

National Level Access to Infringement Documents

**A study on the accessibility of data in the
framework of national laws by using domestic
legal remedies relating to Pilot and infringement
procedures started by the European Commission
against certain Member States**

Comparative Analysis

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I. Introduction

The implementation of access rights (to information, to participation and to justice) in environmental matters enjoys a high esteem and is becoming more and more part of policy-making and decision-making in EU institutions and in EU Member States alike. However, one cannot hide that neither the legislation nor the implementation thereof is complete in the EU and in the UNECE region. It is all the more sad, after 15 years since the entry into force of the Aarhus Convention and more than 10 years since the joining the Convention by the EU.

Enforcement by legal tools of access rights is required in order to improve compliance. Justice and Environment (J&E) is committed to be active in the enforcement of access rights, with special regard to two selected topic sub-areas, having a strategic aim of enhancing participatory processes (both in legislation and implementation). These are the following:

- Access to documents held by EU institutions with special regard to data on Pilot and infringement procedures
- Access to justice directive legislative draft preparation and its ultimate adoption

In this current study, we will be detailing how access to documents generated in infringement procedures is approached by public authorities on the Member State level and what kind of legal remedies are available in case access is not guaranteed. It is even more important, knowing that most of the infringement cases in the EU are initiated in environmental matters.

II. Comparative surveys

In order to collect information, J&E's Aarhus Convention Topic Team undertook a survey within its member organizations, covering 8 Member States (Austria, Croatia, Czech Republic, Germany, Hungary, Poland, Romania and Slovakia).

There were 2 sections in the survey.

Section 1 was about the dominant practice in the respective country while Section 2 was about the progress and outcome of the case the respective J&E member (or anyone else) was doing against the government for the release of infringement data.

Based on responses from the countries covered, we have collected the following experience and came to the following conclusions:

Section 1

Dominant practice of access to Pilot and infringement data

Which government body/ministry is in charge of communicating with the Commission in Pilot and infringement cases?

- Austria** The Federal Chancellery is in charge of coordination and of CJEU infringement cases, but the respective line ministries are in charge to communicate with the Commission on their issues. E.g. the Ministry of Environment is reporting to the Commission in the case of violations of the water framework directive, etc.
- Croatia** The Ministry of Foreign and European Affairs receives communications from the Commission, but if the Pilot or infringement case is related to the environment, it forwards it to the Ministry of Environment and Nature Protection.
- Czech Republic** The Ministry of Foreign Affairs is in charge of communicating with the Commission in Pilot and infringement cases.
- Germany** The Federal Ministry for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie), [Centre for Excellence on European Law](#) is the government body in charge.
- Hungary** The Ministry of Justice is in charge of communicating with the Commission in Pilot and infringement cases. Previously it was the Ministry of Foreign Affairs, but due to an amendment in 2014, the competence was shifted to the Ministry of Justice.
- Poland** The Ministry of Foreign Affairs is in charge of communicating with the Commission in Pilot and infringement cases.
- Romania** The Ministry of Foreign Affairs is in charge of communicating with the Commission in Pilot and infringement cases.
- Slovakia** The Ministry of Foreign and European Affairs coordinates the overall communication with the Commission in any infringement cases. The reasoned opinions in respective cases are prepared by competent line ministries.

Does this body inform the complainant about the progress of the case?

Does this body inform the public about the progress of the case?

How much information is provided to the complainant?

How much information is disclosed to the public?

Austria There is no informing of the complainant by the respective ministry on the progress of the case. Consequently, the amount of information provided to the complainant is zero. The respective ministries do not officially inform the public. The only way to get information is to submit information requests by the Parliament that are published on the website of the legislature within 2 months in case an MP asks the respective minister.

Croatia The Ministry of Foreign and European Affairs does not inform the complainants. The relevant ministries do not publish information on Pilot or infringement cases for the public either.

Czech Republic As far as is known, there was no infringement case with the involvement of the Czech Republic that was opened on the grounds of a complaint. Besides, practically no relevant information is usually disclosed to the public, only general information that an infringement procedure is on-going, in reaction to media articles and within the regular reports being drafted by responsible bodies.

