedural elements of the right to access to environmental information as set out in the law of Germany and the United Kingdom. In particular, the provisions on charging for providing environmental information and the provision regulating the reviews mechanisms that are available to applicants who think that their requests have been inadequately dealt with have been analysed.

With regard to the charges, it has been concluded that it is generally favourable from the perspective of the applicant that they are determined at a central level. At least, it seems beneficial to determine an absolute maximum amount that public authorities may not surpass

[1528] It should be borne in mind that the conclusion that the verifier qualifies as a public authority because it performs public functions in relation to the environment and is under the control of a public authority that was reached in section 5.2.3. is a tentative one. If the verifier is not considered to constitute a public authority pursuant to the Federal Environmental Information Act, then it is not under the obligation to provide environmental information upon request or to follow the review procedures envisaged by the Federal Environmental Information Act.

[1529] The Aarhus Convention Compliance Committee has found that the costs to challenge decisions by public authorities in court are prohibitively expensive, see *Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland* [2011] para 128.

in any case. Such an approach is beneficial for applicants and public authorities alike. Applicants know in advance what the maximum charge may be and public authorities can charge knowing that this charge is within the statutory limits. Moreover, it appears to be beneficial to have brackets of charges as is the case in Germany. This makes charging more transparent, as applicants can get a better idea of what they might have to pay.

With regard to the possibilities to have a decision of a public authority reviewed, where an applicant does not agree with it, it has become clear that public authorities in Germany and the United Kingdom must have in place administrative review procedures, which are similar in both jurisdictions. Moreover, in both countries, applicants who are of the opinion that a public authority has dealt with their requests inadequately, may challenge the public authority's decision before a court. In addition, the United Kingdom has introduced the Information Commissioner as an additional layer of review. For applicants this is a very useful tool, as it makes it possible to have the decision of a public authority checked by an independent third party free of charge.

8. Conclusions

The overall question that this thesis aims to answer is to what extent and in which circumstances environmental information related to compliance and non-compliance with the EU ETS that is held by governmental authorities and/or private entities must be provided to the public upon request. Chapter 2 laid down the foundation to answer this question by examining the EU legislation setting out the right to access environmental information, the Aarhus Convention and the Environmental Information Directive. In chapter 3, it was subsequently analysed what information is actually relevant to check compliance of individual actors with the EU ETS legislation. In chapter 4, the conclusions from the two preceding chapters were combined and it was analysed whether the relevant information should be disclosed to the public upon request pursuant to the Environmental Information Directive. With regard to some of the information, the conclusion was that it should be disclosed. However, for other information a definitive conclusion could not be drawn, as the Environmental Information Directive and its interpretation by the CJEU leave a certain degree of discretion to Member States when implementing the right to access environmental information. The current chapter has contributed to answering the overall research question by trying to fill this gap.

More specifically, the aim of this chapter has been three-fold: (1) determining whether the relevant information, with regard to which this could not be determined in chapter 4, constitutes environmental information; (2) analysing whether the verifier qualifies as a public authority; and (3) examining whether any of the grounds of refusal may relied upon to refuse access to the relevant information. Concerning the first question, it has been concluded that all of the relevant information constitutes environmental information.

With regard to the second issue, the analysis in this chapter focussed on two questions. (1) do verifiers have public *administrative* functions? (2) Do verifiers perform public functions in relation to the environment and are they under the control of a public authority? When determining whether the verifier has public *administrative* functions, it has become clear that, in the context of German law, the crucial question is whether the verifier is an entrusted body. The analysis has shown that it is unlikely that verifiers are entrusted bodies. In the context of the UK Environmental Information Regulations, the question is whether the verifier has special powers that go beyond those which result from the normal rules applicable in relations between persons governed by private law. There are arguments for and against the verifier having such special powers; however, overall, the arguments against it seem to prevail. Thus, it was concluded that verifiers do not perform public *administrative* functions, neither according to the German Federal Environmental Information Act, nor according to the British Environmental Information Regulations.

Concerning the second question, it had already been determined in chapter 4 that verifiers carry out a public function that relates to the environment. Therefore, the analysis in this chapter has focussed on determining whether verifiers are under the control of a public authority. In chapter 4, it was explained that, according to the CJEU, an entity can be considered to be under the control of a public authority, where it is subject to a particularly tight legal framework. The fact that the German Federal Environmental Information Act sets out an exhaustive definition of control that does not mention that being subject to a particularly tight legal framework means being under the control of a public authority, seems to suggest that German law is narrower than the interpretation of the Environmental Information Directive by the CJEU. However, it was concluded that it is possible to interpret the German Federal Environmental Information Act in such a way, so that verifiers can be considered to be under the control of a public authority. Compared to the definition set out in the Federal Environmental Information Act, the definition in the Environmental Information Regulations allows more room for interpretation, since it is not an exhaustive definition. Therefore, if the legislation governing verification of emissions reports was interpreted as constituting a

particularly precise legal framework according to the Environmental Information Directive, it should be possible to interpret the Environmental Information Regulations in the same way.

However, it should be borne in mind that these are only tentative conclusions, since there is almost no guidance as to the criteria that need to be fulfilled for a legal framework to be considered 'particularly precise'. In chapter 4, it was argued that the legislation governing EU ETS verification can be considered to constitute such a particularly tight legal framework. Moreover, it also remains to be seen whether national courts, when presented with this issue interpret their national law in such a way that entities that are subject to a particularly tight legal framework are considered to be under the control of a public authority. If such a case arose, it would be necessary for the German court to submit a preliminary question to the CJEU.[1530]

Regarding the question whether access to the relevant information may be denied based on any of the grounds of refusal, it was determined that both German and English public authorities may, in principle, rely on the ground of refusal protecting the proceedings of public authorities. Furthermore, it has been shown that both Germany and England have set out several criteria that need to be fulfilled before a public authority can refuse a request based on the ground that disclosure would have adverse effects on the confidentiality of commercial or industrial information. It has been determined that, of the relevant information, only the information held by the verifier (internal verification documentation and information provided by the operator to the verifier) seems to satisfy the criteria for confidentiality set out in German law as well as English law. However, it is important to recall that before refusing a request based on any of the grounds of refusal, public authorities must, on a case-by-case basis, weigh the public interest in disclosure against the interest in maintaining an exception.

For instance, where the correspondence between operator and verifier has been requested and there is a strong public interest disclosure since there are indications of collusion between the two, the public authority may still decide to keep the requested information confidential, because there is an ongoing judicial procedure that would be adversely affected by disclosing the requested information. The fact that the public interest test must be performed on a case-by-case basis also demonstrates that the right to access environmental information may be rather costly and burdensome for public authorities in practice. However, to understand how

[1530] Theoretically, it is also possible that the EU legislator revises the Environmental Information Directive to clarify the concept of 'public authority', 'under the control' and 'particularly precise legal framework'. However, given that it was the CJEU who decided that a body can be considered to be under the control of a public authority where it is subject to a particularly precise legal framework, it is of course also an option that the CJEU specifies what it meant with 'particularly precise legal framework'.

serious this problem actually is and to derive general conclusions, a large scale study would be necessary.

Given that this public interest test is dependent on the specific circumstances of each case, it could not be determined whether the public interest in disclosure of the relevant information outweighs any of the interests served by not disclosing it. However, given that accessing the relevant information pursues one of the goals of the Environmental Information Directive (ensuring compliance with and proper functioning of the EU ETS), it may be found that there is an overriding public interest.

Moreover, two procedural requirements have been discussed, since the Aarhus Convention and the Environmental Information Directive give Member States ample discretion in their implementation. Concerning the charges that public authorities may levy for answering requests, Germany and the United Kingdom have taken different approaches. In German law, the amounts that public authorities may charge for answering a request for access to environmental information are clearly defined, while in the United Kingdom, public authorities determine the charges themselves. From the perspective of the applicant, the approach taken by Germany seems to be preferable, since it is clearer from the outset how much a public might charge. However, concerning the maximum charges public authorities may levy in the two jurisdictions, it must be noted that it could be argued that they are too high and have the potential to dissuade prospective applicants.

With regard to the procedures for reviewing a decision of a public authority, it can be said that the procedures in place in Germany and England are completely in line with the provisions of the Aarhus Convention[1531] and the Environmental Information Directive. However, the review procedures in England are very applicant-friendly, as they provide for an additional layer of control that is conducted by an independent third party and free of charge.

In light of the uncertainties with regard to several elements of the right to access environmental information that still persist after thoroughly analysing the Aarhus Convention, the Environmental Information Directive and the legislation of a Member State and a former Member State, it is remarkable that there are still quite a few unresolved issues. Partly, this is due to the fact that public authorities enjoy discretion in the application of the law. For instance when determining the charges for supplying environmental information. Thus, it will be particularly interesting to see how public authorities apply the right to access environmental information in practice. Therefore, chapter 6 will examine this issue.

[1531] To recall, the Aarhus Convention does not touch upon the rights of third parties.

To conclude this chapter, it can be said that it seems possible for the public to access the relevant information. It seems safe to say that the relevant information constitute environmental information. However, there are certain issues concerning which only tentative conclusions are possible. This is primarily the definition of public authorities, in particular the definition of the element of control. It is possible to interpret the national law of Germany and the United Kingdom in conformity with the Environmental Information Directive and its interpretation by the CJEU. However, such an interpretation is, especially in the case of Germany, quite a stretch. In light of these conclusions, it will be highly interesting to see how the bodies holding the relevant information, both governmental authorities and verifiers, react and deal with requests for the relevant information in practice.

CHAPTER VI – REQUESTING ENVIRONMENTAL INFORMATION IN PRACTICE

1. Introduction

The preceding parts of this study have aimed at answering the theoretical part of the main research question – to what extent and under which circumstances must environmental information, regarding compliance and non-compliance, held by public authorities and/or private verifiers involved in the EU ETS, be provided to members of the public upon request? In order to answer that question, chapter 2 examined the Aarhus Convention and the Environmental Information Directive that set out the legal framework within which Member States must implement the right to access environmental information. In Chapter 3, the functioning of the EU ETS as well as the compliance cycle have been analysed. Throughout that analysis, it became clear that the information related to compliance with the EU ETS that is publicly available would not allow the public to check compliance of individual operators. Therefore, some of the information that could be relevant for checking compliance and non-compliance of individual operators with the rules of the EU ETS was identified.[1532] In Chapter 4, the insights of the two preceding chapters have been combined and it has been analysed whether the relevant information must be disclosed pursuant to the rules of the Aarhus Convention and the Environmental Information Directive when requested by the public.

It has been concluded that it is likely that the relevant information constitutes environmental information pursuant to the definitions set out in the Aarhus Convention and the Environmental Information Directive. Thus, public authorities that hold the relevant information must provide it to the public, unless one of the grounds of refusal apply. However, since verifiers (formally private parties) hold parts of the relevant information, it was necessary to determine whether they may qualify as public authorities. Only looking at the Aarhus Convention and the Environmental Information Directive, no conclusive answer could be given to this question. Furthermore, it was concluded that access to the relevant information may be refused based on

[1532] The greenhouse gas permit (including the monitoring plan), the emissions report (including information on which parts have been marked as confidential by the operator), the internal verification documentation (including the results of the verification activities, the strategic analysis and the verification plan), the verification report and the information that the operator has provided to the verifier pursuant to Commission Regulation (EU) No 600/2012 Article 10 (1); Commission Implementing Regulation (EU) 2018/2067 Article 10 (1).

several of the grounds of refusal.[1533] However, also with regard to the application of the grounds of refusal some uncertainty persisted.

In light of these uncertainties, the national law of Germany and the United Kingdom implementing the right to access environmental information has been analysed in chapter 5. The goal of this analysis was to clarify those issues that remained uncertain at the end of chapter 4, in particular the question whether verifiers constitute public authorities and whether any of the grounds of refusal may be relied upon to refuse access to the relevant information. The result of this analysis has been that there are good arguments in favour of the position that verifiers are public authorities. However, this could not be determined with absolute certainty.

The current chapter is dedicated to answering the second, more practical part of the main research question: To what extent do governmental authorities and private verifiers provide environmental information related to compliance and non-compliance with the EU ETS in practice? Thus, this chapter is dedicated to test the conclusions of the preceding chapters in practice, including exploring the identified uncertainties. In particular, it is interesting to examine whether the relevant information is treated as environmental information, whether verifiers see themselves as public authorities and how the grounds of refusal are applied in practice.

In order to answer the second part of the main research question of this thesis, several requests for the information that has been identified as relevant for checking compliance in chapter 3[1534] were sent to the competent national authorities of Germany and the United Kingdom as well as the responsible verifiers. The answers to these requests and the correspondence with the actors involved are evaluated in light of the findings of the preceding chapters. The aim of this chapter is to test to what extent the right to access environmental information can be used to check compliance, not to actually check compliance. In other words, it is tested whether the relevant information can be accessed. It is not examined whether individual operators actually comply, as this would go beyond the scope of this study.

This chapter is structured as follows. The second section discusses some of the empirical studies on access to environmental and the EU ETS that have been conducted so far and explains how this study adds to the existing literature. In the third section, the methodology of

[1533] The following grounds of refusal were examined: the request is manifestly unreasonable, the request concerns internal communications of public authorities, disclosing the requested information would have adverse effects on the proceedings of public authorities, the course of justice the confidentiality of commercial and industrial information, intellectual property rights, and personal data.

[1534] The greenhouse gas permit, the emissions report, the internal verification documentation, the verification report and the information that the operator has provided to the verifiers pursuant to Commission Implementing Regulation (EU) 2018/2066 Article 10 (1); Commission Implementing Regulation (EU) 2018/2067 Article 10 (1).

the requests sent to the public authorities and verifiers will be explained in detail. The fourth section is dedicated to presenting and discussing the results of the requests for the relevant information in light of the findings of the previous chapters. In the fifth section, some reflections on the results of the requests for the relevant information will be showcased and debated. The final section concludes.

2. Previous empirical studies

There is already a vast array of empirical studies on the EU ETS. To a very large extent, they have analysed the EU ETS from an economic point of view, for example examining the impact of the EU ETS on electricity prices[1535] and the impact of the EU Emission Trading System on the efficiency of German manufacturing firms.[1536] However, there are also several empirical studies that investigate the EU ETS from a legal angle.[1537] The European Court of Auditors found that the provisions regarding monitoring, reporting and verification were inadequately implemented, inter alia, since the competent authorities did not check the performance of verifiers and operators to a satisfactory extent.[1538] In contrast, the European Commission attributes the high level of compliance to a large extent to the pivotal role played by national authorities who perform additional checks of emissions reports and monitoring plans as well as of the compliance with requirements of the Monitoring and Reporting Regulation and the Accreditation and Verification Regulation.[1539] The European Commission's study was published 3 years after the one by the European Court of Auditors. Thus, it could be that national governments took into account the criticism by the European Court of Auditors

[1535] JPM Sijm and others, 'The Impact of the EU ETS on Electricity Prices' (2008) ECN-E--08-007.
[1536] Andreas Löschel, Benjamin Johannes Lutz and Shunsuke Managi, 'The Impacts of the EU ETS on Efficiency and Economic Performance – An Empirical Analyses for German Manufacturing Firms' (2019) 56 Resource and Energy Economics <https://www.sciencedirect.com/science/article/pii/S0928765516303785> accessed 14 December 2021.
[1537] Dechezleprêtre (n 646); Verschuuren and Fleurke (n 577); Environment Agency, 'Trends and Projections in the EU ETS in 2017 - The EU Emissions Trading System in Numbers' EEA Report No 18/2017 <https://www.eea.europa.eu/publications/trends-and-projections-EU-ETS-2017>; European Commission, 'Application of the European Union Emissions Trading Directive - Analysis of National Responses under Article 21 of the EU ETS Directive 2016' (n 44); Carole Gibbs, Michael B Cassidy and Louie Rivers III, 'A Routine Activities Analysis of White-Collar Crime in Carbon Markets' (2013) 35 Law & Policy <https://onlinelibrary.wiley.com/doi/abs/10.1111/lapo.12009> accessed 14 December 2021; Brandt and Svendsen (n 132).
[1538] European Court of Auditors, 'The Integrity and Implementation of the EU ETS' (2015) Special Report No 06 12.
[1539] European Commission, 'Application of the European Union Emissions Trading Directive - Analysis of National Responses under Article 21 of the EU ETS Directive 2016' (n 44) 64 f.

and improved their performance by conducting more checks in addition to the prescribed compliance cycle. However, it should be noted that the European Commission's study was conducted by a private consulting firm under the auspices of the Austrian Federal Environment Agency. This can be criticised, as there is little incentive for a national authority to conclude that it is doing a bad job. Thus, it is as such not unthinkable that the study presents the efforts of national authorities in a more favourable light. However, it is impossible to verify this.

Another study found that national public authorities tend to favour domestic industries by turning a blind eye on their fraudulent behaviour, especially in times when the national economy is struggling.[1540] A study based on data from the European Transaction Log found that between 2005 and 2012, there were 4469 instances of non-compliance, equalling 5.2% of all installations and 3.6% of all emissions.[1541] In light of these numbers, it is curious that compliance with and enforcement of the EU ETS has attracted so little attention in the literature.[1542]

Fleurke and Verschuuren conclude that 'non-compliance is usually caused by negligence and by the complexity of the rules.'[1543] Moreover, they find that, overall, verifiers do a good job, as they identify a great portion of mistakes that are subsequently rectified before the end of the compliance cycle.[1544] However, the low allowances price could also contribute to high levels of compliance by operators, since the price of allowances at the time Fleurke and Verschuuren conducted their study was only 4 euros.[1545] In contrast, in October 2021, the price for one allowance cost was 60 euros.[1546] It can be expected that with a rising allowance price, the incentive for non-compliance become stronger. Moreover, it should be noted that Fleurke and Verschuuren base their conclusions primarily on interviews with public servants of several national public authorities responsible for the EU ETS. The question arises whether this method is the most adequate way to detect non-compliance. Ultimately, the competent national authorities are responsible for ensuring compliance with the EU ETS. Thus, if there was non-compliance beyond a negligible degree, public servants have little incentive to unveil this, since this would mean that they are doing a bad job at enforcing the EU ETS compliance cycle. In that regard, the present study adds to this by exploring to what extent the right to access

[1540] Brandt and Svendsen (n 132).
[1541] Dechezleprêtre (n 646) 2.
[1542] ibid 4.
[1543] Verschuuren and Fleurke (n 577) 33.
[1544] ibid.
[1545] ibid 33 f.
[1546] European Energy Exchange, 'Auktionsmarkt' <https://www.eex.com/de/marktdaten/umweltprodukte/auktionsmarkt> accessed 14 December 2021.

environmental information can be used to access information on compliance with the EU ETS in order to try to detect indications of potential non-compliance.

None of the existing studies has analysed whether information related to compliance with the EU ETS should be made accessible upon request. In fact, there are only a few studies that analyse the right to access environmental information from an empirical legal perspective.[1547] One of these studies that do exist is particularly relevant in the context of this thesis. In 2020, a conglomerate of different research institutions published a study evaluating the application of the right to access to environmental information in practice .[1548] The authors sent standardised questionnaires to 423 governmental authorities and 39 private entities qualifying as public authorities.[1549] In the context of this thesis and the question whether the verifier is a public authority, it is interesting that they found that there is 'a lack of a comprehensive judicial clarification to determine what private bodies' constitute public authorities.[1550] However, this study was limited to the application of the right to access environmental information in Germany. Moreover, it examined the right to access environmental information in general and did not focus on a particular area of environmental legislation. This is where the empirical analysis of this thesis and in particular this chapter adds to the literature on the practical application of the right to access environmental information and the EU ETS.

3. Methodology of requests

The aim of this chapter is to answer the second part of the main research question of this study: To what extent do governmental authorities and private verifiers provide environmental information related to compliance and non-compliance with the EU ETS in practice? In chapter 3, the information that is most relevant for the public when trying to check compliance with the EU Emission Trading System has been identified. To recall, this information comprised the greenhouse gas permit, the emissions report, the internal verification documentation, the

[1547] See for example Markus Schmillen, *Das Umweltinformationsrecht zwischen Anspruch und Wirklichkeit: rechtliche und praktische Probleme des Umweltinformationsgesetzes unter Einbeziehung der UIG-Novelle und der neuen Umweltinformationsrichtlinie* (Erich Schmidt Verlag GmbH & Co KG 2003); Doris Hayn, Irmgard Schulz and Danijela Cenan, 'Nutzung Und Marketing Des Umweltinformationsgesetzes (UIG) – Ergebnisse Einer Recherche Im Rahmen Des Projekts "Wissenschaftliche Begleitung Zur Einführung Des Gender Mainstreaming in Die Regelpraxis Des BMU' (2003).
[1548] Karl Stracke and others, 'Evaluation Des Umweltinformationsgesetzes (UIG) - Analyse Der Anwendung Der Regelungen Des UIG Und Erschließung von Optimierungspotentialen Für Einen Ungehinderten Und Einfachen Zugang Zu Umweltinformationen' (Umweltbundesamt 2020) 235/2020.
[1549] ibid 23 ff.
[1550] ibid 17.

procedure for verification activities, the verification report and the information that the operator provided to the verifier pursuant to Article 10 (1) of the Accreditation and Verification Regulation. With a view to find out to what extent governmental authorities and private verifiers provide the relevant information in practice, the relevant information relating to 24 randomly selected installations was requested from the competent public authorities and the verifiers. 12 installations are located in Germany and 12 are located in the United Kingdom. The answers of the governmental authorities and verifiers to these requests were evaluated in view of the main elements of the right to environmental information that were discussed in chapters 4 and 5. More specifically, as will be explained in more detail below,[1551] it was examined, *inter alia*, whether the requested information is treated as environmental information, whether verifiers see themselves as public authorities, which grounds of refusal are used when a request is refused, and whether the entities addressed follow the procedural requirements. By looking at these three central issues, it was possible to determine whether, within the limits of the small empirical sample examined, the conclusions of chapters 4 and 5 can be confirmed and whether the relevant information is accessible in practice.

Throughout the analysis, whenever a reference is made to an individual verifier or operator, their names will be anonymised. One could argue that since their names were disclosed by the competent authority upon request, there should not be a problem with publishing them in this study, since any member of the public could request the same information. However, the behaviour of the verifiers is evaluated in light of the right to access to information. Consequently, verifiers and operators might feel that their behaviour is being presented incorrectly. Therefore, in order to prevent any conflicts with verifiers and operators, their names will be anonymised. Moreover, for the analysis in this chapter, it is not relevant which individual verifier behaved in what way.[1552]

3.1. The competent authorities

Throughout chapter 4 and 5, it was explained that the relevant information is held partly by the competent national authorities and partly by the verifiers. Consequently, the requests needed to be addressed to the competent national authorities as well as the verifiers. Therefore, in an

[1551] See section 4 of this chapter.
[1552] The information collected for this research can be requested via https://doi.org/10.34894/UMF5VF and will be made available to the extent allowed by the applicable (Dutch) access to (environmental) information laws.

initial step, it was necessary to identify which governmental authorities are responsible for the EU ETS in Germany and England. In this section, it will be explained which public authorities in Germany and the United Kingdom are responsible for the EU ETS and consequently were addressed with the requests for the relevant information. The information, which verifier verified the emissions report of which installations is not publicly available. The emissions report and the verification report of each installation indicate this. The competent national public authorities hold both reports. Therefore, it was necessary to request these two reports from the competent authorities first, and only subsequently, after having received the emissions report and the verification report, the requests to the verifiers could be sent out. In the following, the competent authorities of Germany and England will be identified.

3.1.1. Germany

In Germany, the Federal Emissions Authority is responsible for all aspects of the EU ETS, except the greenhouse gas permit. The authorities of the federated states (*Länder*) are responsible for the greenhouse gas permit. The Emissions Trading Act sets out that those authorities that have been tasked with the permit required pursuant to the Industrial Emissions Directive[1553] are also responsible for the greenhouse gas permit under the EU ETS.[1554] Hence, it was necessary to identify the competent authorities in the federated states where the selected installations are situated. The twelve selected installations are located in Bavaria, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony and Schleswig-Holstein.[1555] Generally, the federated states set out in their environmental codes, which governmental authority is responsible for the greenhouse gas permit.[1556] However, in some instances, it was relatively cumbersome to identify the correct governmental authority. The example of North Rhine-Westphalia, which will be explained in more detail below,[1557] illustrates this.

[1553] Industrial Emissions Directive.
[1554] Treibhausgas-Emissionshandelsgesetz, §19 (1) (1).
[1555] See section 3.3. for an explanation how the installations were selected.
[1556] See Annex XIII for an overview of the competent authorities in each of the federal states.
[1557] See section 4.1.1.2. of this chapter.

3.1.2. England

In contrast to Germany, in England, there is no division of competences among several public authorities. The Emission Trading Regulations call the competent authority 'regulator'. In case of installations located in England and Wales, the 'regulator' is the Environment Agency.[1558] The Environment Agency is responsible for all elements of the compliance cycle, such as the greenhouse gas permit.[1559] Moreover, the Emissions Trading Regulations stipulate that the Environment Agency is the competent authority regarding all monitoring, reporting and verification issues applicable to stationary installations as set out by implementing legislation adopted by the European Commission, such as the Monitoring and Reporting Regulation and the Accreditation and Verification Regulation.[1560] Thus, the Environment Agency is responsible for all elements of the compliance cycle, and, therefore, it was the sole recipient of the requests for the relevant information.

