Administrative procedure in environment files linked with Article 258 TFEU proceedings: a lawyer’s perspective
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BRIEFING NOTE

Abstract

The administrative procedure related to Article 258 TFEU is guided by soft rules that may not be systematically applied and are subject to changes any time. This paper will illustrate some of the issues raised by this lack of legally binding rules through a series of real examples related to environment files. The role of complainants will be particularly considered.
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LIST OF ABBREVIATIONS

**CHAP**  Complaint Handling - Accueil de Plaignants
**CJEU**  Court of Justice of the European Union
**EIA**   Environmental Impact Assessment
**MEP**   Member of the European Parliament
**NGO**   Non-governmental organisation
Background

Member States and the European Commission hold a shared responsibility for implementing and enforcing European Environmental Law: the former must implement the obligations that stem from the Treaties and from secondary legislation, whereas the latter, as guardian of the Treaties, must ensure the correct application of those obligations.

A strong enforcement policy is considered as one of the most effective ways of tackling environmental problems together with introducing heavy fines and transparency, according to various polls. For a strong enforcement which citizens can rely on, the supportive structure needs to be solid and clear.

The enforcement policy of European Environmental Law is a good example when analysing the procedure involved, given that most complaints, most EU Pilot files registered and most infringement procedures opened by the Commission are related to the environment.

The Commission is obliged by the Treaties to ensure that the environment objectives are achieved, but at the same time, it has no legal power to investigate Member States once it identifies a potential infringement. Currently the Commission depends largely on complaints, MEPs questions and petitions. The protection of the complainant is important at EU level because damage to the environment affects all of us, but the environment has no owner, and no interest group is specially affected. Its interests are only represented by citizens and NGOs, which have no access to European Courts in environmental matters. If the system is not working, the complainant looses faith and stops raising awareness of breaches of environmental law, and the Commission will end up depending exclusively on the information it receives from Member States, who are at the origin of the breaches themselves. The rights of these complainants need to be protected in order to maintain their trust and confidence in the system; otherwise, it will be difficult to identify breaches of the environmental acquis with a European value.

The current procedure for monitoring compliance and enforcement of European Environmental Law at EU level falls short in some essential areas: there are no legally binding rules, the Commission lacks inspection powers and depends on the information given by the Member State and complainants, and there is no transparency and no control as to how decisions are taken.

This briefing will analyse the current situation of administrative procedures in environment files, especially in respect of complainants, in the light of concrete examples.
INTRODUCTION

According to Articles 4.3 TEU and 192.4 TFEU, Member States shall take the appropriate measures to ensure fulfilment of the obligations derived from the Treaties or from secondary legislation. At the same time, the Commission must act as the guardian of the Treaties and oversee the application of Union Law and take the appropriate measures when necessary (Art 17.1 TEU, Art 258 and Art 260 TFEU).

In its role as the guardian of the Treaties, the Commission assesses compliance of Member States’ actions with European Environmental Law through different means. However, it has traditionally relied on complaints from interested parties and questions from the European Parliament, including those from the Petitions Committee.

If potential breaches are identified, the Commission will initiate the procedure foreseen in Article 258 TFEU, which at the same time is divided into an administrative phase and a judicial phase. The former is understood as covering both, the investigative and the infringement procedure.

However, several structural problems hinder a uniform and efficient enforcement of the European environmental legislation.

Currently, only soft rules apply to the administrative procedure in relation to complainants: Commission Communication (2002) 141 on relations with the complainant in respect of infringements of Community Law and the Commission’s Code of Good Administrative Behaviour.

In 2007 the Commission launched the idea of using Pilot projects in 15 Member States to try to resolve problems of application of EU Law at its source and speed up the complaints procedure. This initiative has been in place since April 2008 as one of the core measures to improve the implementation of European Environmental Law. The rules guiding the EU Pilot mechanism can be found in the EU Pilot Evaluation Report (COM (2010) 70).

Whereas the structural problems encountered in the administrative phase of the procedure lead to think that a legally binding mechanism is necessary, the Commission is currently developing a «soft approach»: In 2010, in its 27th Annual Report on monitoring the application of European Union Law it announced a recast of Communication (2002) 141. This indeed, could be a first step to define a legally binding procedure, and therefore, the participation of the Parliament and the European Ombudsman in its elaboration is vital.

