

Implementation of the Access to Documents Regulation

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

The current study wants to shed light on a specific issue that concerns the implementation of EU law by Member States and its transparency for the public. We have set a hypothesis that procedures for enforcing the proper implementation of EU law by Member States, initiated by the European Commission against Member States, should be open and inclusive. We have faced the reality as an antithesis, i.e. such procedures are far from being transparent and there is not even an intention of the EU legislation or jurisprudence to alter this situation. However, our synthesis is that this is not appropriate like this, and should be changed in order to guarantee good (environmental) governance on the EU level.

The European Union is built on a number of concepts that are interlinked and interwoven, and that collectively shape the Union and make sure that it is a prospering and just community of sovereign states. These concepts are needed for the proper functioning of the EU and problems concerning any of them can cause fundamental discrepancy in the core essence of the Union.

One of these concepts is economic level playing field, which aim is to ensure that economic players throughout the entire Union enjoy the same conditions for their business. This may be damaged if one Member State decides not to follow the rules set by the Union and go counter the trends that are defined on a common level.

Another fundamental concept is a certain, limited but definite transfer of national sovereignty to 'Brussels', i.e. to make way for a joint decision-making without the consent of the country in question, that will be ultimately bound by the joint decision. If a Member State decides to ignore the outcomes of such decision-making procedures, and implement EU law improperly or even not at all, it displays an attitude that in a certain quantity may even question the very logic of the EU and the idea of independent countries forming a joint international entity together for prosperity and peace. While on the one hand such a "renegade" behavior may seem like a regaining of national sovereignty, on the long run and in a broader context it is indeed extremely detrimental to the morale or day-to-day operation of the Union.

Finally, another such concept that bonds Europe is belief in the shared values, including rule of law, participatory democracy, responsibility for the environment, etc. that is again humiliated by any Member State that does not respect Union law encompassing such values for no good reason.

All these concepts are harmed by infringements of the EU law by the Member States. Therefore, promotion of the proper implementation of the EU *acquis* is an important task requiring resources and efforts.

According to the Treaty, the Commission is the guardian of the Treaty and of lawfulness in the Union as regards Union institutions and Member States. Following the information displayed on its own website,

"the Commission of the European Communities is responsible for ensuring that EU law is correctly applied. Consequently, where a Member State fails to comply with EU law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and, where necessary, may refer the case to the European Court of Justice. The Commission takes whatever action it deems appropriate in response to either a complaint or indications of infringements which it detects itself. Non-compliance means failure by a Member State to fulfill its obligations under EU law."

Infringement cases are probably the single most important and influential legal tool in the hands of the Commission to guarantee that the Member States of the Union comply with the EU law.

Infringements of EU law affect a lot of stakeholders, especially in environmental cases. Moreover, in environmental infringement cases the non-compliance of the Member State is frequently communicated to the Commission by citizens and/or environmental non-governmental organizations. These "reporters" of infringements are a) aware of the respective EU and national legislations, b) aware of the factual information that is the basis of the cases, and finally, c) aware of the procedural history of the cases in which the EU law has not been complied with by a Member State.

However, what these members of the public (concerned) are not aware of is what happens with their claims and information and what happens in the infringement cases between the Commission and the Member State.

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 regulates the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission documents in such a way as to ensure the widest possible access to documents. It also establishes rules ensuring the easiest possible exercise of this right, and promotes good administrative practice on access to documents.

We wanted to discover how the Commission applies the Access to Documents Regulation 1049/2001 with special regard to infringement cases. This effort was supposed to reveal whether there has been any recent change in the practice of the Commission concerning the availability of documents related to infringement cases and whether there is a wave of transparency that affects the operation of the Commission. Shortly, the experience is that **there is no divergence whatsoever from the common practice which has been followed for a long time**. Moreover, this practice was also confirmed by the European Court of Justice saying: **information relating to ongoing infringement cases do fall under an exception to openness, based on the Access to Documents Regulation**.

The Access to Documents Regulation

The Regulation establishes – as a basic rule – the prevalence of openness and transparency (*Art. 2.1: 1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.*).