3.2. The installations selected

Requesting the relevant information for all stationary installations is not feasible, since the competent public authorities could reject the requests, based on the ground that the request is manifestly unreasonable.[1561] Moreover, one of the goals of this chapter is to test to what extent the public can use the right to access environmental information to check compliance of individual operators. In that regard, it would make little sense to request the relevant information on all installations. Therefore, the relevant information was only be requested regarding 24 installations in total, 12 German and 12 United Kingdom installations. The number 24 was chosen for several reasons. First, it was expected that the public authorities would not refuse a request for the relevant information of 12 installations. Second, the possible costs were anticipated to be within a certain limit (see below). Third, while not being a representative sample, 24 installations was still seen a sample size that has a certain anecdotal significance. The 24 installations were selected according to the following procedure.

[1558] The Greenhouse Gas Emissions Trading Scheme Regulations (n 1372) regulation 3 (1).
[1559] ibid regulation 10 (1) & (4).
[1560] ibid regulation 8 (6) & (7).
[1561] Although, it is uncertain how this criterion is interpreted. For a theoretical discussion of this ground of refusal see chapter 2, section 7.2.2 and chapter 4, section 4.2.

3.2.1. Germany

The European Commission document listing all stationary installations contains 2,495 entries for Germany.[1562] The document indicates that 269 of those installations do not have an active greenhouse gas permit, that the permit of 222 installations has been revoked and for 47 installations, the document does not contain any information on the greenhouse gas permit. Thus, 2226 installations remain. 91 of the remaining installations have been excluded from EU since 2013, which is evident from the compliance data excel sheet published by the European Commission.[1563] This resulted in 2135 installations. Those installations were assumed to have participated in the EU ETS in 2017. Consequently, they served as the pool of installations from which a sample was to be drawn. Those installations were numbered from 1 to 2135 and 12 installations were randomly selected with the Google random number selector tool.[1564]

As explained in chapter 5, in Germany federal public authorities may charge up to EUR 500 per request. So far, there has not been any empirical study investigating the costs that apply when requesting environmental information. Therefore, it was uncertain what the applicable costs for accessing the relevant information might be. As explained above, given the federal structure of Germany, requesting the relevant information involves requesting information from three entities per installation - the Federal Emissions Authority, a local authority and a verifier. In light of the charges that may apply,[1565] the requests were submitted in two rounds. First, the relevant information regarding two German installations were requested. As explained in chapter 5,[1566] the costs that the Federal Emissions Authority may charge for answering requests range from 0 to 500 EUR per request, depending on the scope of the request. The competent authorities of the federated states in which the installations are located are responsible for the greenhouse permit. As explained in the previous section, the twelve randomly selected installations are located in eight federated states: Bavaria, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, and Schleswig-Holstein. These federated states have distributed the responsibility for the greenhouse gas permits in different ways. Some have given the responsibility to one central authority, such as the Bavarian Environmental Authority, while other federal states have entrusted the county

[1562] European Commission, 'Verified Emissions for 2017' <https://ec.europa.eu/clima/sites/default/files/ets/registry/docs/verified_emissions_2017_en.xlsx>.
[1563] ibid.
[1564] See annex III for an overview of the twelve selected installations
[1565] See chapter 2, section 8.1 and chapter 5, section 7.2.
[1566] See chapter 5, section 7.2.

governments with the responsibility for the greenhouse gas permit, such as North Rhine-Westphalia. The result is that there are eight different authorities that are responsible for the greenhouse gas permits of the twelve randomly selected installations.[1567] Moreover, each federated state has adopted its own catalogue of charges that may be levied for answering a request for environmental information.[1568] The applicable charges range from 0 to 2500 EUR per request.[1569] This means that, if all greenhouse gas permits were requested and the competent authorities all asked for the highest applicable charge, the payable amount would be 7,100 EUR. Additionally, the Federal Emissions Authority is allowed to charge up to 500 EUR, as are verifiers.[1570] This amounts to potential costs of almost 10,000 EUR, if all entities charged the maximum amount possible. This amount exceeds the budget available for this study.

In light of this, two installations were selected that are located in Krefeld and Mühlheim an der Ruhr, North Rhine-Westphalia,[1571] due to two reasons: First, the installations were chosen since they are located in North Rhine-Westphalia, as this is the federal state with one of the lowest costs that a public authority may charge for answering a request for environmental information (maximum of 500 EUR per request). Second, at the time the requests were sent, it was assumed that the county governments of North Rhine-Westphalia are responsible for the greenhouse gas emissions permit. The two particular installations were chosen, since they are located in the same county, and, consequently, the same public authority, the county government Düsseldorf, was assumed to be responsible for their greenhouse gas permits. This would have made it possible to keep the potential applicable costs as low as possible, since one request for the greenhouse gas permits of both installations could have been submitted to the same county government.[1572] The applicable costs are limited to an amount *per request*, this reduced the possible costs to a maximum of 2000 EUR; 500 EUR for the request to the

[1567] The fact that the number of federated states and the number of competent authorities is the same is merely coincidental. There is not always one authority per federated state that is responsible for the greenhouse gas permit. In some federated states, there is more than one competent authority (e.g. North Rhine-Westphalia), while in other federated states (e.g. Schleswig-Holstein) there is one competent authority.

[1568] The catalogue of charges adopted by a federated state applies to requests for environmental information regardless of how many authorities are responsible for the greenhouse gas permit.

[1569] The charge that state authorities may levy for answering requests for environmental information depends on state legislation. Some states have followed the example of the federal legislation but in Bavaria, for example, public authorities may charge up to €2500 per request.

[1570] As explained in chapter 5, section 7.2.2, the Umweltinformationsgesetz (n 422) §12 (4) that private parties which constitute public authorities pursuant to the Federal Environmental Information Act, can levy charges pursuant to the same conditions as federal public authorities.

[1571] See Annex III for the two German installations selected for the first round of requests.

[1572] It is possible that traditionally poorer *Länder* allow their authorities to ask for money for answering requests because those authorities have a lower budget than their counterparts in richer *Länder* and consequently they have to make up for that. In other words, richer *Länder* can afford 'the luxury' of facilitating access to environmental information by lowering the costs. However, this is not supported by evidence. In Bavaria, which is traditionally a rich state, public authorities can charge the highest amount of all *Länder*.

authority of the federated state, 500 EUR for the requests to the Federal Emissions Authority, and another 500 EUR for requests to a maximum of two verifiers. The downside of this choice is that the insights are limited to one federated state and one public authority at the level of the federate states. Consequently, within the chosen state, North-Rhine Westphalia, there are four competent authorities that were not tested, the county governments Cologne, Münster, Detmold and Arnsberg. Moreover, within Germany there are fifteen other federated states and even more public authorities in those federated states. However, at a later stage, after a more in-depth analysis of the law of North-Rhine Westphalia, it was discovered that instead of the county governments, it is the district governments that are responsible for the greenhouse gas permit. Thus, at the state level, two requests had to be submitted, instead of one.

After the requests had been submitted, the county government Düsseldorf submitted a preliminary reply explaining that one of the installations regarding which the request had been submitted had ceased operations in 2014, while the greenhouse gas permit was formally still active. Consequently, none of the requested information was available for the year 2017.[1573] This had not been evident from the list of stationary installations in the Union registry or the compliance data document for 2017. Therefore, the list of selected installations was adapted for the second round of requests. To make sure that the ten remaining installations were actually operating and had actively participated in the EU ETS in 2017, it was necessary to crosscheck the initial 2135 installations with the list of verified emissions per installation found in the Union registry. This revealed that there were 391 installations on the list with an active permit that had ceased operations prior to 2017. Consequently, the number of installations for which the relevant information exists decreased to 1744. Besides the installation for which the information had been requested in the first round of requests, 2 from the initially 12 randomly selected installations, turned out to have a formally active permit while having ceased operations before 2017.[1574] It is remarkable that it is only possible to identify installations that are currently participating in the EU ETS by comparing two different documents. From the perspective of the public that is interested in this issue, this is not ideal, also in light of the fact that these documents contain a lot of other information, as it makes it difficult to filter out the desired information.

In light of the fact that there were 3 installations that were not operational in 2017, two more installations from the 1744 remaining installations were randomly selected, again using

[1573] See section 4.1 for a more detailed discussion of the replies of the requests.
[1574] See annex V for an indication of the three installations that had to be excluded.

the random number generator by Google to replace the two installations that had ceased operations. Moreover, a third additional installation was randomly selected to replace the first installation that had revealed the problem, so that the total number of installations regarding which the relevant information was requested was 12, as originally envisaged.[1575]

3.2.2. United Kingdom

In 2017, 1599 installations located in England participated in the EU Emission Trading System. 483 installations were excluded from the EU ETS because they fell outside its scope. 166 installations did not emit any greenhouse gases in 2017. Out of the remaining active 950 participants, 137 were aviation companies and therefore outside the scope of this study which focuses on stationary installations. Out of the remaining 813 stationary installations, 304 were located in Wales, Scotland and Northern Ireland and on 10 there was no information on the location available. Therefore, 499 installations remained for the analysis. As with the selection of German installations, the installations located in England were numbered 1 to 499 and the Google random number generator was used to randomly select twelve installations.[1576]

Unlike Germany, in England, there is one central authority responsible for all elements of the compliance cycle of the EU ETS. Hence, it was possible to request all information with in a single request. Nevertheless, in an initial phase the relevant information was requested regarding only two installations as well. From the twelve selected installations in England, two were randomly selected. They were numbered from 1 to 12 and Google's random number generator was used to select two random installations from the list.[1577]

3.3. The information requested

3.3.1. Information requested from public authorities

In chapter 3, it was determined that the information that is publicly available is not sufficient to investigate non-compliance with the EU ETS. In the course of analysing the EU

[1575] See annex VI for an overview of the twelve selected installations after corrections.
[1576] See Annex IV for the two English installations selected for the first round of requests.
[1577] See Annex IV for the two English installations selected for the first round of requests.

ETS compliance cycle, some of the information that would be necessary to identify non-compliance with the EU ETS has been identified. This information comprised the greenhouse gas permit, the emissions report, the internal verification documentation, the verification report and the information provided by the operator to the verifier according to Article 10 (1) of the Accreditation and Verification Regulation. In this section, it will be briefly recalled why these elements are necessary for checking compliance with the EU ETS. Moreover, several complementary questions are presented that were submitted to the entities together with the requests for the relevant information.

3.3.1.1. The greenhouse gas permit

The first document that was requested is the greenhouse gas permit – the entry ticket to the EU Emission Trading System. The greenhouse gas permit also contains the monitoring plan. Although, the greenhouse gas permit and the monitoring plan do not reveal whether the operator of an installation reported fewer emissions than actually occurred, the concrete information on the operator's monitoring and reporting duties is the ideal starting point for investigating possible non-compliance. The monitoring plan includes a detailed, complete and transparent description of the methodology pursuant to which the operator measures the emissions. In order to check whether an operator reported fewer emissions, it is necessary to know how emissions were, or at least were supposed to be measured. In addition to requesting the greenhouse gas permit itself, the following, more specific, questions were submitted to the competent public authorities:

- What checks did you, the competent public authority, carry out, in addition to the verification, to examine whether the operators have complied with their monitoring and reporting obligations?
- Did the operator adhere to all the reporting and monitoring requirements set out in the monitoring plan?
    - If not, which reporting requirements were violated?
    - Did the verifier identify these violations?
    - What were the causes of these violations?

These questions complement the information that the greenhouse gas permit comprises, in the sense that they are directed towards learning about instances of non-compliance with essential

duties at the permitting and monitoring stage that cannot be identified by studying the greenhouse gas permit alone. The second question aims at finding out more about the ability of the verifier to identify reporting deficits. The verifier acts as an additional layer of control. The questions are intended to test whether it actually fulfilled that role.

3.3.1.2. The emissions report

Second, the emissions reports of the selected installations were requested. As explained in chapter 3,[1578] the emissions report contains information on all emission sources and source streams including the total emissions, the methodology that was applied to monitor emissions, and the tiers applied. Moreover, the emissions report must set out whether data gaps have occurred, the reasons for their occurrence and how they have been closed by surrogate data. All this information is relevant for checking compliance. The information on the methodology pursuant to which emissions have been monitored complements the insights contained in the greenhouse gas permit and the monitoring plan. It may make it possible, for someone with the necessary expertise, to assess whether the emissions have been monitored and reported correctly. Information on data gaps are crucial as well. Data gaps occur where the data that is necessary to determine the emission of an installation is missing. Data gaps occur either where the monitoring methodology is flawed, or where the operator has not executed the monitoring plan correctly. Thus, in a way, the operator is not complying with the monitoring rules. Although the occurrence of data gaps is not intended to be sanctioned,[1579] the operator must specify in the emissions report why the data gaps occurred and pursuant to which method the missing data has been estimated. Nevertheless, when checking non-compliance, it is relevant to learn whether data gaps occurred in the monitoring process of a specific installation and the reasons for them. In addition to the emissions reports themselves, the following questions were submitted to the public authorities:

- If the emissions reports are not publicly available or cannot be disclosed, due to any reason, please
    - State the monitoring methodology applied by the operators of the listed installations

[1578] See chapter 3, sections 2.4 and 4.4.
[1579] Commission Regulation (EU) No 601/2012 Article 65 (1); Commission Implementing Regulation (EU) 2018/2066 Article 66 (1).

- Indicate whether any data gaps occurred in the emission reports of the installations, the reasons for these data gaps, as set out in the emission reports and how these data gaps were treated.

As explained in chapter 3,[1580] the wording of Article 15a of the ETS Directive suggests that emissions reports should be publicly available on a website or in a database without it being necessary to ask for them. However, neither the English Emissions Trading Regulations, nor the German Federal Emissions Trading Act contain any provision implementing Article 15a.[1581] Moreover, it was neither possible to identify a website on which the German or the English authorities published the emissions reports, nor to find another way to access them. Therefore, in order to test whether Germany and England apply Article 15a of the ETS Directive in the way that it has been interpreted in chapter 3,[1582] the competent authorities were asked whether there is a website or database where the emissions reports are publicly available. In case the answer was negative, they were asked to disclose the emissions reports.

Moreover, the Monitoring and Reporting Regulation sets out that the emissions report 'shall be made available to the public [in accordance with] national rules adopted pursuant to' the Environmental Information Directive.'[1583] However, operators may indicate the information that they consider to be commercially sensitive in accordance with Article 4 (2) (d) of the Environmental Information Directive.[1584] In case the public authority partially discloses the emissions report, redacting parts of it, it would be interesting to know which parts of the emissions report the public authority blacked out based on the indication of the operator and which part it blacked out following its own assessment of the emissions report. Therefore, the following request was submitted to the public authority:

- If the emissions report can only be partially disclosed, please indicate which information the operator has marked as commercially sensitive and which information has been blacked out by you due to other reasons.

Access to the emissions report may be refused, if one or more of the grounds of refusal apply, and it is not possible to separate the confidential information from the rest of the

[1580] See chapter 3, section 5.3.
[1581] See chapter 5, section 5.2.5 and 5.3.6 for a discussion of how the provisions on access to information found in 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 have been implemented in the national legislation of Germany and England.
[1582] See chapter 3, section 5.3.
[1583] Commission Regulation (EU) No 601/2012 Article 71; Commission Implementing Regulation (EU) 2018/2066 Article 71.
[1584] See chapter 3, section 3.5.2 for a discussion of this grounds of refusal and chapter 4, section 9.3 for a discussion of its implementation into the national law of Germany and England.

emissions report. In that case, the competent authority was asked to disclose which monitoring methodology the installations in questions used. Knowing whether the installations used a calculation-based or a measurement-based monitoring methodology is essential when checking compliance. Moreover, the competent authorities were asked to state whether there have been any data gaps in the emissions report and the reasons for those data gaps. For checking compliance, it is crucial to be aware of the occurrence of data gaps because it means that the data necessary for determining the emissions of the installations in question was missing. It is important to know the reasons for this as well as how the data gap was remedied. In order to be able to assess whether a data gap could be the reason for underreporting of emissions, the following questions were submitted to the public authority

- Have you (the competent authority) carried checks of the emission reports of the installations mentioned, in addition to the verification?
    - If there have not been additional controls, please state why.
- Have you (the competent authority) carried out site visits on the premises where the installations in question are located?
    - If so, please disclose any records of those site visits.
- Have you had any meetings with the operators of the installations in question?
    - If yes, please disclose any minutes of those meetings.

3.3.1.3. Information related to verification

At the end of the compliance cycle, operators must submit the emissions report together with the verification report to the competent authority in order to be allowed to surrender allowances. The verification report contains information that is pivotal for checking whether operators of installations comply with the rules of the EU ETS. It comprises the scope of verification, the criteria used to verify the emissions report, the verification opinion statement, a description of any identified misstatements and non-conformities that were not corrected before the verification report had been issued, and instances of non-compliance with the Monitoring and Reporting Regulation. This information is of fundamental importance when checking compliance with the rules of the EU Emission Trading System. However, there is a lot of information that is not contained in the verification report that might nonetheless be useful for checking compliance. The verifier holds that information. Therefore, requests were

also be submitted to the verifiers involved. Before submitting requests to verifiers, it was necessary to identify those verifiers that have verified the emission reports of the selected installations. There is no information readily available to the public, for example through a website, which depicts which verifier verified the emissions report of a certain installation. Therefore, the contact details of the verifiers that verified the emissions reports of the selected installations in the chosen year (2017) were requested from the competent authority. Having obtained this information, it was possible to submit requests to the verifiers themselves. Moreover, the following questions related to verification were submitted to the public authority:

- Have you requested the internal verification documentation, relating to the verification of the emission reports of the installations in question, from the verifiers in question pursuant to Article 26 (3) Commission regulation 600/2012?
- If so, please disclose it.

The internal verification documentation is usually held by the verifier. However, the competent authority may request it from the latter.[1585] Requesting this information from the public authority may be advantageous in case the verifier is not considered to be a public authority, and, consequently, is not subject to the duty to disclose environmental information upon request. If the competent authority holds the internal verification documentation, it can be requested, since the competent authority undoubtedly is a public authority.

- Has a simplified verification procedure been applied, pursuant to Article 31 of the Accreditation and Verification Regulation, when verifying the emissions reports of the installations in question and if so why?

The simplified verification entails that the verifier does not have to carry out site visits since all necessary data can be accessed remotely.[1586] Therefore, the simplified verification is less expensive and, from an economic perspective, more favourable than the normal verification procedure. It is crucial that the simplified procedure is only applied where verification can be properly performed without site visits. Hence, it is important to understand why, in specific circumstances, site visits have been waived.

[1585] Commission Regulation (EU) No 600/2012 Article 26 (3); Commission Implementing Regulation (EU) 2018/2067 Article 26 (3).
[1586] Commission Regulation (EU) No 600/2012 Article 31; Commission Implementing Regulation (EU) 2018/2067 Article 31.

- Please disclose all correspondence with the operators of the installations in question deemed relevant pursuant to Article 10 (1) (k) of the Accreditation and Verification Regulation

Article 10 (1) (k) sets out that the operator must provide the verifier with all correspondence that is relevant for verifying the emissions report. This correspondence may also be relevant for the public when checking compliance. Since the public authorities hold this information as well[1587], and in order to avoid the risk that the verifier might refuse the request, based on the argument that it is not a public authority, the correspondence was included in the requests to the public authorities.

- Please disclose the verification report

The verification report is the document that concludes the process of monitoring, reporting, and verification. It contains valuable information for checking compliance, such as the scope of verification, the criteria used to verify the emissions report, the verification opinion statement, a description of any identified misstatements, and any issues of non-compliance with the rules on monitoring and reporting set out in the Monitoring and Reporting Regulation.[1588]

3.3.1.4. Information about sanctions

- What administrative sanctions have been imposed on the operators in question?
- Please indicate instances where the operators of the installations in question have violated their obligations and where administrative sanctions would have normally been imposed, but the competent authority has decided to refrain from doing so, and the reasons for not imposing sanctions.

In order to learn about the degree to which individual installations comply with their obligations pursuant to the ETS Directive and the national implementing legislation, it is insightful whether the competent authority has imposed any kind of administrative sanctions on the operator of installations. Moreover, it is interesting to learn whether there have been

[1587] The correspondence takes place between the operator and the public authority. Thus, they should both have records of the correspondence.
[1588] Commission Regulation (EU) No 600/2012 Article 27 (3); Commission Implementing Regulation (EU) 2018/2067 Article 27 (3).

violations of obligations by operators concerning which the competent authority has refrained from imposing sanctions and the reasons for not doing so.

3.3.1.5. Charges

In light of the fact that there is no concrete information available as to how potential charges for requests for environmental information are calculated in England, the request to the Environment Agency included a question on how such costs are calculated. In contrast, there is detailed legislation setting out the costs that can be charged when submitting a request to German authorities.[1589] It sets out three categories of charges that may be applied. Since it is unclear how it is determined in which category a request falls, the request to the Federal Emissions Authority contained a question to shed light on this issue.

3.3.2. Information requested from verifiers

Once the public authorities had answered the requests, the following questions/requests were submitted to the verifiers that had verified the emission reports of the selected installations.

1. Please disclose the procedures for verification activities established pursuant to Article 40 of Commission Regulation (EU) 600/2012.
2. Please disclose the internal verification documentation, in particular
   2.1. the results of the verification activities performed
   2.2. the strategic analysis, the risk analysis and the verification plan
   2.3. information to support the verification opinion

The internal verification documentation is 'all documentation that a verifier has compiled to record all documentary evidence and justification of activities that are carried out for the verification of an operator's [emission] report.'[1590] The main elements of the internal verification documentation are the results of the verification activities that were performed, the strategic analysis, the risk analysis, the verification plan and the evidence to support the

[1589] For a detailed discussion of the applicable legislation see chapter 5, section 7.2.2.
[1590] Commission Regulation (EU) No 600/2012 Article 3 (20); Commission Implementing Regulation (EU) 2018/2067 Article 3 (21).

verification opinion. Since it provides in-depth insights into the ways the verifier arrived at its final verification opinion, access to the internal verification documentation is of crucial importance when checking compliance with the EU ETS rules.

3. Please disclose the information that the operator has provided to you pursuant to Article 10 (1) of Commission Regulation 600/2012, in particular
   3.1. the operator's risk assessment and an outline of the overall control system
   3.2. the procedures mentioned in the monitoring plan as approved by the competent authority, including procedures for data flow activities and control activities
   3.3. All relevant correspondence with the competent authority

The operator's assessment of the inherent risk[1591] and the control risk[1592] are valuable for checking compliance, as it would make it possible to evaluate the operator's own assessment of how susceptible its emissions report is to material misstatements. Moreover, it is insightful to see what procedures the operator has put in place in order to prevent such misstatements or, at least, decrease the emissions reports susceptibility to misstatements. Even though the correspondence between the operator and the public was requested from the competent authorities, it was also requested from the verifier in order to learn how the verifier deals with a request for the same information.

4. Please disclose any reports of site visits carried out pursuant to Article 21 of the Accreditation and Verification Regulation, including
   4.1. The results of the assessment of the operation of measuring devices and monitoring systems, and
   4.2. Transcripts of interviews with the operator's staff

The reports of sight visits are highly important for checking compliance. The results of the assessment of the operation of measuring devices and monitoring systems make it possible to draw inferences about the ability of the operator to correctly monitor its emissions. Moreover, reports on interviews may contain valuable insights. This information is not part of the internal verification documentation and, therefore, constitutes a separate item of the request.

[1591] Commission Regulation (EU) No 601/2012 Article 3 (1) (9) defines inherent risk as 'the susceptibility of a parameter in the annual emissions report […] to misstatements that could be material […] before taking into account any related control activities.'; Commission Implementing Regulation (EU) 2018/2066 Article 3 (9).
[1592] Commission Regulation (EU) No 601/2012 Article 3 (1) (10) defines control risk as 'the susceptibility of a parameter in the annual emissions report […] to misstatements that could be material […] and not prevented or detected and corrected on a timely basis by the control system.'; Commission Implementing Regulation (EU) 2018/2066 Article 3 (10).

5. Please disclose the results of the independent review carried out pursuant to Article 25 of the Accreditation and Verification Regulation

The independent review is an additional layer of security at the level of verification. An employee of the verifier, that was not involved in the verification of the emissions report in question, reviews the internal verification documentation and the verification report with the aim to check whether the verification has been conducted in accordance with the rules laid down in the Accreditation and Verification Regulation. The results of the independent review are relevant for checking compliance as they provide a valuable insight into how the verification is conducted and the level of care the verifier applies throughout the verification process.

6. Please disclose any correspondence with the operator

It is unclear whether the correspondence between the verifier and the operator helps to identify non-compliance, since it is unknown what information this correspondence entails. Moreover, it is uncertain to what extent such correspondence exists, and the verifier may simply claim that there is none, or very little. However, regardless of these limitations, access to the correspondence may help to understand the relationship between the verifier and the operator, which in turn helps to understand the compliance cycle and may help to check compliance with the rules of the EU ETS.

7. Please provide an explanation of the analytical procedures used pursuant to Article 15 of the Accreditation and Verification Regulation and the reasons to make use of them.

Pursuant to Article 15 of the Accreditation and Verification Regulation, 'the verifier shall use analytical procedures to assess the plausibility and completeness of data, where the inherent risk, the control risk and the aptness of the operator's […] control activities show the need for such analytical procedures.' This means that where the verifier thought it was necessary to use analytical procedures, it deemed the control activities of the operator insufficient to prevent an emissions report from containing material misstatements. Therefore, it is interesting to see why the verifier deemed it necessary to make use of the analytical procedures and their results.