Germany According to the national J&E member organization, it is untypical that a communication would go from BMWi to EC to the complainant and back. Also there is no public information visible on the website that otherwise has a reference to EU portals (Curia, OJEU, Press Release Database, detailed info on general management of infringement cases in the relation of Germany and the EC). It is interesting that there is a very detailed description how communication between EC and Germany (package discussions "Paketsitzung" – exchanging views on a number of infringement procedures at one meeting) and inside German administration is handled (monitoring internally, coordinating circles of department heads of EU affairs from all ministries, communication with affected bodies in cities/federal states) but no info on communication with the complainant. For environmental infringement cases there is the EU-coordination of the umbrella Organisation German League for Nature and Environment (Deutscher Naturschutzring), who regularly reports in periodicals (newsletter/journal) on infringement procedures. This service is funded by the Ministry of Environment. See: <http://www.eu-koordination.de/about-us>

Hungary The Ministry of Justice does not inform the complainants on an ex officio basis. The Ministry of Justice informs the public in notices available online at the website of the Ministry about cases involving Hungary in any role. These cases are those that are already before the EU Courts. The latest such [summary](#) is dated to 1 January 2015. There is no such summary available on cases where Hungary is involved by the Commission in Pilot or infringement procedures. The newest available notice is 1.5 years old. There is no information provided by the Ministry of Justice to the complainant but there is sufficient information disclosed to the public in cases where Hungary is involved

in cases before the EU Courts, however, there is no information available on Pilot or infringement cases involving Hungary in the pre-litigation phase.

Poland The Ministry of Foreign Affairs does not inform either the complainant or the public about the progress of Pilot and infringement cases.

Romania No information is provided by the Romanian Minister of Foreign Affairs either to the complainant, or to the public related to the progress of the case. However, the decision of the Commission to open or close a case is being communicated by the Minister of Foreign Affairs.

Slovakia There is no informing of the complainant by the respective ministry on the progress of the case. Consequently the amount of information provided to the complainant is zero. Also it is rather difficult to find information about infringements against Slovakia, the [latest publicly available information](#) is of cases from 2010. The informing is rather scattered and difficult to be found.

Section 2

Case against the government for infringement transparency

In order to test the applicability of national legislation as well as monitor how the EU law is applied in a domestic context, a limited number of J&E member organizations submitted freedom of information claims to their respective government ministries, asking for data on ongoing infringement procedures. Below are the summaries of those cases, however, given that only 4 countries out of the surveyed 8 have initiated court cases, the answers are less representative to the prevalent practice in the EU. Questions of this part of the survey focused on how the cases progressed and what outcomes were achieved.



In Austria, J&E Austria applied for relevant infringement information and the court case was currently decided by the Federal Administrative Court. The original application was lodged on 9 August 2013 in the form of a request for information on infringement cases regarding the environment, in cases AZ 2013/0205, AZ 2013/4077 and AZ 2013/4018. The government response was prepared by the Federal Chancellery on 20 March 2014 and was negative. The “Beschwerde” submitted on 16 April 2014 an appeal against the negative decision of the Chancellery, and the appellate decision by the Federal Administrative Court (“Bundesverwaltungsgericht”) has been made lately. The judgment makes clear that undoubtedly, infringement documents are environmental information. In addition, the Court annuls the decision of the Federal Chancellery, instructing the latter that the assessment, whether there are grounds for refusing a request for infringement information must be made only after consultation with the European Commission.



In the Czech Republic, J&E Czech Republic applied for the information relating to the infringement case (pre-litigation phase) concerning the breach of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on Ambient Air Quality and Cleaner Air for Europe by the Czech Republic in July 2014. The original application was submitted on 31 July 2014 in which J&E Czech Republic applied for the information relating to the infringement case (pre-litigation phase). J&E Czech Republic requested the information on the grounds of the special Act No. 123/1998 Coll. on the Right to Environmental Information allowing to obtain information about the environment which is special to a more general Act No. 106/1999 Coll. on Free Access to Information and should apply if information relating to the environment is concerned. The government response was lodged by the Ministry of Foreign Affairs on 14 August 2014 and access to the information was refused. The Ministry argued that the requested information is not “related to the environment” and does not fall under the scope of special Act No. 123/1998 Coll. on the Right to Environmental Information. An appeal was filed on 27 August 2014, insisting on providing the information and the argumentation used. An appellate decision was issued by the Minister of Foreign Affairs on 16 September 2014, reviewing the decision of the Ministry of Foreign Affairs on the grounds of the appeal. However, the Minister confirmed the decision of the Ministry and upheld the reasoning provided. On 18 November 2014, J&E Czech Republic brought the action to the administrative court which shall now deal with the case. Both parties have already submitted their statements, now the parties are waiting for the 1st instance judgment.