The Regulation also states what are those “conditions and limits” referred to in the aforementioned Art. 2.1. This is contained in Art. 4.1 to 4.3¹. In this context, the most

¹ Article 4

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,

frequently used excuse for non-disclosure of information relating to infringement cases is the reference to Art. 4.2 3rd indent: *“the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure”*.

Another ground for refusal may be Art. 4.5 (*“Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.”*), however, the so-called authorship principle applied by Member States previously (i.e. whatever the Member State has produced (authored) are not to be disclosed without any further explanation and based on an extremely wide discretionary power of the Member State) is no longer acceptable for a few years; we will detail this later.

The Practice of the Commission

We tend to look at the Commission as a massive and uniform body acting in unison, and from outside, this may even be an appropriate interpretation. However, there are indeed differences in the application of rules by Directorate Generals or even by units, especially if one has to apply such a broadly formulated law like the Access to Documents Regulation. We can learn about the changes in the practice of the Commission with special regard to a more open attitude followed by DG ENVIRONMENT for some time (that was ultimately stopped by the EC) from the description of a case by the European Ombudsman²:

“51. This issue required an assessment that was frank and free of semantic considerations. To attempt a definition of the term ‘practice’ was neither useful nor necessary. On the basis of the available evidence, referred to in paragraph 3 above, it was clear that the Commission’s DG Environment at one point in time stopped systematically following the Commission’s usual approach of not granting public access to opening letters in infringement procedures relating to its own specific field of work. It was not clear why this happened and the possible explanations are at any rate not necessary for the present part of the assessment. Subsequently, the persons in charge within the Commission brought DG Environment’s approach into line with the above-mentioned usual approach. This was essentially what the Commission stated in its opinion when it declared that “[o]n further consideration following internal debate, in 2009, DG Environment re-aligned its approach with the general approach of the Commission, which is based on a presumption of non-disclosure, as confirmed by the case-law.

— the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

http://www.ombudsman.europa.eu/cases/decision.faces/en/51900/html.bookmark#_ftn5

52. The Ombudsman fully understood the complainant's disappointment at the fact that the Commission did not more openly and expressly engage with his understanding that the above-mentioned steps taken by DG Environment constituted a new disclosure practice, authorised and formally established by the Commission as an institution. It was true that the Commission hesitated, first in its correspondence with the complainant and, subsequently, before the Ombudsman, openly to acknowledge the fact that DG Environment tried out a new approach that was intended to constitute a rule. The Commission could have shown greater openness and frankness towards the complainant from the beginning, and could have avoided certain not very empathetic remarks in its opinion that seemed to suggest that the complainant had simply misunderstood what had happened.

53. At the same time, the Ombudsman also noted that the above-mentioned development brought to light important diverging views within the Commission as to what is the most effective approach to openness in infringement cases. It goes without saying that such divergences are potentially embarrassing to any organisation, and that an initial defensive approach, intended to avoid openness on that issue, is not unnatural. The common understanding of openness in the EU public administration requires, however, that the citizen be told the truth from the outset. This did not happen in the present case.”

Translating this into plainly understandable language: no single DG can diverge from the direction of the Commission in terms of transparency of infringement data, even if a respective DG would like to be more open to the public; if the latter happens, the DG will be led back to the proper path of non-disclosure...

The Standpoint of the European Ombudsman

In the foregoing case (Case: **1947/2010/PB**) of the European Ombudsman (which is a perfect illustration of these kind of cases, and it is last in time but it is also preceded by innumerable similar such cases), the applicant complained that while he got access by the Member State to two opening letters of the Commission sent to Denmark in infringement cases (carrying the registration numbers 2006/2144, relating to the Habitats Directive, and 2006/2134, relating to the Birds Directive), a subsequent request for information was refused by Denmark in one of the above cases (registration number 2006/2134).

To cut it short, the European Ombudsman found that a) there was no maladministration when the Commission refused access to information, and b) there was no maladministration either when the Commission changed its approach termed “practice” by the applicants.

The Ombudsman stated:

“64. The Ombudsman acknowledges, however, that it is possible to interpret the Commission's current practices as being supported by the Court's relevant case law, in

particular as recently interpreted by the General Court in its judgment of 13 September 2013 in the case T-111/11 ClientEarth v Commission (not yet published). The practices therefore do not, in the Ombudsman's view, constitute instances of maladministration as such.

