Petition to the European Parliament

ClientEarth and Friends of the Earth Europe (FoEE) (the Applicants) supported by a number of NGOs (see Annex) address this petition to the European Parliament to draw its attention on the failure of the European Commission (the Commission) to comply with the requirements under the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)[1], Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community institutions and bodies (Regulation 1367/2006)[2] and Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (Regulation 1049/2001)[3].

[1] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998.
[2] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264/13.
[3] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43.

Introduction

1. It is clear from reading the provisions of Regulation 1049/2001 that access to documents is the rule, and confidentiality is intended to be the exception.

2. Additionally, Article 1 TEU provides that "*This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and closely as possible to the citizen*".

3. Article 11 TEU(1)(2) sets out the principle of participatory democracy, stating that "*The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society*".

4. Article 15 TFEU further enshrines the need for transparency, stating that "*In order to promote good governance and ensure the participation of civil society, the Union institutions, ...shall conduct their work as openly as possible*." Paragraph 3 of that provision states that "*Each institution, ...shall ensure that its proceedings are transparent*."

5. Article 298TFEU provides that "*In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open , efficient and independent European administration*".

6. Yet, the practice of the Commission regularly fails to reflect the fundamental premise of access to documents.

7. There is a general pattern of behaviour within the Commission to refuse to disclose certain types of documents that should be publicly accessible. The Applicants have identified categories of documents that are routinely withheld without good reason, which prevents proper participation in the political process. These categories include functional documents (e.g. letters of formal notice and reasoned opinions sent to Member States as part of infringement proceedings, studies ordered by the Commission to check conformity in the way Member States transpose EU directives on environmental matters, and letters sent by the industry to the Commission) and thematic documents (e.g. scientific reports on biofuels).

8. The Commission also systematically requests time extensions to reply to information requests from NGOs, without providing detailed reasons for the delay.

9. With respect to environmental matters, no measures have been taken to achieve full compatibility between the provisions of the Aarhus Convention and of Regulation 1049/2001. Regulation 1367/2006 applying the provisions of the Aarhus Convention to EU institutions has been adopted, it however refers to Regulation 1049/2001 with regards to access to information. Regulation 1049/2001 provides the exceptions and conditions upon which documents may be withheld for non-environmental information. For environmental information, however, these exceptions can only apply to the extent that they conform to the obligations stemming from the Aarhus Convention which is not the case for all of them.

10. Where there may be possible reasons to withhold information, the Commission still regularly fails to demonstrate that there is no overriding public interest in disclosure. The Commission also makes abusive use of the exceptions provided under Article 4 of Regulation 1049/2001.

11. As a result of not applying the relevant pieces of legislation correctly, the Commission fails to actively disseminate environmental information.

12. Finally, and very worryingly, the decisions and critical remarks of the European Ombudsman are, in certain cases, completely ignored by the Commission.

13. These concerns are addressed in detail below and evidence of what is alleged is provided in the Annex.

Recommendations to Members of the Parliament

- Support the right of access to information for European citizens and civil society organisations, by investigating the matters raised in this petition and taking them to the Parliament's plenary, in order to further pressure the European Commission over its repeated failures to comply with its legal obligations under the Aarhus Convention, Regulation 1367/2006 and Regulation 1049/2001.

- Make a recommendation for the Commission to respect its legal requirements to bring Regulation 1049/2001 in line with the provisions of the Aarhus convention. This could be

achieved via the same process as was used to bring Regulation 1049/2001 in line with the Lisbon treaty within the recast.

The failure of the Commission to comply with time-limits under the Regulation

14. The time limits for processing requests provided under Regulation 1049/2001 are regularly ignored by the Commission. The Commission systematically requests time limit extensions to reply to information requests from NGOs, even when nothing in the request (i.e. the volume or the complexity of the information) justifies the use of an extension. The Commission therefore directly violates Articles 7(1)(3) and 8(1)(2) of Regulation 1049/2001.

