Memorandum

Why the European Commission's Standpoint on Access to Infringement Information Should Be Altered?

Introduction

Justice and Environment (J&E) is a network of public interest environmental law NGOs having members in 11 EU Member States.

The aim of J&E is to contribute to a better status of environment and human health in Europe through the use of law (International, European and national environmental laws). We also aim at the improvement of access to information, public participation and access to justice in environmental matters by legal means. J&E also aims at strengthening the participation of NGOs and the public at large in environmental policy-making and implementation.

The objective of J&E to guarantee that the public has appropriate access to environmental information, participation in decision-making and environmental justice have inevitably led J&E to focus on the respective EU legislation on access to documents, notably on Regulation 1049/2001 and 1367/2006. We have in the recent years analyzed our own experiences with the foregoing regulations as well as tested their application through cases initiated against the European Commission.

One of our areas of particular interest was access to information (documents) relating to infringement cases. Access to documents in this context raises a number of questions. First of all, the question of the applicability of exceptions from disclosure; secondly, a broader issue of how the Commission is ensuring the major aim of the Regulation 1049/2001 and how it guarantees public interest in disclosure; thirdly, to what extent there are different rules applicable for environmental cases pursuant to Regulation 1367/2006; and fourthly and finally, it has a strong linkage to the content of European citizenship and the question of why citizens of Member States (citizens of the EU at the same time) cannot have access to information on how a Member State applies or fails to apply EU law.

Methodology

In order to formulate our standpoint, we have performed the following activities:

- we accumulated a few years of practical experience including monitoring access to infringement information cases before analyzing the regulatory framework and the case law; it included access to information claims submitted to four Member State governments (Austria, Czech Republic, Hungary and Poland) and the EC as well
- then we studied the respective norms on the EU level as well as collected the relevant case law of the EU Courts

- we also monitored the development of case law that shows certainly interesting but sometimes diverging trends in access to documents jurisprudence
- we collectively prepared an analysis of the foregoing and this current memo

Status Quo as regards access to infringement information

Regulation 1049/2001 sets an objective to ensure the widest possible access to documents, to establish rules ensuring the easiest possible exercise of this right, and to promote good administrative practice on access to documents.

Regulation 1367/2006 establishes that the grounds for refusal of information access shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

As per the currently applicable legislation's text, the two EU Regulations state as follows:

Regulation 1049/2001

> *Article 4.2*
> *The institutions shall refuse access to a document where disclosure would undermine the purpose of inspections, investigations and audits unless there is an overriding public interest in disclosure.*

Regulation 1367/2006

> *Article 6.1.*
> *As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment*

In our understanding, the overriding public interest that urges EU institutions to disclose information relating to emissions into the environment does not apply to the exception of investigations, in particular those concerning possible infringements of Community law. However, the second sentence of Article 6.1 does apply to any information other than Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations. Therefore it clearly covers the investigations information, including those concerning possible infringements of Community law. It means that the grounds for their refusal shall be interpreted in a restrictive way. However, reality is far from this expectation. What we see instead is a broad application of the exception clauses by the Commission and a disregard of the environmental relevance of cases and treating all access to information requests virtually the same way, irrespective of their environmental character.

As regards the jurisprudence of the EU Courts, it varies over time and shows a certain trend towards more transparency.

In the Case T-191/99, Case T-36/04 and in the joined Cases C 514/11 P and C 605/11 P the confidentiality of procedures (pre-litigation as well as infringement procedures) was established and the Member States' expectation to keep the information of the entire process secret did prevail. It was lately reaffirmed in the Case T-306/12. However, Case T-36/04 already set the framework for the Commission that it has to investigate the individual circumstances of a case in light of the request and must also take into account the overriding public interest in disclosure. In Case T 29/08 it already appeared as an obligation of the Commission to balance the interest of secrecy vs disclosure that was also reiterated in the Case T-306/12. In contrast, the meaning and content of the overriding public interest in disclosure was also detailed by the Court in Case T 29/08 and later in Case T-111/11 it was established that this interest is not the same as the general interest enshrined in the Regulation 1049/2001 to ensure public access to documents. As the latest development showing a trend towards more transparency, the Court in the Case C 612/13 P found that the presumption of secrecy cannot prevail in a context where disclosure is the rule and that is particularly true in cases where investigation of a Member State's compliance with EU law did not lead to starting a formal infringement procedure.