8. Have there been any differences between the data provided by the operator and the final data adjusted based upon information obtained during the verification?
   8.1. If so, what were the operator's reasons for any difference?

In case the emissions report states that a certain amount of emissions has occurred in the reporting period and the verifier finds that this amount is incorrect, the operator is obliged to provide an explanation to the verifier and the latter must then review these reasons. It would be interesting to evaluate the reasons for the incorrect emissions report and the verifiers' assessment. When checking compliance with the rules of the EU ETS, situations like this are highly interesting because the rules were almost violated. If it had not been for the verifier, the operator would have misreported its emissions, i.e. non-compliance.

4. Description and discussion of results

In this section, the results of the requests for the relevant information that were sent to the governmental authorities and verifiers will be presented and discussed. The aim of this empirical study is to test the findings of chapters 4 and 5. The overarching question is to what extent the public can use the right to access environmental information to get access to information related to compliance with the EU ETS in practice. However, it is important to keep in mind that the sample size of installations regarding which the relevant information was requested is relatively small (24) and that it is not statistically significant. Nevertheless, the results of the requests have anecdotal value and provide useful insights into the application of the right to access to environmental information in practice. In light of the overarching question of this chapter, the answers by public authorities and verifiers were evaluated according to the following questions:[1593]

- Did the entity provide an answer?
- Did the entity transfer the request?
- Did the entity provide an answer within the time limits?
- Did the verifier consider itself to constitute a public authority? (only for verifiers)
- Did the entity consider the requested information to constitute environmental information?
- Did the entity refuse parts of the information based on any of the grounds of refusal?
- Did the entity charge for supplying the requested information?
- Did it inform about the charges before supplying the information?
- Did the entity provide the requested information in the form requested?

[1593] For an overview of the results see Annex XII

- If the request was (partially) refused, did the entity inform about possibilities to have its decision reviewed?
- Was a request for internal review submitted?
- Did the entity answer the request for internal review within the applicable time limits?
- Was the request for internal review successful?

By examining the answers by public authorities and verifiers according to these questions, it will be possible to give an answer to the overarching question of this chapter – to what extent do governmental authorities and private verifiers provide environmental information related to compliance and non-compliance with the EU ETS in practice? In light of the small scope of this empirical study, it must be emphasised that the findings and conclusions of this study are limited to the sample examined and that it is not possible to abstract generalisations. Nontheless, the results will showcase whether the right to access environmental information can be used to access information on compliance with the EU ETS in practice and what potential barriers to accessing the relevant information may be.

4.1. Germany

4.1.1. Requests to German governmental authorities

In total, 13 requests were sent to German governmental authorities. 11 of those requests were addressed to the competent authorities of the federated states that are responsible for the greenhouse gas permit and 2 were addressed to Federal Emissions Authority (DEHSt) who is responsible for all other aspects of the EU ETS. All but two governmental authorities provided a reply to the request. In total the German governmental authorities provided 45 documents (9 greenhouse gas permits, 13 emission reports, 13 verification reports and 10 other supplementary documents). The two governmental authorities that did not answer the request were authorities that are responsible for the greenhouse gas permit under the law of one of the federated states.[1594]

[1594] 1. Gewerbeaufsichtsbehörde Oldenburg (Trade Supervisory Authority) and 2. Kreisverwaltung Westewaldkreis (district government)

4.1.1.1. Was the requested information disclosed

7 out of the 11 authorities of the federated states disclosed the greenhouse gas emissions permit.[1595] 2 authorities[1596] did not answer the request, which can be seen as an implicit refusal. As set out below,[1597] one authority[1598] denied the request arguing that the greenhouse gas permit does not constitute environmental information. One authority replied that it could not find the greenhouse gas permit in its archives.[1599] The Federal Emissions Authority partially disclosed the requested information.[1600] Most of the information that was not disclosed was personal data.[1601] However, as explained below,[1602] the Federal Emissions Authority refused to disclose large parts of the emissions report and the verification report of one installation based on the argument that disclosing it would have adverse effects on the confidentiality of commercial and industrial information.[1603] Thus, overall the requests sent to German governmental authorities were successful in the sense that a big part of the requested information was disclosed. Where they did not disclose the requested information, they provided reasons, however only to a limited extent.

[1595] Bezirksregierung (District government Düsseldorf), Email from Bezirksregierung Düsseldorf, 22/10/2019 and Email from Bezirksregierung Düsseldorf 06/11/2019; Email from Bayerisches Landesamt für Umwelt (Bavarian Authority for the Environment), Email from Landkreis Kehlheim 25/05/2020; Email from Stadtverwaltung Köln (City government Cologne), Email from Bezirksregierung Köln, 12/05/2020; Email from Stadtverwaltung Hürth (City government Hürth), Email from Bezirksregierung Köln, 19/05/2020; Email from Landesdirektion Sachsen (State authority Sachsen), Email from Landesdirektion Sachsen, 15/06/2020; Email from Saarländisches Landesamt für Umweltschutz (State authority for environmental portection Saarland), Email from Saarländisches Landesamt für Umweltschutz, 27/05/2020; Email from Landesamt für Umweltschutz Schleswig-Holstein (State authority for environmental protection Schleswig Holstein), Email from Landesamt für Umweltschutz Schleswig-Holstein, 12/05/2020.

[1596] Gewerbeaufsicht Oldenburg (Trade Supervisory Authority) and Kreisverwaltung Westerwaldkreis (district government).

[1597] Section 4.1.1.4. of this chapter.

[1598] Stadtverwaltugn Lünen (city government); see Email from Bezirksregierung Arnsberg, 12/05/2020.

[1599] Email from Landesamt für Umweltschutz Schleswig-Holstein, 08/06/2020.

[1600] Email from Deutsche Emissionshandelsstelle, 14/01/2020; Email from Deutsche Emissionshandelsstelle, 07/07/2020.

[1601] Email Deutsche Emissionshandelsstelle, 14/01/2020; Email from Deutsche Emissionshandelsstelle, 07/07/2020.

[1602] Section 4.1.1.5. of this chapter.

[1603] Email from Deutsche Emissionshandelsstelle, 07/07/2020.

4.1.1.2. Transfer of requests

Interesting to note is that six governmental authorities transferred the requests to another governmental authority.[1604] There were multiple reasons for these transfers. It was not possible to determine the responsible authority for the installation located in Bavaria.[1605] The request was addressed to the Bavarian Environmental Authority,[1606] since it is the governmental authority primarily tasked with the application of the Emission Trading Act in Bavaria. However, the Bavarian Environmental Authority transferred the request to the district government in which the installation is located (Landratsamt Kelheim).[1607] Four requests that were transferred related to installations that are located in North Rhine-Westphalia.[1608] After an initial analysis of the North Rhine-Westphalian Environmental Responsibility Decree, it was assumed that the local governments of North Rhine-Westphalia are responsible for the greenhouse gas permit. However, after the local governments addressed with the requests, transferred the requests to the district governments, the Environmental Responsibility Decree was analysed again and it was found that in North Rhine-Westphalia, district governments are responsible for the greenhouse gas permit. Lastly, the request relating to the installation located in Saarland was sent to the State Ministry for the Environment.[1609] However, after a thorough analysis of the state law, it became clear that in Saarland, the State Authority for Environment and Labour is responsible for the greenhouse gas permits. The Ministry for the Environment of Saarland did, however, transfer the request to the competent authority.[1610]

Two reflections can be made on this experience. On the one hand, it can be noted that it seems that it is not always easy for applicants to identify the public authority that is responsible for a particular issue. This issue is amplified by the federal structure of the German state, where the responsibility for different issues is spread among different levels of government. Given that it was not clear for a researcher in law, which public authority is responsible for the greenhouse gas permit, it is likely that it is even harder for the general public. For ordinary

[1604] Bezirksregierung (District government Düsseldorf), Email from Bezirksregierung Düsseldorf, 06/11/2019; Bayerisches Landesamt für Umwelt (Bavarian Authority for the Environment), Landratsamt Kehlheim Stadtverwaltung Köln (City government Cologne), Stadtverwaltung Hürth (City government Hürth), Stadtverwaltugn Lünen (city government), Saarländisches Umweltministerium (Ministry for the Environment Saarland).
[1605] See section 3.2.1.1. above.
[1606] Email to Landesamt für Umwelt, 01/05/2020.
[1607] Email from Bayerisches Landesamt für Umwelt, 07/05/2020
[1608] Email from Bezirksregierung Düsseldorf, 06/11/2019; Email from Stadtverwaltung Lünen, 05/05/2020; Email from Stadtverwaltung Hürth, 05/05/2020; Email from Stadt Köln, 05/05/2020.
[1609] Email to Saarland, 01/05/2020.
[1610] Email from Saarland, 27/05/2020.

citizens who are interested in a particular environmental issue, this dispersion of responsibility may constitute a barrier to effectively exercising their right to accessing environmental information in practice.

On the other hand, it should be positively noted that all the public authorities that were addressed with the requests but were not competent for the issue at hand transferred the request to the public authority that was competent or indicated the competent public authority, which could be addressed with the request. Thus, while it is not ideal from an access to information perspective that it is apparently not always easy to identify the competent public authority, according to the practical experience gained in the context of this study, this does not seem to be a problem, as public authorities rectify this issue by transferring the request to the competent public authority.

4.1.1.3. Time limits

In chapter 2,[1611] it has been explained that pubic authorities have one month to answer a request for environmental information. In certain circumstances, they may extend this period up to two months, however, they need to inform the applicant thereof and provide reasons for the extension. 9 out of the 11 state authorities that answered the request provided an initial reaction within the one-month time limit.[1612] Thus, the contacted state authorities generally answered the requests within the one-month time limit. However, it should be taken into account that the requests submitted to the state authorities were very simple request, as only one document (the greenhouse gas permit) was requested.[1613] Moreover, it is noteworthy that two of the state authorities did not answer at all, even after a reminder was sent several months after the initial request.[1614]

[1611] See chapter 2, section 8.5.
[1612] Bezirksregierung (District government Düsseldorf) answered within 5 days; Landkreis Kehlheim (district government Bavaria) answered within 25 days, Bezirksregierung Köln (District government of Cologne) answered within 6/13 days; Stadtverwaltung Lünen (City of Lünen) answered within 13 days; Stadtverwaltung Hürth (City of Hürth) answered within 4 days; Stadt Köln (city fo Cologne) answered within 5 days; Landesdirektion Sachsen (State authority Saxony) answered within 7 days; Saarländisches Landesamt für Umweltschutz (State authority for environmental protection Saarland) answered within 26 days; Landesamt für Umweltschutz Schleswig-Holstein (state authority for environmental protection Schleswig-Holstein) answered within 10 days.
[1613] See section 3.3.1.1. of this chapter.
[1614] Email to Gewerbeaufsicht Oldenburg, 28/06/2021; Email to Westerwaldkreis, 28/06/2021

The German Emissions Authority only answered the first request within the one-month period.[1615] During the second round of requests, the German Emissions Authority provided an initial reply in which it answered a few of the submitted questions 17 days after the request had been submitted. In that email, the German Emissions Authority also stated that it would need 2 months to answer the remaining questions and provide the requested information.[1616] Thus, it made use of the possibility to extend the period within which it must answer requests from 1 to 2 months. However, it only provided the requested information after 2 months and 2 days. Thus, technically, the German Emissions Authority answered the request two days too late. However, one should not attach too much weight to a two-day delay. The authority informed about the extension of the period within which it would answer and the request was submitted during the early days of the Covid-19 pandemic,[1617] a time in which requests probably could not be processed normally, given that most people were working from home.

4.1.1.4. Is the information requested environmental information?

One of the most relevant questions is whether the governmental authorities regarded the requested information as environmental information. Regarding this issue, it is necessary to differentiate between the requests to the authorities of the federated states and the requests to the Federal Emissions Authority, since different information was requested from these bodies. The greenhouse gas permit was requested from the authorities of the federated states, while the requests to the Federal Emissions Authority concerned the rest of the relevant information.[1618]

In 8 out of the 9 cases in which the state authorities answered, they did not contest that the greenhouse gas permit constitutes environmental information.[1619] They simply provided the greenhouse gas permit. One state authority, the district government Arnsberg, initially refused the request based on the argument that the requested information, (the greenhouse gas permit) did not constitute environmental information.[1620] It should however be noted that in its reply,

[1615] It took 21 days to provide an initial reply.
[1616] Email from Deutsche Emissionshandelsstelle, 18.05.2020.
[1617] The initial request was sent on 1 May 2020; See Email to Deutsche Emissionshandelsstelle, 01/05/2020.
[1618] The emissions report, the verification report and the supplementary questions.
[1619] Bezirksregierung Düsseldorf (district government Düsseldorf); Landkreis Kehlheim (district government Kehlheim); Bezirksregierung Köln (District of Cologne); Landesdirektion Sachsen (state authority Saxony); Saarländisches Landesamt für Umweltschutz (State authority for environmental protection Saarland); Landesamt für Umweltschutz Schleswig-Holstein (State authority for environmental protection Schleswig-Holstein).
[1620] Email from Bezirksregierung Arnsberg, 14/05/2020.

the public authority asked for clarification.[1621] A response was submitted in which it was explained why the greenhouse gas permit constitutes environmental information.[1622] Subsequently, the public authority accepted that the greenhouse gas permit comes within the ambit of the definition of environmental information and provided the requested information.[1623]

In the first round of requests, the Federal Emissions Authority denied access to the verification report arguing that the verification report did not constitute environmental information.[1624] It was of the opinion that the verification report is a measure or activity, within the meaning of the Environmental Information Directive and the Federal Environmental Information Act but that it does not affect or is not likely to affect the environment or is not intended to protect the environment.[1625] A request for review explaining that the verification report is a measure or activity that is intended to protect the environment was submitted to the Federal Emissions Authority.[1626] Following this request for review, the public authority provided the verification report.[1627] In the second round of requests, the Federal Emissions Authority did not challenge that verification reports constitute environmental information and provided the requested verification reports, unless a ground of refusal applied.[1628] Thus, the conclusion that the relevant information held by the governmental authorities (greenhouse gas permit, emissions report, verification report) constitutes environmental information has been confirmed in practice. Again, it must be borne in mind that this study is not representative and based on these findings it is not possible to generalise. However, it would be strange if the competent authorities treated this information as environmental information in some instances but not in others. Finally, the Federal Emissions Authority also answered all supplementary questions that were submitted together with the requests for the relevant information.[1629]

[1621] Email from Bezirksregierung Arnsberg, 14/05/2020.
[1622] Email to Bezirksregierung Arnsberg, 20/05/2020; see chapter 4, section 2.2. and chapter 5, section 4.2.2. for an explanation why the greenhouse gas permit constitutes environmental information.
[1623] Email from Bezirksregierung Arnsberg, 18/06/2020
[1624] Email from Deutsche Emissionshandelsstelle 16/01/2020
[1625] Email from Deutsche Emissionshandelsstelle 16/01/2020
[1626] Email to Deutsche Emissionshandelsstelle, 21/01/2020. See chapter 4, section 2.4. and chapter 5, section 4.2.2. for an explanation why the verification report may constitute environmental information.
[1627] Email from Deutsche Emissionshandelsstelle, 17/02/2020.
[1628] Email from Deutsche Emissionshandelsstelle, 07/07/2020.
[1629] Email from Deutsche Emissionshandelsstelle, 07/07/2020.

4.1.1.5. Application of grounds of refusal

None of the state authorities refused access to the requested information (the greenhouse gas permit) based on any of the grounds of refusal. However, in both rounds of requests, the Federal Emissions Authority redacted personal data contained in the requested information.[1630] This included information such as the personal details of the contact person of the operator (name, telephone number, email address, etc.). In addition, in one case, it also redacted certain information based on the argument that by disclosing this information, the confidentiality of commercial and industrial information would be adversely affected. This information included

- explanations of the emissions report,[1631]
- changes of the emissions report,
- a list of annexes,[1632]
- part of the table of contents of the emissions report,[1633]
- the amount of transferable CO_2 received,[1634]
- additional remarks on the correctness of the monitoring plans,[1635]
- the entire calculation of the emissions through the mass-balance methodology,[1636]
- information on the completeness of the monitoring and reporting of emissions,[1637]
- parts of a list of documents that the verifier inspected during a site visit,[1638]
- a list of interviews which the verifier conducted during the site visit,[1639]
- information on sampling by the verifier,[1640]
- an explanation why the verifier could not confirm the correct application of the monitoring methodology,[1641]
- a list of non-conformities with the monitoring plan,[1642]

[1630] Email from Deutsche Emissionshandelsstelle, 21/01/2020. Document disclosed, operator A, pp. 5, 6, 11, 12, 53, 54; Document disclosed operator B, p. 6, 8, 10, 11, 49, 50, 54
[1631] Document disclosed operator B, p. 3
[1632] Document disclosed operator B, p. 3
[1633] Document disclosed operator B, p. 4
[1634] Document disclosed operator B, p. 7
[1635] Document disclosed operator B, p. 12
[1636] Document disclosed operator B, 14 – 48.
[1637] Document disclosed operator B, p. 52
[1638] Document disclosed operator B, p. 54
[1639] Document disclosed operator B, p. 54
[1640] Document disclosed operator B, p. 55
[1641] Document disclosed operator B, p. 56
[1642] Document disclosed operator B, p. 57

- the verifier's assessment of the materiality of the non-conformities with the monitoring plan,[1643]
- and remarks on the final assessment of the verifier.[1644]

The Federal Emissions Authority explained that the operators had been consulted and that the operator in question had only agreed to a partial disclosure of the requested information, since disclosing the information that was not provided would have had adverse effects on commercial and industrial information.[1645] Furthermore, the Federal Emissions Authority stated that a third operator, upon being consulted, did not consent to the disclosure of the requested information.[1646] It explained that only the part of the requested information that relates to emissions into the environment could be disclosed, since the part of the requested information that constituted environmental information but not information on emissions into the environment was covered by the grounds of refusal and that there was no overriding public interest.[1647]

There are two interesting issues to be observed. First, it seems that, in the cases examined, the Federal Emissions Authority attaches considerable weight to the operator's assessment of what information constitutes confidential commercial and industrial information. Second, with regard to the operator that refused to give its consent to the disclosure of the requested information, the Federal Emissions Authority explained that the information that does not relate to emissions into the environment is covered by the grounds of refusal. However, it does not set out which grounds of refusal apply and why. This is curious, as public authorities are required to provide reasons when they (partially) refuse a request for environmental information.[1648]

4.1.1.6. Charges

In chapter 2 and chapter 5, it was explained that public authorities may levy charges for supplying environmental information upon request.[1649] None of the authorities of the federated

[1643] Document disclosed operator B, p. 57
[1644] Document disclosed operator B, p. 59
[1645] Email from Deutsche Emissionshandelsstelle, 07.07.2020
[1646] Operator C, see Email from Deutsche Emissionshandelsstelle, 07.07.2020.
[1647] Email from Deutsche Emissionshandelsstelle, 07.07.2020.
[1648] See chapter 2, section 8.4; chapter 5, section 7.1. It would have been interesting to bring this issue before a court. However, the time and resources available for this study did not allow to initiate legal proceedings.
[1649] See chapter 2, section 8.1. and chapter 5, section 7.2.

states levied any charges for supplying the greenhouse gas permit. The Federal Emissions Authority also did not charge for supplying the requested information in the first round of requests. However, in the second round of requests, it charged EUR 300 for supplying the requested information. As justification, it referred to the amount of work that was necessary to compile the requested information. More specifically, it stated that it was necessary to contact the 11 operators to whose installations the request related and their responses had to be evaluated.[1650] Furthermore, the Federal Emissions Authority explained that there are three divisions that have responsibilities related to emissions and verification reports, which had to be consulted when compiling the requested information. The Federal Emissions Authority also explained that it was necessary to check whether any information had to be redacted. Finally, two departments were involved in replying to the supplementary questions that were submitted together with the request for the relevant information.[1651]

Before charging for supplying environmental information, public authorities must inform the applicant of their intention to levy a charge and set out how much they are intending to charge.[1652] It should be noted that before supplying the requested information, the Federal Emissions Authority sent out an email stating that it was intending of charging between EUR250 and EUR500 for supplying the requested information.[1653]

To recall, in chapter 2[1654] and chapter 5,[1655] it was explained that public authorities may levy a reasonable charge and that to be considered reasonable, a charge (1) may not have a deterrent effect and (2) it may not restrict the right to access to information. When assessing whether the charge has a deterrent effect on the applicant, the economic situation of the applicant and the public interest in disclosing the information must be taken into account.[1656] However, based on the correspondence with the Federal Emissions Authority, it does not appear that it took the economic situation of the applicant into account at all. At no point in time, did the Federal Emissions Authority ask the applicant to submit any information that would allow drawing inferences on the economic situation of the applicant.

[1650] Email from Deutsche Emissionshandelsstelle, 07.07.2020.
[1651] Email from Deutsche Emissionshandelsstelle, 07.07.2020.
[1652] See chapter 2, section 8.1.; chapter 5, section 7.2.2.
[1653] Email from Deutsche Emissionshandelsstelle, 18.05.2020.
[1654] See chapter 2, section 8.1.
[1655] See chapter 5, section 7.2.2.
[1656] *Case C-71/14 East Sussex* (n 536) para 40.

4.1.1.7. In the form requested

As explained in chapter 2,[1657] public authorities must provide the requested information in the form and format requested by the applicant, unless it is reasonable for the public authority to provide the information in another form than the one requested or it is already publicly available in another form. The public authorities were asked to supply the requested information as PDF documents, since this guaranteed that the information is easily readable. All of the German authorities, both at federal level as well as state level, provided the information in the form requested. However, it is interesting to note that in the second round of requests, instead of sending the requested information via email, as it did in the first round, the Federal Emissions Authority sent the requested information on a CD via mail. It explained that, since the information contained personal data and confidential commercial and industrial information, sending the information via email was not secure enough.[1658] It did not explain why it was possible to send the requested information via email in the first but not in the second round.

4.1.1.8. Review procedures

Pursuant to the Aarhus Convention, the Environmental Information Directive and the Federal Environmental Information Act, public authorities must inform the applicant of the possibilities to have their decisions reviewed, in case the applicant is of the view that the public authority has incorrectly refused her request or has inadequately dealt with it in another way.[1659] 8 out of the 9 authorities of the federated states that answered the request did not provide any information on the review procedures available.[1660] However, these were the authorities that fully answered the request. Thus, there was no need to inform about the possibility to request a review of the decision. Only the authority that initially refused the request based on the ground that the greenhouse gas emissions permit did not constitute environmental information explained how its decision to refuse the request could be reviewed.[1661] The Federal

[1657] See chapter 2, section 8.2.
[1658] Email from Deutsche Emissionshandelsstelle, 07.07.21
[1659] See chapter 2, section 8.6 and chapter 5, section 7.4.
[1660] The only exception being the Bezirksregierung Arnsberg (District government Arnsberg)
[1661] Email from Bezirksregierung Arnsberg, 14/05/2020.

Environmental Information Authority set out very clearly in its answers how applicants can have its decisions reviewed.[1662]

In all three cases in which access to the requested information was (partially) refused, a request for review was submitted.[1663] In case of the state authority, the request for review was successful.[1664] The governmental authority provided an answer to the request for review within the time limit of one month[1665]. In the first round of requests, the Federal Emissions Authority refused access to the verification report based on the argument that it did not constitute environmental information.[1666] A request for review which explained why the verification report constituted environmental information was submitted to the Federal Emissions Authority.[1667] The review was successful and the Federal Emissions Authority supplied the verification report within one month.[1668]

In the second round of requests, as explained above,[1669] a large part of the requested information regarding one installation was refused based on the ground that its disclosure would have adverse effects on the confidentiality of commercial and industrial information. Again, a request for review was submitted. However, the Federal Emissions Authority did not provide an answer to the request for review. This is concerning, since, in Germany, asking for administrative review is the only possibility for applicant to have a decision of a public authority reviewed for free. The fact that the Federal Emissions Authority did not answer can be interpreted as an implicit refusal and consequently, this implicit decision could be challenge in court.

[1662] Email from Deutsche Emissionshandelsstelle, 16/01/2020; Email from Deutsche Emissionshandelsstelle, 07.07.2020.
[1663] Email to Bezirksregierung Arnsberg 20/05/2020; Email to Deutsche Emissionshandelsstelle, 21.01.2020; Email to Deutsche Emissionshandelsstelle, 23.09.2020
[1664] Email from Bezirksregierung Arnsberg, 18.06.2020
[1665] Email from Bezirksregierung Arnsberg, 18/06/2020
[1666] Email from Deutsche Emissionshandelsstelle, 16/01/2020
[1667] Email to Deutsche Emissionshandelsstelle, 21/01/2020.
[1668] Email from Deutsche Emissionshandelsstelle, 17/02/2020
[1669] See section 4.1.1.5. of this chapter.