15. The requirements provided under these provisions are not fulfilled by most of the requests (see Annex).

16. Article 7(3) of Regulation 1049/2001 provides that:

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

17. Article 8(2) of Regulation 1049/2001 lays down the same requirement at the stage of the confirmatory application.

18. Time limit extensions are for exceptional cases only. In recognition of the exceptional nature of an extension and the implications it has on public participation in the EU decision-making process, the EU legislation requires the institutions to provide detailed reasons when extending the time limit to respond to a request. In the context of refusals, the EU Courts have interpreted the detailed-reason requirement as necessary to allow applicants to determine whether the decision is vitiated by error[4].

19. However, instead of taking only 15 working days to reply to the initial request, in accordance with Article 7(1) of Regulation 1049/2001, the Commission routinely takes approximately one month and a half by taking the additional 15 working days. In cases where it refuses to provide access, the Commission customarily takes another month and a half (instead of 15

[4] Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007); Case C-64/05 P, *Kingdom of Sweden v. Commission of the European Communities and Others* (2007), paragraph 69; Case T-264/04, *WWF European Policy Programme v. Council of the European Union* (2007), paragraph 36, *citing* Case T-187/03, *Scippacercola v Commission* (2005), paragraph 66.

working days) to reply to the confirmatory application made by the applicant. In such cases, the Commission will have taken a total of three months to reply to the request, instead of the one month and a half that is required by Regulation 1049/2001.

20. The Applicants contest the systematic use of Article 8(2) of Regulation 1049/2001 by the Commission. It has become a pattern of behaviour for the Commission to automatically use Article 8(2) of Regulation 1049/2001 and extend the deadline for an answer to the confirmatory applications by a further 15 working days. Each time, the Commission uses the same justification, drafted as a standardized text, without providing any good reasons which justify the extension. ClientEarth has already brought four cases before the General Court in which the Commission abusively resorts to this same extension language, without any justification whatsoever[5]. In two of the cases, the General Court allocated the costs to the Commission because of the time the Commission had taken to reply to the requests, more than five months, leaving no other choice to the NGO than going to court[6].

21. Indeed, the Commission, in certain cases, allows itself to take even more time than allowed by Article 7(3) and 8(2) of Regulation 1049/2001 in exceptional cases and does not provide any reply to confirmatory applications within the authorised one month and a half under Article 8(2), but instead replies months later (see Annex).

22. Furthermore, in these cases, the Commission does not provide substantive reply as to whether the documents will be made accessible or not. In so doing, it creates a legal uncertainty for NGOs as to when a case would need to be lodged with the General Court in order to challenge an implicit refusal, or even what decision to challenge. Indeed, Article 8(3) of Regulation 1049/2001 provides that "*failure to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman*". However, in these cases, the Commission sends a letter stating that it has been unable to reply within the time limit and will reply "*as soon as possible*". Yet, according to Article 263 TFEU, the time limit in which one can challenge an implicit refusal of the Commission before the Court

[5] Case No T-120/10, *ClientEarth and Others v Commission* (lodged March 8, 2010); Case No. T-449/10, *ClientEarth and Others v Commission* (lodged September20, 2010).
[6] Case No T-120/10, *ClientEarth and Others v Commission* ; Case No. T-449/10, *ClientEarth and Others v Commission*.

is two months. If the applicant waits for the reply from the Commission and the reply takes more than two months (which is regularly the case), the Applicant's right to go to court can no longer be exercised. At least, not until the Commission effectively and substantively replies to the request, which can take months (see Annex).

23. In certain cases, the Commission replies only after the Applicants have taken the matter before the Court[7]. This means the applicant must then adapt the legal pleas made in their application before the Court, thereby adding to the burden of work for the applicant and resulting in longer proceedings before the Court.

24. The Commission's failure to provide the documents in a timely manner, in accordance with the prescribed time-limits, deprives the applicants of the ability to meaningfully engage in the decision-making process, including, *inter alia*, participation in the development of policy and legislative proposals, and securing third-party and peer review of the technical findings on specific matters.

25. The Commission's systematic breach of Article 7 and 8 of Regulation 1049/2001 is consequently also a breach of crucial provisions in the EU Treaties, as mentioned above (Article 1 and 11 TEU and 15 TFEU), which set out the basic democratic principles that should form the foundation of the EU, transparency, openness and public participation in the decision-making process.

