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Conference on the Future of Europe

ClientEarth's recommendations

Top Lines

- Making transparency decision-making a reality at EU level
- Granting the public direct access to the Court of Justice of the EU
- Achieving EU's accession to the European Convention on Human Rights
- Expanding the ordinary legislature procedure to all environmental matters

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Introduction

The democratic deficit at EU level is persisting. Despite the repeated calls from civil society, rulings of the Court of Justice of the EU and recommendations from the European Ombudsman requiring EU institutions to be more transparent and to ensure citizens understand and participate in the decision-making process, the EU institutions play deaf.

Significant and strategic stages of the EU decision-making process including the legislative one are still completely opaque. Opacity leads to suspicion. Transparency fosters trust. And when European institutions, including Member States within the Council of the EU, adopt laws and decisions that impact the life of more than 500 million citizens, their health and the environment they live in, trust is needed.

Trust requires compliance with the rule of law and being able to exercise the right to hold decision-makers to account. The EU must be exemplary in that regard. Its institutions must show their willingness to submit themselves to the jurisdiction of judicial, quasi-judicial and administrative bodies such as the Court of Justice of the EU, European Ombudsman, the European Court of Human rights and the Aarhus Convention Compliance Committee. These institutions and bodies are the authoritative sources of interpretation of the law EU institutions are subject to and their findings must be complied with, including those which are not legally binding.

Not addressing these issues effectively and diligently also prevents the effective implementation and enforcement of environmental legislation, including the one adopted within the European Green deal. The climate and the biodiversity crises will not be tackled if the EU citizens are not provided with the necessary rights to weigh in the decision-making process.

The Conference on the Future of Europe is the opportunity to repeat those calls. Despite the lack of clarity and doubts subsisting on the possible outcome of this unprecedented process, EU institutions will have to take into account the recommendations made by EU citizens at the risk of undermining even more their credibility and widening the democratic deficit this whole process is supposed to address.

Making transparency decision-making a reality at EU level

Transparent decision-making is an essential component of any effective democracy. It allows citizens to participate in democratic processes, facilitates accountability of public institutions and inspires confidence in the resulting policy.

To this end, the EU has established transparency rules which should, in theory, ensure that a union “in which decisions are taken as openly as possible and as closely as possible to the citizen” (Art. 10 TEU). However, in practice transparency is often an underfunded afterthought. The result is that many decisions and policy-making processes in the EU institutions remain shrouded in secrecy.

The Conference for the Future of Europe is the ideal opportunity to raise these issues and ensure that in the future transparency will become a reality.

Strong rules but few publications in practice

The EU has a strong transparency regime on paper. The Treaties establish that the Union institutions, bodies, offices and agencies “shall conduct their work as openly as possible” and that any citizen or resident in the EU has the right to access the documents of these same Union bodies (Art. 15 TFEU). The

Charter of Fundamental Rights equally includes the fundamental right to access documents (Art. 42). Moreover, specific Regulations operationalise this right of access to information and establish limited grounds for non-disclosure.[1] The same Regulations also provide for certain obligations to proactively disclose information, most importantly to publish information online and to create databases.

However, in practice neither the Commission, the European Parliament, the Council nor the EIB publish sufficient information during the decision-making procedures. These EU bodies will often only publish relevant documents when the decisions have already been taken, or not at all. This means that it is very difficult for the public and civil society to understand how decisions are taken and to hold decision-makers to account.

Access on request does not replace proactive disclosure

The EU institutions and bodies often defer to the possibility to request access to unpublished documents. However, a crucial hurdle to obtaining information this way is the time that it takes EU bodies to respond to requests. While the Regulations require a reply within 15 working days and permit only in exceptional cases an extension to 30 working days, in our experience the EU bodies will extend the deadline to 30 working days and often even fail to respect this extended deadline.

Moreover, even if a reply is received, EU bodies will often refuse access, frequently based on highly questionable interpretations of the applicable rules. However, the information must be provided in a timely manner. By the time the applicant is able to contest a refusal to provide information before the Court of Justice, the information will by then have lost much of its relevance. The Court has frequently criticized EU bodies for simply claiming that they need "space to think" without specifying how disclosure would result in any concrete, negative impacts on the decision-making process.