4.1.2. Requests to German verifiers

4.1.2.1. Was the information requested disclosed?

In total, 7 requests were sent to verifiers. Some verifiers verified the emissions report of more than one of the chosen installations. Therefore, the number of verifiers addressed with a request was lower than the number of installations. 2 of the 7 verifiers did not answer at all.[1670] 4 verifiers provided an answer within one month after receiving the request[1671] and 1 verifier answered after one month but before the end of the second month.[1672] However, it did not provide any justification why it only replied after one month had passed. Out of the 7 verifiers to which a request for the relevant information was sent, only one provided parts of the requested information. It provided the information in the form requested (PDF documents). In total the German verifier provided 6 documents (3 verification reports and 3 strategic and risk analyses).

Overall, verifiers disclosed very little information. Most verifiers provided a reply to the request and did so relatively fast. The one verifier that replied after one month had passed, replied within 33 days.[1673] Thus, similarly to the reply by the Federal Emissions Authority discussed above,[1674] a 2-day delay should not be given too much weight, despite the fact that, technically, the verifier answered the request too late (2 days had passed after the one-month time period within which requests must be answered). On the other hand, it appears that the contacted verifiers are not open to provide information relating to verification to the public.

4.1.2.2. Do verifiers see themselves as public authorities?

Out of the 5 verifiers that replied, 3 explained that they are not public authorities within the meaning of the Federal Environmental Information Act.[1675] The main argument that all three verifiers put forward as justification why they are not public authorities was that they are not

[1670] Verifier A and Verifier B.
[1671] Verifier C answered within 27 days; Verifier D answered within 5 days; Verifier E answered within 4 days; Verifier F answered within 10 days.
[1672] Verifier G answered within 33 days.
[1673] Email from Verifier G, 26.10.2020.
[1674] See section 4.1.1.3. of this chapter.
[1675] Email from Verifier D, 22/10/2020; Email from Verifier E, 28/09/2020; Email from Verifier F, 02/10/2020

under the control of the federal government or a legal person of public law, which is under the supervision of the federal government.[1676] They stated that they are neither directly nor indirectly controlled by the state within the meaning of the Federal Environmental Information Act.[1677] As further support of their standpoint, two verifiers argued that verification must be conducted independently, in a nonpartisan way, free from instructions and that verifiers are under no obligation to contract with operators[1678] and that operators are not obliged to contract a specific verifier.[1679] One of the verifiers explained that the Federal Emissions Authority, as the competent authority, was only responsible to concretise the legislation applicable to verifiers but that it did not have the power to influence verifiers.[1680] In all cases in which verifiers argued that they did not constitute public authorities, a request for internal review was submitted in which it was explained why verifiers can be considered to be under the control of a public authority.[1681] However, none of these requests was successful. It must be emphasised that the fact that verifiers do not see themselves as public authorities does not mean that verifiers are actually not public authorities within the meaning of the Federal Environmental Information Act.

The request to and exchange with one verifier deserves special attention. Initially, the verifier stated that it was an entrusted body and as such was obliged to disclose environmental information upon request.[1682] It explained that, due to the Corona pandemic, its financial and personnel situation was constricted and that consequently, it would need a binding commitment of a payment of EUR9900.[1683] After an explanation that this charge was not within the statutory limit,[1684] the verifier supplied a large part of the requested information adding that it would send a bill soon thereafter.[1685] However, this bill was never sent. Moreover, in the same email, the verifier explained, thereby directly contradicting its previous statements, that it was not a public authority pursuant to the Federal Environmental Information Act because it was not under the control of a public authority.[1686] Since the verifier did not disclose all of the requested information, a request for review was submitted in which it was explained why verifiers are

[1676] Email from Verifier D, 22/10/2020; Email from Verifier E, 28/09/2020; Email from Verifier F, 02/10/2020
[1677] Email from Verifier D, 22/10/2020; Email from Verifier E, 28/09/2020; Email from Verifier F, 02/10/2020
[1678] Email from Verifier D, 22/10/2020; Email from Verifier E, 28/09/2020
[1679] Email from Verifier E, 28/09/2020
[1680] Email from Verifier E, 28/09/2020
[1681] Email to Verifier D, 17/11/2020; Email to Verifier G, 06/11/2020; Email to Verifier E, 01/10/2020; Email to Verifier F, 02/10/2020.
[1682] Email from Verifier D, 28/09/2020.
[1683] See section 4.1.2.5. for a discussion of the charge.
[1684] Email to Verifier D, 29/09/2020.
[1685] Email from Verifier D, 22/10/2020
[1686] Email from Verifier D, 22/10/2020

under the control of a public authority.[1687] In its reply, the verifier explained that after consulting other verifiers and the Federal Emissions Authority, it concluded that it did not constitute a public authority and hence was not obliged to disclose the requested information.[1688]

4.1.2.3. Is the information requested environmental information

The verifiers' assessments to what extent the requested information constitutes environmental information within the meaning of the Federal Environmental Information Act differed to a considerable extent. One of the verifiers that had refused the request based on the argument that it was not a public authority did not touch upon this issue at all.[1689] It seems that it did not regard it to be necessary to touch upon the question whether the requested information constitutes environmental information. Another verifier argued that none of the requested information constituted environmental information,[1690] while yet another verifier acknowledged that the entirety of the requested information constitutes environmental information.[1691]

Two verifiers argued that the requested information only partially constitutes environmental information.[1692] Both of them argued that apart from the emissions report, none of the requested information constitutes environmental information. More specifically, they stated that the procedures for verification established pursuant to Article 40 of the Accreditation and Verification Regulation,[1693] the internal verification documentation,[1694] the information provided by the operator to the verifier pursuant to Article 10 (1) of the Accreditation and Verification Regulation,[1695] the reports of site visits,[1696] the results of the independent review and the correspondence with the operator do not constitute environmental information within the meaning of the Federal Environmental Information Act.[1697] One of the verifiers argued that

[1687] Email to Verifier D, 17/11/2020; See chapter 5, section 5.2.3 for an explanation why verifiers may considered to be under the control of a public authority.
[1688] Email from Verifier D, 01/12/2020
[1689] Email from Verifier F, 30/09/2020
[1690] Email from Verifier C, 31/03/2020
[1691] Email from Verifier G, 26/10/2020
[1692] Verifier D and Verifier F.
[1693] Email from Verifier D, 22/10/2020; Email from Verifier E, 28/09/2020
[1694] Email from Verifier D, 22/10/2020; Email from Verifier E, 28/09/2020
[1695] Email from Verifier D, 22/10/2020; Email from Verifier E, 28/09/2020
[1696] Email from Verifier D, 22/10/2020; Email from Verifier E, 28/09/2020
[1697] Email from Verifier D, 22/10/2020; Email from Verifier E, 28/09/2020

this information relates exclusively to the processes for verifying the correctness and accuracy of data and information in the emissions report.[1698] The verifier, however, did not explain why this in turn means that the information is not environmental information. The other verifier argued that this information relates to the operative processes of operators and verifiers and is not directly related to the environment.[1699]

4.1.2.4. Application of grounds of refusal

Many of the verifiers that gave an answer to the requests stated that they either do not fall under the definition of 'public authority' or that the requested information does not constitute environmental information. In light of this, it is not surprising that only one verifier referred to the grounds of refusal as a justification for not disclosing the requested information.[1700] It argued that the procedures for verification established pursuant to Article 40 of the Accreditation and Verification Regulation are protected by intellectual property rights, in particular copyrights.[1701] Similarly, the verifier argued that the internal verification documentation is protected by intellectual property rights, such as copy rights and that the internal verification documentation contains commercial and industrial secrets of its clients.[1702] The same argument was invoked for the results of the independent review, the analytical procedures implemented according to Article 15 of the Accreditation and Verification Documentation.[1703] Another verifier did not refer to any specific ground of refusal but simply stated that it is obliged to keep information relating to its client confidential.[1704]

4.1.2.5. Charges

None of the verifiers charged for answering the request. This does not come as a huge surprise, since they only provided the requested information to a very limited extent. As briefly

[1698] Email from Verifier D, 22/10/2020
[1699] Email from Verifier E, 28/09/2020
[1700] Verifier G.
[1701] Email from Verifier G, 26/10/2020
[1702] Email from Verifier G, 26/10/2020
[1703] Email from Verifier G, 26/10/2020
[1704] Email from Verifier E, 28/09/2020

mentioned above,[1705] in an initial response to the request, in which it did not yet disclose any information, one verifier explained that it would provide the information but that it would need 3 days to compile the requested information per installation and that it would charge EUR 1100 per day.[1706] This verifier was responsible for the verification of the emissions reports of three of the selected installations. Thus, the envisaged total amount demanded was EUR 9900.[1707] The verifier requested a pledge of payment before it started compiling the information.[1708] An email was sent to the verifier explaining that, while it is in principle allowed to charge for answering requests for environmental information, the total maximum amount that may be charged is EUR 500.[1709] Further, in the response to the verifier, it was argued that the submitted request was to be regarded as a simple request, for which no charges should apply.[1710]

With its reply, the verifier supplied parts of the requested information and stated that it would send a bill for supplying the information soon. It did not touch upon the arguments put forward in the reply to its initial email in which it asked for a pledge of payment.[1711] Subsequently, there was more correspondence with this verifier about a different issue[1712] but, strikingly, it never sent a bill for supplying parts of the requested information.

4.1.2.6. Review procedures

Only one verifier who refused the request for environmental information provided information about the available review procedures.[1713] It explained that pursuant to ISO 14065 (10),[1714] it has established a complaint mechanism. If the reply to the request for environmental information was unsatisfactory, it would be possible to initiate a formal complaint procedure

[1705] See section 4.1.2.2. of this chapter.
[1706] Email from Verifier D, 28/09/2020
[1707] EUR 1100 x 3 (installations) x 3 (days) = EUR 9900
[1708] Email from Verifier D, 28/09/2020
[1709] Reply to Verifier D, 29/09/2020. For a detail explanation of the charges that may be levied in Germany, see chapter 5, section 7.2.2.
[1710] Reply to Verifier D, 29/09/2020.
[1711] Email from Verifier D, 22/10/2020.
[1712] The verifier only provided parts of the requested information. Its arguments for not supplying all information were challenged. See sections 4.1.2.2. and 4.1.2.3. above.
[1713] Verifier G.
[1714] ISO 14065 is the harmonised standard to which also the Annex II of Accreditation and Verification Regulation refers.

by addressing the verifier in writing.[1715] This was done in the form of an email.[1716] However, the complaint was unsuccessful.[1717]

Even though, all other verifiers did not provide any information about the possibilities to start a review procedures against their decisions, requests for review were submitted in all instances in which the requests were (partially) refused, also where they were refused implicitly (no answer at all). To a large extent, these requests were unsuccessful. In 4 out of 8 cases, the verifier replied to the request for review,[1718] in the other 4 cases, the verifiers did not respond.[1719] Unsurprisingly, 3 of the 4 verifiers that did not reply were the verifiers that also had not answered the initial request. Three of the four verifiers that answered the request for review did not change their initial answer.[1720] Thus, the requested information was also not disclosed after the review. Interestingly, one of the verifiers, the one who initially stated that it was a public authority, answered the request for review 4.5 months after it had been submitted and provided the emissions report and the verification report and some of the raw data used to calculate the emissions.[1721]

4.2. United Kingdom

4.2.1. Requests to the Environmental Agency

As explained before,[1722] in contrast to Germany, there is only one English authority responsible for the administration of the EU ETS, i.e., the Environment Agency. Since it is a governmental authority, it was clear that the Environment Agency is a public authority within the meaning of the Environmental Information Regulations. In the first round of requests, one request was submitted to the Environment Agency asking for the relevant information concerning 2 installations.[1723] In the second round of requests, again one request was submitted to the Environment Agency, this time asking for the relevant information concerning 10

[1715] Email from Verifier G, 26/10/2020
[1716] Reply to Verifier G, 06/11/2020
[1717] Email from Verifier G, 16/12/2020.
[1718] Email from Verifier C, 30/04/2020; Email from Verifier D, 01/12/2020; Email from Verifier G, 16/12/2020; Email from Verifier E, 02/10/2020.
[1719] Verifier A, Verifier F, Verifier B (2).
[1720] Email from Verifier C, 30/04/2020; Email from Verifier D, 01/12/2020; Email from Verifier G, 16/12/2020
[1721] Email from Verifier E, 10/02/2021.
[1722] See section 3.2.2. of this chapter.
[1723] Email to Environment Agency, 17/10/2019

installations.[1724] The Environment Agency did not transfer any of the two requests. In both rounds of requests, the Environment Agency treated all requested information as environmental information[1725] and disclosed it within the time limits and in the form requested (via email).[1726] In total, the Environment Agency disclosed 63 documents (12 greenhouse permits, 12 emissions reports, 12 verification reports and 27 other supplementary documents). It only refused to disclose some information based on two of the grounds of refusal.[1727]

4.2.1.1. Time limits

Public authorities in the United Kingdom have 20 working days to answer a request and may in certain circumstances extend this period up to 40 working days.[1728] If they do so, public authorities must inform the applicant and provide reasons for the extension.[1729] In the first round of requests, the Environment Agency provided an answer to the request within one month.[1730] In the second round, it took more than one month[1731] to reply but stayed within the maximum of two months. However, it did not provide a justification for taking longer than one month.[1732] The fact that in the second round of requests the Environment Agency technically answered too late should not lead to the conclusion that it performed poorly, since it was only a short delay (3 days) and the request in the second round concerned quite a large amount of information. Moreover, it should be taken into account that the Environment Agency could have extended the time limit from one to two months. Therefore, it still answered within the maximum time limit permissible by law.

[1724] Email to Environment Agency, 01/05/2020
[1725] Email from Environment Agency, 12/1/2019; Email from Environment Agency, 04/06/2020.
[1726] However, it should be noted that in the second round of requests, when the relevant information regarding 10 installations was requested, the Environment Agency provided the requested information in a curious format. Instead of sending individual PDF documents, it provided an Excel document that contained the PDF documents of the greenhouse gas permit, the emissions report and the verification report. It was not possible to extract the individual PDF documents with Excel for Mac. This was communicated to the Environment Agency. In its reply, the Environment Agency explained that it was possible to extract the individual documents. Subsequently, it was successfully attempted to extract the individual PDF documents with Excel for Windows.
[1727] See section 4.2.1.2.
[1728] The Environmental Information Regulations (n 1126) regulation 5 (2).
[1729] ibid regulation 7 (1).
[1730] It took the Environment Agency 26 days to reply.
[1731] The Environment Agency took 1 month and 3 days to reply.
[1732] Email from Environment Agency, 04/06/2020.

4.2.1.2. Application of grounds of refusal

Environmental information held by public authorities must be disclosed upon request, unless one of the grounds of refusal applies. In fact, the Environment Agency refused access to parts of the information referring to two different grounds of refusal. First, in all emissions reports that were disclosed, it redacted the names and contact details of the contact person of the verifier,[1733] the name of the EU ETS lead auditor who conducted the site visit[1734] and the name of the independent reviewer.[1735] Second, in several pieces of communication between the Environment Agency and operators, it redacted personal data, such as the addressee and a person in CC.[1736]

Besides the ground of refusal protecting personal data, the Environment Agency also used the ground of refusal protecting international relations, defence, national security and public safety. It stated the description of the installation plan in one of the greenhouse gas permits as well as part of the description of the calculation-based monitoring methodology in the monitoring could not be provided, since 'disclosure would adversely affect international relations, defence, national security or public safety'.[1737] The Environment Agency did not explain why and how disclosure of this information could have adverse effects on international relations, defence, national security or public safety. However, given that the operator is the air traffic control body[1738] of the United Kingdom (NATS),[1739] it is understandable that certain information may be too sensitive to disclose to the public, since they may be abused for conduct that is dangerous to the general public. For example, if terrorists obtained information on the

[1733] Emissions Report by Operator T, p. 6; Emissions Report by Operator Q, p. 6; Emissions Report by Operator W, p. 5; Emissions Report by Operator S, p. 6; Emissions Report Operator N, p. 7; Emissions Report by E.ON UK, p. 6; Emissions Report by Operator P, p. 6; Emissions Report by Operator O, p. 6; Emissions Report by Operator R, p. 6; Emissions Report by Operator V, p. 6; Emissions Report by Operator U, p. 6; Emissions Report by Operator X, p. 6.
[1734] Emissions Report by Operator T, p. 25; Emissions Report by Operator Q, p. 22; Emissions Report by Operator W, p. 17; Emissions Report by Operator S, p. 31; Emissions Report by Operator N, p. 35; Emissions Report by Operator M, p. 24; Emissions Report by Operator P, p. 21; Emissions Report by Operator O, p. 37; Emissions Report by Operator R, p. 31; Emissions Report by Operator V, p. 23; Emissions Report by Operator U, p. 20; Emissions Report by Operator X, p. 21.
[1735] Emissions Report by Operator T, p. 25; Emissions Report by Operator Q, p. 22; Emissions Report by Operator W, p. 17; Emissions Report by Operator S, p. 31; Emissions Report by Operator N, p. 35; Emissions Report by Operator M, p. 24; Emissions Report by Operator P, p. 21; Emissions Report by Operator O, p. 37; Emissions Report by Operator R, p. 31; Emissions Report by Operator V, p. 23; Emissions Report by Operator U, p. 20; Emissions Report by Operator X, p. 21.
[1736] Operator W, Notification 1; Operator N Notification 1 & 2; Operator N Notification 2, 4, 6 & 8; Operator P Notification 2; Operator O Notification 2, 4 & 6; Operator X Notification 1.
[1737] Decision Notice Environment Agency, NR147299, 08/11/2019.
[1738] An air traffic control body could also qualify as a public authority. Examining this would, however, go beyond the scope of this study.
[1739] See Annex IV.

power supply of the air traffic control body, it could allow them to shut down essential air traffic control machinery, which could have serious implications for public safety. Overall, the Environment Agency only refused a very small part of the requested information by reference to the grounds of refusal.

4.2.1.3. Consultation of parties (operators) affected

From the correspondence with the Environment Agency, it is not apparent whether the Environment Agency contacted the operators to whom the requested information relates to in order to give them the opportunity to express whether they are of the opinion that the requested information is covered by any of the grounds of refusal. Of course, the Environment Agency might have contacted the operators concerned without indicating this. In any case, given that the same information was requested from governmental authorities, it is remarkable that the Environment Agency, with the exception of the information on the air traffic control body, only refused to disclose personal data, while the German authority, following the input of the German operators, refused much more information by reference to other grounds of refusal.[1740] It could of course be that disclosing information on activities of the British operators would simply not have had adverse effects on the confidentiality of commercial or industrial information, while this would be the case for information relating to the German operators.

4.2.1.4. Charges

As explained in chapter 2[1741] and chapter 5,[1742] public authorities may levy a reasonable charge for answering a request for environmental information. However, the Environment Agency did not levy a charge for disclosing the requested information. When they are intending to make a charge, public authorities are obliged to provide a table of charges, so that applicants can determine the amount they would have to pay when accessing the requested environmental information. Since the Environment Agency did not charge for disclosing the requested information, it also did not provide such information. However, as explained in chapter 5, there

[1740] See section 4.1.1.5. of this chapter
[1741] See chapter 2, section 8.1.
[1742] See chapter 5, section 7.2.

is only very limited information available on the website of the Environment Agency and even after a phone call to the Environment Agency, no further clarification could be obtained. Therefore, in the request for the relevant information, a question regarding the charges that the Environment Agency levies for answering requests for environmental information was included.

The Environment Agency provided a document[1743] that is mainly intended as guidance for its staff.[1744] This document makes clear that where answering a request requires 18 hours of work or less, the Environment Agency will not levy any charge.[1745] Interestingly, the document states that where it is estimated that answering the request will take longer than 18 hours, the Environment Agency will consider whether the request can be legally refused based on the ground of refusal concerning manifestly unreasonable requests. However, even if it seems possible to refuse a request, the guidance document states that the Environment Agency should consider to exercise its discretion and provide the information for a charge nonetheless.[1746] In such cases, the charge should always be GBP 25 per hour. Thus, where answering a request takes 20 hours, the charge would be GBP 500 (25 x 20).

The question may arise whether it is in line with the Aarhus Convention that a public authority charges the applicant for the hours spent by public servants on answering a request. Based on the Aarhus Convention alone, it is not possible to answer this question. Thus far, the Aarhus Convention Compliance Committee has only issued a finding on what constitutes a 'reasonable' charge.[1747] However, it did not touch upon the question whether a reasonable charge may include the time public servants spent on answering the request. Nevertheless, in its considerations, the Compliance Committee took into account the judgments by the CJEU and national courts. While the Compliance Committee is not bound by the decisions of the CJEU or national courts, it acknowledged that 'their jurisprudence can shed light on how the term "reasonable" [...] may be understood and applied at the domestic level.'[1748] While it seems unlikely that taking into account the working time spent on answering the request is contrary

[1743] Since this document is 8 pages long, it is not included in the annex. It can be provided upon request.
[1744] Environment Agency, 'Charging for Information', operational instruction 384_04, sent via email on 12/11/2019.
[1745] Environment Agency, 'Charging for Information', operational instruction 384_04, sent via email on 12/11/2019, p. 2.
[1746] Environment Agency, 'Charging for Information', operational instruction 384_04, sent via email on 12/11/2019, p. 5.
[1747] This conclusion is based on a search of the compilation of the findings of the Aarhus Convention Compliance Committee.
[1748] *ACCC/C/2008/24 Spain* (n 485) para 77.

to the Convention, further national and CJEU case law could shed more light on the circumstance in which this practice would be contrary to the Aarhus Convention.

4.2.1.5. Review procedures

In chapter 2[1749] and chapter 5,[1750] it was explained that when (partially) refusing a request, public authorities must inform the applicant about the possibilities to have their decision reviewed. When answering the requests for the relevant information, the Environment Agency fulfilled this requirement explaining that it was possible to contact them within two months, if it was felt necessary to have the answer reviewed.[1751] In the first round of requests, a request for review was submitted[1752] and the Environment Agency answered within the time limit of one month. However, the Environment Agency did not change its decision. Given that the information that the Environment Agency did not disclose was personal data and information related to international relations, public security and national defence, this does not come as a surprise. In the second round of requests, no request for internal review was submitted, since the ground of refusal based on which parts of the requested information was not disclosed was only personal information. Thus, it seemed superfluous to submit virtually the same request for internal review again.

4.2.2. Requests to UK verifiers

The information requested from the Environment Agency yielded that the emissions reports of the 12 selected installations were verified by 4 different verifiers. One verifier[1753] verified the emissions report of 6 installations,[1754] one verifier[1755] verified the emissions report of 3 installations,[1756] one verifier[1757] verified the emissions report of 2 installations[1758] and one

[1749] Chapter 2, section 8.6.
[1750] Chapter 5, section 7.4.
[1751] Email from Environment Agency, 12/11/2019; Email from Environment Agency, 04/06/2020.
[1752] Response to Environment Agency, 22/11/2019.
[1753] Verifier H
[1754] Operator T; Operator Q; Operator P; Operator R; Operator V; Operator U
[1755] Verifier J.
[1756] Operator N; Operator M; Operator O.
[1757] Verifier K.
[1758] Operator W; Operator X.

verifier[1759] verified the emissions report of 1 installation.[1760] In total 5 requests were sent to United Kingdom verifiers. 1 request was sent in the first round of requests, since the verifier verified the emissions reports of both selected installations and 4 requests were sent in the second round or requests, as 4 verifiers verified the emissions reports of the 10 installations selected for the second round of requests. Out of the 5 requests that were sent to verifiers, 4 were answered.[1761] 3 of the verifiers that answered the requests provided an answer within one month after receiving the request.[1762] 1 of the verifiers that answered the request provided an answer within two months.[1763] However, it did not provide a reason why it only answered within two months.[1764]

The British verifiers did not provide any of the requested information arguing that they do not come within the definition of public authorities. In all 4 instances in which verifiers provided an answer to the requests, they explained that they were not public authorities[1765] and that due to client confidentiality they could not provide the requested information.[1766] None of the verifiers even touched upon the question whether the requested information constituted environmental information, simply stating that they were not bound by the Environmental Information Regulations, since they were not public authorities.[1767] They also did not refer to any of the grounds of refusal set out in the Environmental Information Regulation. They simply stated that they were not allowed to disclose the requested information due to client confidentiality.[1768]

Pursuant to the Environmental Information Regulations, public authorities may make a charge, where they provide environmental information upon request.[1769] None of the verifiers charged for answering the request. Admittedly, this is not surprising, given that (1) they do not see themselves as public authorities and (2) they did not actually provide the requested information.

[1759] Verifier I.
[1760] Operator S.
[1761] The only verifier that did not answer at all was Verifier I
[1762] Verifier H (2), Verifier K.
[1763] Verifier J.
[1764] Email from Verifier J, 20.01.2021.
[1765] Email from Verifier H, 09/12/02019; Email from Verifier J, 20/01/2021; Email from Verifier K, 09/11/2020
[1766] Email from Verifier H, 05/12/2019; Email from Verifier H, 07/11/2020; Email from Verifier J 12/02/2021; Email from Verifier K, 09/11/2020
[1767] Email from Verifier H, 09/12/02019; Email from Verifier J, 20/01/2021; Email from Verifier K, 09/11/2020
[1768] Verifier H, 05/12/2019; Verifier H, 07/11/2020; Verifier J 12/02/2021; Verifier K, 09/11/2020
[1769] The Environmental Information Regulations (n 1126) regulation 8 (1); see chapter 5, section 6.2 for a detailed explanation of this provision.