26. The Commission, when asked about these late replies, cites a lack of staff and the workload that dealing with the requests entails. According to the Commission, it would be impossible to deal with all the requests made within the required time limits. However, this is not an adequate argument. The structural and administrative incapacity of the Commission to deal with access to documents requests on time is not sufficient reason to prevent the public (NGOs, citizens and any other natural or legal person wishing to have access to information held by the Commission) from exercising one of their fundamental rights, as provided by the provisions of EU Treaties (mentioned above) and the Charter of Fundamental Rights (Article 42).

[7] Case T-120/10 ClientEarth and others v Commission; Case T-449/10 ClientEarth and others v Commission; Case T-111/11 ClientEarth v Commission (pending).

27. It is also well-established case-law of the Court of Justice of the EU that the institutions may not rely on the amount of work that a concrete, individual assessment of each document would entail to delay or refuse access to documents.[8] The workload incurred by the assessment of the requests may not be invoked by the institutions, not least when the documents requested are easily identifiable and neither very long, complex or numerous.

28. It is even more puzzling to see that the Commission acknowledges the situation, and its non-compliance with the time limits set by the regulation, *without committing to finding solutions*. On the contrary, the Commission proposes within the recast of Regulation 1049/2001 to extend the deadline within which institutions could reply to initial requests and confirmatory applications to 30 working days. This shows the lack of understanding from the Commission of the need for civil society to have access to the information as swiftly as possible to be able to use it.

29. First, the Commission's operating presumption should be in favour of disclosure, rather than withholding documents, in accordance with the rule established by Regulation 1049/2001 and established case-law. This is also a matter of administrative efficiency.

30. Second, one solution that could be envisaged, amongst others, would be to consider the confidential aspect of a document when the document is discussed and drafted, instead of considering it only when it is requested. This would allow the Commission's staff to save time at a future date, when it comes to making an examination of documents that were drafted several years previously in a completely different context, in response to a request for access**.** The Commission would then only have to re-assess whether the parts of the documents that had been deemed confidential at the time of drafting should remain so.

31. Third, this should be combined with the compliance by the Commission with its obligation to set up a public register, under Article 11 of Regulation 1049/2001, in particular for environmental information as required by Article 5 of the Aarhus Convention and Article 4 of Regulation 1367/2006. The Commission should actively disseminate the documents that are required to be publicly accessible, in its public register, when the documents are drafted.

[8] General Court, Case T-2/03, *Verein für Konsumenteninformation* v. *Commission*, ECR 2005, p.II-1121.

This would reduce the number of requests and, inevitably, the workload of the Commission. This obligation is addressed below.

32. These solutions would not require more staff and are therefore easily achievable.

33. The problem of the delayed registration and handling of requests for access by the Commission has already been the subject of decisions from the European Ombudsman. The Ombudsman considered that delay in registering and handling the complainant's application for access constituted maladministration[9] and made the following remark: "*The Ombudsman has taken note of the complainant's argument that late registration and late answers to requests are relatively common occurrences within by the Commission. The Ombudsman addressed, in the past, the problem of the belated registration and handling of requests for access to documents by the Commission. The Ombudsman will continue to monitor, on the basis of complaints submitted to him, the Commission's commitment to respect the deadlines stipulated in Regulation 1049/2001. If provided with indications of a systemic problem within the Commission services in this regard, the Ombudsman will consider opening an own initiative inquiry into the matter*."[10]

34. In another case, the Ombudsman stressed the need of the Commission to organise its services to be able to handle requests promptly: "*The Ombudsman recalls that, according to Article 7(1) and 8(1) of Regulation 1049/2001, applications for access to documents and confirmatory applications shall be handled promptly and a reply to an access application or a confirmatory application shall be given within 15 working days as from the date of registration as such an application. The Ombudsman takes the view that the obligation to handle applications promptly implies that the Commission should organise its administrative services so as to ensure that registration normally take places, at the latest, on the first working day following receipt of an application*"[11].

35. As demonstrated above, and by the examples of cases provided in the annex of this petition, it is clear that there is a systemic problem within the Commission regarding its obligation to reply to access to documents requests within the time limits prescribed by Regulation

[9] Case 355/2007/TN, paragraph 94.
[10] Case 355/2007/TN, paragraph 95.
[11] Case 3697/2006, further remark in conclusion.