65. Bearing in mind, however, that a court reviews cases within a more stringent set of procedures and rules of review, the Ombudsman, in the present case, identified systemic opportunities that could render the Commission's current practices more open. However, the Commission's decision not to embrace these opportunities does not, in the Ombudsman's view, constitute an instance of maladministration. This is because the Court's relevant case law appears to be adequately supportive of the Commission's practices in question.

66. The Ombudsman also encouraged the Commission to carry out research in order to identify any empirical evidence that might help to clarify whether it remains reasonable to presume that serious harm would be caused to its "investigations" by disclosing the documents here in question. The Ombudsman found it appropriate to do so in light of the fact that the area here concerned is one of the main areas of the Commission's work, going back to the 1950s. The Ombudsman thought that several decades of experience could provide at least some empirical insight into the concerns that underlie the Commission's confidentiality practices here in question. In its response, however, the Commission concluded that, in relation to disclosure of documents related to ongoing infringement proceedings, "...there is no documentation evidencing actual harm to ongoing infringement proceedings."

The Judgments of the European Court of Justice

As was cited by the European Ombudsman, the ECJ (CJEU) does not find it unlawful to apply the exception clause to disclosure by the Commission (Regulation Art. 4.2) in infringement cases. In Case **T-191/99**³ (Petrie and others v European Commission) the applicants were lecturers of foreign mother tongue at a number of Italian universities and the Commission has started an infringement procedure against Italy based on the information provided by the applicants to the Commission. The applicants – with the intention of assisting as well as correcting the actions of the Commission – requested access to the documents of the infringement cases which was refused by the EC. The Court, examining the arguments came to the conclusion that

"68. As the Court pointed out in paragraph 63 of its judgment in WWF (cited above in paragraph 59), the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. [...]"

3

<http://curia.europa.eu/juris/document/document.jsf?text=petrie&docid=46940&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=620658#ctx1>

69. The Commission was thus justified in refusing to disclose the documents in question on the ground that such disclosure might adversely affect the public interest.”

Luckily, the Court has not given full discretion to the Commission and at least established an obligation for examination and reasoning, as reflected in the following paragraphs of the judgment:

“79. As the Court pointed out in its judgment in WWF (cited in paragraph 59 above, at paragraph 64), the Commission is not entitled to confine itself to invoking the possible opening of an infringement procedure as justification, under the heading of protecting the public interest, for refusing access to the entirety of the documents identified in a request made by a citizen. The Court took the view that the Commission is required to indicate, at the very least by reference to categories of documents, the reasons why it considers that the documents detailed in the request which it received are related to the possible opening of an infringement procedure, by indicating to which subject-matter the documents relate and particularly whether they involve inspections or investigations relating to a possible procedure for infringement of Community law.”

Although the judgment was based on the EC law in force at that time, before the adoption of the Access to Documents Regulation, this approach still persists and functions as guiding interpretation for future case law of the Court as well.

Later, that interpretation was upheld in a recent case of the General Court Case **T-111/11**⁴ (ClientEarth v European Commission). In this case, the applicant was refused in requesting information from the Commission regarding the ‘Management Plan 2010’ of DG Environment. The Court found that the refusal was right and substantiated, applying the following reasoning:

“51. However, it is clear from the case-law that the fact that a document is related to an investigation, within the meaning of that provision, cannot, by itself, be sufficient ground for the applicability of the exception provided for by that provision, taking into consideration the need to interpret and apply strictly the exceptions mentioned in Article 4(2) of Regulation No 1049/2001. The risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical (Joined Cases C-39/05 P and C-52/05 P Sweden and Turco v Council [2008] ECR I-4723, paragraphs 43 and 63).

[...]

4

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=141083&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=632442>

75. Accordingly, the General Court held that, by analogy with the situation of interested parties in the context of the procedure for the review of State aid, there is a general presumption that disclosure of the documents in the administrative file relating to an investigation of a Member State's failure to fulfil obligations would, in principle, undermine protection of the purpose of investigations, and consequently that it was sufficient for the Commission to establish whether that general presumption should apply to all the documents concerned, without its necessarily being required to undertake a specific and individual prior examination of the content each of those documents. The General Court then held that in a situation where, when the decision to refuse access was made, the infringement proceedings were ongoing, the Commission was necessarily required to start from the principle that that general presumption applied to the documents concerned in their entirety (LPN v Commission, paragraph 70 above, paragraph 127)."