The Environmental Information Regulations state that applicants may ask public authorities to reconsider their decision to (partially) refuse the request for environmental information.[1770] In their replies to the initial requests, none of the verifiers informed about the possibility to submit a request for internal review. However, given that they did not see themselves as public authorities, this is comprehensible, as the obligation to inform about the review procedures available to applicants only applies to public authorities. In all instances, a request for review was submitted to the verifiers nonetheless.[1771] However, none of the requests for internal review was successful.

As explained in chapter 5, in the United Kingdom, there is another possibility to review the decisions in the context of access to information, in addition to the internal review and court proceedings. Any applicant may ask the Information Commissioner to review whether a request for information to a public authority has been dealt with correctly.[1772] After the verifier had refused to disclose the requested information in the first round of requests, based on the argument that it did not constitute a public authority, and after it did not change its opinion following a request for internal review, a complaint was submitted to the Information Commissioner.[1773] In this complaint, it was explained why the verifier could be seen as a public authority.[1774] In its reply, the Information Commissioner stated that the verifier is not a public authority pursuant to the definition set out in the Environmental Information Regulations and therefore is not under an obligation to disclose environmental information.[1775] However, unfortunately, the Information Commissioner did not explain in any detail which element of the definition of public authorities was not fulfilled by the verifier.[1776]

Overall, the requests to British verifiers show a clear result: within the limits of the small sample, information related to compliance with the EU ETS that is held by British verifiers is not accessible to the public upon request. The verifiers denied that they were public authorities without exception and consequently refused to provide the requested information in all cases.

[1770] ibid regulation 11 (1); see chapter 5, section 6.3 for a detailed explanation of this provision.
[1771] Email to Verifier H, 06.12.2019; Email to Verifier I, 04.06.2021; Email to Verifier J 20.01.2021; Email to Verifier K, 04.06.2021.
[1772] The Environmental Information Regulations (n 1126) regulation 18; Freedom of Information Act 2000 (n 1482) section 50 (1); see chapter 5, section 7.4. for a detailed explanation of the role of the Information Commissioner.
[1773] Email to Information Commissioner's Office, 17/12/2019.
[1774] See chapter 4, section 3 and chapter 5, section 4.3 for an explanation of why the verifier may be considered a public authority.
[1775] Decision Notice by the Information Commissioner, FER0898322, 24/12/2019.
[1776] As explained in chapter 2, sections 6.3. and 6.4. and chapter 5, section 5, the elements that a body must fulfil in order to constitute a public authority are (1) it must carry out a public administrative function, or (2) it must have public responsibilities relating to the environment and be under the control of a public authority.

The fact that the Information Commissioner does not consider verifiers to constitute public authorities pursuant to the Environmental Information Regulations either gives this interpretation a certain weight. However, since neither the verifiers themselves, nor the Information Commissioner provided any reasons, no new insights for the discussion whether verifier constitute public authorities can be taken from the requests.

5. Reflections on requesting environmental information in practice

When reflecting on the results of the requests for the relevant information, a clear distinction can be made between, one the one hand, the requests to governmental authorities and requests to verifiers on the other. As explained in the previous section, both German and British governmental authorities largely observed the applicable procedural requirements and disclosed almost all of the requested information. Nonetheless, a few interesting observations can be made which allow for some critical reflection on the possibility of the public to request information related to compliance with the EU ETS that is held by governmental authorities in practice. The experience with requesting the relevant information from verifiers was very different, as almost no information was disclosed. Nevertheless, some interesting observations can be made on how the verifiers dealt with the requests for the relevant information. The interaction with German verifiers was quite different from the interaction with British verifiers. While the answers of British verifiers were extremely short (sometimes literally a single line), the replies by German verifiers were more detailed. Thus, more analysis and reflections are possible with regard to the German verifiers.

Given that the experience with requesting the relevant information from governmental authorities was so different from requesting the relevant information from verifiers, this section is divided into two. First, some reflections on the requests to governmental authorities will be presented. The second subsection will reflect upon the experience with requesting the relevant information from verifiers. Both subsections will compare the results from the requests to German and British bodies and reflect on the differences.

5.1. Reflections on requesting environmental information from governmental authorities

5.1.1. Identifying the competent authority

Where a member of the public is interested in accessing certain environmental information, one of the first steps will be to identify the public authority that holds the information in question. The experience with requesting the relevant information in Germany has shown that it is not always easy to determine which public authority holds certain information. The federal structure of the German state and the fact that all 16 states have allocated the responsibility for the greenhouse gas permit in a different way made it difficult to identify the correct public authority. The goal of the Environmental Information Directive and the national legislation implementing the directive is to provide wide access to environmental information and, thereby, to contribute to greater awareness of environmental matters, a free exchange of views and more effective participation. The fact that it is difficult to identify the public authority that holds the information an applicant is interested in may constitute a barrier to the exercise of that right practice. In that regard, a decentralised system, such as the German federal system, is harder to navigate than a centralised system such as the British one, where there is only one authority responsible for administering all aspects of the EU ETS.

However, it should be noted that where they are addressed with a request that they cannot answer, public authorities are obliged to transfer the request to the public authority that holds the requested information or to indicate to the applicant the public authority which holds the requested information.[1777] It is positive to see that the public authorities contacted in the course of this study fulfilled this obligation, since this may, to a certain extent, remedy the fact that it is sometimes difficult to identify the public authority responsible for a certain issue. However, this may not rectify this issue completely, since the one-month time period, within which a public authority must answer a request, only begins on the day on which the request is submitted to the responsible public authority. Where an applicant has an interest in receiving environmental information fast, a single or even multiple transfers of her request could impede the effective exercise of the right to access environmental information.

[1777] See chapter 2, section 7.2.1.

5.1.2. Time limits

Generally, the governmental authorities answered within the statutory time limits of 1 – 2 months. In the second round of requests, a bigger amount of information was requested from the German Federal Emissions Authority (the relevant information relating to 11 installations) and the Environment Agency (the relevant information relating to 10 installations). Both of them extended the period within which they had to answer from 1 to 2 months and both exceeded this limit by a couple of days. Nevertheless, overall, it seems that the public authorities that were contacted for this study made an effort to and succeed in replying to requests within the statutory time limits. This corresponds to the provisions of the Aarhus Convention, the Environmental Information Directive and the national law of Germany and England. In the context of requesting information on the compliance with the EU ETS, the time within which public authorities answer requests is not paramount. However, in other scenarios, it may be crucial that the applicant receives an answer to her request within the time limits. For example, where the information is needed to participate in a public decision-making procedure.

5.1.3. Consultation of third parties

In chapter 5, it was concluded that when public authorities receive a request for environmental information that relates to a third party, such as the operator in the present case, they are obliged to give these parties the opportunity to express their opinion on the potential disclosure of the information in question.[1778] However, there seem to be considerable differences in the conduct of the German Federal Emissions Authority and the British Environment Agency. The Federal Emissions Authority expressly pointed out that it consulted the operators to which the information relates. Moreover, the wording of its decisions[1779] suggests that it based its decision not to disclose the requested information (almost) exclusively on the operators' lack of consent. The information that the operator indicated as confidential was precisely the information that the governmental authority did not disclose. One possible explanation for this is that the public authority rubberstamped the assessment of the operators and refused disclosure without checking whether the grounds of refusal actually applied.

[1778] See chapter 5, section 7.3.
[1779] Email from Deutsche Emissionshandelsstelle, 14.01.2020; Email from Deutsche Emissionshandelsstelle, 07.07.2020.

However, it could also be that it consulted the operator and took its opinion into account but ultimately reached the decision not to disclose parts of the requested information by itself.

In this context, it should also be emphasised that the same information was requested regarding 12 operators. It seems rather coincidental that the only information to which access was refused, is the information that the operator to which the information relates did not want to be disclosed. Thus, even though this does not prove that the Federal Emissions Authority automatically refuses information where the operator to which it relates does not consent to the disclosure, it seems that the opinion of the operator at least has a considerable influence on the decision of the public authority. If this was the prevailing modus operandi of public authorities, it would of course be highly concerning. According to the Arhus Convention, the Environmental Information Directive and the Federal Environmental Information Act, it is ultimately the responsibility of the public authority to decide whether or not to disclose information, taking into account the public interest in disclosure and interests in keeping the information confidential.

In contrast, it appears that, with regard to the requests submitted for this study, the British Environment Agency seems to have taken a very different approach. It does not mention that it contacted operators to get their consent for disclosing the requested information. Of course, this does not mean that it did not contact them at all. If the Environment Agency really did not consult operators before disclosing the requested information, this would mean that it did not follow the Freedom of Information Code of Practice issued by the Cabinet Office.[1780] While the Code of Practice is not legally binding, not giving affected parties would still be problematic in light of the fact that the operators also enjoy the right to be heard pursuant to Article 41 of the CFREU.[1781] Of course, post-Brexit, British public authorities are not bound by the CFREU anymore.

5.1.4. Grounds of refusal and review process

Both the Environment Agency and the Federal Emissions Authority refused access to parts of the information by reference to the ground of refusal protecting personal data. In addition,

[1780] See chapter 5, section 7.3.2. for a detailed discussion of this Code of Practice.
[1781] See chapter 4, section 5 for a detailed discussion of this article. As explained in chapter 4, section 5, Member States are bound by the provisions of the CFREU when implementing EU law and, consequently, must respect the rights and principles set out in the Charter.

the Environment Agency also refused parts of the information, since disclosure would have had adverse effects on international relations, public security or national defence and the Federal Emissions Authority refused parts of the information, arguing that disclosure would have adverse effects on the confidentiality of commercial and industrial information. In their decision notices, both the Environment Agency and the Federal Emissions Authority do not explain how disclosure of the requested information would adversely affect international relations, public security or national defence and respectively the confidentiality of commercial and industrial information. They simply state that the information cannot be provided, since these grounds of refusal apply. However, as explained in chapter 2[1782] and chapter 5,[1783] when refusing a request for environmental information, public authorities must explain the reasons for the refusal. It is unclear whether this criterion is satisfied simply by stating that a certain ground of refusal applies. Nevertheless, this seems questionable, since, while the application of a ground of refusal is a reason to (partially) refuse access, it is not an explanation of the reason.

The fact that public authorities do not explain why a certain ground of refusal applies can be problematic. For an applicant, it is often extremely hard, if not impossible, to comprehend whether disclosing the information would actually have adverse effects on the confidentiality of commercial and industrial information or international relations, public security or national defence, without having access to the information in question. Consequently, it is very difficult to submit a request for internal review in which it is explained why the requested information does not constitute confidential commercial or industrial information. This shows that there is a rather big power or information imbalance between applicant and public authority. A proper explanation by the public authority, why the ground of refusal in question applies, might remedy this asymmetry to a certain extent.

This power or information asymmetry is reinforced by the fact that, at least in Germany, apart from judicial proceedings, the only option for applicants to have a decision by a public authority reviewed is the internal review. This means that the decision is reviewed by a different employee of the same public authority. While it is not obligatory for the applicant to explain in the request for review why she thinks that the public authority erred in its decision, it seems reasonable to assume that the chances for a successful review are higher where the applicant submits such an explanation. However, given the information asymmetry between applicant

[1782] See chapter 2, section 8.4.
[1783] See chapter 5, section 7.1.

and public authority, it is hard for the applicant to make an argument why, for example, certain information does not constitute confidential commercial and industrial information. Court procedures may not always be a feasible option for applicants, since they are usually time- and resource-intensive and applicants may not have the necessary financial means or require timely access to the requested information in question. In this context, it should be recalled that in the second round of requests, the Federal Emissions Authority did not even reply to the request for internal review. This makes the lack of possibilities to review the decisions of public authorities out of court even more serious, since it shows that the only review option that is available to applicants free of charge does not always seem to be properly applied. Of course, requests for review will not always result in the public authority actually changing its assessment. However, the internal review should, at least, be conducted and the result should be communicated to the applicant.

In light of these considerations, an institution, such as the Information Commissioner in the United Kingdom may remedy the information and power asymmetry between applicants and governmental authorities to a certain extent. It gives applicants the opportunity to have the decision by the governmental authority reviewed by an independent third party free of charge and expeditiously. Moreover, the Information Commissioner may take some of the load off the court system by settling at least some access to information-related disputes before they reach the litigation stage.

5.1.5. Charging for answering a request

As explained above,[1784] the Environment Agency did not charge for supplying the requested information, while the Federal Emissions Authority, in the second round of requests levied a charge of EUR 300. As such, the Federal Emissions Authority is allowed to make this charge. Given that the requests to these two authorities were virtually identical, it is however interesting to note that in one of the countries examined, the governmental authority charged for answering the request, while in the other the governmental authority did not. In its internal guidance document on charging for answering requests for environmental information, the Environment Agency sets out that, in principle, it does not charge for answering a request, where compiling the requested information takes less than 18 working hours. However, where

[1784] See sections 4.1.1.6. and 4.2.1.4. of this chapter

answering a request takes longer than 18 working hours, the Environment Agency contemplates refusing the request. Answering most requests will probably not take more than 18 working hours. Thus, for the large majority of applicants this means that they will not be charged for accessing environmental information held by the Environment Agency. Such an approach contributes to a wide public access to environmental information. The flipside of the coin is that where answering a request takes more than 18 working hours, the Environment Agency will consider to refuse the request based on the argument that it is manifestly unreasonable or charge an hourly rate of GBP25.

It seems that, in practice, this charging scheme is similar to the German scheme.[1785] In both systems, applicants are not charged for simple requests. However, as explained in chapter 5, the Federal Emissions Authority usually starts charging for answering a request, where it requires a comprehensive written reply. However, the experience with requesting information in the context of this study suggests, that for the German authority the threshold of work required for answering a request that needs to be reached before it charges for answering the request is lower than in the United Kingdom. In other words, the Federal Emissions Authority starts charging earlier than the Environment Agency. Therefore, solely looking at the charges, the British system provides broader access to environmental information.

Another interesting point related to the charges is that, according to the CJEU,[1786] public authorities need to take the economic situation of the applicant into account, when determining the charge, so that the levied charge does not deter applicants from accessing the information. However, as explained above, it was not apparent that the public authority that levied a charge (the Federal Emissions Authority) took the economic situation of the applicant into account. In light of the fact that a charge may not have a deterrent effect, it seems highly important to do so. For instance, a person with a yearly income of EUR 50.000 is more likely to be deterred from accessing information where a public authority levies a charge, than a person with an income of EUR 150.000. However, if the second person has gone to university in the United States and consequently owes EUR 100.000 in tuition debt, while the first person has gone to university in Denmark, where there are practically no tuition fees, the second person might be deterred more easily. This illustrates that there are many factors that can have an impact on the deterrent effect of a charge. Thus, it is all the more curious that the Federal Emissions Authority did not seem to take the economic circumstances of the applicant into account.

[1785] See chapter 5, section 7.2.2.
[1786] *Case C-71/14 East Sussex* (n 536) para 43.

5.1.6. Form and format of information supplied

It appears that the public authorities contacted for this study were willing or did not have any problems with supplying the information in the form and format requested. However, it should be noted that they were asked to disclose the relevant as PDF documents, a very common format. It could be that if asked to supply in a different format they would have been less acommodating. However, the Aarhus Convention, the Environmental Information Directive, and national law allow public authorities to deviate from the obligation to disclose requested information in the form and format requested, where it is reasonable to disclose in a different form and format. One interesting point to reflect upon is that, in the second round of requests, both the British Environment Agency and the Federal Emissions Authority supplied the requested information in a slightly different format than requested. Instead of sending individual PDF documents, the British Environment Agency sent an Excel file comprising the PDF documents. Only after some consultation with the Environment Agency, was it possible to access the individual files. The Federal Emissions Authority sent the requested information on a CD via mail. Its argument that it was not an option to send it via email, since the requested information contained personal data and confidential commercial and industrial information and that sending the information via email was not sufficiently secure is odd. The public authority decided to disclose the information following a request for environmental information. If the information can be disclosed to one member of the public, there should, in principle, be no reservations to disclose it to the public at large. Therefore, the justification for sending the requested information via CD instead of email does not really make sense. Moreover, it is strange that during the first round of requests, when the same information had been requested, the public authority sent it via email.

5.2. Reflections on requesting environmental information from private entities

5.2.1. Verifier as a public authority

In chapter 2,[1787] it was explained that the Aarhus Convention and the Environmental Information Directive set out three different categories of public authorities.[1788] Since verifiers are not governmental authorities, they may only constitute public authorities pursuant to the second or third category. In chapter 5,[1789] it was argued that it seems unlikely that verifiers can be considered entrusted bodies (entities with public administrative functions) and consequently constitute public authorities pursuant to the second category of the Federal Environmental Information Act. The verifiers confirm this interpretation, in the sense that, apart from the one verifier that first stated that it was a public authority but later revoked that statement, none of them even tries to refute that they may constitute natural or legal persons performing public administrative tasks. Instead, they solely refer to the third category of public authorities when arguing why they do not constitute public authorities. Of course, simply because verifiers do not touch upon a certain argument does not mean that it is not relevant. However, the fact that they do not even deem it necessary to argue that they are not public authorities pursuant to the second category suggests that, in their view, it is not even a remote possibility that they might constitute public authorities because they perform public administrative functions.

In chapter 5, it was explained that the definition of control, as set out in the Federal Environmental Information Act, is potentially narrower than the definition set out in the Environmental Information Directive.[1790] However, it was argued that the Federal Environmental Information Act could be interpreted in such a way, that it would be in conformity with the Environmental Information Directive. Both German and British verifiers argued that they do not constitute public authorities and therefore refused to disclose the requested information. As explained above, the replies by the British verifiers were extremely short and did not contain any proper explanation why they did not constitute public authorities. In contrast, several German verifiers provided more detailed explanations why, in their opinion, they did not qualify as public authorities.

[1787] See chapter 2, section 6.
[1788] (1) Governmental authorities, (2) natural or legal persons performing public administrative functions, and (3) natural or legal persons performing public function relating to the environment that are under the control of a public authority.
[1789] See chapter 5, section 5.2.2.
[1790] See chapter 5, section 5.2.3.

The main argument of German verifiers contacted for this study was that they were not under the control of a public authority and therefore did not constitute public authorities. The arguments put forward by verifiers largely correspond to the arguments that were discussed in chapters 4[1791] and 5.[1792] In their argumentation, the German verifiers only look at the wording of the Federal Environmental Information Act.[1793] They do not take into account the interpretation of the term 'under the control' by the CJEU.[1794] As was explained in chapter 4,[1795] the CJEU has set out that a body may be considered to be under the control of a public authority, where it is subject to a particularly precise legal framework.[1796] It seems that verifiers either do not know about the CJEU's interpretation of the term 'control' or that they know about this issue but consciously avoid to mention it, hoping that it is not brought up by the applicant.

In this context, it is also highly interesting to recall that one verifier initially stated that it was a public authority but later revoked that assessment. The fact that the verifier first stated that it was a public authority and was going to disclose the requested information for a charge of EUR 9900 shows that this verifier was at least not aware of the fact that the maximum charge that public authorities may levy is EUR 500. Moreover, this indicates that, at least, this particular verifier is not fully aware what being a public authority within the meaning of the Environmental Information Directive entails. It could be that when first receiving the request, the verifier asked for a charge of EUR 9900 to be paid hoping either that this amount would discourage the applicant or that they would actually receive this money. However, it seems that the verifier was surprised when a reply was submitted in which it was explained that public authorities may only levy a charge of up to EUR 500. It could be that, following this reply, the verifier researched the legal framework governing access to environmental information and, upon fully grasping what being a public authority entails, thought that it would be favourable not to be classified as a public authority and consequently decided to change its argument. Of course, this is pure speculation. Nevertheless, the behaviour of the verifier shows that it is not at all clear, even to verifiers themselves, whether they are public authorities.

The experience with requesting the relevant information from verifiers gained throughout this study shows that the verifiers do not see themselves as public authorities and that,

[1791] See chapter 4, section 3.3.
[1792] See chapter 5, section 5.2.3.
[1793] Email from Verifier D, 20.10.2020; Email from Verifier G, 26.10.2020; Email from Verifier E, 28.09.2020; Email from Verifier K, 30.09.2020.
[1794] *Fish Legal* (n 157) para 71.
[1795] Chapter 4, section 3.3.
[1796] *Fish Legal* (n 157) para 71.

consequently, it is extremely hard if not impossible to access the relevant information held by them, since, according to the verifiers, they are not subject to any obligation to disclose environmental information upon request. Moreover, it seems that the contacted verifiers are not even aware of the possibility that they might be considered to constitute public authorities. Of course, simply because verifiers do not see themselves as public authorities pursuant to the access to environmental information regime, does not mean that they do not constitute public authorities.

5.2.2. Is the information requested environmental information

Apart from one, the verifiers often pointed out that some of the requested information did not constitute environmental information without giving an explanation. The one verifier that did provide an explanation argued that some of the requested information[1797] did not constitute environmental information, as these items did not have a *direct* connection to the environment.[1798] This is interesting, since the question how strong a link between a certain piece of information and the environment must be in order to constitute environmental information was already raised in chapter 4,[1799] in the context of discussing whether information related to verification is environmental information pursuant to the Environmental Information Directive. However, in chapter 5,[1800] it was concluded that the Federal Environmental Act sets a relatively low threshold for information to relate to the environment and that consequently, the information related to verification should be considered environmental information. Overall, it seems that, unless it is very clear that the information relates to the environment, the contacted verifiers denied that the requested information is environmental information. Even where an extensive explanation why other information should also be considered environmental information was submitted, they did not change their view.

[1797] (1) an explanation of the procedures pursuant to Commission Regulation (EU) No 600/2012 Article 40, (2) the internal verification documentation, (3) the information provided by the operator to the verifier, (4) any reports of site visits, (5) the results of the independent review, (6) all correspondence with the operator.
[1798] Email from Verifier E, 28/09/2020
[1799] See chapter 4, sections 2.4 & 2.5.
[1800] See chapter 5, section 4.2.

5.2.3. Review procedures

The experience with requesting information from EU ETS verifiers has shown that the power imbalance between the applicant and the responding body (governmental authority or verifiers) described above,[1801] may even be more problematic when the responding body is not a governmental authority but a private party that potentially qualifies as a public authority. If the responding body refuses the request based on the argument that it is not a public authority, the applicant does not even have the option of submitting a request for internal review, since only public authorities are obliged to provide for this option. In such a case, the only option left to applicants is to initiate legal proceedings against the responding body.

In this context, it would be interesting to know who makes use of the right to access environmental information. While it seems unlikely that the average citizen who requests access to environmental information will start court proceedings, this may be different for ENGOs or companies, since they usually have recourse to more resources and time. In light of these considerations, it seems that the enforcement of the right to access environmental information or the lack of enforcement possibilities for applicants can be a huge limitation to the exercise of the right to access environmental information in practice. It seems that an institution such as the Information Commissioner in the United Kingdom is a good way to counter the power and information asymmetry between the applicant and the replying body, at least to a certain extent. In addition to the administrative review and going to court, it gives applicants an additional option to have the decision of a public authority reviewed. Unlike court proceedings, submitting a complaint to the Information Commissioner is free of charge and more expedient. This is particularly useful where the entity to which the request for information was addressed refuses the request based on the argument that it is not a public authority. The reason is that, in such a case, the option to ask for administrative review is not available to applicants, as only public authorities are obliged to have in place administrative review procedures. Thus, without the Information Commission, the only option would be to initiate court proceedings, which could, as pointed out above, pose a practical barrier to the effective exercise of the right to access environmental information.

[1801] See section 5.1.4.

6. Conclusions

It has been the aim of this chapter to answer the second part of the main research question: To what extent do governmental authorities and private verifiers provide environmental information related to compliance and non-compliance with the EU ETS in practice? To answer that question, requests for the information that has been identified as relevant for checking compliance with the EU ETS were sent to the governmental authorities responsible for the EU ETS in Germany and the United Kingdom, as well as to verifiers that verified the emissions reports of selected installations. Subsequently, the results of these requests were presented and analysed.

It has become clear that, generally, the contacted governmental authorities provided the requested information to a very large extent. All information that was requested from them (greenhouse gas permit, emissions report and verification report) was treated as environmental information. Thus, with regard to the governmental authorities contacted for this study, the conclusions to the analyses in chapter 4 and chapter 5 have been confirmed in practice. The governmental authorities only refused access to a small part of the requested information arguing that it was covered by one of the grounds for refusal.[1802] Thus, depending on the individual circumstances, access to information relevant for checking compliance with the EU ETS was denied. However, the experience gained throughout the empirical study does not suggest that the grounds of refusal are a general barrier to accessing information related to compliance with the EU ETS held by governmental authorities. One issue that could have been problematic was that it was not always easy to identify the competent public authority in Germany. As the example of North-Rhine Westphalia has shown, the federal structure of Germany means that the rules regulating which governmental authority is responsible for the greenhouse gas permit differ in every state. This may make it difficult to identify the correct public authority. This problem is intensified for ordinary members of the public, for whom it might already be difficult to find the law setting out the responsible public authority. Reading the law and determining the competent public authority may be another hurdle. However, in practice, this did not arise to be a barrier to accessing the relevant information, since public authorities were eager to help, either transferring the request or indicating the competent public authority.

[1802] In specific, the governmental authorities referred to the grounds of refusal protecting the confidentiality of commercial and industrial information, personal data and international relations, public security and national defence.