This paper will first explain the obligations of both Member States and the Commission when implementing and enforcing European Union Law. Secondly, it will outline the functioning of the complaint system, and thirdly analyse the problems that currently arise by using real examples. Finally, some concluding remarks will consider the need for a uniform, transparent, independent and reliable enforcement policy for environment at EU level. These reflexions could apply to many other areas of EU Law.

1 Further rules may be found in: Communication from the Commission - a Europe of results – applying Community Law, COM (2007) 502 final; Communication from the Commission- Better monitoring of the application of Community law COM (2002) 725 final
LEGAL BASES

Member States and the European Commission hold a shared responsibility when complying with and enforcing European Environmental Law, as recognized by the CJEU in its jurisprudence².

1.1. Member State’s obligations

Article 4.3 TEU establishes that:

Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

This obligation translates into Member States correctly transposing, applying and enforcing EU Law in general and consequently European Environmental Law.

In the exercise of their obligations, Member States are compelled by the principle of sincere cooperation (Articles 4.3 TEU and 13.2 TEU) to assist each other in mutual respect³. They should restrain from doing anything that could hinder the functioning of the EU, and must cooperate with the Commission in its tasks of monitoring compliance with and enforcing European Environmental Law. This implies that the information they give must be clear and precise⁴.

1.2. Commission’s obligations

Article 17.1 TEU establishes that it is for the Commission as guardian of the Treaties to ensure the correct application of the obligations embodied in the Treaties and those deriving from secondary legislation. Moreover, it shall oversee the application of Union law under the control of the Court of Justice of the European Union.

The Commission has first to ensure that Member States are correctly implementing and applying EU Law in general, and if not, take appropriate measures. This means that, if a breach of Member State’s obligations is identified, it will initiate procedures in accordance with Articles 258 TFEU. Established case law states that the Commission enjoys a discretionary power when deciding when to commence an action or to initiate infringement procedures which private persons cannot challenge⁵.

The discretionary power of the Commission though, should be balanced with the obligation stemming from Article 17.1 TEU of ensuring the application of EU Law. The Commission cannot escape this obligation by means of its discretionary power or by bouncing it back to Member States.

² Case C-365/97 Commission v Italy [1999] ECR I-7773, paragraphs 58-60
³ Case 192/84, Commission v Greece [1985] ECR 3967, paragraph 19
⁴ Case C-456/03 Commission v Italy [2005] ECR I-5335, paragraph 27
2. ADMINISTRATIVE PHASE: INVESTIGATION OF COMPLAINTS AND INFRINGEMENT PROCEDURE IN ENVIRONMENTAL CASES

This phase may be triggered either by a Petition or Parliamentary question from the European Parliament, by a Commission’s “own initiative” inquiry and by complaints received from interested parties. Complaints have been traditionally the most used resource to identify potential breaches of Environmental Law.

A first step would entail the administrative phase of Article 258 TFEU procedure, where the Commission registers and analyses the complaints it receives, decides whether to pursue the matter or not and ultimately investigates and decides whether there has been a breach of European Environmental Law. This administrative procedure is based mainly in the information received from the complainant itself and the Member State in particular. The Commission has no legal powers to investigate, and only in very specific cases will it require Member States’ agreement for an « on-the-spot » visit of Commission officials.

This phase is guided by « soft law » instruments, notably Commission Communication (2002) 141 on relations with the complainant in respect of infringements of Community Law, the Commission’s Code of Good Administrative Behaviour and the EU Pilot Evaluation Report. These instruments are not legally binding, and not applied systematically.

The new complaint system, the EU Pilot, in place since April 2008, is intended to find an early solution for potential infringements through facilitating cooperation between the Commission and the Member States. So far it has only been applied to complaints against 17 Member States, but it will ultimately be applied to all.

2.1. Origins

The origins of the complaint system in environment can be found in the Single European Act (SEA) which for the first time contained a Chapter devoted to Environment. The Commission decided to widen the scope of the complaints system, already in place for the attainment of the Common Market, and asked organizations and interested parties to submit their complaints whenever they identified a problem related to the implementation and application of Community Environmental Legislation by Member States. Petitions and Parliamentary questions were also welcome. At this moment, the Commission undertook to treat all complaints related to a problem of non application of Community Environmental Law.