This would be less problematic if after losing in Court, the institutions would change their practice going forward. However, our experience suggests otherwise. For example, in 2018 the Grand Chamber of the Court of Justice decided that the European Commission should disclose impact assessments prior to the publication of the associated (legislative) proposal. Based on this judgement, we have filed four access to information requests to obtain impact assessments, all of which have been refused on similar grounds than those already rejected by the Court.

Particularly secretive decision-making processes

The problems mentioned so far apply independently of the institutions and the process involved. However, there are certain processes that are particularly secretive and shielded from public scrutiny. The lack of transparency in all of these areas has in the last years been criticized by the European Ombudsman, who is charged with overseeing maladministration by the EU institutions and bodies. In each case, the Ombudsman has issued recommendations or suggestions which have not yet been fully implemented by the EU body concerned.

Comitology

One example is the so-called "comitology procedure", which serves to determine technical additions to and implementation of EU legislation. As part of this procedure, Member State representatives meet in committees, which are chaired by a EU Commission representative, in order to reach a decision regarding the future provisions of the EU Commission's implementing decision. Examples of areas of law subject to decisions taken through this procedure: chemicals, pesticides, vehicle control systems etc. An example of

[1] Regulation 1049/2001/EC and Title II of Regulation 1367/2006/EC.

a particular controversial decision that was adopted by way of comitology was the decision to re-authorize the probably carcinogenic pesticide glyphosate in 2017.

This makes comitology procedures very important in EU decision-making. Moreover, since its main actors are the Commission and the Member State representatives, there is comparatively little democratic oversight (e.g. through involvement of the EU or national parliaments). Nonetheless, only summary records and not full minutes reflecting the discussions are published. Moreover, voting records do not reflect the votes of individual Member States. Thus, it is not clear to the public how their own or other Member State governments have positioned themselves in the discussions.

The European Ombudsman has held that the decision by the Commission to refuse access to minutes of comitology meetings and voting behaviour amounted to maladministration. However, this has not led to any systemic changes as regards transparency of these documents.

Commission Expert Groups

A similar issue arises as regards Commission expert groups. The Commission consults these experts to inform its policy-making, many of which are representing private, business interest. The lack of transparency in these groups has been the subject of an own initiative inquiry of the European Ombudsman in 2014 and issued recommendations to the Commission in 2017. The Commission has subsequently amended the rules governing expert groups but is still not publishing minutes or summaries of expert group meetings.

Council legislative deliberations

Another example are legislative deliberations by the Member State representatives in the Council. The lack of transparency in this area, prompted an own initiative inquiry of the European Ombudsman in 2017 which resulted in a finding of maladministration, a set of recommendations and a special report to the European Parliament. The Ombudsman especially criticised the failure to systematically record the identity of Member State positions in legislative discussions as well as the widespread restriction of access to documents by marking them as “LIMITE”.

Unfortunately, the Council has since then not made any significant progress on implementing these recommendations and improving public access. While the Finish Presidency implemented a number of measures during its Presidency in 2019 and issued a report for the other delegations, the changes were very limited in scope and the initiative did not have a significant, long-term impact. The issue has since then again fallen by the wayside.

European Investment Bank

The European Investment Bank is the financial arm of the European Union. It is the world’s largest multilateral lender and the biggest provider of climate finance. The EIB has set up a public document register in 2014, which contains certain information related to projects financed by the Bank. Nonetheless, the decision-making procedure of the Bank remains mostly shrouded in secrecy; information generally only becomes available once relevant decisions have already been taken.

In its 2019 Annual Report, the European Parliament called on the EIB to review its transparency policy with a view to “*the timely publication of more ample information on all its financing activities*” (para. 79). This year, the European Ombudsman has suggested that the EIB start publishing relevant documents that it uses in its appraisal of finance proposals, including as regards financial intermediaries, as well as its monitoring reports in relation to ongoing projects.

