6 March 2017

Complaint to the European Ombudsman - Failure of the European Commission to disclose conformity checking documents in compliance with case C-612/13 P ClientEarth v Commission

1. This complaint deals with the European Commission's failure to respect the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, Regulation 1367/2006[1] (the "Aarhus Regulation"), Regulation 1049/2001 (the "Regulation")[2] as well as the Court of Justice's decision in case C-612/13 P[3] with regard to the active dissemination and disclosure upon request of conformity checking studies in the field of environmental law. ClientEarth considers the Commission's conduct as an instance of maladministration.

2. Part 1 of this complaint will lay out the facts and details of the request for information made by ClientEarth to the Commission in 2010, and the subsequent request submitted in September 2015. Part 2 provides the legal arguments according to which the replies from the Commission to refuse access constitute an instance of maladministration. Part 3 deals with the Commission's failure to actively disseminate the studies. Part 4 places this complaint within the wider context of the Commission's commitments to better enforcement of EU environmental legislation.

1 Facts

3. On 8 September 2010 ClientEarth submitted a request for access to the studies on the conformity of Member State legislation with EU environmental law mentioned in the Management Plan 2010 of the Commission's DG Environment. The Commission granted partial access to the request, by sending one of the 41 requested documents to ClientEarth. ClientEarth sent a confirmatory application asking the Commission to reconsider its position on 10 November 2010. On 30 May 2011 the Commission adopted its decision, granting ClientEarth partial access to 41 conformity checking studies. In each document, the Commission redacted the sections headed "Summary datasheet", "Legal Analysis of the Transposing Measures" and "Conclusions" and an annex containing a table of concordance between the Member State legislation and the relevant EU law. The Commission justified withholding the information on the grounds of the third indent of Article 4(2) of Regulation 1049/2001 relating to the protection of the purpose of investigations. According to the Commission, the studies were intended to inform the Commission's decisions on whether to bring infringement proceedings against Member States for failure to fulfil obligations under Article 258 TFEU.

4. ClientEarth brought an action before the General Court to annul the Commission's decision. The General Court rejected ClientEarth's arguments and upheld the Commission's decision[4]

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[1] Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies.

[2] Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament Council and Commission documents.

[3] ECLI:EU:C:2015:486

[4] Case T-111/11 ClientEarth v Commission (ECLI:EU:T:2013:482).

effectively applying a general presumption of confidentiality to the conformity checking studies for the reason that they may be used as the basis on which to bring infringement proceedings (see Annex 1).

5. ClientEarth appealed to the Court of Justice, which overturned the General Court's decision on 16 July 2015[5] (Annex 2). It held that the studies which had led the Commission to send a formal letter of notice to the Member States concerned were indeed covered by a general presumption of confidentiality on the basis of Article 4(2), third indent, by virtue of the fact they had been placed in a file pertaining to the pre-litigation stage of infringement proceedings. However, none of the other studies were covered by the presumption and, as such, the Commission was obliged to make a specific and individual examination of each of the remaining studies.

6. On 29 September 2015, ClientEarth submitted a further request to the Commission for access to the conformity checking studies in the field of environmental law received since the last request in October 2010 (Annex 3). Following a number of exchanges between the Commission and ClientEarth in the context of a fair settlement in accordance with Article 6(3) of the Regulation (Annexes 4 - 8), an initial response was sent by the Commission on 16 February 2016, allowing access to 237 studies and withholding 177 studies (Annex 9).

7. The Commission stated that the studies that could be disclosed related to investigations that had, on the date of the request for information, been closed. However, all studies relating to investigations that were still ongoing were withheld on the following grounds:

    - Studies relating to ongoing infringement proceedings for which a letter of formal notice has been sent to the Member State concerned. These studies are covered by the presumption of confidentiality on the basis of Article 4(2), third subparagraph, recognised in case C-612/13 P.
    - Studies related to ongoing investigations under EU Pilot. The Commission applied the presumption of confidentiality on the basis of Article 4(2), third indent.
    - Studies related to ongoing investigations prior to opening of EU Pilot procedures, which show evidence of incorrect interpretation and/or transposition of the directives concerned. The Commission stated that it was necessary to withhold these documents on the basis of Article 4(2), third indent, because of the possibility that they could lead to opening EU pilot or infringement proceedings in the future. In addition, the Commission stated that they were also covered by Article 4(2), first indent, on the protection of the Commission's internal decision-making process, because they include preliminary views and could therefore reveal possible options which are currently under consideration.