The procedure was simple: all letters referring to a problem were registered and acknowledged. Complainants and the Member State in question were compelled to send all...
information relevant. For Member States, the so-called « pre-Article 258 letters » were sent through their Permanent Representation in Brussels. Agreed visits would be an exception. When sufficient information was collected and analysed, the College of Commissioners would take a decision of either opening the judicial phase of Article 258 TFEU or closing the case without any further action. Only these decisions would legitimise erasing the case from the register.

From the beginning the system was very successful, and the number of complaints rose steadily. Nevertheless, throughout the years, their number increased, and the Commission, despite the good work of its individual officials, lacked the resources and instruments to adapt to the new reality.

With time, not all complaints were registered, and after criticism from the European Parliament and the European Ombudsman\(^1\), the Commission issued a decision containing its Code of Good Administrative Behaviour (the Commission's Code)\(^2\) and later the Communication (2002) 141 on relations with the complainants in respect of infringement cases (the 2002 Communication). This Communication embodies a set of administrative measures which apply to the "infringement proceedings", understood as the phase previous to actions under Article 258 TFEU. These rules have not been applied strictly and are prone to being changed at any moment either by the Commission itself or by a DG.

Repeated concerns by the European Ombudsman\(^3\) led to the creation in October 2009 of a new Central Registry (CHAP) where all complaints and enquiries related to the application of EU Law, including those related to environmental issues, are registered. Since the beginning there has been a great increase in the number of complaints and enquiries\(^4\). The functioning of this Registry is still unclear.

In this sense, the Commission has announced in its 27\(^\text{th}\) Annual Report on monitoring the application of EU Law\(^5\) a recast of this Communication, which should clarify the use of the CHAP Registry.

### 2.2. New treatment of complaints: EU Pilot

In 2007 the Commission launched the idea of using Pilot projects in 15 Member States to try resolving problems of application of EU Law at its source\(^6\). This new measure

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\(^1\) See Decision of the European Ombudsman on complaint 995/98/OV against the European Commission where the EO concluded that the Commission misinformed the complainant of the reasons for the closure of its investigation and closed the case without giving the complainant a genuine opportunity to produce further evidence. The Ombudsman suggested the establishment of clear procedural rules for the Commission to prevent such a situation from occurring again.

\(^2\) Commission Decision amending its Rules of Procedure of 17 October 2000, 2000/633/EC, OJ L267/63. It is worth noting that on 6 September 2001, the Parliament adopted a resolution approving the European Code of Good Administrative Behaviour which European Union institutions and bodies should respect in their relations with the public. The Commission has not adopted this Code. At the same time, the Parliament called on the European Commission to submit a proposal for a regulation containing the Code. To emphasise the binding nature of the rules and principles contained therein and apply uniformly to all EU institutions and bodies, thereby promoting transparency and consistency. So far, no proposal has been put forward.

\(^3\) See for example Decision of the European Ombudsman closing his own-initiative inquiry OI/3/2009/MHZ concerning the European Commission, where a Spanish environmental NGO informed the Ombudsman that the Commission did not appear to register certain correspondence alleging infringements of European Environmental Law. The EO found no maladministration, however, expressed concerns on how the Commission interpreted certain requirements of the 2002 Communication too broadly.

\(^4\) 2500 files were registered in the first 6 months: 65% complaints, 35% enquiries.


substitutes the “pre-258 letter procedure” and aims to find an early solution for potential infringements through facilitating cooperation between the Commission and the Member States.

EU Pilot is an internal data base shared by the Commission and Member States where Desk Officers may put their questions regarding a specific complaint directly. This system avoids passing through the sometimes burdensome step of sending a letter to the Permanent Representation of the Member State and having to wait for a response. It also saves time to the Commission, which needs not to draft a letter, but simply fill in a form, upload the complaint in the system17 or address specific questions.

According to the 25th Annual Report on monitoring the application of EU Law18, the starting date was fixed at 15 April 2008. The basic elements of how the procedure works are to be found in the EU Pilot progress Report of 201019, and, in principle, apply in combination with Communication (2002) 141 on relationship with complainants.