1049/2001. This systematic problem needs to be addressed *today*. **The Applicants therefore call on the European Parliament to carry out the appropriate enquiries and take the necessary measures to ensure that the Commission complies with its obligations in these regards.**

Non-compliance with the Aarhus Convention

36. The Aarhus Convention was approved by Council Decision 2005/370/EC.[12]

37. According to Article 216(2) TFEU, "*agreements concluded by the Union are binding on the institutions of the Union and on its Member States*". The Convention is therefore an integral part of the EU legal order, which makes it binding on EU institutions, including the Commission.

38. However, some of the exceptions set out in Article 4 of Regulation 1049/2001, to which Regulation 1367/2006 on the application of the Aarhus Convention to EU institutions refers, are not provided for by the Aarhus Convention. The exceptions laid down in the Aarhus Convention may not be expanded or added to by any of the exceptions mentioned in Regulation 1049/2001, because the Convention prevails over secondary EU legislation[13]. The fundamental right of access to information in environmental matters, granted by the Aarhus Convention and its ratification by the EU, cannot be restricted by secondary EU legislation. Article 2(6) of Regulation 1049/2001 confirms this, as it provides that "*this Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them*".

39. Moreover, the Convention's implementation guide states that *"(i) national legislation should set out a framework for the process of answering information requests in accordance with the Convention and that (ii) national legislation may limit access to information in accordance with the optional exceptions outlined in Article 4, paragraphs 3 and 4*[14]." The national framework established at national level, in the present case at EU level, may therefore only reproduce the one provided for by the Convention. Indeed, Parties do not have any discretion as to the information that must be disclosed. The Convention's

[12] Council Decision 2005/370/EC 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, OJ L 124/1.

[13] See case C-344/04, IATA and ELFA, paragraph 35: "Article 300(7) EC [now Article 216(2) TFEU] provides that 'agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. In accordance with the Court's case law, those agreements prevail over provisions of secondary Community law".

[14] United Nations Economic Commission for Europe, *The Aarhus Convention, an implementation guide*, prepared by S. Stec and S. Casey-Lefkowitz in collaboration with J. Jendroska, p.54.

implementation guide confirms this point: "*Paragraphs 3 and 4 [of Article 4 of the Convention] outline the only circumstances under which exceptions to the general rule apply*".[15]

40. Furthermore, any exception to the right of access to environmental information has to be interpreted in a restrictive way. Article 4(4), last indent, of the Convention provides that the "*aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.*".

41. This provision is mirrored at EU level by Article 6(1) of Regulation 1367/2006, which also requires a restrictive interpretation of the exceptions to the right of access to environmental information:

> "*As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment*."

42. The Commission, however, systematically applies all the exceptions provided under Article 4 of Regulation 1049/2001, in environmental matters, which is a clear violation of Article 3(1) and Article 4 of the Aarhus Convention.

43. First, Regulation 1049/2001 provides for "*absolute*" grounds for refusal, as Article 4 (1)(2) provides that "*The institutions shall refuse access…*", whereas the Aarhus Convention states only that "*a request for environmental information may be refused if…".* Where the Regulation sets out an obligation to refuse access, the Convention only provides the possibility of doing so.

[15] *The Aarhus Convention, an implementation guide*, ibid, p.53.

44. Second, Article 4(1)(a), second indent, of Regulation 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of *"... military matters"*. This is not an exception that the Convention allows, as Article 4 (4)(b) of the Convention only allows public authorities to refuse access to protect "*national defence*". Military matters are not necessarily defence matters. For example, in a case decided by the German Bundesverwaltungsgericht, the Supreme Administrative Court, the administration of a military airport had concluded a contract which allowed a private parachuting association to use the airport for flights. The contract in question concerned military, but not defence matters. The German court granted access to the contract.[16]

45. Third, and similarly, Article 4(1)(a), fourth indent, of Regulation 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of the financial, monetary or economic policy of the Community or a Member State. This is not an exception that the Convention allows. Yet, despite the fact that the exception protecting the economic policy of a State is not provided in the Convention and thus not applicable to environmental information, the European Commission has applied this exception, at least once, to withhold environmental information. The Commission refused to grant access to a letter it received from a Member State relating to a declassification of a site protected under Directive 92/43/EEC[17], on the basis of the exception regarding the economic policy of a Member State, pursuant to the fourth indent of Article 4(1)(a) of Regulation 1049/2001[18]. The Commission did not even consider whether the requested information constituted environmental information. The decision to declassify a protected site is clearly environmental information, under the Aarhus Convention and Regulation 1367/2006, and so the exception covering the economic policy of a State should not have been applied in this case (see Annex).