So we may conclude that this is solid and established case law now of the Court.

If we look at the Court's case law regarding the other possible reason for refusing access to information (Art. 4.5 of the Regulation), one of the most notable cases are Case **C-64/05 P** (Sweden v European Commission). The whole case started as a request for information by the German animal welfare organization IFAW Internationaler Tierschutz-Fonds gGmbH whose request was refused by the Commission and later this refusal was upheld by the Court of First Instance. The latter judgment was appealed by Sweden and the Court of Justice has set aside the first instance judgment, giving the following reasons:

"95. It follows from all the foregoing that the Court of First Instance committed errors of law that justify quashing the judgment under appeal, first, by holding in paragraphs 58 and 59 of that judgment that the refusal of a Member State to give its prior agreement to disclosure of a document on the basis of Article 4(5) of Regulation No 1049/2001 does not have to be accompanied by reasons and, notwithstanding the lack of such reasons, is equivalent to an instruction to the institution concerned not to disclose the document, that institution not being able to examine whether the non-disclosure of the document is justified, and, second, by holding in paragraph 61 of the judgment that the consequence of such an objection by the Member State is that access to the document in such a case is governed not by the regulation but by the relevant provisions of national law."

In such cases, consequently, the Court established an examination and reasoning obligation towards the Union institutions and indirectly, towards the Member States as well. However, even this obligation is weakened by a recent Court judgment in Cases **C-514/11 P** and **C-605/11 P** stating:

“48. In that type of situation, the recognition that there is a general presumption that the disclosure of documents of a certain nature will, in principle, undermine the protection of one of the interests listed in Article 4 of Regulation No 1049/2001 enables the institution concerned to deal with a global application and to reply thereto accordingly.”

The Efforts of J&E and their Outcomes

J&E with the intention to get a better insight into how practice is embraced by the Commission in 2013, has submitted a request for information to the Commission DG ENVIRONMENT⁵. In our request, we have asked the following:

- 1. What criteria are used by the Commission to select what Member States will be subject to an infringement procedure? How does the Commission apply the criterion of strategic nature to a potential infringement case? (By what mechanism and process does the Commission ensure that only strategic infringements within a MS are taken to the Court and no single, individual occurrences of maladministration?)*
- 2. How many environmental infringement cases were initiated in 2012 and 2013 and against which countries? How many of them started upon a complaint by an individual or a non-governmental organization? How many complaints were received by the Commission in 2012 and 2013 that requested the initiation of an infringement procedure from the public and against which MS? In how many cases were substantive briefs or memos submitted by the public and in how many cases were they taken into account in making a decision regarding starting and infringement case?*
- 3. We would like to receive the responses produced by the respective Member State to the Letter of Formal Notice/Reasoned Opinion in the following cases: (4 cases from Austria, Czech Republic, Estonia and Spain were identified).*

We have sent this letter to the Deputy Head of Unit / Enforcement, Infringements Coordination & Legal Issues at DG ENVIRONMENT on 13 May (repeating the request on 31 May) and have received an answer on 12 July⁶. The essence of the answer was the following:

- The current Treaties do not allow for an active role of the public or NGOs in case where the Commission has already started infringement procedures.
- In practice, the strategic nature of a case requires an assessment on a case by case basis, taking into account all the information available to my services and certain policy priorities and it is difficult to formulate further useful sub-criteria in this respect.

⁵ See the request for information in Annex I

⁶ See the answer in Annex II

- Although the Commission will need to be selective when it comes to opening or not of an infringement procedure, it remains open to receiving information from the public and NGOs about what they perceive as being examples of bad implementation of EU environmental law.
- In 2012 the Commission started 90 infringement procedures 4 of which originated from complaints filed in that year, whereas up to June 2013 the Commission started 116 cases none of which originated as a complaint filed in 2013.
- the Commission is not in a position to provide a copy of the above-mentioned documents, because they relate to the infringement proceedings covered in their entirety by the exception provided for by Article 4(2), third indent, of Regulation 1049/2001/EC.
- In the matter of investigations of infringements, genuine co-operation and a climate of mutual confidence between the Commission and the Member State concerned are required, to allow both parties to engage in a process of negotiation without bringing it before the Court of Justice: in the context of infringement proceedings, the disclosure of documents concerning the procedure would undermine the proper conduct of the infringement procedure and the dialogue between the Commission and the Member State.

