



Effective implementation

Transparency in the EU
infringement process

Introduction

EU environmental legislation is among the most advanced in the world. However, the failure to implement it on the ground costs the Union economy around EUR 55 billion each year in health costs and in direct costs to the environment¹. The 2022 Environmental Implementation Review further underscores that compliance with EU environmental law is a key challenge². With the adoption of new legislation under the EU Green Deal, it is more important than ever that the laws agreed by the EU legislators are enforced in practice.

The most important mechanisms to enforce environmental legislation in the EU's toolkit are infringement actions by the European Commission. However, over the last years the number of opened infringement procedures has in fact decreased³. Further, the infringement procedure is traditionally shrouded in secrecy which makes it impossible for the European Parliament to effectively monitor it.

To improve the efficiency of the enforcement process, enable effective law-making, protect the rule of law, ensure public accountability, and build public trust, the Parliament should insist on full transparency of the EU environmental law enforcement process. All documents exchanged as part of the infringement process, including the letters of formal notice, the reasoned opinions and Member States' replies, should be published in the infringements database. The Commission should also publish information about Member State compliance, whether or not they form part of an active infringement procedure.



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Current lack of transparency

While there is a database for infringement decisions⁴ and short press releases on the infringement packages⁵ are summing-up the specific cases, both contain very limited information. The database only provides the infringement number, name, decision date, type of decision, Member State, policy area and whether it is an open case. Only for some decisions, a link to a press release or a short memo is provided. The letter of formal notice or the reasoned opinion itself, as well as answers by the Member State, are not made public. The complaints themselves are not integrated in this database, nor are the so-called pilot procedures which are lengthy, closed dialogues with the Member State in question. Information on whether or not a complaint has already been filed on a certain issue, or the Commission's response to a complaint, are not publicly available either.

The Commission also does not systematically publish information about Member State compliance with EU environmental law. For instance, conformity checking studies - which are carried out for the Commission by external consultants and assess the extent a Member State is implementing EU law - are often kept confidential. In the past, for example, the Commission has only disclosed conformity checking studies after being ordered to do so by the Court of Justice⁶. Similarly, Member State reports on how they have implemented EU law as well as audits and other inspection reports are not always made public.

Some argue that the Commission would not be permitted to disclose the above information under applicable EU transparency rules. However, this is not the case. The CJEU has confirmed that the Commission is *permitted* to withhold access to information on the basis that it forms part of an ongoing infringement procedure⁷.

Therefore, while the Commission *may* rely on this presumption, it is *not* under a legal obligation to do so. Infringement documents will also usually not contain any other confidential information, such as private data, and if they do these very limited parts can easily be redacted⁸.

In other words, it is a purely political question for the Commission. The Commission could and should be much more transparent in the handling of infringement procedures for several reasons. It is clear that the current complete lack of transparency is entirely political rather than legal.

Why transparency in the infringement procedure is crucial for the European Parliament

Members of the European Parliament (MEPs) would benefit greatly from transparency in the Commission's infringement procedures, as it would facilitate:

1. Effective monitoring of the executive's accountability to the law
2. Protection of EU's citizens' fundamental right to know
3. Informed law-making
4. Civil society support in the enforcement process

1. Effective monitoring of the executive's accountability to the law

As EU legislators, MEPs must be able to monitor the EU's executive (the Commission) and ensure that the legislator's will is respected.

An argument that is often put forward against the publication of the infringement documents is that they are part of negotiations carried out in confidence. However, negotiation is not and should not be the purpose of the enforcement process. Member States, together with the Parliament and Commission, negotiated to come to an agreement on the law. Once the law is in place and in force, all Member States are bound by it. The obligation to comply with EU laws is not a matter of negotiation and should therefore not require secrecy.

On the contrary, to protect the rule of law, non-compliance with environmental law should be met with a clear and automatic no-tolerance approach, particularly in light of the triple climate, biodiversity and pollution crisis. Any law is only as good as its implementation. Without ensuring that EU law is implemented and complied with, the wider public experiences very little benefit of EU environmental law.

Without access to the infringement documents, MEPs are further not able to adequately respond to petitions from members of the public (Article 227 TFEU) or to questions posed by their constituents. Often, those petitions relate to complaints submitted by citizens and local associations or ongoing infringement procedures. However, even in these circumstances, MEPs are not able to obtain access to the infringement documents, meaning that they cannot adequately respond to the petitions.

A public database setting out the key steps that the Commission has taken to address complaints and/or process infringements would help to make bottlenecks and other issues standing in the way of an effective enforcement system apparent. Currently, it often takes years for complaints to be taken up, if at all. Similarly, the infringement process often takes years despite clear evidence of ongoing non-compliance⁹. Greater transparency would permit MEPs to question the Commission in case of such delays in ongoing procedures.