8. The Commission could find no overriding public interest in disclosing the documents.

9. ClientEarth sent a confirmatory application on 8 March 2016 asking the Commission to reconsider its decision with regard to the studies related to ongoing investigations under the EU Pilot and the studies where no EU pilot or infringement proceedings had been opened (Annex 10). It also reminded the Commission of its duty to actively disseminate the studies in compliance with Article 4 of Regulation 1367/2006.

[5] Case C-612/13 P ClientEarth v Commission (ECLI:EU:C:2015:486).

10. The Commission sent its confirmatory decision on 12 May 2016 (Annex 11). It confirmed that none of the studies relating to open EU pilot cases could be disclosed. With regard to the studies where no EU pilot or infringement proceedings had been opened, the Commission broke these down into 3 sub-categories:

    - 20 studies "*concerning cases where the Commission services, after having assessed all the studies concerned, did not consider it necessary to open an EU Pilot case or to propose opening infringement proceedings on the basis of the information available at that stage*". These studies were disclosed in full.
    - 31 studies in relation to which the opening of an EU pilot is imminent. According to the Commission, "*the internal preparatory work to launch investigation activities in case of undisclosed studies...is fully ongoing and focuses on the preparation of EU Pilot proceedings which will lead to a dialogue with the Member States concerned. The Commission will make full use of the information provided by the 31 studies in that dialogue. The draft letters formally opening the EU Pilot case are being prepared or are envisaged to be prepared imminently*." The studies were withheld on the basis of Article 4(2), third indent, of the Regulation.
    - 32 studies that were "*approved only recently and are being still subject of the preliminary assessment by the Commission services*". These studies were withheld in their entirety on the basis of Article 4(2), third indent and the first subparagraph of Article 4(3) of the Regulation.

11. The Commission also stated that the question of active dissemination of the studies was outside the scope of the confirmatory review mechanism.

2 Failure to carry out an individual assessment of the requested documents

2.1 Refusal to disclose on the basis of Article 4(2), third indent

2.1.1 Studies relating to ongoing EU Pilot cases

12. The Commission's decision applies a general presumption of confidentiality on the basis of Article 4(2), third indent, to the studies connected with ongoing EU pilot cases, citing case T-518/12 *Spirlea v Commission* to support its approach.[6]

13. However, the Commission's application of the general presumption to these conformity studies is erroneous.

14. First, the *Spirlea* case, which is currently under appeal in case C-562/14 P Sweden v Commission, should be distinguished on the facts. In that case the requested documents concerned requests for information from the Commission to the Member State concerned, and the Member State's responses, within the structure of the Pilot procedure. It did not relate to factual information pre-dating the opening of the Pilot case, as is the case for the conformity studies in question.

[6] Case T-518/12 *Spirlea v Commission*, ECLI:EU:T:2014:131, currently under appeal to the Court of Justice in case C-526/14 P.

15. Second, the *Spirlea* decision was handed down in March 2014, i.e. more than one year prior to the Court of Justice's decision in case C-612/13. Therefore, had the Court of Justice intended for confirmatory studies relating to ongoing Pilot cases to be covered by the general presumption of confidentiality, it would have said so.

