

# **Transparency and Inclusiveness in the Enforcement of EU Law**

with special regard to the EU's  
PILOT and Infringement Procedures

Position Paper

***Justice and Environment 2013***

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**Position Paper**

**On J&E**

Justice and Environment (J&E) is a European Network of Environmental Law Organizations.

J&E works in Europe and consists of NGOs from twelve different countries dealing with environmental law solely or as one of their activities. J&E aims for a better legislation and implementation of environmental law on the national and European Union (EU) level to protect the environment, people and nature. J&E does this by enhancing the enforcement of EU legislation through the use of European law and exchange of information on the national, cross-border and wider European level. All J&E activities are based on the expertise, knowledge and experience of its member organizations. The members contribute with their legal know-how to and are instrumental in the initiation, design and implementation of the J&E work program.

**Introduction**

A constant aim of J&E is to make sure environmental decision-making processes are transparent and inclusive. The processes running before the EU institutions are no exception. For this reason, the attention of J&E in 2013 turned to the so-called EU PILOT procedures and adjacent infringement procedures.

The [EU Pilot](#) project was introduced by the Commission with a number of volunteer Member States in 2008 with the aim of improving the cooperation between Member States and the Commission on issues concerning the **conformity** of national law with EU law or the **correct application of EU law**. As a general rule, EU Pilot is used as a **first step to try to clarify or resolve problems**, so that, if possible, formal infringement proceedings can be avoided. Currently 27 Member States are participating in EU Pilot.<sup>1</sup>

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[http://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/eu\\_pilot/index\\_en.htm](http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm)

J&E has performed the following in 2013:

- analyzed the EU PILOT procedures with special regard to its role of enhancing access to justice
- cross-checked the Commission's own evaluation on the effectiveness of the PILOT process with the own experience of J&E staff and member organizations
- analyzed the implementation of the Access to Documents Regulation of the EU with special attention to access to PILOT and infringement procedure information
- created a wish list containing information that J&E believes should be accessible to the public in PILOT and infringement procedures
- analyzed the existing EU level transparency regulations
- drafted a Model Transparency Regulation on the foregoing matters
- requested infringement related information from Member State public authorities
- requested infringement related information from the EU DG Environment
- approached MEPs in order to establish frameworks of cooperation therewith in the foregoing matters

After having accomplished all this, we have come to the following conclusions<sup>2</sup> and have drafted the below suggestions for solving the pertaining problems regarding the transparency and inclusiveness of the EU PILOT and infringement procedures.

### **The current situation in terms of transparency and inclusiveness**

While Article 1 of the Treaty on European Union (TEU) declared that *“(T)his 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 as closely as possible to the citizen”, “the process of monitoring the application of EU environmental law remains an almost entirely closed business between the EU Commission and the EU Member States.”*

Although *“almost the only source of information on the concrete application of EU environmental law is thus the citizen's complaint, [...] individual citizens and environmental organisations have practically no right to participate in the procedures. [...] Secrecy determines the procedure of monitoring the application of EU environmental law.”*

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<sup>2</sup> In our efforts, we were greatly helped by a yet unpublished article of Professor Ludwig Kramer on the “EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement”. Many findings of J&E could not have been better formulated than by Professor Kramer in his article, therefore in some occasions we have taken the bravery to copy his sentences and represent his views as ours, since those two seem perfectly identical in this matter.

However, this is not appropriate like this, given that “whether an EU Member State applies a provision of EU environmental law or not is not just a matter between that State and the EU Commission.” It is a matter of public interest.

### **The ways to improve the situation i.e. suggestions by J&E**

While there are a number of suggestions<sup>3</sup> that can be drafted to increase the genuine success rate and effectiveness of the EU procedures aiming at ensuring a better enforcement of EU law by Member States, we will focus on those only that would enhance the transparency and inclusiveness of such procedures, i.e. those that would improve the public’s rights to participate in such processes. These are the following:

1. **Rights of the complainants** should be improved/increased, including that the complainant can obtain the full file sent by the Member State to the Commission before the EC makes a decision.
2. Public access to the so-called **conformity studies and tables of concordance** (studies ordered from consultant by the Commission in order to uncover the status implementation of a particular piece or area of EU legislation) should be ensured.
3. A **publicly accessible register** of all PILOT and infringement cases should be set up with access to the files produced either by the Commission, or by the Member State or by third parties, including the letters of formal notice and the reasoned opinions.
4. The complainants should be given the **right to act as *quasi amicus curiae* (*amicus commissionis*)** in both the PILOT and the actual infringement procedures (in the pre-trial phase certainly, but also in the judicial phase preferably).
5. Eventually, the **success rate of the PILOT procedures should be measured** not by the number of cases closed – based on the response of the Member State – but by the number of problems solved; i.e. not by a formal unit of measurement but by one that measures true and substantive effectiveness.
6. Formal **review/reconsideration mechanisms** should be ensured against decisions made by the Commission in EU Pilot and infringement procedures in order to guarantee access to justice, in line with the Aarhus Convention.

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<sup>3</sup> They are also found in the aforementioned article by Professor Kramer.

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