A way forward

Addressing these barriers is comparatively easy, in the sense that it does not require a Treaty reform, nor even legislative action. The issue lies instead in a lack of commitment of the Commission, the European Parliament, Council and the EIB to make documents available while decision-making procedures are ongoing. This issue would be solved with a simple commitment to publish:

- Minutes of comitology meetings, Commission expert groups, Council legislative discussions and EIB Board of Governors;
- Voting records of comitology meetings, Council sessions and the EIB Board of Directors that reflect individual Member State positions;
- Documents on the basis of which "comitology" committees, Council and EIB Board of Directors take their decision, such as draft decisions, reports, opinions and studies.

These simple changes would be transformative for transparency and effective democracy at EU level. It would bring the Union closer to the citizens, as intended by the EU Treaties.

The public's right of access to the Court of Justice

It is now abundantly clear that any reflection about the future of Europe entails reflection on the EU's fight against climate change and ecological collapse. Being a Union founded on the values of democracy and rule of law, the topic of access to justice is fundamental in this fight.

Currently, the right to challenge acts of EU institutions adopted in environmental matters is regulated by the Aarhus Regulation which implements the provisions of the Aarhus Convention at EU level. This right is however granted with regards to a limited category of acts and only provides for an indirect access to the Court of Justice of the EU. In addition, the rules governing direct access to the Court of Justice of the EU do not allow members of the public, including individuals and non-governmental organisations, to challenge environmental wrongdoing. This is because Article 263 TFEU limits direct access for the public to acts that are "*addressed to that person or which is of direct and individual concern to them*."

In practise, very few EU legal acts affecting the environment – whether legislative or regulatory – are addressed to a specific person or are of direct and individual concern to them. These laws and decisions tend to be of general application and, in practice, have a tremendous impact on millions of Europeans and the environment they live in.

This creates the perverse situation that the more people affected by an unlawful EU measure, the less likely it is that members of the public, and the organisations they create to represent them, will have access to the EU courts to challenge it.

The People's Climate Case, in which a number of Europeans and non-Europeans acutely affected by climate change sought the annulment of inadequate GHG emissions reductions targets, was thrown out of the EU courts at the earliest stage precisely due to this limitation on standing. The judges did not even address the legal questions at steak, despite claims that the individuals' fundamental rights were being breached by the effects of climate change. This is a stark warning that the EU rules regulating access to the courts are not working to the benefit of its citizens!

A direct and equal pathway to the Court of Justice for all Europeans affected by unlawful EU decision-making would improve access to justice in Europe and would also guarantee the protection of fundamental rights across all Member States.

Direct access to the Court of Justice should also be extended to public and regional authorities of Member States. Typically, under national administrative law, local and regional authorities have considerable powers, particularly in the field of environmental protection.

While it is within the powers of the Court of Justice of the EU to change its interpretation of the standing criteria in Article 263 to ensure wider access to justice, this result could also be obtained through an amendment to the Treaty on the Functioning of the European Union.

EU's accession to the ECHR

The EU has legally bound itself to accede to the European Convention on Human Rights (the ECHR).[2] After a first negotiated attempt failed,[3] the negotiation process is now underway again. EU accession to the ECHR is essential for closing a gap in human rights protection in Europe.

The greater the Union's competence in a particular area, the more important the accession process for the protection of human rights in that area. But this is not simply a sliding scale. The nature of the human rights gap depends on which actor is responsible for the rights violation and the way that EU law is involved.

Violations of EU Law that also violate Human Rights

If a Member State breaches EU law and, in so doing, violates a human rights obligation, the victims of that violation will have a remedy – under national and EU law and, if they do not resolve the matter, then before the European Court of Human Rights (the ECtHR). This could be the case, for example, if an EU Member States puts someone's health at risk by not enforcing EU clean air rules or by not making sure toxic substances are labelled properly or excluded from the market.

Other Member State violations of Human Rights in areas governed by EU Law

Member State authorities might also be acting in an area governed by EU law, without breaching EU rules, yet still violating of human rights. For example, national authorities might exceptionally authorise the use of a banned pesticide, following the procedures for this under EU law but putting human health at risk. EU accession to the ECHR would enhance protection in these circumstances, by ensuring the EU is also responsible under the ECHR system for its role in this kind of violation.