16. On the contrary, it specifically stated that, "*such a general presumption could not, on the other hand, prevail with respect to those of the contested studies which, when the express decision was adopted, had not led to the sending by the Commission of a letter of formal notice to the Member State concerned, under the first paragraph of Article 258 TFEU, and where, consequently, it remained uncertain, at that time, that the outcome of those studies would be the opening of the pre-litigation stage of infringement proceedings against that Member State*." The Court further added that, "*It must, in that regard, be recalled that the Commission, when it considers that a Member State has failed to fulfil its obligations, remains free to assess whether it is appropriate to bring legal proceedings for infringement and to decide when it will initiate infringement proceedings against that Member State*."[7]

17. Advocate General Sharpston recently delivered her opinion in the Spirlea appeal which is currently pending before the Court of Justice.[8] It is interesting to note that she specifically referred to case C-612/13 to support her view that the General Court erred in law when it extended the scope of the general presumption against disclosure to EU pilot cases.[9] She states: "*the Court held that the General Court had erred in law by accepting that the Commission could extend the scope of the presumption of non-disclosure to the second category of studies, namely those which, when the Commission decision was adopted, had not led to a letter of formal notice being sent. At that point it still remained unclear whether those studies would lead the Commission to open the pre-litigation phase of infringement proceedings. The Commission was therefore obliged to examine each request for access to those studies individually*. *That reasoning applies by analogy with greater force to Mr and Mrs Spirlea's case*."[10]

18. Regarding the nature of the EU Pilot procedure, the Advocate General stated that, *"[a]s the scope of the EU pilot procedure goes beyond that of infringement proceedings, it is not possible to identify precisely in what respects the purpose and progress of EU Pilot procedures would be undermined by disclosure. Furthermore, the absence of specific rules governing the EU Pilot procedure means that the scope of any exception to the general principle of transparency would be particularly uncertain*."[11]

19. The application of such a presumption to the requested studies indeed illustrates the extent of such uncertainty. The documents that are still being withheld because they relate to ongoing Pilot cases consist of three studies that date from 2010; 11 studies that date from 2011; 23 studies that date from 2012; 21 studies that date from 2013; and 13 studies that date from 2014 (please see the table that was attached to the Commission's confirmatory decision in Annex 11a). In other words, EU citizens are unable to find out the details of

[7] Paragraph 79.

[8] Opinion of Advocate General Sharpston in case C-562/14 P Sweden v Commission, delivered on 17 November 2016 (ECLI:EU:C:2016:885).

[9] Paragraphs 57-59.

[10] Paragraph 58.

[11] Paragraph 51.

breaches of EU law that were highlighted to the Commission up to six years ago. Yet, the breaches have not been resolved so as to allow the Commission to close the EU Pilot case and have not prompted the initiation of infringement procedures. Withholding this information, without even performing an examination of each document, means that citizens are denied access to the information that would help them to put pressure on national administrations to achieve compliance and/or to bring cases in the national courts. In the meantime, the breaches of EU environmental law persist, causing further damage to the environment. We do not know when the EU pilot cases were opened but it is clear that the procedure often lasts much longer than the 20 weeks referred to on the Commission's website[12] and in its Second Evaluation Report on EU Pilot.[13] Therefore, extending the scope of the presumption to studies related to ongoing EU pilots effectively allows the Commission to withhold them for an undetermined period of time.

20. The Advocate-General rightly concludes, "*I do not accept that the EU Pilot procedure in general constitutes a new sixth category of documents to which a general presumption against disclosure should apply. I believe that conclusion to be consistent with the requirement that such a general presumption must be interpreted and applied strictly, since it is an exception to the rule that the institution concerned is obliged to make specific and individual examination of every document which is the subject of an application for ccess under Regulation No 1049/2001 and, more generally, to the principle (underpinned by Article 15 TFEU and Article 42 of the Charter) that the public should have the widest possible access to the documents held by the EU institutions*."[14]

21. Therefore, it must be concluded that conformity checking studies connected to ongoing Pilot cases are not covered by the general presumption of confidentiality on the basis of Article 4(2), third indent and, as a consequence, the Commission should have carried out an individual assessment of each study.

2.1.2 Studies not related to ongoing infringement or EU Pilot procedures

22. The Commission has also withheld 63 studies that are not related to ongoing infringement or EU Pilot procedures. Some of these studies were received and approved by the Commission in February 2014, almost three years ago.

