

Transparency in EU Level Procedures

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

Legal Analysis

Justice and Environment 2013

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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.¹

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http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm

Examples of Transparency Regulation on the EU Level

J&E has collected examples from the legislative framework of the EU in order to justify its position that information about PILOT and infringement procedures should be provided to the public. These examples illustrate that transparency is a live and widely applied method also in processes that are run by EU institutions.

Interinstitutional Agreement

Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organizations and self-employed individuals engaged in EU policy-making and policy implementation

- The main focus of this agreement is to establish a joint register of all organizations and individuals engaged in EU policy-making and policy implementation. The register must be operated under a number of principles: 1) must respect the general principles of Union law, including non-discrimination and proportionality; 2) must respect the rights of Members of European Parliament to exercise their Parliamentary mandate without restriction, nor impede access of constituents to the Parliament's premises; 3) must not impinge on the competences or prerogatives of the parties hereto or affect their respective organisational powers; 4) all operators must be treated in a similar manner and there must be a level playing-field for registration.
- The register covers all activities "carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the EU institutions, irrespective of the channel or medium of communication used." Article 10 provides some exceptions: lawyers in certain situations, especially involving the right to a fair trial; the activities of social partners as participations in the social dialogue when performing the role assigned in the Treaties; and activities in response to direct and indirect requests from EU institutions or Members of the European Parliament.
- The register must include: guidelines on the scope of the register, eligible activities, and exemptions, sections open to registration, and information required from registrants; a code of conduct; and a complaint mechanism and measures for cases of non-compliance with the code of conduct (should include an investigatory procedure and complaint treatment procedure).
- Upon registering, organizations agree to: abide by the code of conduct including any provisions regarding infringement, agree that information provided is correct and open to the public, accept that any complaint against them will be handled according to the code of conduct.

- This agreement invites, but does not require the European Council or the Council to join the register.

Charter of Fundamental Rights of the European Union

The Right to Good Administration--Article 41:

- Includes a right to be heard as well as the right to access his or her file
- Obligates the administration to provide a good reason for their decisions

Right to Access to Documents—Article 42:

- Citizens and residents of the EU have the right to access documents of the European Parliament, Council, and Commission.

Ombudsman-published Public Service Principles (June 2012)

Transparency is included as a principle.

The Ombudsman defines transparency as civil servants “should be willing to explain their activities and give reasons for their actions.” Additionally, civil servants should “keep public records and welcome public scrutiny of their conduct.”

The European Code of Good Administrative Behavior

This code was approved by the European Parliament.

- Article 18—Duty to State the Grounds for Decisions. All decisions must state the grounds for the decision (the facts and the legal basis). Citizens affected by the decision should be provided the explanation of the decision. If this is not possible because there are too many people, the decision must be available on request.
- Article 22—Requests for Information. The article provides for the facilitation of access to information. Under this article, officials must provide information about starting an administrative proceeding. This information must be clear and understandable. Secondly, if an oral request is complicated, the official must ask the requestor to submit the request in writing. Thirdly, if an information request is denied, an explanation for the denial must be provided. Fourthly, officials must direct requestors to the correct official if information requested is out of the official’s jurisdiction. And finally, officials should direct requestors to the correct institution.

- Article 24—Keeping Adequate Records. Records must be kept of incoming and outgoing mail, received documents, and measures taken.

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

- Under the EC treaty, each institution lays down its own specific provisions regarding access to its documents in its own rules of procedures. Council Documents are accessed under Council Decision 93/731/EC, Commission documents under Commission Decision 94/90/ECSC, and Parliament documents under Parliament Decision 97/632/EC. These provisions should be modified or appealed accordingly.
- The purpose of this regulation is to broaden access to information and documents held by EU Institutions.
- Article 4 provides exceptions. Exceptions are available when: disclosure of a document would undermine the protection of the public interest as regards public security, defense and military matters, international relations, and financial, monetary, or economic policy or undermine the privacy and integrity of the individual; disclosure of a document would undermine protection of commercial interests of a natural or legal person, court proceedings and legal advice, and the purpose of inspections, investigations, and audits, unless there is an overriding public interest in disclosure; disclosure of a document (drawn up by an institution for internal use or received by the institution , which relates to a decision not yet taken by the institution) would undermine the institution’s decision-making process. Furthermore, when dealing with third-party documents, the institution shall consult the third-party to determine if the document qualifies as an exception, and when dealing with documents originating from a Member State, the Member State may request that the institution seek permission before releasing documents.
- Article 13 requires that documents be published in an official journal; this provision refers primarily to decisions, conventions, etc.
- Article 17 includes requirements for published reports by institutions. These reports must be published annually and include: the number of times the institution refused to grant access to documents, reasons for the refusal, and the number of documents not recorded in the register.