All files as from April 2008 should be entered into EU Pilot. Whereas all Member States are called to join EU Pilot, there is no indication as to which countries join and when20. As far as October 2010, 17 Member States participated in EU Pilot. This means that so far, the two different procedures (traditional procedure and EU pilot) coexist. Complainants may only be aware of the existence of EU Pilot when the Commission decides to open their case and informs them in writing that it will use the new procedure. No explanation as to how the procedure works will be given.

The new system is viewed positively by Member States, because it shortens the pre-258 letter procedure and eliminates the formalities of using Permanent Representations.

The Commission considers that it is functioning well and positively contributing to a better co-operation with Member States, and proposes the extension of the EU Pilot to the 27 Member States21.

2.3. Infringement procedure: Letters of Formal Notice and Reasoned opinions

Once the preliminary investigation has taken place, classifying the file as EU Pilot or following the traditional procedure, a decision is made as to whether initiate infringement proceedings or not.

From this moment on, every decision will be taken at College level.

- The letter of formal notice represents the first formal stage in the pre-litigation procedure, during which the Commission requests a Member State to submit its

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18 25th Report on monitoring the application of Community law COM (2008) 777
19 EU Pilot Progress Report COM (2010) 70
20 In a letter received by ClientEarth in December 2010, the Commission informed that Bulgaria and Estonia joined the project in October 2010; however, if one looks at the 27th Annual Report on monitoring the application of EU Law published in October 2010, there is no indication as to these two countries joining.
observations on an identified problem regarding the application of EU law within a given time limit. According to Rule 8 of the 2002 Communication, this decision should be taken within a year from the date of registration of the complaint. If this limit is exceeded, the complainant should be informed in writing.

- Upon its reply, the Commission is compelled to take a second decision: whether to send a reasoned opinion (RO). Its purpose is to set out the Commission’s position on the infringement and to determine the subject matter of any action, requesting the Member State to comply within a given time limit. The reasoned opinion must give a coherent and detailed statement, based on the letter of formal notice, of the reasons to conclude that the Member State concerned has failed to fulfil one or more of its obligations under the Treaties or secondary legislation.

- A last step would be the referral by the Commission to the Court of Justice according to Article 258 TFEU, which opens the litigation procedure.

Complainants should be informed after every decision, having the possibility to submit comments within a period of four weeks, prior to the definite closure of the case.

3. STRUCTURAL ISSUES TO BE CONSIDERED

From the moment a complaint is sent to the Commission until a final decision is taken, the steps followed are unclear and the few rules in place, insufficient and not systematically applied. The following issues will show a need for more transparency towards complainants and citizens in general, but also towards the European Parliament, so that it can monitor the discretionary power of Desk Officers and the College of Commissioners. This would provide for legal certainty and regaining complainants’ confidence.

3.1. Length

Anyone may file a complaint, and all correspondence likely to be investigated should be registered and acknowledged within 15 days of receipt, and again later, within one month from the date of dispatch of the initial acknowledgement with a reference case number\textsuperscript{22}. The new CHAP Registry seems to have solved the registration issues pointed by the Ombudsman, but not the acknowledgment.

In practice, a preliminary decision on the state of the complaint may be taken already in the same acknowledgement of receipt. If the Desk Officer takes this approach and follows the rule, the complainant would be informed of the Commission’s position within less than two months. Since these rules are not legally binding, information as to the fate of a case may take longer.

Rule 8 states that, when the Commission decides to investigate a case, a decision as to whether to issue a formal notice or close the case should be taken within not more than one year. Thus, if the first acknowledgement of receipt did not contain information about the future of the complaint, a year may pass before the complainant is informed. According to point 4 of the Commission’s Code, the complainant may send a direct enquiry about the

\textsuperscript{22} See Rules 2, 3 and 4 of Communication (2002) 141
complaint at any moment, and expect an answer within 15 days, but the problem remains, because there is no legally binding obligation as to the time limits.

The situation may give rise to unreasonable time limits to make a decision. Moreover, the EU Pilot may be used to double count the limits.

At the level of DG Environment, the great bulk of complaints will be directly registered in the EU Pilot database. The Member State has 10 weeks to reply, and the Commission another 10 weeks to make its assessment and inform the complainant. This time limit is not compulsory.