Another issue that may be problematic when using the right to access environmental information in practice were the justifications for refusing disclosure of the requested information. Where the governmental authorities refused disclosure, they pointed out on which ground of refusal they were relying. However, they did not explain why and how this particular ground of refusal applied to the requested information. Therefore, it has been argued that, without such an explanation of the governmental authority, it is extremely difficult, if not impossible, for an applicant to comprehend whether and why certain grounds of refusal apply. This makes it difficult for applicants to submit a request for internal review in which they explain why the requested information is not covered by a certain ground of refusal.

Part of the right to access environmental information is also the possibility to submit a request for internal review or even to challenge a decision of a public authority in court. Without a proper justification and explanation by the public authority why a certain ground of refusal applies, this becomes considerably more difficult. Thus, it can be said that this issue is a barrier to using the right to access environmental information relating to the compliance with the EU ETS. This effect is reinforced by the fact that, at least in Germany, apart from judicial proceedings, the only option for applicants to have a decision by a public authority reviewed is the internal review. Court procedures may not always be a feasible option for applicants, since they are usually time- and resource-intensive. It has been argued that an institution, such as the Information Commissioner in the United Kingdom, is an excellent remedy to this problem, since it provides applicants with the opportunity to appeal against the decision of a public authority before an independent third party free of charge.

As explained in section 3.3. of this chapter, one of the major concerns for not requesting the relevant information relating to more installations were the potential charges that public authorities might have levied. In that regard, this study has shown that the concerns were largely unjustified. Thus, in the cases examined for this study, the costs charged for supplying information did not amount to a practical barrier for applicants to access environmental information. In practice, the British Environment Agency and the competent German state authorities did not charge at all for supplying the requested information, while the German Federal Emissions Authority levied a charge of EUR 300. In light of the amount of information that was requested, this amount does not seem unreasonable and, therefore, should also not be seen as a barrier to accessing information related to compliance with the EU ETS in practice.

The experience with requesting the relevant information from verifiers was very different from the experience with requesting the relevant information from governmental authorities. As explained in sections 4.1.2. and 4.2.2., to a very large extent it was not possible to use the

right to access environmental information held by verifiers[1803] in Germany and the United Kingdom. The main reason was that verifiers do not seem themselves as public authorities within the meaning of the Aarhus Convention, the Environmental Information Directive, and the national law of Germany and the United Kingdom respectively. While the British verifiers did not even explain why they do not qualify as public authorities, the German verifiers explained that they were not under the control of a public authority. However, even after an explanation of the reasons why verifiers could be regarded as public authorities, verifiers did not change their opinion. Nevertheless, simply because the verifiers contacted for this study do not see themselves as public authorities does not mean that verifiers are not public authorities. However, the experience of this chapter confirms the finding by Stracke et al. that there is 'a lack of a comprehensive judicial clarification to determine what private bodies' constitute public authorities.[1804]

In chapters 4 and 5, it was showcased that whether verifiers are public authorities is not an easy question to answer, as there are well-founded arguments for both positions. However, regardless of the answer to that question, it is clear that entities, such as verifiers, which hold relevant information but do not recognise that they are bound by access to environmental information laws, are a huge barrier to accessing the relevant information. Especially, since, often, the only option left to applicants in such a situation is to initiate court proceedings. It has been explained that this can be problematic, since court proceedings are often time- and resource- intensive. It may be that applicants simply do not have the money or the time to go to court to determine whether a private body is a public authority. Moreover, in contrast to situations where information is requested from entities that acknowledge that they are public authorities, applicants do not even have the option to submit a request for review to bodies that deny that they are public authorities. In light of this, it has been argued that an institution such as the Information Commission in the United Kingdom is a smart solution to this problem. It offers applicants the possibility to submit a complaint relating to a request for information to an independent third party, regardless of whether the responding body acknowledges that it is a public authority.

Thus, the conclusion to this chapter and the answer to the research question of this chapter is twofold. On the one hand, it has become clear that the right to access to environmental

[1803] The verification report, the internal verification documentation and the information provided to the verifier by the operator according to Commission Regulation (EU) No 600/2012 Article 10 (1); Commission Implementing Regulation (EU) 2018/2067 Article 10 (1).
[1804] Stracke and others (n 1548) 17.

information can be used very well to access information on compliance with the EU ETS that is held by governmental authorities. On the other hand, the experience in practice has shown that this is not the case for information held by EU ETS verifiers, since they deny that they are public authorities and consequently are not bound by the obligation to provide environmental information upon request.

CHAPTER VII – CONCLUSIONS

1. Summary

The EU ETS is one of the main pillars of the EU's efforts to reduce greenhouse gas emissions. For the system to achieve this aim, it is pivotal that the participating operators comply with the applicable legislation and do not cheat. In addition to the controls by private verifiers and national public authorities, the public, including journalists, NGOs and individuals, may play a watchdog role. The public could try to identify anomalies in the compliance cycle or indications for instances of non-compliance with the EU ETS legislation and bring these issues to the attention of the authorities responsible for enforcement and/or the public at large. Moreover, the watchdog role could entail checking whether national public authorities and verifiers perform their functions correctly. However, in order to carry out such checks, the public must have access to the necessary information. This is where the right to access environmental information comes into play. The Aarhus Convention and the Environmental Information Directive set out that, subject to certain limitations, public authorities must disclose environmental information upon a request by the public.

In light of this, the overall question this study aimed to answer is: in which circumstances must environmental information related to compliance and non-compliance with the EU ETS, that is held by governmental authorities and/or private verifiers, be provided to the public upon request and to what extent do governmental authorities and private verifiers provide this information in practice?

This thesis consisted of three parts, each of which answered a part of the main research question. Chapters 2, 3 and 4 made up the first part and were dedicated to determining whether environmental information related to compliance that is held by governmental authorities and private verifiers must be made available according to EU law. Chapter 2 analysed the right to access environmental information, as enshrined in the Aarhus Convention and the Environmental Information Directive. Chapter 3 examined the EU ETS compliance cycle with a view to identifying the most relevant information for checking compliance. Finally, chapter 4 combined the insights of the two preceding chapters and analysed whether, according to the Aarhus Convention and the Environmental Information Directive, the information that is relevant for checking compliance with the EU ETS rules must be made available to the public.

The second part focused on the national dimension of the right to access environmental information. Since the Aarhus Convention and the Environmental Information Directive must be implemented into national law by the parties to the Convention and the Member States, it was analysed, in chapter 5, whether and to what extent the particularities of the national law of Germany and England change the conclusions of chapter 4.

Analysing the law and determining whether or not certain information must be made available upon request is highly relevant. However, the questions that the first two parts of this thesis answered have a strong relation to practice, since the right to access environmental information is meant to be actively used by the public. Therefore, the last part, comprising chapter 6, focused on testing the conclusions of the two preceding parts empirically.

In this concluding chapter, the findings of this thesis will be presented briefly and it will be explained why and how they are relevant for the academic debate on access to information and what their implications may be for policy-making as well as society at large. Moreover, this chapter will present the limitations of this research and provide some suggestions for future research.

2. Overview of and reflections on the main findings

2.1. The main features of the right to access environmental information

In order to answer the main research question, it was necessary to map out the right to access environmental information. Therefore, in chapter 2, the right to access environmental information, as enshrined in the Aarhus Convention and the Environmental Information Directive, was analysed with a view to identifying its main elements and features. It was demonstrated that the most important elements of the right to access environmental information are the definitions of environmental information, public authorities and the definitions of the grounds based on which a request for environmental information can be refused. Moreover, there are several important procedural requirements that public authorities need to observe when answering requests. Further, it was analysed to what extent the Convention and the Directive leave discretion to Member States in the implementation of the right to access environmental information into national law.

It was explained that the Aarhus Convention and the Environmental Information Directive set out a broad right to access environmental information. The main reason for this is that the

definition of environmental information is formulated in an open way. However, this open wording also gives rise to a certain degree of uncertainty. Particularly, the phrase 'information on activities and measures that are likely to affect the environment or factors that affect or are likely to affect the environment' seems to potentially cover a very broad range of information. The limits of this phrase could not be determined based on the analysis of the Aarhus Convention, the Environmental Information Directive and the applicable case law of the CJEU. Therefore, this issue was further analysed in the context of national law.[1805]

Another concept that is central to the right to access environmental information is the definition of public authorities. Depending on how wide the definition of public authorities is, the public has a right to request environmental information from a broader range of entities. It was shown that the definition of public authorities set out in the Aarhus Convention and the Environmental Information Directive is so wide, as to cover not only traditional governmental authorities but also, under certain circumstances, private actors. The latter constitute public authorities where they either perform public administrative functions or perform public functions that relate to the environment and are under the control of a public authority. Public administrative functions have been defined as 'special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.'[1806] With regard to the question under what circumstances an entity can considered to be under the control of a public authority, the CJEU has determined that this is the case where it is subject to a specific system of regulation which is particularly precise and lays down 'a set of rules determining the way in which such companies must perform the public functions related to' the environment which they carry out.[1807] However, the question when a regulatory framework can be considered to be 'particularly precise' could not be answered conclusively. Hence, this was another issue that was further examined in the context of national law.[1808]

2.2. Information necessary for checking compliance

In addition to comprehending what exactly the right to access environmental information entails, it was necessary to identify what information the public would need access to in order

[1805] See section 2.3. of this chapter below.
[1806] *Fish Legal* (n 157) para 52.
[1807] *ibid para 71*.
[1808] See section 2.3. of this chapter below.

to perform a watchdog role and identify instances of non-compliance and perform checks on public authorities and verifiers. Thus, chapter 3 was concerned with analysing the compliance cycle of the EU ETS with a focus on monitoring, reporting and verification of greenhouse gas emissions and with answering the question: what does the compliance cycle entail and what information would the public need to try to get insights into possible non-compliance with the EU ETS?

It was demonstrated that the information related to compliance with the EU ETS that is publicly available does not enable the public to check compliance of individual public authorities or verifiers. The reason is that almost all information that is publicly accessible is aggregated and based on reporting by Member States. Therefore, the compliance cycle was analysed with a view to identifying the information that is most relevant for checking compliance of individual operators. A lot of the information that is produced throughout the compliance cycle by specific installations could be useful for the public when trying to check compliance of operators and verifiers[1809] with the EU ETS legislation.

2.3. Accessing the relevant information in theory

Chapter 4 combined the insights from the two preceding chapters and was dedicated to answering the question of whether, according to the Environmental Information Directive, the relevant information must be disclosed upon request by the public. In order to answer that question, it was necessary to determine (1) whether the relevant information constitutes environmental information, (2) whether the entities that hold the relevant information constitute public authorities, and (3) whether access to the relevant information could be refused based on one of the grounds of refusal.

Chapter 5 complemented chapter 4 and analysed the national law of Germany and the United Kingdom with a view to determining how the right to access environmental information has been implemented in these two jurisdictions. More specifically, this analysis focused on examining the particularities of the way in which each of the two jurisdictions implemented the right to access environmental information in order to determine whether these

[1809] As was explained in chapter 1, section 1.1. compliance by verifiers with the rules applicable to them is crucial for the overall functioning of the EU ETS. If verification is not properly carried out, verifiers might miss material misstatements in the emissions reports of operators. This could mean that operators emit more than they declare in the emissions report, which could, in an extreme case, endanger the effectiveness of the entire EU ETS.

particularities affect the conclusion whether the relevant information must be disclosed upon request that was reached in chapter 4.

With regard to the information related to monitoring and reporting, it was demonstrated that it is environmental information. However, concerning information related to verification, this could not be determined with certainty. Nevertheless, in chapter 4, it was argued that this information could be considered environmental information, as it is part of a larger system, the EU ETS, which is intended to protect the environment. Subsequently, this issue was examined according to national law, which confirmed the validity of this 'bigger picture' argument. Thus, information on a measure or activity is environmental information where the measure or activity is part of a larger system that is intended to protect the environment. However, the definition of environmental information is also not all-encompassing, and it is still not entirely clear where the line must be drawn. Therefore, clarification by the legislator, interpretation by the CJEU or guidance by the European Commission[1810] is needed to determine how strong the link between a given measure or activity and the larger system that is intended to protect the environment of which the measure or activity is part must be. Until then, research could shed some light on this issue by analysing the limits of the bigger picture approach.

One of the most crucial issues in examining whether the relevant information must be disclosed upon a request by the public was determining whether the verifier constitutes a public authority. Answering this question based on the analysis of the Environmental Information Directive proved very difficult, since the definition of public authorities set out therein is worded rather broadly. On the one hand, this means that it potentially covers a wide range of actors. However, on the other hand, the consequence of a broad wording is also that it is not always possible to determine with certainty whether a given entity comes within the ambit of that definition. In the context of the verifier this was illustrated by two issues. First, there were both arguments for and against the position that verifiers carry out public *administrative* tasks. Both the analysis of EU law and of German and United Kingdom national law suggested that, while there are arguments that verifiers perform public *administrative* functions, overall, it seems unlikely that this is the case.

Second, it was not entirely clear whether verifiers could be considered to perform public functions that relate to the environment while being *under the control of a public authority*. The analysis of the Environmental Information Directive demonstrated that verifiers' functions

[1810] An interpretation by the CJEU would, if sufficiently clear, entail more legal certainty than a guidance document by the European Commission and is therefore to be preferred.

relate to the environment and that an entity can be considered to be under the control of a public authority, where it is subject to a particularly precise legal framework. However, it remained unclear when a legal framework must be considered particularly precise. The analysis of German and United Kingdom law did not provide further clarification. However, it seemed that German and United Kingdom legislation can be interpreted so that the legislation applicable to verifiers could be considered particularly precise.[1811] Nevertheless, it remains to be seen whether national courts, when presented with this issue, interpret their national law in such a way that entities that are subject to a particularly tight legal framework are considered to be under the control of a public authority. If such a case arose, it would be highly welcome if a preliminary question was submitted to the CJEU.

Alternatively, the EU legislator could also amend the Environmental Information Directive and clarify the concept 'public authority' in general and more specifically under what circumstances an entity can be considered to be 'under the control of a public authority' as well as what makes a legal framework 'particularly precise'. However, given that it was the CJEU who decided that a body could be considered to be under the control of a public authority where it is subject to a particularly precise legal framework, it is not excluded that it will also be the CJEU who specifies what makes a legal framework particularly precise, if a preliminary question in that regard is submitted.

The difficulties with determining whether the verifier can be considered a public authority are in line with the findings of Schomerus and Bünger who concluded that based on the applicable legislation, it is hardly possible to provide a comprehensive assessment of what private bodies are under an obligation to provide environmental information pursuant to either German or English law.[1812] Thus, it appears that the conclusion that it is not possible to develop an abstract definition of public authorities according to clear criteria is still true. However, in addition, there may be cases, as illustrated by the analysis in this study, where it is extremely difficult or even impossible, to determine whether a concrete entity qualifies as a public authority.

[1811] Naturally, this is less relevant for English legislation, since the United Kingdom has left the EU. As the United Kingdom has left the EU, it is no longer bound by the Environmental Information Directive and its interpretation by the CJEU. While the United Kingdom remains a party to the Aarhus Convention, the definition of public authorities set out in the Aarhus Convention has not been interpreted (by the Aarhus Convention Compliance Committee) in a way that where a private party is subject to a particularly tight legal framework, it can be considered to be under the control of a public authority. However, at least unofficially, the interpretations of the right to access environmental information by the CJEU are influential for the interpretation of the Aarhus Convention.

[1812] Bünger and Schomerus (n 50).

The analysis in this study has shown that, with regard to the EU ETS verifier, the concerns related to outsourcing governmental tasks for access to information that were set out in the introductory chapter are not unfounded. If verification was conducted by governmental authorities, information relating to verification was more accessible to the public, since it constitutes environmental information and the entity holding the information would be, without a doubt, a public authority. Therefore, a less legalistic perspective on the question whether verifiers qualify as public authorities seems to be worth considering. As has been pointed out in chapter 4,[1813] verification contributes to the enforcement of the EU ETS. Traditionally, the enforcement of law is a task carried out by the state. The Environmental Information Directive gives the public the right to access environmental information that is held by the state, i.e., public authorities. One of the reasons why the drafters of the Aarhus Convention and the Directive gave the concept of public authorities such a broad meaning, as to include private natural and legal persons under certain circumstances, was to avoid that states outsource certain functions to private entities and thereby circumvent public access to environmental information relating to those functions.[1814] The difficulties with determining whether verifiers are public authorities and with accessing environmental information held by verifiers in practice illustrate very well the potential disadvantage of outsourcing governmental tasks to private actors that was briefly described in the introductory chapter.[1815] If it is not specifically regulated in the applicable legislation, as is the case with the EU ETS verifiers, outsourcing governmental tasks to private actors can mean that the rules on access to information that are applicable to governmental authorities are either bypassed, intentionally or not, or at least the question whether these rules also apply to the private entities that carry out the task is complicated to answer.

With regard to the EU ETS, the EU legislator has chosen to outsource the verification of emissions reports to the private sector, arguably for good reasons. The competent national authorities may lack the capacity to fulfil this task and, further, by making the operator pay for the verification, to effectuate the polluter-pays-principle. In light of the findings of this study, two arguments should be considered. First, one could propose to transfer the task of verifying emissions reports to a dedicated national governmental authority. However, as explained in the introduction, once a function has been outsourced to a private actor, it is difficult to reassign the task to governmental authorities, since they have failed to develop the necessary expertise

[1813] See chapter 4, section 3.3.
[1814] Götze and Engel (n 146) 50; Ebbesson (n 12) 77 ff.
[1815] See chapter 1, section 3.

and the initial investments required to reintegrate the function into the public domain would be high. Therefore, reassigning the verification task to governmental authorities is depending on the political will to restructure the compliance cycle of the EU ETS. Moreover, there is already a problem of compliance with EU environmental law, while predominantly governmental authorities are responsible for monitoring and enforcement. In other words, enlarging the monitoring tasks of governmental authorities would not guarantee better compliance rates.

Second, the legislator should have done a better job at anticipating the legal consequences of assigning a traditionally governmental power to private entities. More specifically, the legislator should have made it explicit that the access to environmental information rules apply to the EU ETS verifiers, especially in light of the aim of the Aarhus Convention to prevent that these rules are circumvented by privatisation.

The third central question when determining whether the relevant information must be disclosed upon request was whether any of the grounds of refusal apply. Based on the analysis of the Environmental Information Directive, it was not possible to determine in an abstract way whether they may be applied to refuse access to the relevant information with regard to some of the grounds of refusal. Ironically, the reason was that it would have been necessary to actually have access to the relevant information in order to make that assessment. This is quite interesting and points towards the imbalance of power or information asymmetry between the applicant and public authorities processing requests for environmental information. Another reason was that it depends on the specific circumstances of each case, whether they may be relied upon. In this context, it is also remarkable that there is almost no case law by the CJEU on this issue.[1816] Nonetheless, it became clear that, in the context of accessing information to check compliance with the EU ETS legislation, one of the most relevant grounds of refusal is the protection of the confidentiality of commercial and industrial information. It was demonstrated that only the information held by the verifiers satisfies the conditions for the application of this ground of refusal set out in German and United Kingdom legislation.

A key issue regarding the application of the grounds of refusal is the public interest test. In every individual case, public authorities must weigh the public interest in disclosure against the interest protected by applying one of the grounds of refusal.[1817] Where the public interest outweighs other interests, the information must still be disclosed. Thus, public authorities enjoy a considerable degree of discretion in the application of the right to access environmental

[1816] Moreover, thus far, there seems to be little attention to compliance with monitoring, reporting and verification of EU ETS emissions from ENGOs in the EU.
[1817] See chapter 4, section 4.9.

information in practice. The fact that the public interest test must be performed on a case-by-case basis also demonstrates that the right to access environmental information may be rather costly and burdensome for public authorities in practice. However, to understand how serious this problem actually is and to derive general conclusions, a large-scale study would be necessary. Therefore, future research should systematically investigate how public authorities perform the public interest test. Ideally, this test should be conducted in a harmonious way throughout the EU and eventually also among the parties of the Aarhus Convention. Future studies could contribute to this goal by developing guidelines and/or best practices on how to carry out the public interest test.

2.4. Accessing the relevant information in practice

Chapter 6 was dedicated to test the findings of the previous chapters in practice and thereby answering the second part of the main research question of this thesis: To what extent do governmental authorities and private verifiers provide environmental information related to compliance and non-compliance with the EU ETS in practice? To answer that question requests for the relevant information were sent to public authorities as well as verifiers and their answers and the way they responded were analysed.

Overall, governmental authorities were very responsive and only refused access to a small part of the requested information based on one of the grounds of refusal. However, it should be noted that it was not always easy to identify the governmental authority responsible for the greenhouse gas permit in Germany. It is particularly remarkable that in the context of this academic research, difficulties arose with identifying the responsible public authority. It can be assumed that the average citizen would find it even more difficult. Nevertheless, public authorities remedied this issue by transferring the requests to the correct public authority. Thus, in the empirical test, the requests always reached the public authority for which they were intended.

Public authorities may, in principle, levy a charge for disclosing environmental information. Depending on the amount charged, these charges can arise to be a barrier to the effective exercise of the right to public access to environmental information. Only one of the public authorities addressed in the empirical analysis of this study levied a charge. As explained in chapter 6, the empirical analysis conducted for this study is merely anecdotal. However,

based on the experience, it appears that governmental authorities, both in Germany and the United Kingdom, only charge for disclosing environmental information, if processing the request requires a substantial amount of work, whereas most requests will be answered free of charge.

In contrast to governmental authorities, verifiers were only willing to provide the relevant information to a very limited extent. Thus, it was not possible to obtain certain parts of the information identified as relevant.[1818] This in turn means that it is not possible to assess whether the verifier complied with all its obligations under the EU ETS legislation. The main argument why they refused access was that they did not constitute public authorities. This corresponds to the finding that it is difficult to determine whether verifiers are public authorities. The interaction with verifiers when requesting the relevant information from them shows that it can be challenging, also for the bodies themselves, to determine whether they actually qualify as public authorities. On the one hand, verifiers seem to be of the opinion that they, as legal persons governed by private law that have been contracted to perform a service in the public interest, do not qualify as public authorities. On the other hand, strong arguments can be made that they constitute, or at least should constitute, public authorities, since their function is in the public interest and contributes to the enforcement of and compliance with EU environmental law.

Getting access to environmental information is exacerbated where the entity addressed with the request does not acknowledge that it is a public authority. The experience with requesting access to information held by verifiers illustrates this. Where an entity refuses access to information based on one of the grounds of refusal or argues that the requested information does not constitute environmental information, the applicant may submit a request for internal review. However, where the entity argues that it is not a public authority, in practice the applicant does not get this option, since only public authorities are obliged to have in place internal review procedures.[1819] Thus, by arguing that it is not a public authority, the entity in question deprives the applicant of an essential procedural tool. The only option left to the applicant in such a situation is going to court. Since legal proceedings can be time- and resource-intensive, it is unlikely that many applicants pursue this path.

[1818] The procedures for verification activities, the internal verification documentation, the strategic analysis, the risk analysis, relevant correspondence with the competent authority, reports of site visits, results of the assessment of the operation of measuring devices and monitoring systems, transcripts of interviews with the operator's staff and the independent review.
[1819] Formally, applicants would have this option, where the entity wrongly states that it is not a public authority.

The United Kingdom Information Commissioner could be seen as a potential solution to this problem. The Information Commissioner gives applicants the opportunity to submit a complaint, where they are of the opinion that their request has been inadequately dealt with and they have exhausted the possibilities of internal review. Unlike court proceedings, submitting a complaint to the Information Commissioner is free of charge and it takes its decisions relatively fast. In light of this, the establishment of similar institutions could be a step to rectify this issue. At EU level, the EU Ombudsman already fulfils a similar role. Applicants that requested access to documents held by the EU institutions and who are not satisfied with the reply or the way their request was handled can submit a complaint to the EU Ombudsman.[1820]

3. Contributions and implications of the study

This study investigated the right to access environmental information in a specific case study – the EU ETS. From an academic point of view, this study contributes to the debate on this topic in several ways. While the right of access to environmental information has already been the subject of previous studies, these have systematically analysed the definition of key concepts, such as environmental information, public authorities and grounds of refusal only to a limited extent. In particular, the examination of the concept of public authorities and the analysis whether verifiers qualify as such has shown that to understand the right to access environmental information the definitions of the central concepts are of pivotal importance. This study contributes to the academic debate by furthering the understanding of the definitions of these key concepts.

Moreover, this study is, so far, the only one that not only analyses the right to access environmental information from a purely theoretical point of view but examines at the hand of a case study (the EU ETS) and an empirical analysis whether and under what circumstances certain information must be disclosed. While the case law on access to environmental information has been analysed in the literature,[1821] there have not been more academic studies that investigate whether certain specific information must be disclosed pursuant to the

[1820] Access to Documents Regulation Article 8 (1) & (3) states that where a request for access to documents is refused, 'the institution shall inform the applicant of the remedies opem to him or her, namely (...) making a complain to the Ombudsman.'

[1821] Wegener (n 163); Roman Götze, 'Aktuelle Entwicklungen Im Umweltinformationsrecht' (2013) 23 Landes- und Kommunalverwaltung; Etemire (n 154).

Environmental Information Directive or national legislation. This is surprising, since the right to access environmental information is meant to be used in practice and, as showcased in this study, its scope of application is potentially very broad. Moreover, this study is one of the very few that analyse the application of the right to access to environmental information in practice.[1822] So far, there has been only one study in which requests for environmental information were sent to public authorities and which evaluated the answers to those requests.[1823] The empirical part of this study adds to the existing literature by investigating the application of the right to access environmental information in practice.