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

- For purposes of this regulation, environmental information is information in any form on the state of the environment.
- For purposes of this regulation, environmental law is objectives of Community policy on the environment set out in the Treaty (establishing the EU)
- The grounds for refusal of access to information should be interpreted in a restrictive manner. Decisions on whether to deny access to information should take into account the public interest served in the disclosure and whether the requested information relates to emissions in the environment. The commercial interest's exception covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity.
- Public participation should occur early when all options are still open. The Community must identify the public that may participate.
- The Preamble, paragraph 20 relates to the role of NGOs under this regulation. Certain NGOs may request internal reviews at a Community level of acts and omissions by a Community institution or body (for environmental law issues).
- Title II provides information on access to information with article 6 providing exceptions. These exceptions are lined out in regulation 1049/2001, article 4. Additionally, there is an exception for information that may adversely affect environmental protections.
- Title III outlines requirements for public participation concerning plans and programs.
- Title IV includes information on requests for internal reviews and access to justice.

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 54/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC and Commission Regulation No. 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive

- These directives do not apply to transparency at an EU but apply to transparency in financial markets with regard to reporting and other actions. Perhaps there are parts of this regulation that can be used as a model for legislation applying to EU transparency. These bits of legislation include a mix of directly applied regulations as well as regulations that are applied through the interpretation and desires of the Member State.
- Directive 2004/39 aims to harmonize the authorization and operating requirements for investment firms, including rules regarding conducting business (Regulation 1287/2006 is the implementing legislation).
 - Preamble, paragraph 34 requires that member states remove barriers that prevent consumers from being able to compare prices—remove barriers that prevent the consolidation of information at a European level.
 - Preamble, paragraph 44 states that transparency of transactions is necessary to both protect investors and to ensure the smooth operation of the securities market. For this transparency, participants in the market must be able to access at any time the terms of the transactions they are considering and to verify after the transaction the conditions in which it was carried out. There must be a “comprehensive transparency regime applicable to all transactions in shares irrespective of their execution by an investment firm on a bilateral basis or through regulated markets or MTFs.”
 - Preamble, paragraph 45 allows member states to apply reporting requirements even to financial instruments that are not admitted to trading on a regulated market.
 - Preamble, paragraph 46 allows member states to expand the application of transparency requirements to non-share financial instruments.
- The only real mentions of transparency are in the Preamble.

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and Amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No. 100/2009 and (EU) No. 1095/2010

- Preamble, paragraph 48 asks that an AIFM “should, for each of the EU AIFs it manages and for each of the AIFs it markets in the Union, make available an annual report for each financial year no later than 6 months following the end of the financial year.”
- Preamble, paragraph 49 requires that AIFMs that use leverage disclose information regarding “the level of leverage employed, the leverage arising from borrowing of cash or securities, and the leverage arising from positions held in derivatives, the reuse of assets and the main sources of leverage in their AIFs.” Additionally, paragraph 50 asks that AIFMs demonstrate that the level of leverage is reasonable.
- Preamble, paragraph 58 states that “the obligations to notify and disclose information should therefore apply subject to the conditions and restrictions relating to confidential information set out in Directive 2002/14/EC of the European Parliament and of the Council.”
- Preamble, paragraph 81 asks that delegated acts “specify the types of conflicts of interest AIFMs have to identify.”
- Article 6, paragraph 7 requires that AIFMs provide enough information that authorities can monitor their compliance with the conditions of the Directive
- Article 14, paragraph 1 requires that AIFMs take “reasonable steps to identify conflicts of interest”
- Chapter 4 lists all transparency requirements:
 - Article 22 requires an annual report. This annual report must contain a balance sheet of assets and liabilities, an income and expenditure account for the financial year, a report on the activities of the financial year, any material changes in the information listed in Article 23, the total amount of remuneration for the financial year, and the aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF.
 - Article 23 requires a disclosure to investors. This disclosure requires a number of pieces of information, including: description of the investment strategy and objectives of the AIF, information on where any master AIF is established and where the underlying funds are established if the AIF is a fund of funds, a description of the types of assets in which the AIF may invest, the techniques the AIF may employ and any associated risks, applicable investment restrictions, information pertaining to leverage such as circumstances where leverage may be used, the type and sources of leverage, the risks related to leverage, restrictions on leverage use, and the maximum level of leverage allowed; descriptions of procedures employed for