23. In section 2.1.2 of the decision, the Commission justifies withholding the 31 studies for which the opening of an EU Pilot study is "imminent", as well as the 32 studies for which a preliminary assessment is ongoing, on the basis of Article 4(2), third indent. The Commission's reasoning is that their disclosure "*would undermine the protection of the purpose of the ongoing investigations with a view to possible opening EU Pilot cases. This risk has to be considered as actual and reasonably foreseeable, as all the information contained in the studies under this category will possibly be used to open the EU Pilot proceedings with regard to several Member States*."

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12 http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm

13 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0930&from=EN

14 Paragraph 52

24. In other words, rather than carry out an individual assessment of each study as instructed by the Court of Justice, the Commission extends the presumption of confidentiality to all studies that indicate shortcomings in transposition.

25. The Commission states that "*an individual assessment of the **various categories of documents** requested was indeed carried out, based on an assessment of their content and the status of the investigation and after grouping them into the categories for which the same type of reasoning applies*" (ClientEarth's emphasis). The decision cites case T-344/08 *EnBW Energie Baden-Wurteemberg AG v Commission*, paragraph 64, as its authority for dispensing with an individual examination of each study. However, this case makes it clear that this is only possible if "*the documents within that category are manifestly covered in their entirety by the exception relied on*". ClientEarth refutes that this condition has been fulfilled. While the studies have one characteristic in common, i.e. that they indicate shortcomings in transposition, this does not mean that they are, in their entirety, manifestly covered by the exception in Article 4(2), third indent. Such an approach does not take into account a wide range of factors that could influence whether the exception applies, including the specific provisions of EU environmental law at issue, the seriousness of the shortcoming, its duration and the willingness of the Member State concerned to disclose the information.

26. Ignoring these factors is in breach of the Commission's obligation to interpret the exceptions in Article 4 of the Regulation strictly and its duty to explain how disclosure of the document could specifically and actually undermine the interest protected by the exception and that the risk is reasonably foreseeable.[15] It is also contrary to Article 6(1) of the Aarhus Regulation, which states that the exceptions in Article 4 must be interpreted strictly, taking into account the public interest served by disclosure. [16]

27. Furthermore, the Commission's approach is, again, in direct opposition to the Court of Justice's ruling in case C-612/13 P, in which the Court specifically said that, for the studies in relation to which a formal letter instigating an infringement proceeding had not been sent, the "*the Commission ought, on the contrary, to have examined and explained how such full disclosure would have actually and specifically undermined the interest protected by the exception laid down in the third indent of Article 4(2)...*"[17]

2.2 Refusal to disclose on the basis of Article 4(3), first subparagraph

28. The Commission also justifies its decision to withhold the 32 studies that are the subject of an ongoing preliminary assessment on the basis of the first sub-paragraph of Article 4(3) regarding the protection of the ongoing decision-making process. However, as the studies constitute "environmental information" within the meaning of Article 2(1)(d) of the Aarhus Regulation, they do not fall within the scope of this exception.

[15] Case C-506/08 P Sweden v My Travel and Commission (ECLI:EU:C:2011:496), paragraph 76; Cases C-39/05 P and C-52/05 P Sweden and Turco v Council (ECLI:EU:C:2008:374), paragraph 43.

[16] Article 2(1)(d)(iv) of Regulation 1367/2006 specifically states that “reports on the implementation of environmental legislation” comes within the definition of “environmental information”.

[17] Paragraph 101.

