

# Evaluation of Effectiveness

with regard to the EU's PILOT Procedures

Legal Analysis

*Justice and Environment 2013*

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#### Legal Analysis

##### 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.

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)

According to the official information on the website of the Commission ([http://ec.europa.eu/eu\\_law/infringements/application\\_monitoring\\_en.htm](http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm)):

*“The EU Pilot project has been operating since April 2008 with the aim of providing quicker and fuller answers to questions, and solutions to problems arising in the application of EU laws – particularly those raised by citizens or businesses – requiring confirmation of the factual or legal position in a Member State.*

*It is designed with a view to improve communication and problem-solving between the Commission services and Member State authorities on issues concerning the application of EU law or the conformity of the law in a Member State with EU law at an early stage before an infringement procedure is launched under Article 258 TFEU. Wherever there might be recourse to the infringement proceeding, EU Pilot is used as a general rule before the first step of an infringement procedure under Article 258 TFEU is taken by the Commission.*

*Under EU Pilot your enquiry or complaint will be examined by the responsible service in the Commission and forwarded to the Member State authority concerned with any questions or indications identified by the Commission service. You will be informed in writing that this method is being used to treat your correspondence. A general 20 week deadline has been set for responses to be provided (10 weeks for the Member State authorities and 10 weeks for the Commission services). The Commission service will inform you of its evaluation.*

*The rules on personal data confidentiality are maintained - in contacts with national authorities, we will only divulge your identity if you have specifically authorised us to do so. The effective management of individual issues can depend on the disclosure of facts specific to the individual case, in which case you will be informed.”*

From this introduction as well as other, publicly available information the following brief summary can be drawn on the nature and functioning of the EU PILOT.

### **EU PILOT Factsheet**

#### **Goal:**

- To provide quicker and fuller answers to questions, and solutions to problems arising in the application of EU laws
- Particularly seeks to deal with those questions raised by citizens or businesses
- Requires a confirmation of the factual or legal position in a Member States
- PILOT aims to solve infringements of EU law at an early stage to avoid infringement hearings. PILOT further aims to encourage cooperation between the Commission and the Member States during the response and solution to complaints and inquiries.

### How the Process Works:

- Occurs before the start of a formal infringement hearing. The PILOT process, in many ways, seeks to be an alternative to infringement hearings and to reduce the need for full-scale infringement proceedings.
- Inquiries or complaints are brought to the Commission. These inquiries or complaints can be brought by citizen or businesses or can be self-initiated by the Commission.
- Inquires and complaints are examined by the appropriate service within the Commission. If a submitted inquiry or complaint follows the PILOT path, the inquiring party will be notified in writing.
- The Commission submits the inquiry or complaint to the Member State.
- There is a 20 week limit for answers. Generally, the Member State will take 10 weeks to submit a response, and the Commission will take 10 weeks to examine and process the response.
- The Commission informs the inquiring party of the result of the application. If the Member State's response is sufficient, the file will be closed, and if the Member State's response is not sufficient, the complaint may continue to an infringement procedure.

### More Information:

- Environmental inquiries and complaints form the largest percentage of complaints, but do not form a majority. Environmental issues comprise 63% of inquiries into apparent problems in the application of EU law and 16% of inquires on problems exercising rights under EU law.
- The initial stage of PILOT consisted of 15 Member State participants. The second year increased participation to 25 Member States with only Malta and Luxembourg not participating. However, Malta is in the process of making internal arrangements to begin participation, and Luxembourg is still in ongoing negotiations regarding participation.

After this introduction, it is worth wile to take a look how the EU is evaluating the success of this legal instrument. There have been a number of occasions when the EU itself evaluated the outcome of the EU PILOT.

### The Evaluation of the EU PILOT:

- Since the start of PILOT in 2008, two evaluations have analyzed the success of the program.
- March 2010 evaluation: Evaluation of the first year of the EU Pilot program consisted primarily at looking at the outcomes of complaints and enquiries submitted to the Commission. By assessing the outcomes of specific files, the evaluation established the percentage of cases where the Commission deemed the

Member State response satisfactory and closed the case. The vast majority of cases fell into this category. The evaluation further ascertained the percentage of files that proceeded to infringement hearings (about 40 total files), and the percentage of cases deemed inappropriate for the PILOT program (around 4.5%). PILOT was found effective primarily by taking into account the number of files closed. Further, the evaluation assessed the average time frame necessary to address an inquiry (averages about 10 weeks for the Member State response and 10 weeks for the Commission evaluation), as well the origin of inquiries and the policy areas affected by them.