2. Protect people's fundamental right to know

The European Parliament directly represents the will and protects the interest of EU citizens. This includes protecting the right of people in the EU to know whether their elected national government representatives comply with EU laws. This is appropriate and necessary since the EU has transformed from mere intergovernmental cooperation into a supranational organisation that regulates the lives of EU citizens. There is no justification for shielding Member State governments and the Commission from this form of public scrutiny.

A transparent approach to enforcement would enable the public to be fully informed about the non-compliance issues, ensuring that there is accountability when governments who have agreed to be bound by EU laws fail to comply with them. This can also help to generate the necessary public support or pressure to bring Member States into compliance.

It is for these reasons that the right to access documents held by public authorities is recognised as a fundamental right under EU law. The EU Treaties recognise that decisions shall be taken "as openly and closely to the citizen as possible" (Art. 1 and 10(3) TEU) and the EU's Charter of Fundamental Rights recognises EU citizen's fundamental right to access

documents held by the institutions (Art. 42 of the Charter). The European Court of Human Rights, in its *KlimaSeniorinnen* decision, also held that “information held by public authorities of importance for setting out and implementing the relevant regulations and measures to tackle climate change must be made available to the public”¹⁰. Moreover, the EU itself and all its Member States are Parties to the Aarhus Convention, which recognises the right to access environmental information as one of the aspects of the right to a healthy environment (Art.1, 4 and 5 of the Aarhus Convention). It is therefore at least questionable whether the current lack of transparency is compatible with the EU’s obligations under international law¹¹.

In short, ‘justice must be seen to be done’. Instead of hiding infringement procedures from public view, veiled as a secretive negotiation to protect Member States, the Commission should practise full transparency to reassure people living in the EU and their elected representatives in the Parliament that it takes its role as Guardian of the Treaty seriously and acts when Member States are suspected to be in breach of EU environmental law.

3. Informed law-making

As EU legislators, MEPs must have access to all information that the executive (the Commission) holds in relation to Member State compliance with existing EU law.

Information about implementation gaps and challenges is crucial for effective and well-informed law-making. The infringement procedure documents are an important source of information on what those gaps and challenges are. If MEPs are unable to obtain information about these gaps, they cannot take this into account when making new legislation or assessing the fitness of existing laws.

For example, in the context of the recent revision of the Fisheries Control Regulation, MEPs did not have access to mission and audit reports prepared by the Commission assessing issues of compliance with the Regulation. The Commission does not proactively make these documents available. When an NGO requested access to these documents related to Denmark and France to present them to MEPs, the Commission refused access on the basis that there was an ongoing infringement procedure¹².

It is unacceptable that even MEPs of the relevant committees do not have access to documents held by the executive that would give them a clearer idea about the practical issues in the application of a piece of legislation that they are currently amending. It is in the interest of all people in the EU that their representatives have access to all the information that permits them to make the best laws possible.

4. Civil society support in the enforcement process

A great number of infringement procedures are based on complaints filed by members of the public and civil society organisations¹³. They fulfil a crucial role in the system as the Commission has very limited inspection powers and is therefore often reliant on complaints to identify national implementation challenges. However, without access to infringement documents, the complaint procedure does not live up to its full potential.

Complaints

With no access to pending complaints, a possible complainant has no way of knowing whether or not the same or a similar complaint has already been filed. As a result, multiple complaints may be made about the same issue, without cross-reference to existing ones, requiring separate responses by the Commission to all of them. By making the complaints publicly available, the process would become more efficient as multiple separate complaints about the same issue can be avoided, freeing up time for the Commission to focus on the substance of the most urgent or systemic complaints. In addition, members of the public would be able to provide useful supplementary information for ongoing complaints.

Information about the steps taken by the Commission would help members of the public to identify strong complaints that have been taken forward. By having public access to successful complaints, future complainants can learn from these, improving the quality of complaints in the future. This will in turn help to make the most efficient and effective use of the Commission's time in handling complaints, with the aim at ensuring overall compliance of Member States with EU law.

Infringements

If the infringement documents were publicly available, members of the public, and particularly NGOs, would be able to contribute towards a timely resolution of the process. They could, for example, provide further information about the non-compliance issue, generate public pressure against evident breaches of EU law, or help to gather additional data required by the Commission to solve the case. By having access to the legal provisions breached, the arguments used and the key legal issues relevant to the infringement, NGOs or members of the public can consider complementary legal action at national level. National litigation or non-legal advocacy can help to add pressure to ensure more timely compliance of the Member State. It could also help signal likely next steps to other Member States with similar non-compliance issues.