46. Fourth, Regulation Article 4(2), first indent, only refers to "*the protection of commercial interests of a natural or legal person*" to allow institutions to refuse access, whereas Article 4(4)(d) of the Aarhus Convention provides that "*a request for environmental information may be refused if the disclosure would adversely affect the confidentiality of commercial and*

[16] See Bundesverwaltungsgericht, 7C5.04, Decision of 5 December 2007.
[17] Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora.
[18] Case T-362/08, *IFAW* v *Commission*, 13 January 2011.

industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest."

47. This exception is twofold. Firstly, it implies that there must be some law protecting the confidentiality of the specific commercial or industrial interests that would be adversely affected by disclosure. Consequently, it is necessary for there to be a law *other than* Regulation 1049/2001 which provides that the information at stake must remain confidential.

48. The Guide on the implementation of the Convention confirms this interpretation, as it states that :

"*Under the Convention, public authorities are allowed to withhold certain limited types of commercial and industrial information from the public. For the public authorities to be able to withhold information from the public on the basis of commercial confidentiality, that information must pass several tests.*

First, national law must expressly protect the confidentiality of that information. This means that the national law must explicitly protect the type of information in question as commercial or industrial secrets."[19].

49. Secondly, the confidentiality must protect a "*legitimate economic interest*".

50. As an exception to the exception, Article 4(2) of the Convention further adds that *"Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed"*. This means that the exception on the protection of commercial and industrial information does not apply when the information requested relates to emissions into the environment. This requirement is mentioned in Regulation 1367/2006 as well. Article 6(1) of the Regulation provides that:

"*As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.*"

[19] *The Aarhus Convention, an implementation guide, UNECE, p.60.*

51. Yet, the Commission resorts to the exception on the protection of commercial interests, provided under Article 4(2) of Regulation 1049/2001, even when the economic interests are not legitimate to allow non–disclosure, and when no other law protects the confidentiality of the specific commercial or industrial interests. Most of the time, the Commission uses this exception to protect the image or reputation of the company which sent the information, which is clearly not a legitimate economic interest. The "Porsche case" is a clear example of this exception being used in this way by the Commission (see Annex).

52. Fifth, Article 4(2), third indent, of Regulation 1049/2001 provides that access shall be refused where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless the public interest test applies. With respect to environmental information, the Aarhus Convention does not provide any exception for "*inspections, investigations and audits*" in such general terms. The only exception that relates to investigations is the one provided under Article 4(4)(c) of the Convention, on enquiries of a criminal or disciplinary nature.

53. Article 4(4) (a) of the Aarhus Convention states that: "*A request for environmental information may be refused if the disclosure would adversely affect (...) the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature".*

54. The Commission cannot be considered as conducting criminal or disciplinary investigations, in environmental matters, against Member States. Yet, the Commission uses this exception to withhold environmental information, notably within infringement proceedings with Member States.

55. The Commission uses this exception to refuse access to environmental information such as letters of formal notice and reasoned opinions sent to Member States as part of infringement proceedings under Article 258 TFEU. Similarly, to withhold conformity checking studies on the way Member States transpose EU Directives in environmental matters. Neither of these examples are enquiries of criminal or disciplinary nature and therefore they should not be protected under any exception to the right of access to information (see Annex).

56. Even if the requested conformity-checking studies could be considered as "*enquiries*" for the purpose of Article 4(4)(c) of the Convention - which is doubtful - they still would not be part

of, or would not in any way lead to, *criminal* or *disciplinary* enquiries. The disclosure of the requested documents does not therefore fall under the scope of the exceptions provided for by Article 4(4)(c) of the Convention. Nor do they fall under the scope of any other exceptions provided for under Article 4(4) of the Convention, as there are no exceptions in the Convention relating to studies or reports on Member States' compliance with their legal obligations. In other words, the exception for inspections, investigations and audits in Regulation 1049/2001 cannot apply to environmental information.