Besides contributing to the academic debate on the right to access environmental information, this study also has implications for policy-making on this issue. First, this study has highlighted several issues related to the right to access environmental information with regard to which the legislator should consider publishing guidance documents or even revising the existing legislation. As already mentioned above,[1824] the fact that the definition of public authorities is as broad as it is comes with both advantages and disadvantages. Concretising the definition could result in a narrower definition, which could mean that certain entities would not come within the ambit of the definition anymore. Nevertheless, more concretisation of the concept of public authorities is needed. Next to a non-binding concretisation of the definition, this could also include examples of private entities that constitute public authorities. This would contribute to the general understanding of how the definition is applied in concrete cases. The problem that through assigning tasks that are in the public interest, such as verification of emission reports, access to information related to such tasks is circumscribed could also be avoided by not outsourcing these tasks to private entities in the first place. Moreover, where the legislator decides to assign tasks in the public interest to private entities, it should be set out in the applicable legislation whether or not these bodies are to be considered as public authorities within the meaning of the Environmental Information Directive.

Finally, the study of United Kingdom law and the experience with requesting environmental information from United Kingdom governmental authorities and verifiers has demonstrated the value of the Information Commissioner for the functioning of the access to information regime. It constitutes an additional level of review and allows the applicant to submit a complaint. The Information Commissioner will then review how an entity has dealt

[1822] Stracke and others (n 1548). This study was published in the course of this PhD project; Bünger and Schomerus (n 50).
[1823] Stracke and others (n 1548).
[1824] See section 2.3. of this chapter.

with the request for information free of charge. Thus, after exhausting the possibilities of administrative review, the applicant has another review option, which is fast and considerably cheaper than going to court. Such an institution is particularly beneficial where requests for information are refused because the entity addressed with the request does not consider itself to be a public authority, since, in such a situation, the applicant does not even have access to an administrative review procedure and the only option is going to court. In light of this, it is suggested that Member States investigate whether to introduce an institution similar to the British Information Commissioner.[1825]

Often, the broader societal relevance of legal research is not entirely obvious. However, the topic of this study – the right to access environmental information as a tool to investigate compliance with the EU ETS – is highly relevant for society at large in several ways. First, the Aarhus Convention and the legislation implementing it grant the right to access environmental information to *the public*. Thus, all members of society enjoy this right. Therefore, the findings of this study are relevant for society at large, as they contribute to the understanding of this right and can provide guidance on what to consider when making a request. The small empirical analysis carried in this study has shown that where the public wants to obtain information related to compliance with the EU ETS, it is relatively easy to obtain such information from governmental authorities, while the opposite is the case for verifiers. Thus, from a practical point of view, it might be more resource efficient to focus on requesting information from governmental authorities. The experience with requesting information from verifiers in the context of this thesis has shown that where the information is only held by verifiers, it is unlikely that the information is disclosed. It is for further research or for ENGOs or citizens in practice to contest refusals in court. Naturally, this will require sufficient capacity and resources.

Second, the environment is a public good and its protection is in the interest of the public at large. Consequently, the proper enforcement of legislation that is intended to protect the environment is also in the interest of society. This study has showcased a way in which society can try to contribute to the enforcement of such legislation, although it remains to be seen whether the public can actually fulfil this watchdog role in practice.

[1825] It seems that, thus far, there has not been any literature that explores the idea of creating an institution similar to the UK Information Commissioner in other countries.

4. Limitations of the study and future research

Despite the important insights and findings this study has contributed to the literature on access to environmental information, it is important to acknowledge its limitations. This study aimed at answering the question to what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS, that is held by governmental authorities and/or private verifiers, be provided to the public upon request and to what extent do governmental authorities and private verifiers do so in practice? From the question, it is clear that the findings of this study are of immediate relevance only for the EU ETS. Yet, that does not mean that they are not relevant for other fields of EU environmental law. In particular, the discussion on the concepts of environmental information, public authorities and the grounds of refusal are highly valuable in other contexts as well. Chapter 1[1826] pointed to two other areas of EU environmental law in which the legislator has chosen to outsource public powers to private actors, i.e., ascertaining the sustainability of biofuels and the verification of maritime emissions were presented. Both examples are characterised by the outsourcing of public tasks, which are crucial for effectively achieving the aim of environmental legislation, to private entities. Wherever such outsourcing occurs, questions similar to the ones discussed in this study are likely to occur. Consequently, the findings of the present study will be relevant not only for the EU ETS, the sustainability of biofuels and maritime emissions, but for every area of environmental law, in which traditionally public tasks, such as monitoring polluters with regard to their compliance with their obligations pursuant to environmental law, have been outsourced to private actors as well as areas in which the legislator is considering to do so.

Moreover, this study only looked at two national jurisdictions – Germany and the United Kingdom.[1827] Future studies should examine the national legislation of other Member States and/or parties to the Aarhus Convention. When this study was designed, the United Kingdom had not yet voted to leave the EU and the expectation was to compare how two Member States of the EU had implemented the right to access environmental information. While this is no longer possible since the United Kingdom has left the EU, Brexit also offers a unique chance. At the time when the British legislation was analysed and the requests for the relevant information were submitted, Brexit had just been finalised. Thus, the legislation that had been adopted to implement the Aarhus Convention and the Environmental Information Directive

[1826] See chapter 1, section 1.
[1827] The United Kingdom left the EU in the course of this study.

had not been adapted yet and, thus far, the British government has not announced that it intends to do so. Therefore, it seems likely that the requests were handled in the same way as they would have been handled, if the United Kingdom had still been a Member State of the EU. The fact that this study was conducted while Brexit was being negotiated and implemented also means that it may serve as a reference point for future studies that investigate how the right to access environmental information is implemented in the United Kingdom.

The empirical part of this study also adds to the existing literature, since, thus far, no study delving in depth into how access to environmental information is applied in practice has been conducted, and it contributes to the understanding of the application of the right to access environmental information in practice. However, it should be noted that it is not a representative study, in the sense of providing a thorough and comprehensive picture of legal practice, since the number of requests that were sent out and the number of public authorities and verifiers that were contacted is relatively low. Nevertheless, the empirical evidence collected has anecdotal value and may serve as a starting point for future research. For example, future studies building upon the present one could examine how the right to access environmental information is applied in practice, by building upon the findings of this study and systematically analysing, for example, how public authorities determine the fee they charge for supplying environmental information, how they determine whether a certain ground of refusal applies, how they perform the public interest test and finally, to what extent it is truly possible to identify non-compliance.

Besides the limitations that relate to the design of the study, it should also be kept in mind that the EU ETS is a highly technical topic, not only from a legal perspective but also from the perspective of natural sciences (e.g., climate science) and engineering (how are greenhouse gases technically monitored). In light of this, it is feasible that besides the information that was identified as being relevant for checking compliance with the EU ETS in chapter 3, there is more information that would be necessary. As a lawyer, it is difficult to assess what information is relevant for checking compliance, since the compliance cycle of the EU ETS is such a technical topic. A lawyer can study the legislation applicable to the EU ETS and conclude that the information which is necessary to verify the emissions report could also be relevant for checking compliance and analyse under what circumstances such information must be disclosed. In light of this, it is likely that the relevant information identified in this study would only allow to perform a procedural check, not a substantive check. Actually checking compliance would require the scientific evaluation of the relevant information. Lawyers alone cannot perform this task, since they do not have the necessary technical knowledge. Therefore,

future inter-disciplinary research should be dedicated to the question whether the public would be able to check compliance with the information acquired in the empirical part of this study. If the answer is no, future studies should investigate whether the answer would be the same if verifiers had disclosed all the information that was requested.

This also links to one of the disadvantages of the right to access environmental information discussed in the introductory chapter. Access to information will only achieve its aims, including enabling the public to act as a watchdog, if the public is actually able to understand and act upon the information it receives. In that sense, even where the information on compliance with the EU ETS is accessible to the public, it is not automatically guaranteed that the public can actually identify non-compliance. Given the highly technical nature of the topic, only highly specialised members of the public will actually be able to assess compliance. This could be, for instance, environmental non-governmental organisations.

5. Final conclusions

It has become clear that it is possible for the public to access at least part of the information that is most relevant for checking compliance with the EU ETS legislation. It has been concluded that the relevant information constitutes environmental information. However, while there are convincing reasons to say that verifiers are public authorities, it is only possible to draw tentative conclusions on this issue and practice has shown that verifiers do not see themselves as public authorities. Whether any of the grounds of refusal can be invoked to refuse access to the relevant information, depends on the specific circumstances of each case. Given that public authorities addressed with requests must weigh the public interest in disclosure against interests in keeping the information confidential whenever they answer a request for environmental information, the absence of case law on such an important topic related to a core instrument of EU climate law is striking. This may suggest that the public, thus far, has not made much use of the right to access environmental information to access information related to compliance with the EU ETS. Given that the decision whether to disclose requested information can be a difficult to make since the public interest in disclosure must be weighed against protected interests by keeping the requested information confidential, legal conflicts may readily occur. Moreover, this study has pointed out that while the EU legislator has chosen to outsource an important part of the compliance cycle to private actors, it did not provide

sufficient legal certainty regarding the implications for provisions on access to environmental information.

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Commission Implementing Regulation (EU) 2018/2067 of 19 December 2018 on the verification of data and on the accreditation of verifiers pursuant to Directive 2003/87/EC of the European Parliament and of the Council (OJ L 334/94)

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)

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)

Corrigendum to Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions (OJ L 129, 30.4.2014) (OJ L 140/177)

Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market 1991

Criminal Procedure and Investigations Act 1996

Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC (OJ L 264/1)

Decision No 1359/2013/EU of the European Parliament and of the Council of 17 December 2013 amending Directive 2003/87/EC clarifying provisions on the timing of auctions of greenhouse gas allowances (OJ L 343/1)

Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the European Union (OJ L 112/6)

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

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

Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms (OJ L 338/18)

Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ L 8/3)

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)

Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ L 140/63)

Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) OJ L 344/17 2010

Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315/1)

Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L 336/1

Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure

Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ L 76/3)

European Convention on Human Rights

Regulation (EC) No 219/2009 of the European Parliament and of the Council of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part Two (OJ L 87/109)

Regulation (EC) No 401/2009 of the European Parliament and of the Council on the European Environment Agency and the European Environment Information and Observation Network 2009 (OJ L 126/13)

Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents 2001

Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC 2009 (OJ L 309/1)

Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies 2006 (OJ L 264/13)

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 2015

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC 2016 (OJ L 119/1)

Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021 (OJ L 350/7)

Regulation (EU) 2018/841 of the European Parliament and of the Council 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU 2018 (OJ L 156/1)

Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 2018 (OJ L 156/26)

Regulation (EU) No 421/2014 of the European Parliament and of the Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions (OJ l 129/1)

Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council 2012 (OJ L 316/12)

The Greenhouse Gas Emissions Trading Scheme Order 2020 (No 1265)

Treaty of the European Union

Treaty of the Functioning of the European Union

3 C 3509 (Bundesverwaltungsgericht)

7 C 2 09 (Bundesverwaltungsgericht)

7 C 504 (Bundesverwaltungsgericht)

8 A 3358/08 (Oberverwaltungsgericht NRW)

2005/370/EC: 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 (OJ L 124/1)

ANNEXES

1. Annex I: Checks of emissions reports by national authorities in 2017

	Share of emissions reports checked for completeness and internal consistency	Share of emissions reports checked for consistency with monitoring plan	Share of emissions reports cross-checked with allocation data	Share of emissions reports cross-checked with other data	Share of emissions report that were analysed in detail	Number of site visits at installations by the competent authority	No. of installation	No. of emission reports not analysed in detail
AT	100%	20%	100%	20%	20%	No data	189	151
BE	100%	100%	34%	33%	32%	0	305	207
BG	100%	100%	100%	10%	100%	0	119	0
HR	100%	100%	100%	100%	100%	44	52	0
CY	100%	100%	100%	100%	100%	10	11	0
CZ	100%	20%	20%	20%	10%	1	310	279
DK	100%	100%	100%	83%	43%	0	338	192
EE	100%	100%	100%	100%	100%	0	46	0
FI	100%	100%	0%	0%	100%	3	571	0
FR	99%	49%	79%	100%	15%	23	1095	930
DE	100%	25%	100%	0%	25%	9	1833	1374
GR	100%	100%	100%	100%	100%	4	138	0
HU	100%	100%	100%	0%	100%	37	169	0
IC	100%	100%	100%	100%	100%	1	8	0
IR	100%	12%	100%	5%	12%	12	101	88
IT	100%	60%	0%	0%	0%	0	1036	1036
LV	100%	100%	100%	0%	0%	1	64	64
LI	100%	100%	100%	100%	100%	0	2	0
LT	100%	30%	100%	30%	100%	0	91	0
LU	100%	100%	100%	100%	100%	0	21	0
MT	100%	100%	0%	0%	100%	0	4	0
NL	100%	100%	90%	100%	30%	39	428	300
NO	No data	No data	No data	No data	No data	No data		
PL	100%	100%	93%	0%	100%	0	710	0
PT	100%	100%	100%	50%	75%	0	183	45
RO	100%	100%	100%	100%	100%	1	167	0
SK	100%	100%	100%	100%	0%	0	119	119
SI	100%	100%	100%	100%	0%	0	48	48
SE	No data	No data	No data	No data	No data	No data		
ES	95%	98%	94%	46%	29%	182	834	592
UK	59%	59%	59%	59%	59%	62	825	338

TOTAL							9817	5763

Source: Data collected from the Member States' answers to the questionnaire referred to in Article 21 of Directive 2003/87/EC. Answers are available at https://cdr.eionet.europa.eu/.

2. Annex II: Number of verifiers per Member State in 2017

Member State	**Number of accredited/certified verifiers in 2017**	**Number of verifiers accredited by a NAB in another MS that carried out verification**
Austria	3	0
Belgium	1	7
Bulgaria	7	5
Croatia	2	2
Cyprus	0	2
Czech Republic	7	0
Denmark	3	2
Estonia	2	1
Finland	4	0
France	8	0
Germany	16	2
Greece	5	0
Hungary	4	5
Iceland	0	3
Ireland	0	7
Italy	11	0
Latvia	3	0
Liechtenstein	1	2
Lithuania	0	2
Luxembourg	0	5
Malta	0	1
Netherlands	4	2
Norway	No data	No data
Poland	7	7
Portugal	3	0
Romania	8	2
Slovakia	6	4
Slovenia	2	0
Spain	6	5
Sweden	No data	No data
United Kingdom	8	2
TOTAL	**121**	

3. Annex III: Selected installations in Germany

Operator	Installation name	Installation ID	Permit ID	Lines of Business Carbon leakage	Verified emissions in tonnes
Outokumpu Nirosta GmbH	Stahlwek Krefeld	68	14220-0034	Production of steel	0
Röben Tonbaustoffe GmbH	Röben Tonbaustoffe GmbH Bannberscheid	359	14260-0095	Production of bricks and tiles	11644
Olfry Ziegelwerke GmbH & Co. KG	Ziegelwerk für Verblendziegel	427	14260-0167	Production of bricks and ziles	13393
Kehlheim Fibres GmbH	Kraftwerk Kehlheim	777	14310-0172	Production of viscose fibres	152358
Medl GmbH	Fernheizwerk Sandstraße	1126	14310-0563	Energy Production	3774
E.ON Kraftwerke GmbH	GT Itzenhie	1212	14310-0563	Energy production	3438
Orion Engineerd Carbons GmbH	Furnacerußanlage	3398	14290-0005	Production of rubber	259952
Porcelaingres GmbH	Anlage zur Produktion von Feinsteinzeugflies	202045	14260-0247	Production of stoneware	28369
Dow Olefinverbund GmbH	Acrylat-Anlage Böhlen	202203	14280-0168	Production of chemicals	129210
Schoeller Technocell GmbH & Co. KG	TCP-Papiermaschine 16	202526	14280-0168	Production of paper	15473
Spezialpapierfabrik Oberschmitten GmbH	Spezialpapierfabrik Oberschmitten GmbH	203457	14280-0169	Production of paper products	0

Installations highlighted in green are the installations regarding which the first round of requests were sent out.

4. Annex IV: Selected installations in the United Kingdom

Operator	Installation name	Installation ID	Permit ID	Line of Business	Verified emissions in tonnes
E.ON UK Plc	Enfield Energy centre Ltd	78	UK-E-IN11869	Energy production	421024
Conoco Philips Petroleum Company Ltd	Conoco Philips Seal Sands	102	UK-E-EN-11415	Energy production	310728
Philips 66 Limited	Humber Refinery	278	UK-E-IN-11607	Refinery	2128498
Gatwick Airport Ltd	Gatwick Terminal – Boiler Houses	368	UK-E-IN-11708	Airport	9304
NATS (EnRoute) plc	NATS (Enroute) plc Swanwick	403	UK-E-IN-11731	Air Traffic Control	1220
Castle Cement Ltd	Ketton Works	672	UK-E-IN-11396	Production of cement	643361
British Sugar Ltd	British Sugar plc Newark	727	UK-E-IN-11673	Production of sugar	114648
Molson Coors Brewing Co UK LTd	Coors Brewers Ltd Burton Brewery	949	UK-E-IN-11400	Brewery	24616
Perenco UK Limited	Perenco Natural Gas Terminal	1268	UK-E-IN-12050	Oil and gas	103495
Lotte Chemical UK Ltd	Lotte Chemical Ltd	202508	UK-E-IN-12681	Production of PET	40840
Barclays Bank LTd	Barclays Capital 10 South Colonnade	202711	UK-E-IN-12574	Banking	21
Perstorp UK Ltd	Perstorp UK	203132	UK-E-IN-12599	Production of chemicals	82

Installations highlighted in green are the installations regarding which the first round of requests were sent out.

5. Annex V: Installations that were excluded from the list

Operator	Installation name	Installation ID	Permit ID	Lines of Business Carbon leakage	Verified emissions in tonnes
Outokumpu Nirosta GmbH	Stahlwek Krefeld	68	14220-0034	Production of steel	0
Röben Tonbaustoffe GmbH	Röben Tonbaustoffe GmbH Bannberscheid	359	14260-0095	Production of bricks and tiles	11644
Olfry Ziegelwerke GmbH & Co. KG	Ziegelwerk für Verblendziegel	427	14260-0167	Production of bricks and ziles	13393
Kehlheim Fibres GmbH	Kraftwerk Kehlheim	777	14310-0172	Production of viscose fibres	152358
Medl GmbH	Fernheizwerk Sandstraße	1126	14310-0563	Energy Production	3774
E.ON Kraftwerke GmbH	GT Itzenhie	1212	14310-0563	Energy production	3438
Orion Engineerd Carbons GmbH	Furnacerußanlage	3398	14290-0005	Production of rubber	259952
Porcelaingres GmbH	Anlage zur Produktion von Feinsteinzeugflies	202045	14260-0247	Production of stoneware	28369
Dow Olefinverbund GmbH	Acrylat-Anlage Böhlen	202203	14280-0168	Production of chemicals	129210
Schoeller Technocell GmbH & Co. KG	TCP-Papiermaschine 16	202526	14280-0168	Production of paper	15473
Spezialpapierfabrik Oberschmitten GmbH	Spezialpapierfabrik Oberschmitten GmbH	203457	14280-0169	Production of paper products	0

In red: the installation regarding which a request was sent out and regarding which the county government indicated that it ceased operations in 2014 and consequently it was discovered that there are installations whose permit is still active even though they do not operate anymore.

In orange: the two installations that were consequently excluded from the list.

6. Annex VI: Updated list of selected installations

Operator	Installation name	Installation ID	Permit ID	Lines of Business Carbon leakage	Verified emissions in tonnes
Michelin Reifenwerke	Feuerungsanlage (Wärmeversorgungs- und Stromerzeugung)	1618	14310-1110	Production of tyres	50065
Röben Tonbaustoffe GmbH	Röben Tonbaustoffe GmbH Bannberscheid	359	14260-0095	Production of bricks and tiles	11644
Olfry Ziegelwerke GmbH & Co. KG	Ziegelwerk für Verblendziegel	427	14260-0167	Production of bricks and ziles	13393
Kehlheim Fibres GmbH	Kraftwerk Kehlheim	777	14310-0172	Production of viscose fibres	152358
REMONDIS Production GmbH	Kraftwerk mit Abfallmitverbrennung	1145	14310-0585	Recycling	54947
E.ON Kraftwerke GmbH	GT Itzenhie	1212	14310-0563	Energy production	3438
Orion Engineerd Carbons GmbH	Furnaceruβanlage	3398	14290-0005	Production of rubber	259952
Porcelaingres GmbH	Anlage zur Produktion von Feinsteinzeugflies	202045	14260-0247	Production of stoneware	28369
Dow Olefinverbund GmbH	Acrylat-Anlage Böhlen	202203	14280-0168	Production of chemicals	129210
Schoeller Technocell GmbH & Co. KG	TCP-Papiermaschine 16	202526	14280-0168	Production of paper	15473
Vinnolit GmbH & CO. KG	A012-Oxilochlorierung	201541	114616-0059	Production of PVC products	6619

In green: the newly selected installations to replace the installations that were excluded.

7. Annex VII: Request sent to the Umweltbundesamt

Mathias Müller
Bouillonstraat 1 – 3
6211 LH Maastricht
Die Niederlande
mathias.muller@maastrichtuniversity.nl

Die Deutsche Emissionshandelsstelle
Bismarckplatz 1
14493 Berlin
Deutschland

Antrag auf Zugang zu Umweltinformationen 16. April 2019

Sehr geehrte Damen und Herren,

Gemäß §3 Abs. 1 Umweltinformationsgesetz beantrage ich den Zugang zu Umweltinformationen über die Umsetzung von EU Umweltrecht und über Anlagen, die am EU Emissionshandelssystem teilnehmen. Ich bitte Sie mir die unten gelisteten Umweltinformationen als PDF per Email zuzuschicken.

Bezüglich der Anlagen, die in der unterstehenden Tabelle aufgelistet sind, beantrage ich folgende Informationen/bitte ich Sie mir die folgenden Fragen zu beantworten:

1. Sind die Emissionsberichte der aufgelisteten Anlagen für den Zeitraum vom 01.01.2017 bis 31.12.2017, z.B. in einer Datenbank, auf einer Website, o.ä. öffentlich zugänglich?
   1.1. Wenn ja, bitte ich Sie mir Zugang zu dieser Datenbank zu gewähren.
   1.2. Wenn nein, bitte ich Sie mir die Emissionsberichte zuzusenden.
2. Bitte schicken sie mir die Namen und Kontaktdaten der Prüfstellen, die die Emissionsberichte für den Zeitraum 01.04.2017 bis 31.03.2018 bewertet haben
3. Die Prüfberichte der Prüfstellen, die die in (2) genannten Emissionsberichte bewertet haben.

Betreiber	**Anlage**	**Anlagen ID**	**Genehmigungs-ID**	**Adresse**
Outokumpu Nirosta GmbH	Stahlwerk Krefeld	68	14220-0034	Oberschlesienstraße 16, 47807 Krefeld
medl GmbH	Heizwerk Sandstrasse	1126	14310-0563	Sandstraße, 45473 Mühlheim an der Ruhr

Darüber hinaus bitte ich Sie mir, die folgenden Fragen zu beantworten:

4. Haben die Betreiber der aufgelisteten Anlagen alle Auflagen, bezüglich der Berichterstattung von Emissionen, die in der Emissionsberechtigung bzw. der Immissionschutzberechtigung festgehalten sind, befolgt?
   4.1. Falls nicht, welche Auflagen wurden nicht befolgt?

5. Haben die Prüfstellen diese Fälle identifiziert?

6. Was waren die möglichen Gründe für die Nichteinhaltung der Auflagen?

7. Falls die Emissionsberichte weder öffentlich zugänglich sind, noch dem Antrag diese zugänglich zu machen nachgekommen werden kann, bitte ich Sie anzugeben,
   7.1. welche Überwachungsmethodik von dem Betreiber angewandt wurde
   7.2. ob Datenlücken aufgetreten sind, die im Emissionsbericht durch Ersatzdaten gefüllt worden sind und die Gründe für diese Datenlücken, die im Emissionsbericht angegeben sind.

8. Haben Sie, zusätzlich zu der Prüfung durch Prüfstellen, Kontrollen der Emissionsberichte der aufgelisteten Anlagen durchgeführt?
   8.1. Falls dies nicht der Fall ist, geben Sie bitte die Gründe an.

9. Haben Sie die internen Prüfungsunterlagen der Prüfstellen, die die Emissionsberichte der aufgelisteten Anlagen geprüft haben, gemäß Artikel 26 (3) der Verordnung (EU) Nr. 600/2012, beantragt?
   9.1. Wenn dem so ist, dann bitte ich Sie mir diese zukommen zulassen.

10. Wurde eine vereinfachte Prüfung, gemäß Artikel 31 der Verordnung (EU) Nr. 600/2012 für die Prüfung der Emissionsberichte der oben genannten Anlagen angewandt?

11. Bitte senden Sie mir die komplette Korrespondenz mit den Betreibern der oben genannten Anlagen zu, die gemäß Artikel 10 (1) (k) der Verordnung (EU) Nr. 600/2012 als ‚einschlägig' betrachtet wird.

Für etwaige Rückfragen stehe ich selbstverständlich zur Verfügung.

Vielen Dank im Voraus.