In Hungary, the original application was submitted by J&E Hungary on 24 June 2015 as a request for information on the Hungarian responses sent by the Government to the Commission in the infringement case against Hungary for failing to meet the requirements of the EU Directive 2008/50/EC (air quality) No. Hu 2008/2193 ENVI. The government response was lodged by the Ministry of Justice of Hungary in the form of no response. J&E Hungary filed a lawsuit on 30 July 2015 against the Ministry of Justice for failing to respond to the request and for failing to disclose the requested information. The judgment on the 1st instance was made by the Capitol Court of Budapest on 21 January 2016, ordering the Ministry of Justice to disclose the responses sent by the Government of Hungary to the Commission, without the need to disclose information originally received by the Government from the Commission. The Ministry of Justice of Hungary appealed against this judgment on 22 February 2016, claiming that the procedure for the MS to consult the EU first was not properly performed and that the information sent to and received by the Commission are inseparable, therefore no information can be disclosed. The judgment on the 2nd instance was made by the High Court of Budapest on 16 June 2016, establishing that the requested information does not have to be disclosed because there is an ongoing investigation pursuant to Regulation EC 1049/2001. J&E Hungary filed a cassation claim to the Supreme Court (Curia) of Hungary, complaining that the EU Regulation on access to documents is not to be applied in cases where access to domestically generated documents is at stake. Now the parties are waiting for the final judgment in the case.



In Poland, Fundacja Frank Bold applied for the disclosure of information in an EU Pilot case to the Ministry of Environment and the Ministry of Foreign Affairs. The applicant did not receive the requested information. The original application was submitted on 15 June 2015 (request to the Ministry of Environment) and on 1 July 2015 (request to the Ministry of Foreign Affairs) asking for the disclosure of documents issued by the Commission, Polish Government and other authorities in the EU Pilot case over failing to meet the requirements of the EU Directive 2008/50/EC. The government response was lodged by the Ministry of Foreign Affairs on 10 July 2015, when the first request was passed to the Ministry of Foreign Affairs and the Ministry of Foreign Affairs passed it to the Commission. On 15 July 2015, the Commission refused to disclose the documents. Fundacja Frank Bold did not appeal against the Commission's decision. Response to the second request was issued on 10 July 2015 and delivered to the applicant on 30 July 2015. The Ministry informed, that the requested documents cannot be disclosed and invoked Art. 5 of the EU Regulation 1049/2001. Fundacja Frank Bold on 12 August 2015 submitted a request for reconsideration to the Ministry of Foreign Affairs pointing out that Art. 5 of the EU Regulation 1049/2001 applies solely to the documents originating from an EU institution and that there is an overriding public interest in disclosure of the requested documents. The Ministry of Foreign Affairs upheld the refusal to disclose the documents on 31 August 2015. Fundacja Frank Bold submitted a complaint on 27 November 2015 to the Voivodeship Administrative Court in Warsaw against the Ministry's failure to act in regards to the request. The judgment on the 1st instance made by the Voivodeship Administrative Court in Warsaw on 18 April 2016 dismissed the complaint. According to the Court, the EU Regulation 1049/2001 excludes applicability of the Polish Access to Public Information Act, hence the Ministry's actions were lawful. The court pointed out to the judgments of the Supreme Administrative Court issued in similar cases. Fundacja Frank Bold filed a cassation complaint to the Supreme Administrative Court on 22 June 2016, including a request to ask the Court of Justice of the EU for a preliminary ruling. Now the parties are waiting for the final judgment in the case.

III. Conclusions

In the context of the brief survey made by J&E in this matter, there can be conclusions drawn for both the management of cases by the government bodies and the adjudication of cases on the national level once these are initiated by national level NGOs.