57. Refusals from the Commission, made on the basis of these exceptions, but with regard to environmental information, are therefore in violation of Article 4 of the Aarhus Convention. Measures should be adopted to specify the exceptions to the right of access to information that apply in environmental matters, which are in compliance with the Convention. Although the recast of Regulation 1049/2001 would have been the opportunity to bring the Regulation into compliance with the Convention, the Commission refused to make any of the relevant changes.

We therefore call on the Parliament to take the appropriate measures to ensure that Regulation 1049/2001 and the interpretation and application by the Commission of Regulation 1049/2001, is brought into compliance with the Aarhus Convention.

Failure to actively disseminate environmental information

58. The Aarhus Convention, Regulations 1049/2001 and 1367/2006 provide that electronically accessible public registers of documents shall be established by the institutions.

59. Article 5 (2) of the Aarhus Convention provides that:

"*Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:*

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information us made available and accessible and the process by which it can be obtained;

(b) Establishing and maintaining practical arrangements, such as:

(i) Publicly accessible lists, registers or files;

(ii) Requiring officials to support the public in seeking access to information under this Convention; and....

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge."

60. Article 5(3) of the Aarhus Convention adds that:

"Each party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks."

61. Certain types of information are then listed as examples that should be included in the register.

62. This obligation is mirrored in Article 4 of Regulation 1367/2006, which provides that:

"*1. Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and /or electronic technology in accordance with Articles 11(1) and (2), and 12 of Regulation No 1049/2001. They shall make this environmental information progressively available in electronic databases that are easily accessible to the public through public telecommunication networks. To that end, they shall place the environmental information that they hold on databases and equip these with search aids and other forms of software designed to assist the public in locating the information they require...*"

63. Article 11 of Regulation 1049/2001 sets out the obligation to provide public access to a register of documents, in electronic form, and adds that "*References to documents shall be recorded in the register without delay*".

64. For each document the register shall contain a reference number (including, where applicable, the inter-institutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner that does not undermine the protection of the interests in Article 4.

65. The register should have been operational since June 3, 2002.

66. Article 12 of Regulation 1049/2001 further specifies the obligation to have a register which makes the documents directly accessible to the public.

67. The obligation is more specific regarding environmental information, as Article 4(2) of Regulation 1367/2006 lists the type of documents that should be made accessible in the register. These include progress reports on the implementation of EU environmental law; data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment; authorisations with a significant impact on the environment;

environmental agreements; environmental impact studies and risk assessments concerning environmental elements; or, references to the places where such information can be requested or accessed.

68. However, part of the environmental information that should be actively disseminated is still being withheld by the Commission. The existing register is the one of the Commission as a whole. DG environment does not have any publicly accessible lists, registers or files as required by the Convention and Regulation 1367/2006. The only documents that are actively disseminated are the ones put on the website of DG Environment. It is therefore clear that the Commission is in breach of its obligation in that regard.

69. Additionally, the existing register of the Commission only contains COM-, SEC- and C-documents. It is therefore limited to documents that reached the Secretariat General and received a COM(SEC or C) number. Thus, first drafts, for example those that went out for consultation with stakeholders or with Member States, are not included. Neither is any correspondence concerning specific topics, nor documents drafted by the different DGs, including the Legal Service, studies, reports and other documents, which are below the level of the college of the Commission.

70. It is obvious that the Commission's register does not comply with Article 11 of Regulation 1049/2001, let alone with Article 4 of Regulation 1367/2006. It would probably be necessary for each DG to establish its own register where documents (correspondence, internal notes, opinions, studies etc) on each specific topic are listed.

71. For example, scientific and other types of study, carried out with taxpayer's money, should be actively disseminated on the Commission's website. Citizens should not need to ask the Commission to have access to such studies, but should have the possibility of consulting them when they wish.