The length of the procedure may be extended up to 2 years before taking a decision on the issuing of a letter of formal notice: The 20-week period is not legally binding, and Rule 8 of the 2002 Communication allows for the deadline to go up to one year. The practical result of this is that investigations under the old system which had to be resolved within one year may be inserted in the EU Pilot at any moment, and the time limits would start counting again.

In this sense, it would have an added value to know the average length of the procedure under the EU Pilot as opposed to the normal complaint system in order to assess whether this measure is achieving positive results. So far, there are no statistical records at the level of DG Environment. It would also be necessary to clarify this situation, and require that the 2002 Communication time limits apply only once.

**The never ending story**

A Spanish NGO sent a complaint to the Commission on 29th of January 2009, and was registered and acknowledged within the prescribed 15 days.

Three months later, in May 2009, the Commission informs the complainant that the complaint was "being assessed", understood as an analysis as to whether there is a potential breach, and whether the case should be pursued any further.

20 months after registration and after several requests for information, the NGO had no further news. A decision on the admissibility and on a further Letter of Formal Notice should have been taken by January 2010; however, this was not the case, while the time that has lapsed was 8 months.

Finally, in October 2010, DG Environment informed the complainant that they were planning to investigate the facts alleged in the complaint. It took over a year and a half to assess whether the complaint might represent a potential breach. There was no mention to the EU Pilot, despite Spain being an « EU Pilot » member, and despite the Commission having acknowledged that all admitted complaints would be part of the project.

In January 2011, two years after registration and three months after having initiated investigations, new information arrived: the file had been registered as an EU Pilot, and the 20 week period foreseen to take a decision, started counting as from this moment.

The counter starts from zero again, and considering that the 2002 Communication still applies, the Commission may allow itself up to one year to take a decision, thus January 2012, three years after the complaint was sent.
As to decisions taken with respect to the letter of formal notice or the reasoned opinion, the Commission enjoys absolute discretion as to the time limits requested to Member States, and the role of the complainant remains the same: he may enquire about the situation of the case, and receive a response within 15 days, unless the complexity of the matter requires longer. In this case, a reply indicating the expected date for an answer should be sent\textsuperscript{23}. The average duration of the procedure for environment files is 25 months\textsuperscript{24}.

The length of the procedure may also be influenced by limited human resources. DG ENV is one of the few DGs which counts with two Units to deal with infringement procedures. It is vital that the Commission supports the commitment and good work of these Units by reinforcing its capacity with new budgetary resources. The European Parliament has long been requesting the deployment for more human resources for the Commission to address infringements, and in a Resolution of 2008 stated that it would support the Commission through increased budgets appropriations as requested by several DGs\textsuperscript{25}.

### 3.2. Transparency

Article 1 TEU states that \textit{decisions are taken as openly as possible and as closely as possible to the citizen}. Equally, Article 15 TFEU declares that: \textit{In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible}. Finally, Article 9 TEU calls for the Union to respect the principle of equality of its citizens, who shall receive equal attention from the institutions.

According to Rules 7 and 10 of the 2002 Communication, the Commission will inform complainants of every decision taken (FN, RO and referral to Court) and give a period of 4 weeks to send comments before the formal closure of the dossier. This is not systematically done.

As to the EU Pilot, it is worth noting that certain NGOs, especially local ones, have hardly ever heard about this new system. Together with the fact that the document explaining how EU Pilot works, the EU Progress Report, was drafted over 3 years after the project entered into force, it makes it difficult for a complainant to be able to follow a case once it has entered the system.

### The missing file

A NGO sent a complaint against a Member State to the Commission in 2003 concerning the construction of certain infrastructure that could negatively affect certain Special Areas of Conservation.

In 2005, the Commission decided to open an infringement procedure, way over the period established by the 2002 rules.

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\textsuperscript{23} Commission’s Code, Point 4

\textsuperscript{24} For a complete analysis see Prof. Dr. Ludwig Krämer, \textit{Environmental Judgements by the Court of Justice and their duration}, \textit{Journal of European Environmental & Planning Law 2008}, p.263

\textsuperscript{25} European Parliament’s Resolution of 21 February 2008 on the Commission’s 23rd Annual report on monitoring the application of Community law (2005) (2006/2271(INI)) Para. 4
In 2009, six years after the complaint had been registered, the complainant enquired about the state of it. Surprisingly, the NGO was informed that it had been closed in 2007 without any previous notice or any information whatsoever as to the reasoning behind, as required by the rules.