In short, keeping complainants in the dark about the process and key issues that are being pursued by the Commission is inappropriate and closes the door to useful support that could be obtained from the complainant.

A transparent approach to enforcement

The European Parliament should pressure the Commission to proactively publish all letters and documents relating to the enforcement process. This would not require a change of the EU treaties or a different interpretation of the rules by the CJEU, but is a merely political decision to change the Commission's practice.

A new approach to enforcement transparency would bring the Commission in line with the Aarhus Convention, the Charter of Fundamental Rights of the EU, and recommendations of the European Ombudsman¹⁴.

A transparent approach to enforcement should contain the following key elements:

1. The **infringements database**¹⁵ **should be expanded** so that all letters of formal notice, reasoned opinions, referrals to the CJEU, all relevant annexes, and all replies by the Member States are added to the database.
2. A **database for complaints** should be set up with information about the Member State, the legislation and provisions complained about and a brief summary of the issue. Complainants should be able to choose whether they want to remain anonymous or not¹⁶, and whether the complaint itself can be published or not. This database should include information on the steps taken by the Commission, the deadlines for action¹⁷ and any key documents that have been exchanged between the Commission and the Member State as a result of the complaint.
3. A **clear link between the complaints and the infringement database** should be made, so that complaints that have been taken up can easily be found and followed in the infringements database.
4. The **pilot procedure should be abolished** as it is even more opaque than the infringement process, often very lengthy, and often fails to provide effective results.
5. There should be a **public schedule with advance notice on the release of infringement packages**, which should come out on a regular basis.
6. The **proactive publication of all information collected by the Commission to assess Member State compliance** with EU law, whether or not it forms part of an ongoing infringement procedure. This should include, amongst others:
 - Conformity checking studies;
 - Member State reports on implementation of EU laws; and
 - Audit and other national investigation reports.

These changes should go alongside broader improvements in the enforcement process, such as real political will, a significant increase in staff, and compliance with timelines*.

* For more details see: EEB, BirdLife, 'Stepping up enforcement – Recommendations for an European Commission better compliance agenda', <https://eeb.org/library/stepping-up-enforcement/>

References

- 1 8th Environmental Action Programme, para. 3. [Available here](#).
- 2 EU Environmental Implementation Review. [Available here](#).
- 3 EU Commission 2022 Annual Report on monitoring the application of EU law. [Available here](#).
- 4 Information about Commission decisions on infringement cases. [Available here](#).
- 5 Press releases on the infringement packages. [Available here](#).
- 6 See Case C-612/13 P ClientEarth v Commission.
- 7 C-514/11 LPN v Commission; C-562/14 P Sweden v Commission; C-514/07 P Sweden v API and Commission. And more recently, T-354/21, para 65-68. The Commission has relied on this presumption to essentially reject any access to document requests without individually examining the documents ([see response](#) from Commission to NABU).
- 8 Legal arguments brought in infringement documents do not require confidentiality protection, nor does the environmental data used to underpin arguments. Data on emissions, the state of nature or progress in meeting legal targets will usually be information that is already in the public domain. If there is a genuine risk of adverse environmental interference or an individual privacy risk, only these details should be redacted to the extent necessary. Any redaction should be minimal and not defeat the object and purpose of disclosure.
- 9 For some examples, see the NABU & EEB “Stepping Up Enforcement” report, p. 14. [Available here](#).
- 10 Verein KlimaSeniorinnen Schweiz and others v Switzerland, Application no. 53600/20 (ECtHR, 9 April 2024), para 554(a).
- 11 Art. 4 Aarhus Convention includes an exhaustive list of reasons based on which a public institution may refuse to give access to environmental information. However, the ground on which the European Commission regularly withholds access to infringement documents, namely the protection of investigations, is not included in this provision. Art.4(4)(c) Aarhus Convention only permits the refusal of a request for environmental information if the disclosure would ‘adversely affect’ the course of justice.
- 12 There is an ongoing procedure before the Court of Justice to challenge the Commission’s refusal. On first instance, the General Court sided with the Commission (case T-354/21). An appeal is pending. Two MEPs applied to intervene to highlight the importance of disclosure but the Court did not admit them.
- 13 By way of background, see section “How does the Commission get information about infringements of EU law?” in the Commission’s FAQ on Enforcement. [Available here](#).
- 14 Decision of the European Ombudsman setting out suggestions following her strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission’s handling of infringement complaints. [Available here](#).
- 15 Information about Commission decisions on infringement case. [Available here](#).
- 16 As for public consultations.
- 17 1 year for complaint-handling: Communication from the Commission — EU law: Better results through better application. [Available here \(p.3.\)](#).



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