29. The Commission must interpret the exception in the first sub-paragraph of Article 4(3) of the Regulation in the light of Article 4(4)(a) of the Aarhus Convention.[18] Article 4(4)(a) of the Convention allows the Commission to refuse an access to documents request only if disclosure would "*adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law*". Advocate General Szpunar recently had the opportunity to consider the meaning of "public proceedings" in his opinion on case C-60/15 P Saint Gobain v Commission. The case concerned the Commission's partial refusal, on the grounds of the first sub-paragraph of Article 4(3) of the Regulation, to grant access to a document communicated by Germany in the course of the procedure for the free allocation of emissions allowances. Saint Gobain doubted the facts used to calculate its provisional emissions allowances in the requested document and wanted to verify their accuracy. In deciding whether the exception could be applied, the Advocate General looked at the different language versions, and noted that the French version refers to "délibérations des autorités publiques" and other language versions also refer to "deliberations" and even "internal deliberations", as opposed to the broader term "proceedings" in English. He noted that the Aarhus Convention and its implementing legislation seeks to ensure greater public access to environmental information and specifically requires a restrictive interpretation of the exceptions to this rule. He also referred to case C-204/09 Flachglas Torgau, in which the Court ruled that national law must clearly establish the scope of the concept of "proceedings", which "*refers to the final stages of the decision-making process of public authorities*"[19]. He concluded that *"[t]he exception relating to requests for access to information under those provisions of EU law must be understood as referring to the confidentiality of the 'proceedings of public authorities' and covering information whose disclosure could adversely affect the confidentiality of the deliberation process in the decision-making procedures...such a narrow interpretation excludes a priori information which simply forms the factual basis for the decision-making process*."[20]

30. The same conclusion applies in this case. The Aarhus Convention and the Aarhus Regulation do not allow the exception in the first sub-paragraph of Article 4(3) of the Regulation to be applied to information which simply forms the factual basis for the Commission's decision-making process.

31. However, even if the studies did fall within the scope of the exception in the first sub-paragraph of Article 4(3), the case-law of the ECJ requires it to be established that access to the document in question is likely, specifically and actually, to undermine protection of the institution's decision-making process, and that the risk of that interest being undermined is reasonably foreseeable and not purely hypothetical.[21]

32. The Commission states that these studies, received and approved in October/November 2015, "*are still being examined by the Commission services with a view to taking the decision to launch EU Pilot/infringement case. Their public disclosure would therefore reveal possible options which are still under consideration*." The Commission goes on to state that

[18] See the opinion of Advocate General Szpunar in Case C-60/15 P Saint-Gobain Deutschland GmbH v Commission, paragraphs 39-41.

[19] Case C-204/09 Flachglas Torgau (EU:C:2012:71), paragraph 63.

[20] Opinion of Advocate General Szpunar in Case C-60/15 P Saint-Gobain Deutschland GmbH v Commission, paragraph 60.

[21] T-471/08 Toland v Parliament, paragraph 70 and case law cited.

"*disclosure of the studies would lead to external pressure, jeopardising the possibility for the Commission to take an objective decision on the need to open a pre-litigation procedure. This, in turn, would seriously undermine its decision-making process within the meaning of Article 4(3) of Regulation 1049/2001*."

33. In case T-51/15 *Pesticide Action Network Europe v Commission*, the General Court specifically condemned the Commission's use of *"[s]uch general, vague and imprecise statements", stating that "the reality of such external pressure must be established with certainty, and evidence must be adduced to show that there was a reasonably foreseeable risk that that process would be substantially affected owing to that external pressure*."[22]

34. In addition, Article 6(1) of the Aarhus Regulation obliges the Commission to apply the exception in a restrictive way, taking into account the public interest served by disclosure[23].

35. The Commission's decision falls short of this standard. Its reasons are purely hypothetical. They fail to demonstrate that it is reasonably foreseeable that pressure would be exerted on Commission staff in the event of disclosure, and that the staff would be unable to take an objective decision in the face of such pressure. It also fails to consider that there is a clear public interest for citizens to know the way in which their governments are breaching EU environmental law and to be able to take action to remedy the situation.