<u>Our points of arguments</u>

Based on all these we are convinced that

1. There are a number of international legal documents, ranging from the Aarhus Convention (to which the EU is a party since 2005), as well as the European Convention on Human Rights (Art. 10) that require openness and transparency from public authorities, in this context from the bodies of the EU. Even the EU Charter of Fundamental Rights includes the right to information (Art. 11). According to these sources, access should be regarded as a rule and any restriction is an exception requiring justification in light of the requirement for restrictive interpretation.
2. In this context, the EU (the Commission) is overusing the exception of investigation in access to documents cases, and while it may be a legitimate reference point in a few occasions, nothing can legitimize its invocation so frequently, especially in Pilot procedures, let alone in cases when tables of concordances are commissioned to be prepared by external subcontractors with no purpose whatsoever to start infringement processes.
3. In a number of cases the Commission is "more papal than the Pope" i.e. in numerous occasions, even in our own experience, Member States are willing to disclose information to the public in infringement cases. In such situations, the overly cautious or secretive approach of the Commission is totally unnecessary.
4. The legal possibility provided for in the Regulations 1049/2001 and 1367/2006 to withhold information on investigations, including those concerning possible infringements of EU law, where the information concerned is environmental information, is derived from and in fact circumscribed under international law by the

possibility to withhold certain information under the Aarhus Convention, notably Art. 4.4(c). However, even aside from the cross-cutting impact of the 'tail' of Art. 4.4, it is questionable how applicable the language in Art. 4.4(c) is to infringements-related information. It is at the very least open to question, on a case by case basis, whether members of the public having information about infringements-related proceedings between Member States and the Commission would (not could) adversely affect 'the course of justice', or the ability of a person – in this case, a Member State – to receive a fair trial, or the ability of a public authority – in this case, the Commission – to conduct an enquiry of a disciplinary nature (if indeed infringement proceedings can be characterized as disciplinary proceedings, which is itself open to question). In fact, it is somewhat difficult to imagine circumstances in which the criteria for invoking this exemption would be fulfilled. The fact that the member of the public making such a request may be a citizen and/or taxpayer of the Member State concerned, and that the Member State is supposed to be representing its citizens' interests in the case, makes this an entirely different situation than one in which for example proceedings are held between two parties that are independent of and external to the requester.

5. Last but not least, in most of the cases the disclosure has no impact whatsoever on the respective infringement case, all the more because these cases are initiated as a reaction to past behavior of Member States, which, in turn cannot be altered any more. As the Court found in Case C 350/12 P, it is not even established that release of internal documents about formulating an EU standpoint in an EU – US negotiation would mean any harm to public interest and the interests of the EU and its position in the negotiations.

<u>Conclusion</u>

Therefore we firmly believe that there is a strong trend justifiably moving towards more transparency. Part of this change are new legislative instruments (the Aarhus Convention), draft amendments to existing international treaties (Transboundary Industrial Accidents Convention), draft new regional instruments on environmental transparency (the Latin American and Caribbean Convention drafting by UN ECLAC). Also there are new judgments of the EU Courts that started to move towards transparency from an obsolete culture of secrecy.

To follow this trend and respect its international and internal obligations, our request would be to amend the current standpoint of the EU represented by the Commission's practice and to provide access to information in EU law infringement matters to the public upon request in all but exceptional cases. Failing to do so, will result in the EU being the last one standing against the spirit of change and against good governance characterized greatly by openness and transparency.

J&E[1]

[1] Prepared in consultation with the European Environmental Bureau (EEB).