When the EU violates Human Rights

Yet climate change, the biodiversity crisis, and environmental risk factors for human health are increasingly linked to human rights violations in areas where the EU may be wholly or mostly responsible for the violation. This is particularly the case in areas where the EU has exclusive competence,[4] such as

[2] Article 6(2) Treaty on European Union.
[3] Following an unfavourable ruling from the Court of Justice of the EU: Opinion 2/13 of 18 December 2014.
[4] Article 3 Treaty of the Functioning of the EU.

in relation to the conservations of marine resources, the common fisheries policy, common commercial policy, and competition rules. But even when the EU has shared competence with Member States – in areas such as the environment, trade, energy, and the internal market – the EU can be responsible for human rights breaches. What follows are a few examples of areas where the EU's failure to accede to the ECHR leaves potential victims of human rights without a remedy.

Access to environmental information. If an EU decision that violates human rights is directly addressed to an individual or organisation, they will have recourse to the EU courts to challenge it. This has been the case, for example, when it comes to access to information in relation to environmental matters. NGOs such as ClientEarth which make access-to-information requests to the Commission and are refused are arguably victims of a violation of Article 10 ECHR (freedom of expression, which includes the right to receive information in the context of access-to-information requests). At least they can bring a case to the EU courts to challenge the refusal. Yet ,as mentioned in the previous section, there are some environmental access-to-information issues that remain unresolved. For example, the European Ombudsman has condemned the failure of the Council of the EU to make public in real time information it relies on when setting total allowable catches for fish stocks every December.[5] If the EU courts do not or cannot provide a remedy for this, EU accession to the ECHR could ensure that one exists.

Climate change. The growing recognition of the interrelationship between environmental breakdown and human rights is placing new burdens on the the ECtHR to resolve new kinds of disputes. For example, the Court is currently dealing with complaints brought by people affected by climate change, accusing States of putting their lives and health in danger by doing nothing.[6] Yet the twenty-seven Member States of the EU cannot deal with climate change on their own. This is not just a factual observation (i.e. that no country can deal with climate change on its own). It is also a legal observation: Member States have ceded sovereignty to the EU in key areas (e.g. regulation of energy markets, taxation of fuel) which must be reformed to deal with climate change. The fact that the ECtHR can only hold Member States accountable, and not the EU itself, will weaken the outcome of such cases.

Chemicals regulation. The need to detoxify Europe's economy is as urgent as the need to decarbonise it. And while the EU might pride itself on having the world's best chemicals regulation system, it is still not good enough. What, for example, if the EU authorises the use in Europe of a chemical that harms human health? This is not a theoretical problem. In 2016, the Commission authorised a company to place lead chromates (paint pigments) on the EU market for uses such as warning signs, road equipment, and boot covers for cars.[7] These pigments are carcinogenic and have toxic properties for human reproduction. In the end the Commission decision was found to be unlawful, because Sweden challenged it in court. To the extent that an individual could claim to be a victim of the decision, she would not have been able to challenge it under the EU legal order; but she might be able to before the ECtHR once the EU has acceded to the ECHR. The EU makes decisions like this all the time. People in Europe should not have to depend on a Member State exercising its discretion – through a political decision – to challenge such decisions on their behalf.

[5] Recommendation of the European Ombudsman in case 640/2019/FP on the transparency of the Council of the EU's decision-making process leading to the adoption of annual regulations setting fishing quotas (total allowable catches), 29 April 2020, available at https://www.ombudsman.europa.eu/en/recommendation/en/120761.
[6] See, for example, *Duarte Agostinho and others v Portugal and 32 other States* (application number 39371/20), a case pending before the Court against all 27 Member States and which concerns States' failures in relation to climate change.
[7] Case Case C-389/19 P, *Commission v Sweden* and T-837/16, *Sweden v Commission*.