As a solution, the file was put in the EU Pilot registry, in order to assess if the reasons to open the infringement procedure still existed. The NGO learnt at this very moment of the existence of the EU Pilot, which opened again the period of one year.

In its correspondence with the NGO, the Commission informed that the Member State had given enough “reassurance” without providing any further information and again closed the case without further notice to the complainant.

Complainants’ participation in the procedure is not requested, though some officials may turn to NGOs to seek more information and evidence to substantiate the cases.

Besides being able to participate more actively, access to information and documents about the case is vital to improve the effective action of the Commission and the confidence of the complainant. In the light of the principle of institutional transparency and of the Commissions’ commitments, there is a need for openness to citizens. This would legitimise institution’s actions and make citizens closer to institutions.

In practice, lack of transparency and participation hinders the possibilities of the complainant being able to bring more substantial evidences and solid arguments to the Commission. This situation has to be understood together with the lack of investigative powers of the Commission and the burden of proof it carries when referring a case to the CJEU.

3.3. Lack of investigative powers

The Treaty does not confer investigative powers to the Commission in environmental matters. Nor does it confer these powers in other matters, such as competition, and this did not hinder the development of secondary legislation whereby Commission officials are entitled to practise investigative actions.

Nowadays, the Commission relies, on one hand, on the information received by complainants, and on the other hand, on that received by the Member States, who are at the origin of the alleged breach, and which do not always send the information in time, or send it incomplete. This hinders an effective monitoring on the part of the Commission.

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26 See for instance Commission Communication (2007) 502 “A Europe of results”, where transparency and information to the public are identified as areas for improvement.

27 A good example is the use of correlation tables when monitoring transposition. There is no legal obligation to transpose in one piece of legislation. Some Member States have a federal structure, transposition is made regionally and do not always send the tables, but an extensive list of laws and acts. The Desk Officer will have to then review each of these pieces and find out how each article was transposed, where and if in conformity.

In 2006, the European Parliament asked the Commission to systematically request these tables to the Member States, and making them available to the Parliament. In 2007, the Commission announced that it would systematically include in each new proposal for a Directive an obligation for Member States to submit correlation tables on how Directives are being applied in their legal system. In practice, since September 2007 there have been several Directive proposals with this legal obligation, which the Council systematically blocks in the definite text of the Directive. The obligation ends up relegated to the recitals.
In the light of the principle of sincere cooperation, Member States accept the Commission’s inspections, and such inspections have been carried out on a number of occasions. These missions however, are more intended as a political pressure for the Member State in question, since no technical personnel assist the Commission’s officials in their assessment of the situation.

The Parliament encouraged in 2008 the use of fact-finding missions to investigate issues raised by petitioners in order to fill in this gap, but no subsequent action from the part of the Commission has taken place.

At the same time, this problem is translated into a more serious one: when bringing an action before the CJEU, the Commission holds the burden of the proof. Unfortunately, several cases have been lost due to issues of adequate proof. In this sense, and whilst this is no satisfactory solution, NGOs should be as supportive as possible, providing the Commission with as much information as possible in order to substantiate the case.

**What if Iberian Lynxes cannot read road signs?**

The Habitats Directive provides for the creation, under the name Natura 2000, of a European ecological network of sites hosting natural habitat types and species of Community interest so that they can be maintained or, where appropriate, restored to a favourable conservation status.

In December 1997, Spain proposed the Doñana natural park (Andalusia) as a site of Community importance because of the presence there, inter alia, of Iberian lynx. The Commission placed that site on the Community list in July 2006.

In November 1999, a project was adopted for the upgrading of the country byroad which runs alongside the edge of that natural park and cuts through a section of it. Conditions and corrective were required for the development of the project.

The Commission brought an action against Spain because the upgrading of the country road was in an area of particular sensitivity in relation to the survival of the Iberian lynx and, would expose young animals to the risk of being struck by a vehicle and killed.