72. The citizen's right of access to information/documents, provided under the Aarhus Convention Article 4, and Article 2 of Regulation 1049/2001, is being impaired, because the

citizen does not know what kind or how many documents exist relating to certain matters, and cannot therefore make proper use of his/her right. The setting up of a comprehensive register would remedy this situation. It would also imply less work for the Commission's staff, as the more information that is actively disseminated, the fewer requests the Commission will receive and have to process. Although setting up the register will require time and reflection, once established, it will save time for Commission staff and foster more transparent practices.

We therefore call upon the Parliament to take steps to ensure the Commission complies with its obligation to set up a register in accordance with Article 5(2) (3) of the Aarhus Convention, Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2006 in line with the enhanced commitment to openness and transparency established in the Treaties.

Failure to demonstrate that there is no overriding public interest in disclosure

73. The Commission systematically fails to weigh up the different interests at stake in requests for access to documents (see Annex).

74. The Commission persistently limits itself to stating that there is no overriding public interest justifying the disclosure of the requested documents, without demonstrating that this is so.

75. The standard assessment provided by the Commission is that "*Having carefully examined your request in the light of Article 4(2) and (3) of Regulation 1049/2001, I have not been able to identify in this case the existence of an overriding public interest which could justify the disclosure of the requested documents*" (see Annex).

76. Yet, Article 4(2), last indent, and Article 4(3) of Regulation 1049/2001 require the institutions to balance the different interests at stake, stating that: "*The authorities shall refuse access to a document (…)* ***unless there is an overriding public interest in disclosure***". This obligation is also required under the Aarhus Convention (Article 4(4)(h)) and Regulation 1367/2006 (Article 6(1)).

77. Moreover, recital (1) of Regulation 1049/2001's preamble refers to the second subparagraph of Article 1 of the TEU, which enshrines the concept of openness, stating that the *"Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decision are taken as openly as possible and as closely to the citizen"*. Article 4(2) and Article 4(3) of Regulation 1049/2001 must thus be construed in accordance with the principles set out in TEU Article 1, granting the public the widest possible access to EU institutions' documents. This provision of the Treaty along with Article 11 TEU and first paragraph of Article 15 TFEU have new wording to a large extent since the Lisbon Treaty, yet the Commission behaves as if nothing had changed.

78. Indeed, the fact that the protected interest would be undermined by the disclosure of the requested documents is not sufficient grounds to refuse access to those documents. It is incumbent upon the EU institutions, in this case the Commission, to ascertain whether there is an overriding public interest justifying disclosure despite the fact that the purpose of the

protected interests under Article 4(2) and (3) would thereby be undermined[20]. Moreover, if the Commission refuses - after having weighed up the different interests - to disclose the documents, it must give a detailed statement of reasons for their refusal[21].

79. In case T-105/95,[22] the Court decided to annul the Commission's decision refusing to grant access to the requested documents because the decision did not "*enable the applicant and, therefore, the Court to ascertain whether the Commission fulfilled its obligation to undertake a genuine balancing of interests involved as required by the Code of Conduct .., given that [the decision] rel[ies] upon the confidentiality exception and make[s] no mention of any balancing of the interests involved."* The Court thus considered that the contested decision failed to meet the requirement to state reasons, in accordance with Article 190 of the Treaty, and therefore had to be annulled.

80. In Case T-36/04, Association de la Presse Internationale v Commission, the Court acknowledged that the principles of transparency, openness and democracy constituted an overriding public interest and that it was to the institutions holding the document to weigh up the different interests at stake. The Court stated: *"The overriding public interest, as referred to in the last line of Article 4(2) of Regulation No 1049/2001, which is capable of justifying the disclosure of a document which undermines the protection of court proceedings must, as a rule, be distinct from the above principles [principle of transparency and openness] which underlie that regulation. However, the fact that […], a party requesting access does not invoke a distinct public interest does not automatically imply that it is unnecessary to weigh up the interests at stake. The invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question"*[23].

We therefore call upon the Parliament to require the Commission to comply with its obligation to weigh-up the interests at stake in the access to documents requests made by NGO Applicants, and to demonstrate that there is no overriding public interest in disclosure to justify their decision to withhold the requested documents.

[20] Joined Cases C-39/05 and C-52/05 P *Turco*, ibid, paragraph 44.
[21] Joined Cases C-39/05 and C-52/05 P *Turco*, ibid, paragraph 69.
[22] See Case T-105/95, *WWF UK v Commission* [1997] ECR II-00313, paragraph 76.
[23] Case T-36/04, *API v Commission* [2007], paragraph 97.