Clean air. The EU's Ambient Air Quality Directives[8] are not only flouted by Member States. They are also below the World Health Organisation's guidelines, and too inflexible to incorporate our rapidly advancing scientific knowledge about pollutants.[9] While it may be possible (at least in theory) to hold individual Member States to account for the breaches of EU clean air legislation, only EU accession to the ECHR will make it possible to ensure the EU itself is accountable for its role in failing to frame standards that in theory are capable of protecting human health.

Fisheries. Sometimes the EU breaks its own laws. In 2013, for example, the EU committed in law to each sustainable fisheries by 2020.[10] Yet as of 2020 and 2021, the EU (specifically, the Council) was still setting total allowable catches unsustainably (that is, not in accordance with scientific advice). Specifically, the Council has continued, unlawfully, to put short-term socio-economic considerations ahead of the long-term sustainability of Europe's fisheries – and the people whose livelihoods depend on them. Yet the Council seems to believe it can act with impunity. To the extent people whose livelihoods are affected by these short-sighted, unlawful decisions can show they are a victim of an ECHR right, EU accession to the ECHR would provide them with an avenue for redress.

Embracing a Human Rights culture

The scope of the European Green Deal shows the enormity of rule-making and enforcement powers the Union will have to wield. The human rights implications are likewise immense. Whether the EU is accused of doing too much or too little, EU law in relation to the environment will trigger a wide range of disputes about the rights to life, property, respect for private and family life, and expression (particularly the right to receive information), among others. EU accession to the ECHR means that a new forum will be available to resolve disputes NGOs and individuals should be able to bring against the EU (on its own or together with Member States) for action or inaction.

This is vital to the Future of Europe. If accession is merely a box the EU ticks to fulfil a legal obligation, it risks contributing further to the decline of respect for the rule of law in Europe. This will add to the unmanageable[11] load of Court judgments that have not been executed, and deprive Europeans of the sorely needed opportunity to hold the EU to account.

Instead, the Union needs to use accession as an opportunity to instil a greater human rights culture across its institutions and agencies. Matters such as regulating harmful chemicals, legislating on air quality, setting catch limits for fisheries, defining the taxonomy for sustainable investments, responding to environmentally related access-to-information requests, or pursuing Member States for environmental infringements must be framed for the Union's staff in terms of the Union's accession to the ECHR. And when the EU inevitably loses cases before the Court of an environmental character, it must follow the example of its most compliant Member States and implement general measures to put things right; and not set an example for those Member States which stubbornly resist Court judgments. This greater human rights culture must involve increased powers for the Fundamental Rights Agency – particularly to ensure respect for Article 37 of the Charter of Fundamental Rights – and a programme of human rights

[8] Directives 2008/50/EC and 2004/107/EC.
[9] See ClientEarth et al., The first ten years of the EU Ambient Air Quality Directive – an essential tool for protecting our health, 11 September 2018, available at https://www.clientearth.org/latest/documents/the-first-ten-years-of-the-eu-ambient-air-quality-directive-an-essential-tool-for-protecting-our-health/.
[10] Regulation 1380/2013, Article 2(2).
[11] According to the European Implementation Network, for example, of the leading cases decided by the Court in the past decade, 45% have not yet been implemented: https://www.einnetwork.org/implementation-of-judgments-of-the-european-court-of-human-rights.

training across the Union, including how to respond when cases are pending before Court and how to respond to findings of violations.

The European Green Deal and its legacy will be tested under the ECHR and before the Court. The Union must make sure all its institutions and agencies are aware that test is coming and are prepared to pass it.

Expanding the ordinary legislature procedure to all environmental matters

We cannot ensure Europeans start living within our planetary boundaries unless we change our fiscal policies. Yet when tax law meets environmental law, the EU treaties create a bind.

Article 191 of the Treaty on the Functioning of the European Union (TFEU) requires the EU to ensure a high level of environmental protection.

Article 192(1) TFEU creates a legal basis for the EU to legislate to that end, using the ordinary legislative procedure: the Commission makes a legislative proposal, followed by a majority vote in the European Parliament and a qualified majority among Member States in the Council of the EU.