We may see now that as long as a request for information (or rather, a general request for advice) is submitted, the Commission is ready to answer fully and frankly, but as soon as the focus is on actual individual cases where Member States are involved, the refusal clause is applied. This is the case even in those instances where the Commission otherwise acknowledges the role of the public in initiating infringement cases by complaints, in providing additional information to substantiate the standpoint of the Commission against a Member State or even in promoting the general agenda of the EU, by making the enforcement of EU (environmental) law more successful.

J&E via its staff working at member organizations on the national level also turned to the competent national authorities in Member States to get information on specific infringement cases. The list of cases in which information was requested was found on the openly accessible website of the Commission where EC releases information to the public in the start and progress of certain infringement procedures against particular Member States. A request for information was submitted to 7 countries from which the following answers arrived:

Austria

The Federal Chancery of the Republic of Austria – responsible for infringement proceedings – did not provide any information with the following justifications: The information required (documents on an ongoing infringement procedure) is not environmental information according to the Environmental Information Act. Furthermore, the information required concerns open – and not already closed – proceedings. The aim of Art. 4.2.3 of Regulation 1049/2001 (“2. The institutions shall refuse access to a document where disclosure would undermine the protection of: — commercial interests of a natural or legal person, including

intellectual property, — court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.”) would be undermined by disclosure of relevant information to the information seeking party. A climate of mutual confidence between the EC and the Republic of Austria has to be held up so settlements can be effectively achieved within infringement procedures.

Czech Republic

The applicant has sent a request to the Ministry of Environment that shifted it to the Ministry of Foreign Affairs. The latter decided that the information requested was not environmental information, in the sense of the EU and Czech legislation, therefore they are subject to general provisions of the Freedom of Information Act and as such, they shall be refused. The justification for the decision mentions also Art. 6.1 of the 1367/2006 Aarhus Regulation and refers to ECJ/CJEU case law, namely cases T-105/95, T-36/04 and C-514/07.

Estonia

The Ministry of Environment sent the applicant the letter from the European Commission as well as the answer of the Estonian Government to the Commission in the infringement case.

Hungary

The Ministry of Foreign Affairs has refused access to the requested information with reference to the Regulation 1049/2001 Art. 5, claiming that the requested documents belong to the Commission and access thereto can be guaranteed upon negotiation with the Commission. As regards the response of the national authorities sent to the Commission in the infringement procedure, the Ministry claimed that these fall under the national Freedom of Information Act but as such, they constitute a document not accessible for 10 years, therefore its access had to be denied.

Slovakia

The Ministry of Environment declined the request for information in part due to the following reasons. Firstly, concerning the finished infringement procedures as requested, complete information may be found at the electronic web page of the European Commission at http://ec.europa.eu/eu_law/infringements/infringements_decisions_sk.htm. Concerning pending procedures in relation to which also a request was submitted, the selected procedure is in a stage of 'letter of formal notice' and documents related to pending procedures, concerning Articles 258-260 of the Treaty of Lisbon, are confidential in accordance with the Regulation of the European Parliament and Council No. 1049/2001, Art. 4.2, during the related investigation.

Slovenia

The Ministry of Environment sent the applicant the requested documents in the infringements procedures against Slovenia. As an additional information, the applicant also sent a request for information in EU pilot procedures also those documents were received.

Spain

No answer was received until December 2013 to a request for information sent in July 2013 from the competent national ministry.

Conclusion

It seems that the structure and machinery of access to information in EU institutions (i.e. refusing information requests) is solid. Nevertheless, we may find certain signs that there may be changes in the EU's attitude once – but this “once” will probably happen in the distant future. Both the practice of the Commission and the case law of the European Ombudsman and of the Court of Justice of the EU are consistent in a way that eventually, no access is granted to infringement documents if the Commission properly applies the respective legislative framework.