As for the management, it is obvious that almost all of the surveyed countries entrusted their Ministry of Foreign Affairs with keeping contact with the European Commission in infringement cases. This suggests that such cases are overwhelmingly regarded as matters of external and Union relations and belong to the sphere of diplomacy, rather than the sphere of specific knowledge in environmental matters. There is one example (Hungary) where these issues were added to the portfolio of the Ministry of Justice, conveying the message that these issues are fundamentally legal ones to be managed by lawyers.

These cases do not fall under the competence of line ministries, however, as an exception, in Germany it is a specific body in charge of these cases, demonstrating that this is indeed possible to delegate the management of such cases to a government body having specific knowledge. In Austria, the entrusting of the Chancellery can be a good example also, especially when factoring in that line ministries are communicating with the Commission. A medium solution to the problem of centralized management vs specific knowledge is to provide for coordination between the respective Ministry of Foreign Affairs and the line ministries, which is a common practice in all the countries surveyed.

As regards the provision of information from the government bodies to either the complainant (the natural or legal person whose notice triggered the initiation of the Pilot or infringement case) or to the public, the situation is quite depressing. It is not quite understandable why none of the surveyed countries have systems that would ensure the information provision to the complainant on the status and progress of the case in which it has played a definitive role. The complainant – especially in environmental matters – usually does not represent his or her own interest but the public interest by calling the attention of the competent authorities and the European Commission to an alleged breach of EU law. This role, although not formally recognized in either the Pilot or the infringement procedure, should warrant that the complainant is at least informed about the case not only by the European Commission but also by the competent national authorities. And while it is the mutual interest of the EU and the Member State to resolve the dispute that may have arisen in relation to a possible infringement of EU law by the Member State, it is also the Member State's interest to keep contact with the complainant and inform him or her about the development of the case.

What can be even less comprehended is the lack of public information on infringement cases by the national authorities. The only two countries that produce some kind of – although far from complete and updated – public information with online availability are Hungary and Slovakia. But even these two countries publish only those cases where the dispute is already in the judicial phase, before the Court of Justice of the EU. Thus there is no public information on cases that are either in the Pilot phase or in the pre-litigation phase of an infringement procedure. This conduct, however, may question whether obligations arising from Art. 5 of the Aarhus Convention (proactive information provision by the government to the public) are met by these Member States.

When we turn our attention to the national level management of access to infringement information, with special regard to the interpretation by the domestic courts on what laws govern the issue and how, we again see a specific common pattern in the countries where the survey covered these aspects.

First of all, in none of the countries affected were the requested documents disclosed to the applicant. Secondly, in all the countries a judicial remedy procedure had to be started in order to ensure transparency of the requested documents. Thirdly, in none of the countries is there already a final judicial decision in the dispute, however, signs are quite negative as for the possible outcome of the cases.

In Austria, the refusal was questioned and the court expressed its opinion after more than 2,5 years of procedure. While the court did not question that the requested information was environmental, it made the decision of the public authority conditional upon a prior consultation with the Commission. In the Czech Republic, it was the court that questioned whether the requested information was

environmental information at all. In Hungary and in Poland, there is a strange similarity between the judicial decisions: in both cases, the courts apply Art. 5 of the Transparency Regulation or Access to Documents Regulation of the EU (1049/2001) to documents generated and held by national authorities while Art. 5 of the latter Regulation applies to documents generated and held by EU institutions; not surprisingly, the application of this provision resulted in the non-disclosure of the documents in both countries.

There is a certain spirit of secrecy in all such cases which also transpires the courts' approach, resulting in a leaning towards arguments that are against transparency or even "creatively" construing the law in order to be able not to disclose the requested documents.

J&E firmly believes that the final judicial decisions will correct the misunderstandings made by the lower courts and will order the national authorities to disclose the documents in question.

In general, J&E demonstrated that in the examined countries

- the coordination in Pilot and infringement cases in the Member States is mostly entrusted with non-specialist government agencies
- the provision of information in such cases to a possible complainant or the general public is non-existent or insufficient and outdated
- the judicial interpretation of the prevailing legal framework in infringement transparency cases favors non-disclosure

Therefore J&E's general conclusion is that based on the information gathered in the surveyed countries, access to information in Pilot and infringement cases is insufficient.

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