Failure to comply with decisions of the European Ombudsman

81. Not only does the Commission fail to comply with the established case law of the EU courts, as noted above, it sometimes also fails to comply with the Ombudsman's decisions and critical remarks. As a result, the applicants are without any effective remedies to the Commission's refusal to grant access to documents that should, legitimately and legally, be publicly accessible.

82. Although the Ombudsman's decisions are not legally binding on the EU institutions, there is an obligation for the Commission to cooperate with the Ombudsman.

83. The "*Porsche*" and "*Granadilla*" cases are good examples of the lack of respect shown by the Commission to the Ombudsman's decisions[24].

84. In the Porsche case, the requested documents were letters relating to meetings between the Commission and representatives of Porsche AG during which the Commission's approach to CO_2 emissions from cars was discussed.

85. Friends of the Earth Europe (FoEE) made a first request, which was denied by the Commission. A complaint was lodged with the Ombudsman, following which the Ombudsman found that the Commission had committed a maladministration, under Regulation 1049/2001, by not disclosing the letters and failing to provide any sound justification for their non-disclosure. As a result, the Commission gave partial access to the letters. The Ombudsman adopted a decision on 7 July 2010 in which he considered that, by failing to properly justify why it refused access to the letters in their entirety, the Commission committed an instance of maladministration. Following his draft recommendations to the Commission, the Ombudsman adopted a special report, 2010/2086(INI), addressed to the Committee on Petitions of the European Parliament. The report was adopted by the Parliament, and concludes that the Parliament requires that the "*European Commission acknowledge that the excessive delays in responding to the European Ombudsman in this case constitute a breach of its duty of sincere cooperation as envisaged by the TEU and that*

[24] Case 676/2008 and Case 355/2007.

it gives an undertaking that it will respect the duty of sincere cooperation with the European Ombudsman in the future. Should the Commission fail to give such an undertaking and/or persist in its uncooperative practices towards ombudsman, inter alia, the placing of a portion of the Commission's budget for administrative expenditure into reserve".

86. However, despite this decision, the Commission still did not disclose the letters in their entirety and did not provide any explanation to the Ombudsman or to the Applicant.

87. On 23 November 2010, FoEE and ClientEarth therefore decided to make the request again, under Regulation 1049/2001, stating that although the Commission had already granted partial access to the requested documents, the Applicants requested to have access to the letters in their entirety.

88. The Commission still refused access to the letters in their entirety, referring to Article 4(2), first indent, of Regulation 1049/2001, citing the protection of the commercial interests of Porsche AG. The Commission had already used this defence in its reply to the complaint made before the Ombudsman, and which the latter had very clearly rejected as inapplicable.

89. The Applicants filed a confirmatory application under Article 8 of Regulation 1049/2001, and informed the Commission that if the letters were not released in their entirety an application would be lodged with the General Court.

90. Although it did not provide a reply within the prescribed time limit, and instead took more than 2 months to reply, the Commission finally decided to disclose the letters in full.

91. This demonstrates how reluctant the Commission is to disclose documents which should be publicly accessible in the first place. This reluctance persists despite the requirements of the law, Regulation 1049/2001, the Aarhus Convention and Regulation 1367/2006 (as, in this case, the information requested related to emissions into the environment and so the exception on the protection of commercial interests did not apply).

92. In order to finally gain access to the requested documents, it took a formal request under Regulation 1049/2001, a complaint to the Ombudsman, followed by another request and confirmatory application and finally a threat to go to court. The process took 4 years instead

of the 15 working days that should have been sufficient, had the law had been applied correctly.

93. The delays in this case prevented the NGO applicant from participating in the decision-making process or the discussion on the legislation to be adopted. The Commission was provided with the arguments and viewpoints of a car company, without allowing civil society to provide counter arguments, thereby failing to engage in a transparent and balanced discussion on the matter concerned, namely CO2 emissions from cars.

94. The Granadilla case is also a good example of the reluctance of the Commission to provide access to documents, even when the Ombudsman adopts a formal decision and critical remark requiring it to reveal the requested information (see Annex).

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