3 Obligation to actively disseminate conformity studies

36. As stated above, the conformity checking studies in question constitute "environmental information" as defined by Article (2)(1)(d) of Regulation 1367/2006. Therefore, ClientEarth's confirmatory application also reminded the Commission of its obligation to actively disseminate environmental information in line Article 5(2) and (3) of the Aarhus Convention. This obligation has been transposed into EU law by Article 4(1) of Regulation 1367/2006, which provides that "*Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public*". This should be done in a continuous and systematic manner in accordance with Articles 11(1), 11(2) and 12 of Regulation 1049/2001 through a public register of documents.

37. Article 4(2) of Regulation 1367/2006 lists more specific requirements on the type of documents that should be made accessible in the register, including, progress reports on the implementation of EU environmental law. It should also be noted that Directive 2003/4 on public access to environmental information imposes the obligation on Member States to actively disseminate information on the implementation of EU environmental legislation. These provisions demonstrate that the EU legislature was of the opinion that information on the implementation of EU environmental legislation is an important component of environmental information, and that it is the objective of EU environmental policy to achieve the "*widest possible systematic availability and dissemination of environmental*

[22] Case T-51/15 *Pesticide Action Network Europe v Commission, ECLI:EU:T:2016:519, paragraphs 30-36 and 40-42.*

[23] Article 6(1) of Regulation 1367/2006/EU

information"[24]. In this context, it is useful to remember that "*public authorities hold environmental information in the public interest*"[25]. This is particularly the case when the studies have been paid for with tax payers' money. It is, therefore, a legitimate interest of civil society and of citizens to know how EU environmental legislation has been transposed within the EU Member States and what the EU institutions do in order to ensure that this legislation is completely, correctly and effectively transposed and applied. It also allows citizens to take legal action against public authorities for failing to implement EU environmental legislation correctly.

38. The Commission register set up to comply with this requirement only includes documents submitted to the College of the Commissioners in view of a decision to be taken and which receive a COM, SEC or C registration number. Conformity checking studies, although clearly coming within the obligation in Article 4 of Regulation 1367/2006, are not actively disseminated in the register. Their publication depends on the particular DG responsible for commissioning the studies. DG Environment has not published any of the conformity checking studies it has commissioned and received.

39. The Commission's decision stated that this question falls outside the scope of the confirmatory assessment. It then went on to quote case law of the General Court which states that the EU institutions are not obliged to actively disseminate information that is covered by one of the exceptions in Article 4 of the Regulation[26]. ClientEarth does not question the logic of the General Court in this regard. However, we would like to reiterate that the Commission must publish on an ongoing basis those studies that are not covered by an exception. At the very least this includes all of the studies that have already been disclosed in response to ClientEarth's request, as well as those that are related to EU Pilots and infringement proceedings that have since been closed.

40. It should be noted in this regard that it is DG Justice's practice to proactively publish the conformity checking studies it commissions. For example, see the conformity checking studies carried out for the implementation of Directive 2008/99 on the protection of the environment through criminal law and Directive 2009/123 on crimes against ship-source pollution: http://ec.europa.eu/justice/criminal/criminal-law-policy/environmental-protection/index_en.htm

41. This shows that active dissemination of the studies poses neither a practical nor a legal problem for the Commission.

4 Considerations regarding the implementation and enforcement of EU environmental law

42. The Commission could find no overriding public interest justifying the disclosure of the studies, stating that the importance of transparency is not sufficient to outweigh the interest protected in applying the exceptions. However, to properly assess the public interest, it is necessary to place this complaint within the wider context of the proper transposition, implementation and enforcement of EU environmental law.

[24] Regulation 1367/2001, Article 1(1)(b).

[25] Aarhus Convention, recital 17.

[26] Case T-111/11 ClientEarth v Commission, ECLI:EU:T:2013:482

43. In its 7th Environmental Action Programme[27], published in 2013, the Commission placed improving the implementation of EU environmental legislation as its fourth priority objective. It stated that "*improving the implementation of the Union environment acquis at Member State level will therefore be given top priority in the coming years. There are significant differences in implementation between and within Member States. There is a need to equip those involved in implementing environment legislation at Union, national, regional and local levels with the knowledge, tools and capacity to improve the delivery of benefits from that legislation, and to improve the governance of the enforcement process*."