Is it then a Don Quijote fight for the civil society to claim more transparency and openness of these data and hope for the change in this regime of managing freedom of information claims by the EU institutions?

It may seem like that today, however, there are promising signs which, reaching a critical mass, can result in a regulatory framework (and ensuing practice) that guarantees more transparency; these signs are:

- the inconsistent practice even within the Commission regarding the extent of access the EC should grant to the public
- the obligation on the EU institutions when applying exceptions to examine the situations giving rise to the application of the exceptions and to give an explanation on the reasons why the exception was refused
- the erosion of the authorship concept in case of documents drawn up by Member States
- the Motion for a Resolution of the European Parliament in July 2013 calling on the European Commission and the Member States to come back to the negotiating table and reopen the Access to Documents Regulation's negotiation process⁷
- the promisingly open standpoints certain EU institutions take, especially the European Ombudsman

We think that this study cannot be better finished than citing the European Ombudsman from the aforementioned case; this tells all and embraces the essence of the claims of civil society in such matters:

⁷ <http://www.access-info.org/en/european-union/417-ep-wants-to-reopen-1049-deadlock>

“63. The Commission is convinced that public disclosure of documents exchanged with the member states during infringement procedures will necessarily harm the purpose of that procedure, which is to ensure the correct application of EU law. The Ombudsman considers, however, that this position is not immediately evident or self explanatory. Indeed, it is not reasonably foreseeable that a confidential exchange of arguments between the Commission and the Member State will always promote a solution to an infringement more than would a transparent discussion of the various legal viewpoints and interests at stake. On the contrary, one can imagine infringement procedures where public disclosure of the different opinions and arguments exchanged, exactly because of the robust involvement of public opinion and civil society, both national and European, could actually favour or facilitate an end to the infringement. One can even reasonably suppose that public disclosure of documents in infringement procedures where environmental issues are at stake would likely be one of those situations. It is indeed plausible that, with an eye to bringing the member state legislation in line with EU law, involvement of civil society and public opinion would be highly favourable. The general and blanket assertion that public disclosure of documents exchanged in infringement procedures will always harm the purpose of that procedure (which is the protected interest in Art 4(2) third indent) appears to be too general in nature and can therefore be understood as merely hypothetical.”

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ANNEX I

Marie-Claude BLIN

Deputy Head of Unit

Enforcement, Infringements coordination & legal issues

BU-9 01/194

Brussels

Belgium

1049

10 May 2013

Dear Madam Blin,

Justice and Environment (J&E) is an association of public interest environmental law organisations. J&E aims to ensure the implementation and improvement of the EU environmental and sustainability legislation through the use of European law and exchange of information.

Within the Annual Work Plan of J&E in 2013, we lay considerable emphasis – as in the preceding years – on the improvement of access rights in environmental decision-making (access to information, participation and justice). We believe that these rights are also cornerstones of the proper application of the EU environmental acquis.

In this regard, we consider the infringement procedures as a very powerful tool to make the Member States – who are undoubtedly on different levels of development and enforcement capacities – create a level playing field and ensure a systematic and strong implementation of the environmental directives.

Many great success stories before the ECJ and many favorable environmental judgments are attributable to infringement processes started by the Commission. Indeed there is big capacity in these cases, all the more because they have a clear motivational impact not only for the very Member State who is taken to the Court but for the rest of the EU members who learn important lessons from such cases and the judgments delivered by the Court.

NGOs and the public, however, feel left out from or even neglected in such cases, not having access to information to the details of the foregoing cases, let alone a chance for meaningful participation in the form of comments or quasi amicus briefs. J&E believes that this practice hinders the exploitation of the full potential of the legal institution of infringement.

In order to create a more enabling environment for the public to exercise access rights also in relation to infringement cases, we would like to offer our assistance, convey our message and make an impact on the regulation as well as the practice of infringement cases. Also in order to facilitate access to information of the public to the data contained in such procedures, we hereby are submitting a request for information (pursuant to the Regulations 1049/2001 and 1367/2006 as well as the Aarhus Convention) and ask the European Commission to disclose within the statutory deadline the responses to the following questions:

1. What criteria are used by the Commission to select what Member States will be subject to an infringement procedure? How does the Commission apply the criterion of strategic nature to a potential infringement case? (By what mechanism and process does the Commission ensure that only strategic infringements within a MS are taken to the Court and no single, individual occurrences of maladministration?)