Mit freundlichen Grüßen,

Mathias Müller

8. Annex VIII: Requests to the competent of the federated states (example)

Mathias Müller
Bouillonstraat 1 – 3
6211 LH Maastricht
Die Niederlande
mathias.muller@maastrichtuniversity.nl

Bezirksregierung Düsseldorf
Cecilienallee 2
40474 Düsseldorf
Deutschland

Antrag auf Zugang zu Umweltinformationen 16. April 2019

Sehr geehrte Damen und Herren,

Gemäß §2 Umweltinformationsgesetz NRW beantrage ich den Zugang zu Umweltinformationen über Anlagen, die am EU Emissionshandelssystem teilnehmen. Ich bitte Sie mir die unten gelisteten Umweltinformationen als PDF per Email zuzuschicken.

Bezüglich der Anlagen, die in der unterstehenden Tabelle aufgelistet sind, beantrage ich eine elektronische Kopie der Genehmigung, die die Anlage berechtigt am EU Emissionshandelssystem teilzunehmen.

Betreiber	Anlage	Anlagen ID	Genehmigungs ID	Adresse
Outokumpu Nirosta GmbH	Stahlwerk Krefeld	68	14220-0034	Oberschlesienstraße 16, 47807 Krefeld
Medl GmbH	Heizwerk Sandstraße	1126	14310-0563	Sandstraße, 45473 Mühlheim an der Ruhr

Für etwaige Rückfragen stehe ich selbstverständlich zur Verfügung.

Vielen Dank im Voraus.

Mit freundlichen Grüßen,

Mathias Müller

9. Annex IX: Requests to the German verifiers (example)

Herr
GUT Certifizierungsgesellschaft
Eichenstraße 3B
12435 Berlin
Deutschland
David.kroll@gut-cert.de

Mathias Müller
Maastricht University
Bouillonstraat 1-3
6211LH Maastricht
Niederlande

Antrag auf Zugang zu Umweltinformationen 22. September 2020

Sehr geehrter Herr,

Am 02.03.2018 hat XXX den Emissionsbericht der Anlage Kraftwerk (Anlagennummer 777 | Genehmigungs ID 14310-0172) der Kehlheim Fibres GmbH für das Jahr 2017 als frei von wesentlichen Falschangaben verifiziert.

Hiermit beantrage ich, gemäß §3 Abs. 1, Umweltinformationsgesetz, den Zugang zu Umweltinformationen, die diese Anlage betreffen. Ich bitte Sie, mir die beantragten Umweltinformationen als PDF per Email zuzuschicken.

Ich beantrage folgende Informationen:

1. Eine Erläuterung des/der Verfahren(s), das/die die TÜV Süd Industrieservice GmbH gemäß Artikel 40 der Verordnung (EU) Nr. 600/2012 eingeführt und dokumentiert hat und das/die die TÜV Süd Industrieservice GmbH im Prüfungsprozess des obengenannten Emissionsberichts angewandt hat.
2. Den Prüfbericht, der den obengenannten Emissionsbericht als frei von wesentlichen Falschangaben verifiziert.
3. Die internen Prüfungsunterlagen gemäß Artikel 26 der Verordnung (EU) Nr. 600/2012, insbesondere
    a. Die Ergebnisse der Prüfungstätigkeiten
    b. Die strategische Analyse, die Risikoanalyse und den Prüfplan
    c. Die hinreichenden Informationen zur Untermauerung des Prüfgutachtens.
4. Die Informationen, die die Kehlheim Fibres GmbH der TÜV Süd Industrieservice GmbH gemäß Artikel 10 (1) der Verordnung (EU) Nr. 600/2012 zur Verfügung gestellt hat.
5. Jegliche Berichte o.ä. über die Standortbegehung, die die TÜV Süd Industrieservice GmbH am 01.03.2018 durchgeführt hat, insbesondere
    a. Die Ergebnisse der Prüfung der Messgeräte und des Überwachungssystems
    b. Mitschriften o.ä. der Interviews, die durchgeführt wurden.
2. Die Ergebnisse der unabhängigen Prüfung gemäß Artikel 25 der Verordnung (EU) Nr. 600/2012.
3. Jegliche Korrespondenz mit der Kehlheim Fibres GmbH.

4. Eine Erläuterung der analytischen Verfahren gemäß Artikel 15 der Verordnung (EU) Nr. 600/2012 und die Gründe für deren Anwendung.
5. Informationen über etwaige Unterschiede zwischen den Daten, die von der Kehlheim Fibres GmbH übermittelt wurden und den finalen Daten, die die TÜV Süd Industrieservice GmbH im Prüfungsverfahren festgestellt hat.
    a. Falls es tatsächlich Unterschiede gab, die Gründe, die von der Kehlheim Fibres GmbH angeführt wurden.

Vielen Dank im Voraus.

Mit freundlichen Grüßen,

Mathias Müller

10. Annex X: Requests to the Environment Agency

Mathias Müller
Bouillonstraat 1 – 3
6211 LH Maastricht
The Netherlands
mathias.muller@maastrichtuniversity.nl

Environment Agency
PO Box 544
Rotherham
S60 1BY
United Kingdom
enquiries@environment-agency.gov.uk

Request for environmental information 15th April 2019

Dear Sir or Madame,

Pursuant to the Environmental Information Regulations, I am requesting access to environmental information relating to the implementation of EU environmental legislation and to British installations that participate in the EU Emission Trading System. I would like to ask you to send me the requested information in as PDF documents attached to an email.

Regarding the EU ETS installations listed in the table below, I request the following information/ask you to answer the following questions:

1. Please disclose the greenhouse gas permits for the period from 1 January 2017 to 31 December 2017.
2. Are the emissions reports of the listed installations for the period from 1 January 2017 to 31 December 2017 available to the public in a database, on a website, or the like?
   2.1. If yes, please grant me access to that database.
   2.2. If not, please disclose the emission reports.
3. Please disclose the names and contact details (postal address, email address and phone number) of the verifiers that verified the emissions reports of the listed installations in the period from 1 January 2017 to 31 December 2017.
4. The verification reports that verified the emissions reports as satisfactory.

Operator	Installation	Installation ID	Permit ID	Address
NATS (EnRoute) plc	NATS (EnRoute) plc - Swanwick	403	UK-E-IN-11731	4000 Parkway, Whiteley, Fareham PO15 7FL
Molson Coors Brewing Co UK Ltd	Coors Brewers Ltd Burton Brewery	949	UK-E-IN-11400	PO Box 217, Burton upon tren DE14 1BG

In addition to the requested information and questions set out above, please answer the following questions:

5. Did the listed installations adhere to all the reporting requirements set out in the monitoring plan/greenhouse gas permit?
   5.1. If not, what reporting requirements were violated?

6. Did the verifier identify these violations?

7. What were the possible causes of these violations?

8. If the emissions report can only be partially disclosed, please indicate which information the operator has marked as commercially sensitive and which information has been blacked out by you due to other reasons.

9. If the emission reports are not publicly available and cannot be disclosed, please
   9.1. State the monitoring methodology applied by the mentioned installations.
   9.2. Indicate whether any data gaps occurred in the emission reports of the installations and the reasons for these data gaps, as set out in the emission reports

10. Have there been checks of the emissions reports of the listed installations, in addition to the verification?
    10.1. If there have not been additional controls, please state why.

11. Have you requested the internal verification documentation regarding the verification of emission reports of the listed installations from the verifiers in question, pursuant to Article 26 (3) Commission Regulation 600/2012?
    11.1. If so, please disclose it.

12. Has a simplified verification procedure, pursuant to Article 31 of Commission Regulation 600/2012, been applied when verifying the emission reports of the listed installations, and if so why?

13. Please disclose all correspondence with the operators of the listed installations deemed relevant pursuant to Article 10 (1) (k) of Commission Regulation 600/2012

Please do not hesitate to contact me in case you have questions regarding my request.

Many thanks in advance.

Best wishes,

Mathias Müller

11. Annex XI: Requests to the British verifiers

Good evening,

Pursuant to the EIR, I request access to environmental information. Please send me the requested information as PDFs via email.

1. Please disclose the procedures for verification activities established pursuant to Art 40 of Reg 600/2012.

In 2017, SGS verified the emissions report of Barclays Capital - South Colonnade, Inst. ID 202711, Permit ID UK-E-IN-12574

With regard to this installation,

2. Please disclose the verification reports
3. Please disclose the internal verification documentation, in particular
a. The results of the verification activities performed
b. The strategic analysis, the risk analysis and the verification plan
c. Information to support the verification opinion
4. Please disclose the information that the operator has provided you, pursuant to Art 10 (1) of Reg 600/2012, in particular
a. The operator's risk assessment and an outline of the overall control system
b. The procedures mentioned in the monitoring plan as approved by the competent authority, including procedures for data flow activities and control activities
c. All relevant correspondence with the competent authority
5. Please disclose any reports of site visits carried out pursuant to Art 21, Reg. 600/2012, including
a. The results of the assessment of the operation of measuring devices and monitoring systems, and
b. Transcripts of interviews with the operator's staff.
6. 6. Please disclose the results of the independent review carried out pursuant to Art 25 of Reg 600/2012
7. Please disclose any correspondence with the operator
8. Please provide an explanation of the analytical procedures used pursuant to Art 15 of Reg 600/2012 and the reasons to make use of them.
9. Have there been any differences between the data provided by the operator and the final data adjusted based upon information obtained during the verification?
a. If so, what were the operator's reasons for the differences?

Many thanks in advance.

Best wishes

Mathias Müller

12. Annex XII: Overview of empirical results

Body	Round	Answer	Transfer	Public authority	Time limits	Env Info
BK Düsseldorf	1	Yes	Yes	GOV	< 1 month	Yes
Bayerisches Landesamt für Umwelt	2	Yes	Yes	GOV	< 1 month	Yes
Stadtverwaltung Lünen	2	Yes	Yes	GOV	< 1 month	No
Stad Köln	2	Yes	Yes	GOV	< 1 month	Yes
Stadt Hürth	2	Yes	Yes	GOV	< 1 month	Yes
Landesdirektion Sachsen	2	Yes	No	GOV	< 1 month	Yes
Gewerbeaufsichtsamt Oldenburg	2	No	n/a	GOV	did not reply	
Saarländisches Landesamt für Umweltsc	2	Yes	Yes	GOV	< 1 month	Yes
Landesamt für Umweltschutz SH (1)	2	Yes	No	GOV	< 1 month	Yes
Landesamt für Umweltschutz SH (2)	2	Yes	No	GOV	< 1 month	Yes
Westerwaldkreis	2	No	n/a	GOV	did not reply	
DEHSt	1	Yes	No	GOV	1 - 2 months without justification	Partially
DEHSt	2	Yes	No	GOV	1 - 2 months with justification	Yes
Enviziert	1	Yes	No	PA	< 1 month	No
GUT CERT	2	Yes	No	No	< 1 month	Partially
KPMG	2	Yes	No	PA	1 - 2 months without justification	Yes
Müller BBM	2	Yes	No	No	< 1 month	Partially
Pro Terra	2	No	n/a		did not reply	
SSG TÜV Saar	2	Yes	No	No	< 1 month	
TÜV Süd (1)	2	No	n/a		did not reply	
TÜV SÜD (2)	2	No	n/a		did not reply	
Environment Agency	1	Yes	No	GOV	< 1 month	Yes
Environment Agency	2	Yes	No	GOV	1 - 2 months without justification	Yes
Lucideon	1	Yes	No	No	< 1 month	
BSI Group	2					
Lloyd's	2	Yes	No	PA	> 2 months	
Lucideon	2	Yes	Yes	No	< 1 month	
SGS	2					

Body	Exception 1	Exception 2	Exception 3	Charges	Inform about charges	Disclosure	In the form requested
BK Düsseldorf	n/a	n/a	n/a	0	n/a	Full	Yes
Bayerisches Landesamt für Umwelt	n/a	n/a	n/a	0	n/a	Full	Yes
Stadtverwaltung Lünen	n/a	n/a	n/a	0	n/a	Denied	Yes
Stad Köln	n/a	n/a	n/a	0	n/a	Full	Yes
Stadt Hürth	n/a	n/a	n/a	0	n/a	Full	Yes
Landesdirektion Sachsen	n/a	n/a	n/a	0	n/a	Full	Yes
Gewerbeaufsichtsamt Oldenburg							
Saarländisches Landesamt für Umweltsc	n/a	n/a	n/a	0	No	Full	Yes
Landesamt für Umweltschutz SH (1)	n/a	n/a	n/a	0	n/a	Full	Yes
Landesamt für Umweltschutz SH (2)	n/a	n/a	n/a	0	n/a	Other	n/a
Westerwaldkreis							
DEHSt	Personal data	n/a	n/a	0	n/a	Partial	Yes
DEHSt	Personal data	Commercial or ir	n/a	300	Yes	Partial	Yes
Enviziert	n/a	n/a	n/a	0	n/a	Denied	n/a
GUT CERT						Denied	
KPMG	Commercial or i	Intellectual property rights		0	n/a	Denied	n/a
Müller BBM	Commercial or i	n/a	n/a	0	n/a	Denied	n/a
Pro Terra							
SSG TÜV Saar	n/a	n/a	n/a	0	n/a	Denied	n/a
TÜV Süd (1)							
TÜV SÜD (2)							
Environment Agency	Personal data	n/a	n/a	0	n/a	Partial	Yes
Environment Agency	Personal data	n/a	n/a	0	n/a	Partial	Yes
Lucideon	Commercial or i	n/a	n/a	0	n/a	Denied	n/a
BSI Group							
Lloyd's						Denied	n/a
Lucideon	Commercial or i	n/a	n/a	0	n/a	Denied	n/a
SGS							

Body	In the form requested	Info about review	Request for review submitted	Review successful	Review answered	Answer to Review within time limits
BK Düsseldorf	Yes	n/a	n/a	n/a	n/a	n/a
Bayerisches Landesamt für Umwelt	Yes	n/a	n/a	n/a	n/a	n/a
Stadtverwaltung Lünen	Yes	Yes	Yes	Yes	Yes	Yes
Stad Köln	Yes	n/a	n/a	n/a	n/a	n/a
Stadt Hürth	Yes	n/a	n/a	n/a	n/a	n/a
Landesdirektion Sachsen	Yes	n/a	n/a	n/a	n/a	n/a
Gewerbeaufsichtsamt Oldenburg						
Saarländisches Landesamt für Umweltsc	Yes	n/a	n/a	n/a	n/a	n/a
Landesamt für Umweltschutz SH (1)	Yes	n/a	n/a	n/a	n/a	n/a
Landesamt für Umweltschutz SH (2)	n/a	n/a	n/a	n/a	n/a	n/a
Westerwaldkreis						
DEHSt	Yes	Yes	Yes	Yes	Yes	Yes
DEHSt	Yes	Yes	Yes			
Enviziert	n/a	No	Yes	No	Yes	Yes
GUT CERT						
KPMG	n/a	Yes	Yes			
Müller BBM	n/a	No	Yes	Partially		
Pro Terra						
SSG TÜV Saar	n/a	No	Yes			No
TÜV Süd (1)						
TÜV SÜD (2)						
Environment Agency	Yes	No	Yes	No	Yes	Yes
Environment Agency	Yes	No	No	n/a	n/a	No
Lucideon	n/a	No	Yes	No	Yes	Yes
BSI Group						
Lloyd's	n/a	n/a	Yes			
Lucideon	n/a	n/a	No	n/a	n/a	n/a
SGS						

13. Annex XIII: Overview of competent authorities of German federal states

Federal state	Competent authority	Legislation
Bavaria	District government or Bavarian Environmental Authority	Verordnung über die Einrichtung der Bayerischen Landesämter für Gesundheit und Lebensmittelsicherheit sowie für Umwelt
Lower Saxony	Staatliche Gewerbeaufsichtsamt	Verordnung über Zuständigkeiten auf den Gebieten des Arbeitsschutz-, Immissionsschutz-, Sprengstoff-, Gentechnik-, und Strahlenschutzrechts sowie in anderen Rechtsgebieten
Rhineland-Palatinate	District governments	Landesverordning über Zuständigkeiten auf dem Gebiet des Immissionsschutzes
Saarland	Landesamt für Umwelt- und Arbeitsschutz	Verordnung über die Zuständigkeit nach dem Bundes-Immissionsschutzgesetz und nach dem Treibhausgas-Emissionshandelsgesetz
Saxony	Landesdirektion Sachsen	Sächsische Immisionszuständigkeitsverordnung
Schleswig-Holstein	Landesamt für Landwirtschaft, Umwelt, und ländliche Räume	Immissionschutz-Zuständigkeitsverordnung
North Rhine-Westphalia	District governments	Zuständigkeitsverordnung Umweltschutz

SUMMARY

The EU Emissions Trading System (ETS) is one of the major EU legal instruments to reduce greenhouse gas emissions. Compliance with the EU ETS is ensured by a set of measures called the compliance cycle. All installations covered by the EU ETS must obtain a permit. Operators of installations must monitor the emissions themselves and record them in an emissions report. This emissions report must be verified by a third party, the verifier. Only where the verifier approves the emissions report, may the operator surrender allowances and thereby pay for its emissions. The overall aim of reducing emissions is achieved by reducing the total number of allowances each year.

Thus, the EU ETS legislator made a choice to rely on private parties for the verification of the reporting of emissions. For the system to achieve its aim – reducing overall greenhouse gas emissions, the absence of cheating is crucial. In addition to the controls by private verifiers and national public authorities, the public, including journalists, NGOs and individuals, may play a watchdog role. The public could try to identify anomalies in the compliance cycle or indications for instances of non-compliance with the EU ETS legislation and bring these issues to the attention of the authorities responsible for enforcement and/or the public at large. However, to play this watchdog role, transparency of the compliance cycle is particularly important. Therefore, this thesis aims to answer the following question: to what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS, that is held by governmental authorities and/or private verifiers, be provided to the public upon request and to what extent do governmental authorities and private verifiers provide such information in practice?

This study illustrates that the information on the EU ETS that is publicly available would be insufficient to determine whether individual operators comply with the EU ETS rules. The following information is relevant in this context: the greenhouse gas permit, the emissions report, the internal verification documentation, the verification report and other information provided by the operator to the verifier. Given that this information is not publicly available, the question arises of whether it must be disclosed upon request. The Aarhus Convention and the Environmental Information Directive provide a general right to access environmental information. At the national level, Germany has implemented the Convention and the Directive by means of the Umweltinformationsgesetz. In England, the Environmental Information Regulations implement the UK's obligations stemming from the Aarhus Convention. Despite

the Brexit, looking at England is still relevant, since the United Kingdom continues to be a party to the Aarhus Convention and the legislation that was adopted to implement the Environmental Information Directive has not changed since the United Kingdom left the EU. In this context, three central questions arise: (1) is the relevant information environmental information? (2) are the entities that hold the information public authorities? (3) Do any of the grounds of refusal apply?

The definition of environmental information, as set out at the level of international law, EU law and national law of Germany and the United Kingdom is very broad, and this study argues that it is very likely that all of the relevant information constitutes environmental information. The definition of public authorities is also rather broad and includes not only traditional governmental authorities but, under certain circumstances, also private entities. The relevant compliance information is held by both governmental authorities and private verifiers. Regarding verifiers, the question arises whether they are covered by the obligation, set out in the Aarhus Convention and the Environmental Information Directive, to provide access to information, which would be the case if they constituted public authorities. In this regard, there are two crucial questions: first, do verifiers perform public administrative functions, and second, are verifiers under the control of a public authority? While these questions currently cannot be answered with certainty, from a teleological point of view, it could be argued that verifiers are public authorities, since they perform functions that are in the public interest and that are traditionally carried out by the state.

As a next step, this study examined the grounds based on which a request for access to environmental information may be refused. Both the Aarhus Convention and the Environmental Information Directive provide several grounds based on which requests for environmental information may be refused. It is not possible to determine in a general way whether the ground of refusal applies to the information identified as relevant for checking compliance with the EU ETS. It depends on the specific circumstances of each individual case and the assessment of the public authority addressed with a request for environmental information whether a ground of refusal applies. In the course of this assessment, public authorities must also determine whether there is an overriding interest in disclosure. Where the requested information relates to emissions into the environment, an overriding public interest is presumed.

Partially, these findings were also confirmed by a small-scale empirical study. Both German and British governmental authorities treat the relevant information as environmental information and disclose it upon request. Only in a few instances, were the requests for

environmental information denied. In contrast, verifiers from both countries do not see themselves as public authorities. However, this research has shown that there can be confusion among verifiers, which can be an indication of the complexity of the question of whether verifiers are public authorities.

Finally, this thesis has illustrated that while the EU legislator has chosen to outsource such an important part of the compliance cycle to private actors, it did not provide sufficient legal certainty regarding the implications for provisions on access to environmental information.

IMPACT PARAGRAPH

The European Union (EU) has committed to reducing its greenhouse gas emissions in 2030 by 55% compared to 1990 and to become climate neutral by the year 2050. The EU Emissions Trading System (ETS) is one of the main tools to achieve that aim. It limits total emissions to a certain amount by means of a cap on allowances, which is reduced every year. Thereby, the EU ETS achieves its overall goal of reducing emissions. Operators of industrial installations must monitor their greenhouse gas emissions throughout the year and record them in an emissions report. This emissions report must be verified by a private third party. If the verifier attests that the emissions report is free from mistakes, the operators must compensate for their emissions with allowances that they have previously acquired. For this system to work, it is pivotal that the participating operators comply with the applicable legislation – particularly this obligation to surrender allowances according to the emissions caused – and do not cheat. In addition to the controls by private verifiers and national public authorities, the public, including journalists, NGOs and individuals, may play a watchdog role. The public could try to identify anomalies in the compliance cycle or indications for instances of non-compliance with the EU ETS legislation and bring these issues to the attention of the authorities responsible for enforcement and/or the public at large. Moreover, the watchdog role could entail checking whether national public authorities and verifiers perform their functions correctly. However, to carry out such checks, the public must have access to the necessary information.

The main objective of this study was to determine to what extent and in which circumstances environmental information related to compliance and non-compliance with the EU ETS that is held by governmental authorities and/or private verifiers must be provided to the public upon request and to what extent governmental authorities and private verifiers provide such information in practice. To answer that question, three intermediary questions needed to be answered: (1) Is the relevant information environmental information? (2) Are the entities that hold the information public authorities? (3) Do any of the grounds of refusal apply? It was shown that most of the relevant information constitutes environmental information, which is a prerequisite for the application of the Aarhus Convention and the EU Environmental Information Directive. The entities holding the information on the compliance cycle are governmental authorities and private verifiers. It is clear that governmental authorities constitute public authorities. Even though no definitive conclusion could be reached with regard to the private verifiers, there are strong arguments in favour of considering private verifiers public authorities. However, in practice, verifiers denied that they are public

authorities. Whether any grounds of refusal apply depends on the specific conditions of each case.

From an academic perspective, this study may contribute to a deeper understanding of the right to access environmental information, both from a legal as well as from a practical perspective. The empirical part of this study showcases some of the practical barriers to exercising the right to access environmental information, in particular in cases, where the information in question is held by private entities that have been tasked with the performance of public tasks. The findings of this study are particularly relevant for the legal academic community since this is one of the few studies that investigate to what extent information on compliance with the EU ETS must be disclosed to the public and the first one to request information in practice. This study has demonstrated the complexity of exercising the right to environmental information, given the lack of the legal framework of the right to access environmental information. Some questions still need to be answered and further case law development is necessary. Alternatively, the legislator could improve the legislative framework. One of the issues that future research should focus on is the condition that must be fulfilled for a legal framework to be considered particularly precise so that actors covered by that legal framework are considered as being under the control of a public authority.

From a larger societal perspective, this study may draw the attention of the legislator to the necessity to be wary of the implications of outsourcing public tasks to private entities for the right to access environmental information and to ensure that the legal framework is sufficiently clear so that the public can effectively exercise its right. Furthermore, it may serve as inspiration for legal professionals, such as judges, when interpreting the law on access to environmental information. In that regard, the question of whether the information identified as relevant for checking compliance with the EU ETS constitutes environmental information and the question of whether the EU ETS verifiers constitute public authorities are of particular importance.

The study may also raise awareness about the issues that were examined. Primarily the question of enforcement of the EU ETS, which has, thus far, not been a priority of civil society. The study can serve as guidance for civil society when submitting requests for access to environmental information on issues related to compliance with the EU ETS. If civil society becomes more active in this area and uses the right to access environmental information to investigate also compliance with EU environmental law at large, not limited to the EU ETS, the problem of non-compliance with EU environmental law may be alleviated to a certain extent.

Finally, the results of this study may also serve private companies, as it may draw their attention to the fact that they, under certain circumstances, can be categorised as public authorities and consequently be obliged to provide environmental information upon request, unless a valid ground of refusal applies. As this study has shown, thus far, they seem largely unaware of this possibility.

CURRICULUM VITAE

Mathias Nikolaus Müller was born in Bergisch Gladbach, Germany in 1992. He holds a Bachelor of Arts degree in European Studies and a Master of Laws degree in European Law from Maastricht University. While writing his Ph.D. thesis Mathias was involved in teaching several courses on European and International Environmental Law, EU Institutional Law and International Law. While finalising the Ph.D. manuscript, Mathias completed a traineeship in the Transparency Unit of the European Parliament. Since March 2022, Mathias is working as Sustainability and Environment, Health and Safety Officer at the European Semiconductor Industry Association (ESIA).