44. In particular, the Commission pledged that by 2020 "*the public has access to clear information showing how Union environment law is being implemented consistent with the Aarhus Convention*".

45. This clearly demonstrates that the Commission recognises the important role that the public must play at national level in ensuring that EU environmental legislation is correctly implemented and enforced, and the ensuing necessity for the public to access relevant information.

46. The Commission has also acknowledged the vital role of national courts in implementing EU law. In the 7th Environmental Action Programme, the Commission committed to ensuring that EU citizens have effective access to justice in environmental matters in line with the Aarhus Convention (unfortunately, the Commission has yet to take any action on this point). This is consistent with the importance given to national courts in the Commission's recent reply to the draft findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32, where it referred to "*the vital role that the courts of the Member Stats play as 'ordinary courts' within the EU legal order, whose task is to implement EU law*."[28]

47. Yet the Commission continues to withhold the very information the public needs to bring cases against national administrations that do not properly implement EU environmental legislation.

48. Indeed, direct legal challenges at national level are often more effective in enforcing EU environmental law than the Commission's protracted Pilot and infringement procedures. An indicative example of this is the ongoing infringement procedure against the UK Government for failure to implement Directive 2008/50/EC on air quality. Following a successful challenge in the UK courts brought by ClientEarth in April 2015, the UK Government came up with a plan that would see the UK reach compliance only in 2020. The plan was based, in part, on the Government's calculation that 2020 would be the year in which the infringement procedure would finally conclude with an order for the UK to pay a fine to the EU, and therefore it put off complying with the law until that date.[29] ClientEarth applied for judicial

[27] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'

[28] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/From_Party/frPartyC32_18.10.2016_comments_draft_findings.pdf

[29] For further information see http://www.clientearth.org/government-chose-arbitrary-date-minimum-compliance-measures/ and read the UK Supreme Court ruling here: http://www.documents.clientearth.org/wp-content/uploads/library/2016-11-02-high-court-judgment-on-clientearth-no-2-vs-ssefra-on-uk-air-pollution-plans-ext-en.pdf

review of the plan which resulted in it being quashed by the UK High Court. Having access to conformity checking studies would aid national civil society organisations in bringing such cases.

5 Conclusion

49. The Commission's response to ClientEarth's request for access to conformity checking studies is in breach of the Aarhus Convention, Regulation 1049/2001 and Regulation 1367/2006 for the reasons given above. It also fails to take account of the Court of Justice's judgment in case C-612/13 which clearly stated that the conformity checking studies that are not connected to ongoing infringement procedure are not covered by a general presumption of confidentiality and, as such, must be subjected to an individual assessment.

50. We also take this opportunity to urge the Ombudsman to remind the Commission of its obligations to actively and systematically disseminate all conformity checking studies that are not covered by the exceptions in Article 4 of Regulation 1049/2001 in its electronic register, in compliance with the Aarhus Convention and Regulation 1367/2006.

51. Finally, we urge the Ombudsman to remind the Commission that by giving access to conformity checking studies, the Commission would greatly contribute to achieving better implementation and enforcement of EU environmental legislation, which is an important priority of the 7th Environmental Action Programme.

Annexes

1. Judgment of the General Court in case T-111/11 ClientEarth v Commission

2. Judgment of the Court of Justice in case C-612/13 P Commission v ClientEarth

3. ClientEarth initial access to documents request dated 29 September 2015 sent by email

4. Commission letter requesting a fair solution dated 23 November 2015

5. ClientEarth email regarding the request for a fair solution dated 30 November 2015

6. Commission letter suggesting a timeline for handling the request dated 10 December 2015.

7. ClientEarth email dated 17 December 2015

8. ClientEarth email dated 5 January 2016

9. Commission's initial response dated 16 February 2016

10. ClientEarth confirmatory application dated 8 March 2016

11. Commission's confirmatory decision and annex dated 12 May 2016

12. Conformity checking studies disclosed by the Commission with its response of 16 February 2016