In the light of the evidence presented by the Commission, the Court considered that it was not sufficiently proved that the road had a real impact on the habitat fragmentation of the Iberian Lynx, neither than the project would place animals in great risk of being struck by cars.

Other areas such as Competition Law do recognize the investigative powers of the Commission. One could argue that it is a matter of competences: Competition is an exclusive competence of the EU, and therefore, inspections are justified. Nonetheless, there are other shared competences areas where inspections at EU level are equally accepted by Member States, and other areas where disparities in enforcement actions at Member State

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28 Last November, the Commission paid a visit to the region of Campania (Italy) where inspectors from DG ENV could witness the lack of compliance with a previous CJEU ruling.


30 C-308/08 Commission v Spain, 20 May 2010 ny;

level, justify the need to develop EU legislation to ensure that the *acquis communautaire* is uniformly applied, including in the area of intellectual property\(^{32}\) or public health protection.

For instance, Commission veterinary experts at DG Health and Consumers (SANCO) are authorised to check border inspections\(^{33}\) and conduct on-the-spot checks to uncover potential health problems resulting from the intra-Community trade in animals and animal products\(^{34}\).

Even Agencies are granted monitoring and inspection powers in certain fields, like EMSA or EASA. The EMSA in Lisbon, for instance, is empowered to provide the Commission with technical assistance in the performance of the inspection tasks to monitor Member State’s compliance with legislation on enhancing ship and port facility security\(^{35}\), as well as monitor the overall functioning of the Community port State control regime, which may including visits\(^{36}\). These competences are based in the attainment of the policy objectives related to transport in Article 100 TFEU.

In a nutshell, investigative powers do not depend on the recognition of this competence in the Treaty, but rather on the capacity to organise the available resources.

### 3.4. Commission’s discretionary power and accountability

#### 3.4.1. Discretion of Desk Officers

**Reasoning**

In the absence of a letter of formal notice, the correspondent department of the Commission may close a case without the need to discuss it at College level where initial examination has made it clear that the complaint is either groundless or irrelevant; or when there is insufficient evidence to substantiate the complaint or when the complainant shows no further interest\(^{37}\). In practice, the reasons for which a Desk Officer argues to close the case after an initial examination are sometimes different to the ones embodied in this list. One may argue that this rule should be seen under the light of the discretionary power, several times acknowledged by the CJEU\(^{38}\); however, the lack of control at this level hinders the legal certainty that complainants should expect from Commission officials.

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\(^{32}\) See for instance Directive 2004/48 on the enforcement of intellectual property rights based on Article 114 TFEU.

\(^{33}\) Commission Decision 2001/881/EC of 7 December 2001 drawing up a list of border inspection posts agreed for veterinary checks on animals and animal products from third countries and updating the detailed rules concerning the checks to be carried out by the experts of the Commission, OJ L 326, 11.12.2001, p. 44–62.


\(^{35}\) Article 9.4, Regulation no 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security


\(^{38}\) In Competition Law, the General Court acknowledged the principle of sound administration in relation to complainants. This principle implies that the Commission should have a diligent and impartial examination of complaints as acknowledged by the Charter of Fundamental Rights, the only requirement being the existence of procedural rights expressly recognised by the Treaties (T-54/99 max.mobil v Commission [2002] ECR II- 313, Para. 48 and ss.). This principle was revoked by the Court of Justice in appeal, arguing that complainants have no right to challenge the Commission’s discretion to bring proceedings against a Member State (Case C-141/02 P Commission v max.mobil [2005] ECR 1-1283, Para 72).
Moreover, previous to the final closure, the complainant has to be notified and given a period of 4 weeks to submit comments, which should then be considered. This may not always be the case, leaving the complainant without any recourse to reply to the Member State’s arguments and be able to provide with more specific evidence that could raise awareness of the Commission.

For the assessment of registered complaints (CHAP files) and EU Pilot complaints, where Desk Officers have the power to decide what to do without the supervision at Director or College level, the range of reasons may vary:

- **CHAP files**: Whereas the Commission undertakes that all complaints and infringement will be dealt with, since 2002, it follows a strategic approach when pursuing infringement cases, focusing its attention on what is considered « important infringements » according to priority criteria39. In practice, and as a general rule, Desk officers will also use this filter, and close cases outside the scope of criteria: “dealing with” only implies being registered and closed.