- The December 2011 Evaluation looked at the data from two time periods—from the start of the program to the start of the evaluation, and from March 2010 to February 2011. The evaluations considered a number of different quality and cooperation/support criteria. The evaluation also dealt with the general trends in Member States, the origin and policy fields of submitted files, the length of time required to analyze a file, and the “success” rate of the projects, measured by the number of Member State responses allowed the Commission to close a file without opening a formal infringement proceeding.

#### Potential Problems Originating with the Evaluation Process:

- The success rate of PILOT is measured primarily through its ability to dispense with complaints in a timely and efficient manner. The primary measures of the success of the program are the average time frame for dispensing with files and the number of responses that the Commission deems acceptable enough to close the file. These measures do not allow the evaluation to determine whether PILOT has increased the Commission’s ability to enforce compliance with EU law or whether follow-up finds increased actual compliance with EU law. However, as PILOT is still in the early stages, perhaps future evaluations will include data on the actual effect of PILOT on legal compliance.
- Determining the success of closed files involved evaluating the quality of inquiries submitted to the Member State, as evaluated by the Member State, and the cooperation and support between the Member State and the Commission. This process of evaluation does not measure the satisfaction of the applicant with regard to the inquiry or the quality of the resolution of the complaint.

#### Does PILOT help achieve the Access to Justice requirements of the Aarhus Convention?

The Aarhus Convention<sup>2</sup> requires that its Parties take necessary legislative, regulatory or other measures to ensure rights granted by the three pillars of the Convention (access to information, public participation in decision-making, and access to justice). So far, the EU has passed directives aimed at access to information and public participation in decision-making but has failed to enact legislation addressing access to justice.

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<sup>2</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 9, Jun. 25, 1998, 2161 U.N.T.S. 477.

Without a specific directive or regulation requiring access to justice, does the EU PILOT or infringement process meet the access to justice requirements of the Aarhus Convention?

Article 9 of the Convention defines the access to justice requirements. First, article 9 requires that signatory States allow for an appeals process for the denial of access to information. Second, while the Convention does not provide a definition for standing and allows Parties to apply their national standing laws, it does require that Parties apply the same standing requirements to NGOs as they do to individuals. The Convention defines NGOs as „public concerned” and Parties shall respect this. Next to it, the ACCC case law can be simplified in a way that both under Art. 9.2 and 9.3, the national standing conditions for both individuals and NGOs shall be interpreted broadly and that under both provisions and with respect to all acts subject to them, there shall be at least some NGOs and some individuals who can get standing. Nothing of this means, that the very „same” standing requirements must be applied by the Parties to NGOs and individuals. Third, article 9 provides that persons with standing must be allowed to challenge acts and omissions of private persons or public authorities for violations of national environmental laws. Fourth, article 9 requires that remedies be effective, adequate, and accessible. Fifth, proceedings must be fair, equitable, timely, and not prohibitively expensive. Sixth, decisions must be in writing and publically available. Finally, Parties should provide the public with information about access to justice and should provide assistance mechanisms to reduce financial and other barriers to access to justice.

PILOT does not provide an appeals process for citizens who are denied access to requested information. This absence of an appeals platform comes because PILOT is not designed to deal with requests for information. Instead, PILOT is a preliminary step in looking at potential Member State infringements of EU law. Access to environmental information has been applied to Member States through an independent directive making denial of access to information by a Member State a potential infringement of EU law. However, once a PILOT file is closed, the PILOT program itself does not have an appeals process. Applicants may be able to appeal within other EU legal instruments.

PILOT meets the standing requirements outlined in article 9(2). Infringement complaints have very liberal standing requirements. Complainants do not need to have a formal interest or be directly or principally concerned by the legislation. The sole requirement for complaints is that they regard a violation of EU law by a Member State.

Article 9(3) requires that citizens be allowed to challenge both government authorities and private persons for infringements of environmental law. Because PILOT only provides a forum to challenge Member State adherence to EU law, PILOT fails to meet this obligation. However, citizens are free to submit a complaint for any act or omission by a Member State that may have violated EU law.

