

What J&E did for Access to Documents in 2014/2015

A significant part of J&E's Annual Work Plan 2014 was focusing on the so-called access rights (information, participation and justice) ensuring transparency and inclusiveness in the environmental sector. We also laid emphasis on how the EU and its institutions comply with the respective transparency and inclusiveness requirements that stem from the Aarhus Convention and the respective EU legislation, principally from the EU Regulation 1049/2001 on Access to Documents. J&E did the following in 2014 to promote the goal of more openness in the EU institutions:

1. Freedom of Information Requests to the European Commission

We were especially curious to what extent the information regarding PILOT and infringement procedures initiated by the Commission is available. Therefore we submitted two freedom of information requests, one regarding a case started against the Czech Republic and one against Hungary. Both cases were initiated by the EC DG Environment for the respective MS not meeting the requirements of the Ambient Air Quality Directive. The requests were sent in on 10 December 2014, and on the very same day we had to provide our postal address in order that the EC would respond. On 8 January and on 20 January 2015 we have received the negative responses i.e. the refusals of our requests.

2. Confirmatory Applications after Refusal by the EC

After the refusals of the requests for information, on 9 February 2015 we submitted confirmatory applications, i.e. quasi appeals which were adjudicated by the Commission itself. We relied on the public interest in the disclosure of information as well as asked for partial disclosure in case its conditions prevail. Our confirmatory applications were also refused, on 26 February 2015.

3. Freedom of Information Requests to the Member States

To find other legal avenues, we also submitted – in the name of J&E or via our member organizations and their local NGO partners – information requests to national authorities in the very same cases, in order to get the same pieces of information, this time from the respective national authorities. The latter have also refused disclosing the requested data, both in Austria, the Czech Republic and Hungary respectively.

4. Court Applications after Refusal by the MS

In all these cases we initiated court procedures after each respective national authority refused our information requests. All these cases are still pending, and the outcomes of these litigations will show the similarities and differences of how domestic laws perceive and regulate access to information of EU relevance.

5. Joint Work with [Access Info Europe](#)

It is highly important to mention that in all our such efforts we cooperated with Access Info Europe, the a human rights organisation dedicated to promoting and protecting the right of access to information in Europe. For submitting our information requests to the EU as well as for communicating with the EC, we used the website of AIE called Ask the EU: <http://www.asktheeu.org/>.

There the two cases and its documents are also available:

CZ: http://www.asktheeu.org/en/request/czech_republic_air_quality_infri#incoming-6070

HU: http://www.asktheeu.org/en/request/hungary_air_quality_infringement

Based on these outcomes we started a campaign page on the website, which is also available here:

<http://blog.asktheeu.org/2015/02/the-right-to-clean-air-and-the-right-to-know-when-the-air-is-not-clean/>

You can join this page if you agree with our goals.

6. Plans for the Future

J&E has not given up the fight for more transparency yet – it would be against our nature anyway. Therefore in 2015, while implementing our Annual Work Plan 2015 that received funding from the EU's LIFE funding scheme, we will

- repeat our info requests to the EU
- go on with the national cases in Austria, the Czech Republic and Hungary
- in case our EU requests are refused, we will go on with confirmatory applications and this time will not stop but
- we will go to the EU Court to get a verdict in the matter

We will inform you about these developments in due course during 2015.

7. Miscellaneous

It is worth mentioning two legal developments, namely two EU Court judgments in the matter, although none was made in connection with the activities of J&E. However, we think that the readers - in case interested in the topic - should know about them.

T-306/12.

[Darius Nicolai Spirlea and Mihaela Spirlea vs the European Commission](#)

The General Court in this judgment stated that

62 [...] Since the maintenance of confidentiality has been recognized by the case law of the Court during the preliminary (pre-trial) phase of an infringement proceeding, the same confidentiality is justified especially in EU Pilot processes whose only goal is to avoid a more lengthy and complex infringement procedure and, where appropriate, an infringement action.

63 Consequently, the institution concerned may, in the case of an appeal to the exception for investigations in Art. 4, para. 2, third indent of Regulation No. 1049/2001, deny access to certain categories of documents based on the general presumption that it would affect an EU pilot process as a precursor to any formal opening of an infringement procedure.¹

In this case, the applicants have complained about medical practice in Germany to the European Commission in reaction to which the Commission started a PILOT procedure against Germany. The applicants requested access to the documents of the PILOT process, however, the Commission refused disclosure. The Court here ruled in line with the standpoint of the Commission and has clearly made its vote in favor of secrecy, unlike, however, in the most recent judgment of the Court in the following case:

T-402/12.

[Carl Schlyter vs the European Commission](#)

82 Furthermore, the Commission has not stated the reason why the fact that a formal notice in an infringement procedure incorporates alleged infringements of EU law similar to those set out in the detailed opinion that it delivers in the context of the procedure laid down by Directive 98/34 would alter the nature and conduct of the infringement procedure and adversely affect any negotiations between it and the Member State in question. The Court points out, in that regard, that the disclosure of such a detailed opinion does not enable third parties to the infringement procedure, like the applicant, to know the content of the formal notice. The applicant may at most speculate as to that content on the basis of the detailed opinion. Such speculation by a third party to an infringement procedure is not, however, capable of altering the nature, subject-matter or conduct of that procedure. In addition, the Commission has not stated the reason why the speculation of third parties about its view as regards the compatibility of a technical regulation with the EU law on the free movement of goods, the free movement of services and the freedom of establishment of service operators within the internal market would adversely affect the negotiations which it might have with the Member State concerned.

The Commission has the power to object to draft national laws in EU member states if it determines these laws could be barriers to trade. Under the procedure, the Commission issues a 'detailed opinion', which can lead to the law being withdrawn or amended. The Court ruled that the Commission should have made the document available as a 'detailed opinion' of a Commission objection is not the same as an investigation, inspection or audit, to which the Commission is entitled to restrict access to documents.

April 2015

¹ The judgment is not available in English.