2. How many environmental infringement cases were initiated in 2012 and 2013 and against which countries? How many of them started upon a complaint by an individual or a non-governmental organization? How many complaints were received by the Commission in 2012 and 2013 that requested the initiation of an infringement procedure from the public and against which MS? In how many cases were substantive briefs or memos submitted by the public and in how many cases were they taken into account in making a decision regarding starting and infringement case?

3. We would like to receive the responses produced by the respective Member State to the Letter of Formal Notice/Reasoned Opinion in the following cases:

CZ 2013/2048 ENVI IMPACT - Non-conform transposition of the Directive 2011/92/EU in the Czech Republic

EE 2012/2107 ENVI INFORMATION - Transposition of Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC into the Estonian legislation

AT 2013/4018 ENVI WATER - Bad application of Article 4 Water Framework Directive 2000/60/EC

ES 2013/0127 ENVI 32010L0075 Directive 2010/75/UE du Parlement européen et du Conseil du 24 novembre 2010 relative aux émissions industrielles (prévention et réduction intégrées de la pollution)

We would be pleased to receive the aforementioned information at your earliest convenience.

Sincerely Yours,

Csaba Kiss

Coordinator

J&E

ANNEX II

EUROPEAN COMMISSION

DIRECTORATE-GENERAL

ENVIRONMENT

Director-General

European

Commission

Brussels, 4 f08 / 2-Ot 5

ENV.D.2/MV/ts/GestDem 2013/3792

Mr Csaba Kiss

Coordinator of Justice and

Environment

info@justiceandenvironment.org

Subject: your letter dated 10 May 2013 on infringement procedures and access to documents

Dear Mr Csaba Kiss,

Thank you for the letter dated 10 May 2013 (received by email on 12 July 2013) to Mrs Blin.

In this letter you express thoughts on strengthening the role of the public and NGO's in infringement procedures. You also asked for information on the Commission's policy on infringement procedures and you formulated a request for access to documents pertaining to ongoing infringement procedures. Given the latter request, we have registered your letter as a request for access to documents in accordance with Regulation 1049/2001/EC1 regarding public access to European Parliament, Council and Commission documents as GestDem 2013/3792.

Please refer to this reference in any future correspondence.

I would like to thank you for the support expressed on the positive effects of our infringement procedures and in the role played by the public and NGOs. The current Treaties do not allow for an active role of the public or NGOs in case where the Commission has already started infringement procedures. This is because the Member State at stake is entitled to some form of confidentiality concerning the infringement procedure. Having no formal role to play in such procedures does not however imply that complainants are kept uninformed. Complainants are

informed of registration of their complaints in CHAP and, if the Commission services deem it necessary to ask the national authorities for explanations, of the outcome of this preparatory phase². Complainants are also informed of the outcome of an infringement procedure.

I will now react to your points in the order in which they were raised.

1. Your first request does not concern documents as such but rather general information. You will find general information on the infringement procedure on the Commission's website³. As to the criteria used by the Commission for opening or not of infringement procedures, I take it from your letter that you are already fully aware of the different Communications issued on the subject in 2007, 2008 and 2012⁴. As you will probably know, the Commission has a certain margin of discretion for opening infringement procedures or not. The criterion of a breach of a strategic nature is used to ensure that scarce public resources are employed where such action would have the most useful effect. In practice this requires an assessment on a case by case basis, taking into account all the information available to my services and certain policy priorities and it is difficult to formulate further useful sub-criteria in this respect. I would however like to underline that the strategic criterion must be understood as being one which provides on the one hand guidance to the Commission services and on the other hand forms some kind of expectation management for the public. Although the Commission will need to be selective when it comes to opening or not of an infringement procedure, it remains open to receiving information from the public and NGOs about what they perceive as being examples of bad implementation of EU environmental law. Such information may be at the basis of a conclusion of the need to open infringement procedures because of its strategic nature.