changing investment strategy or policy; description of the legal implications of the investment relationship; identities duties of the AIFM, the AIF's depository, auditor, and other service providers and investor rights relating to these service providers; description of the AIFM's compliance with article 9(7); description of delegated management functions and safekeeping functions; description of the AIF's valuation procedure and all pricing methodologies; description of the liquidity risk management; description of all fees charges, and expenses; a description of how the AIF ensures fair treatment of investors and an accounting of any preferential treatment given to investors; the latest annual report; procedure and conditions for the issue and sale of shares; the latest net asset value of the AIF; accounting of the historical performance of the AIF; the identity of the prime broker and description of arrangements with the prime broker; and a description of how this information will be disclosed.

- Article 24 requires that AIFMs maintain the reporting requirements to the competent authorities of the Member State. This requires that AIFMs provide Member States with at least the following information: the percentage of AIF's assets that are subject to special arrangements arising from their illiquid nature; any new arrangements for managing the liquidity of the AIF; the current risk profile of the AIF and strategies for dealing with risk; information on the main categories of assets in which the AIF has invested; and the results of stress tests.

Commission Delegated Regulation No. 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

- Paragraph 8 states that the data used to calculate the total value of assets doesn't need to be available for the public, but competent authorities must be able to verify the amounts.

Laeken Declaration

- Addresses the need for European organizations to be more open and efficient—one section is titled: "More democracy, transparency and efficiency in the European Union."
- The question of how to make the European Union more legitimate and transparent requires analysis of all levels of governance—from how representatives are elected and how long they serve to how much power for decision-making each segment of the organization has to how and which information should be public.

Secondary Sources

Friedl Weiss, Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison, 30 Fordham Int'l L.J. 1545 (2007)

- Transparency is an important and essential part of good governance.
- The European Commission White Paper on Administrative Reform stress the importance of transparency, as well as service, independence, responsibility, accountability, and efficiency. This paper included the good of good administrative behavior discussed above.
- The 2001 Laeken Declaration on the Future of the European Union included transparency.
- Transparency has received more attention since 2006. The European Council agreed to make all “deliberations of the Council of Ministers on legislative acts subject to co-decision procedure” public, as well as information about the votes and explanations of the votes.
- 2006 also marked the birth of the European Transparency Initiative, a program designed to strengthen the rules of ethics for EU policy-makers. The Green Paper on European Transparency details some of these programs.
- The right to information is an important aspect of transparency—The EU has enacted or adopted a number of laws and provisions to this effect. The right to information is in the Treaty of Amsterdam, the Code of Conduct concerning public access to Council and Committee Documents, and Decisions 93/731/EC and 94/90/ECSC, EC, Euratom. There is also the directive applying the Aarhus Convention and the directive addressing access to information for environmental issues.
- There is also a history of case law (ECJ) dealing with transparency and openness issues:
 - Netherlands v. Council found that there was an affirmative right to access to documents held by public authorities.
 - Hautala v. Council held that the public must have as wide an access to documents held by the Commission and the Council as possible. This case also affirms that the Commission may not withhold an entire document because part of the document qualifies as an exception. Instead the Commission may release a censored version.
 - Mattila v. Council and Commission reaffirmed that documents that may be withheld should be examined for the possibility of partial release.
 - Kuijer v. Council found that the release of documents is the rule and that withholding documents should be only the exception.
 - Interporc Im-und Export GmbH v. Commission of the European Communities held that “Regulation 1049/2001 ‘lays down the principles and conditions for exercising that right in order to enable citizens to participate more closely in the decision-making process, to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system and to

contribute to strengthening the principles of democracy and respect for fundamental rights.”

- Verein fur Konsumenteninformation v. Commission narrowed the right to access of documents slightly. In this case, the Court of First Instance found that the Commission could weigh the public benefit of the release of a file with the burden of work required to examine each page in the file.
- Technische Glaswerke Ilmenau GmbH V. Commission repeats the VKI decision (above). Affirms that for documents that fall into the exceptions, there must be an overriding public interest in disclosure to overcome the exception.

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