Article 192(2) provides an exception:

> ***2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:***
>
> ***(a) provisions primarily of a fiscal nature;***
>
> ***(b) measures affecting:***
>
> ***—town and country planning,***
>
> ***—quantitative management of water resources or affecting, directly or indirectly, the availability of those resources,***
>
> ***—land use, with the exception of waste management;***
>
> ***(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.***
>
> ***…***

When it comes to fiscal policy, this is consistent with Article 113 TFEU, which applies the same exceptional legislative procedure to taxation. There are other such exceptions in the treaties. Measures concerning discrimination based on race, religion, or sexual orientation,[12] for example, or allowing EU citizens to live in another Member State[13] or stand in municipal or European elections there,[14] are also

[12] Article 19 TFEU.
[13] Article 21 TFEU.
[14] Article 22 TFEU.

subject to unanimity. But such exceptions became narrower when the Lisbon Treaty made the "co-decision" procedure between the Council and the Parliament into the Ordinary Legislative Procedure.

Departing from the Ordinary Legislative Procedure creates obstacles on several levels to translating the majority will of the people of the EU into legislative action. It reduces the participation of the Parliament to a mere consultative role. This undermines what the Court of Justice has repeatedly described as "*the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly*".[15] It places power jointly in the hands of the EU's executive authority (the Commission) and the executive authority of the Member States, who are responsible for making decisions in Council, with only indirect control by national parliaments. And it gives any Member State's executive authority a veto.

It is normal in democratic societies to put obstacles in the way of majority rule. But Articles 113 and 192(2) TFEU stand out as exceptionally onerous. It is difficult to find a similar instance of multi-level democratic governance where decisions on matters of taxation that need to be taken at the highest level are subject to such a veto and where the people's representatives play such a limited role.

Article 192(2) also generates legal uncertainty that slows down law-making. The more exceptions to the Ordinary Legislative Procedure there are, the more cases there will be where EU secondary legislation could have two or more legal bases requiring different legislative procedures. These cases create space for legal challenges by Member States (challenging the use of the Ordinary Legislative Procedure) or by Parliament (challenging its lack of a binding say). This existence of exceptions to the Ordinary Legislative Procedure also slows down the process of developing legislative proposals.[16] The Court of Justice has developed a sophisticated response in its jurisprudence that guides these situations.[17] But the European Green Deal and the climate and nature emergencies we are living through will require more environmental legislation raising more issues about the legal basis. The clarity of a single legislative procedure will speed up that process and stop it being held hostage to legal haggling.

Any consideration of the future of Europe must examine carefully whether excluding the Parliament from more than a consultative role, while giving a veto to any Member State's executive, is appropriate in a given area. Tax policy in relation to multi-national corporations, taxation of fuel, and discrimination by police (which is not covered by current EU anti-discrimination legislation) have become politically salient subjects in recent years. If Europeans knew how especially powerless they were to influence legislation on these matters, they would be surprised.

We believe that the Conference on the Future of Europe should recommend ensuring that all environmental matters, even those named in Article 192(2), be subject to the Ordinary Legislative Procedure. Doing this would not require changing the Treaties. Article 192(2) concludes as follows:

> ***The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph.***

[15] See, e.g., Case C-300/89, *Commission v Council*, para.20.
[16] See, e.g., Interinstitutional Agreement on Better Law-Making, 12 May 2016, Article 25: "The Commission shall provide, in relation to each proposal, an explanation and justification to the European Parliament and to the Council regarding its choice of legal basis and type of legal act in the explanatory memorandum accompanying the proposal"; "If a modification of the legal basis entailing a change from the ordinary legislative procedure to a special legislative procedure or a non-legislative procedure is envisaged, the three Institutions will exchange views thereon".
[17] See, most recently, Case C-626/18, *Poland v Parliament*; and Case C-482/17, *Czech Republic v Parliament*.

Such an action would enhance the EU's democratic accountability on environmental matters and give citizens and civil society a meaningful opportunity to influence decision-making in matters – such as taxation of carbon-emitting fuels – that have become existential.

Other matters mentioned in this paper (such as anti-discrimination or free-movement rules) could be made subject to the Ordinary Legislative Procedure through decisions taken under Article 48(7) of the Treaty on European Union.

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