2. Your second request is also about general information and not about documents as such. My services generated the following data from its IT system. Between 2012 and June 2013, DG ENV registered around 830 complaints in the system CHAP, covering the whole policy field for which it is responsible. Cases registered in CHAP do not necessarily imply that the Commission identified an infringement of EU law and consequently cases can be closed without the Commission contacting the Member States authorities via the EU Pilot or opening up an infringement procedure against the Member State. This explains probably why the number of infringement cases actually opened following a complaint is much lower than those registered in CHAP. In 2012 the Commission started 90 infringement procedures 4 of which originated from

complaints filed in that year, whereas up to June 2013 the Commission started 116 cases none of which originated as a complaint filed in 2013.¹ I can tell you however, that although not all cases actually originated from a complaint, information on practices in the Member States obtained via complaints may be used by the Commission in the cases which it starts on its own initiative. Moreover, if complainants indicate that national court proceedings are already on-going, the Commission may decide that there is no added value in starting parallel investigations at EU level. In fact, national judicial authorities are called upon to apply EU law and they are better equipped to find a solution, because they can annul the decisions which are questioned and order the authorities to repair gaps in the legal reasoning underlying the decisions.

3. You asked to have access to documents pertaining to the infringement procedures numbers 2013/2048 opened against the Czech Republic, 2012/2107 against Estonia, 2013/4018 against Austria and 2013/0127 against Spain. This request does fall under the scope of Regulation 1049/2001/EC and will be treated hereafter as such.

It concerns the following documents:

2013/2048: letter of formal notice of 25 April 2013

2012/2107: letter of formal notice of 21 June 2012 and reasoned opinion of 25 April 2013

2013/4018: letter of formal notice of 25 April 2013

2013/0127: letter of formal notice of 21 March 2013

I regret to inform you that I am not in a position to provide a copy of the above-mentioned documents, because they belong to the infringement proceedings covered in their entirety by the exception provided for by Article 4(2), third indent, of Regulation 1049/2001/EC.

I have also examined the possibility of granting a partial access to the requested documents, in accordance with Article 4(6) of Regulation 1049/2001/EC. However, partial access is not possible considering that the documents concerned are at the stage of infringement proceedings covered in their entirety by the exception under Article 4(2), third indent.

Article 4(2) of the Regulation 1049/2001/EC lays down that the institutions shall refuse access to documents where disclosure would undermine the protection of the purpose of inspections, investigations and audits unless there is an overriding public interest in disclosure.

In the matter of investigations of infringements, genuine co-operation and a climate of mutual confidence between the Commission and the Member State concerned are required, to allow both

parties to engage in a process of negotiation without bringing it before the Court of Justice: in the context of infringement proceedings, the disclosure of documents concerning the procedure would undermine the proper conduct of the infringement procedure and the dialogue between the Commission and the Member State. Such dialogue often allows the case to be settled before it is brought before the Court of Justice. Therefore, the safeguarding of this objective warrants the refusal of access to the documents you requested.

This has been confirmed by the case-law of the Court of First Instance. In its judgement of 11 December 2001 in case T-191/99, recently confirmed in case T-29/08, the Court held that: "the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC [258 TFEU] proceedings on the ground of protection of the public interest relating to inspections, investigations and court proceedings

Having carefully examined your third request in light of Article 4(2), 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. I consider that the disclosure of the requested documents would undermine the dialogue between the Commission and the Member State and the objective of settling the dispute before the case is brought to the Court of Justice.

If you do apply for a review you may write to the Secretary General of the European Commission, Rue de la Loi, B-1049 Brussels (sg-acc-doc@ec.europa.eu) confirming your original request and asking her to review the decision. You must do this within 15 working days of receiving this letter, otherwise your original application will have been deemed to have been withdrawn.

The Secretary General will inform you of the outcome within 15 working days of receiving your application, either allowing access to the documents requested or confirming refusal. If the latter is the case, she will provide details of further redress procedures.

Yours sincerely,

1 OJ L 145, 31.05.2001, page 43

2 See http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm

3 See http://ec.europa.eu/eu_law/infringements/mfringements_en.htm

4 See for these Communications <http://ec.europa.eu/environment/legal/law/index.htm>

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