As an alternative interpretation of this situation, we may say that the fact that within the PILOT process, there is no specific review procedure, as such, it is not contrary to the Aarhus Convention, as the general EU Access to Information instruments i.e. Regulation 1049/2001 and Regulation 1367/2006 (AR) for environmental information is fully applicable and theoretically sufficient. The problem is the restrictive application of these instruments. In addition, Aarhus Convention Art. 9.2 applies to review procedures concerning decisions, acts and omissions subject to Art. 6 of the Convention, i.e. decisions whether to permit activities listed in Annex I of the AC. Most of the enquiries or complaints, starting the PILOT procedure, probably deal either with shortcomings of the transposition of EU law, or systemic failures of EU law application. In such cases, Art. 9.2 of AC is not applicable at all. In case the enquiry or complaint relates to a permit of such activity, there is another question - if any EU body, which cannot fully review both substantive and procedural legality of the permit, as Art. 9.2 requires, because it can only assess correct application of the EU law, can be a review body in the sense of Art 9.2. But even if yes, the PILOT process should be - in such limited cases - seen as the „preliminary review procedure“ in the meaning of last subpar. of Art. 9.2, not as the review as such, because the Commission EC is neither a court of law nor another independent and impartial body, and PILOT is not an adversarial process granting the applicant full procedural rights. Finally, in the literal interpretation, PILOT could really be seen as an "administrative" review procedure, concerning the acts and omissions of public authorities of the EU Member states, as presumed by Art. 9.3. But despite this, PILOT shall again not be seen as a review procedure in the meaning of Art. 9.3 of the Aarhus Convention. Again, the Commission is neither a court nor another independent ("quasi-judicial") body, and the person who sends the complaint is not in a position of the party to a fair trial (which would be contrary to Art. 9.4). The other thing is that the outcome of the PILOT procedure, if it concerns environmental issues – namely when EC closes the case without further steps taken – can be seen as an act by the public authority (in the meaning of Art. 9.3), which further shall be subject to a review procedure by an independent body - in this case, by the CJEU. Nevertheless, the conclusion of the Factsheet, stating that the PILOT program fails to meet several of the Aarhus Convention Art. 9 requirements, is correct.

The PILOT program exists as a preliminary step in the infringement proceeding. Because the purpose of PILOT is to minimize the number of complaints that progress to formal infringement hearings, PILOT does not have the authority to issue remedies. PILOT does examine Member State explanations and responses to perceived infringing behavior and decide whether the Member State response is sufficient to avoid an infringement proceeding. Furthermore, a complaint's passage through the PILOT program to a formal infringement proceeding does not guarantee an effective remedy. If a complaint continues to an infringement proceeding, the remedy will only be addressed if an infringement is found.

PILOT succeeds at timeliness and costliness. On average, PILOT successfully pushes through complaints in 20 weeks. Furthermore, complaints can be submitted with little expense to the complainant. However, PILOT does not necessarily provide a fair or equitable forum.

The Handbook on Access to Justice Under the Aarhus Convention, produced by the Regional Environmental Center for Central and Eastern Europe, defines fair procedures as providing impartiality in access to justice.<sup>3</sup> PILOT is still a new program, making determining whether it is impartial or not difficult, but the structure of the program suggests that it could be prone to partiality. The Commission reviews complaints submitted and Member State responses and determines if the complaint should proceed to an infringement hearing; there is no involvement of an independent judiciary. Furthermore, the process is not adversarial. These may also be reasons why a PILOT is not, or should not be interpreted as, an Art. 9.3 review procedure. A complaint, once submitted, is out of the hands of the complainant. While the complainant will receive updates regarding the progress of their complaint and may be asked for additional information, they are not given the opportunity to challenge Member State claims, except in their original complaint. While there is no proof that PILOT is a partial and unfair process, it is far from an impartial judicial process.

The decision of the Commission regarding a PILOT decision will be submitted to the complainant in writing. However, the Member State's answer to the complaint may not be available to the complainant or the public-at-large.

The EU has done an acceptable job providing the public with information about PILOT and the infringement process. Details about the processes and how to submit a complaint can be found on the EU website. Furthermore, citizens are able to submit complaints at minimal costs.

The Commission's PILOT program fails to meet several of the requirements for access to justice outlined in article 9. Because PILOT fails to meet the requirements outlined by article 9 of the Aarhus Convention, PILOT, while providing a forum for public justice and enforcement of EU law, does not adequately provide access to justice as required by the Aarhus Convention.

#### **Contact information:**

**name:** Kelly Brouse, dr. Csaba Kiss  
**organization:** J&E  
**address:** 1076 Budapest, Garay u. 29-31.  
**tel/fax:** 36 1 3228462/36 1 4130300  
**e-mail:** [info@justiceandenvironment.org](mailto:info@justiceandenvironment.org)  
**web:** [www.justiceandenvironment.org](http://www.justiceandenvironment.org)

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<sup>3</sup> **Regional Environmental Center for Central and Eastern Europe**, Handbook to Access to Justice under the Aarhus Convention, ed. Stephen Stec (March 2003).