In environment, cases falling outside the scope of these criteria, those already being dealt at national courts, cases of individual bad application and even cases referring to legislation that requires enforcement mechanisms at national level will be closed without any further consideration.

Even in cases where a breach is identified, the complainant will most likely be referred to national courts, which is by no means a guarantee that the case is going to be dealt with.

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**The Hungarian Salami Slicing**

A Hungarian environmental NGO sent a complaint to the Commission related to the construction of the second Phase of a residential complex. Both phases would cumulatively exceed the limit value for an Environmental Impact Assessment (EIA) screening.

Both the High Court of Budapest and the Supreme Court of Hungary ruled that because the two phases are on two different pieces of land and have two different land registry identification numbers, they constitute two projects, and therefore, there was no need for an EIA.

Upon a complaint sent by the NGO, the Commission considered it as a general complaint against the EIA regulatory framework in Hungary. There was already an opened infringement procedure for bad transposition of the EIA Directive, and this case could be used as an example.

Despite acknowledging a potential breach of environmental law, in its letter, the Commission argued that it abstains from the inspection of individual cases, because they have no real added values and unnecessarily waste the limited resources of the Commission.

As a recourse, it suggested that the complainant should bring actions before national courts by using the direct effect doctrine.

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This policy option raises many concerns: the legal standing for the NGO at national level is not uniform in all Member States; it is uncertain if the national court will grant interim measures or ultimately recognise the direct effect; and even more, there is the risk that the court in question would follow the Hungarian Supreme Court jurisprudence.

In the best case scenario, by the time the national court ruling were published, it would be too late to avoid any possible damages to the environment.

- EU Pilot files: If we look at the figures for environment cases, out of 462 files submitted to Member States, almost 300 of them were closed at this stage. Only 31 files required further actions, i.e. issuing of a letter of formal notice. In the general figures provided by the Commission, out of the 723 files considered until February 2010, only 40 gave rise to an infringement procedure. It could be understood that simply by replying to the Commission’s requests, Member States evade the risk of an infringement procedure. There is no public information as to the type of reasoning applied by the Commission, and no data base on which to base an eventual analysis. One may think that the Commission is taking a soft approach towards Member States.

**The role of national Courts**

When a case is considered to fall outside the scope of the criteria or to be more apt for being dealt with at national level, the complainant will be advised to address a national judge, who would then submit a preliminary ruling request before the CJEU.

National judges are indeed a basic pillar for the correct application of European environmental law. Nevertheless, there are still many disparities that show a difficulty in achieving uniform access to justice for complainants as well as a uniform interpretation and application of environmental law: there are significant differences as to their knowledge of EU Law in general, their knowledge of other languages and access to EU legislation and jurisprudence data bases.

The preliminary ruling procedure remains long and it is only compulsory for last instance judicial bodies. The economic crisis with its budgetary consequences is also putting a strain on national systems of justice.

**Access to justice for complainants in environmental matters**

Furthermore, disparities exist for access to justice for complainants at Member State level and at EU level.

At EU level, Article 263 TFEU establishes that only natural or legal persons with direct and individual concerns may bring proceedings against an act of the Institutions addressed to him. No NGO or individual has succeeded in bringing an action before the European Courts to contest a decision of one of the European institutions in an environmental matter.

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The proposal for a Directive on access to justice in environmental matters establishes a set of minimum requirements on access to administrative and judicial procedures in environmental matters, and transposes the third pillar of the Arhus Convention into EU law and the law of the Member States⁴¹, but it is blocked at Council level. Whereas it is necessary that the Council advances the dossier, the efforts of the Commission to focus in supporting access to justice at national level have been successful. For instance, in *Commission v Ireland*⁴², the CJEU ruled against the Member State for failure to adopt the necessary regulations to transpose Article 3.7 of Directive 2003/35 implementing the Aarhus Convention’s requirements concerning access to justice⁴³.

At national level, there are many disparities.

In Germany, for instance, citizens and NGOs have virtually no access to the courts in relation to environmental matters. Claimants are required, among other things, to demonstrate that their own rights have been impaired by a decision before this can be challenged, which is a very difficult task for an NGO. As a result, decisions in environmental matters remain unchallengeable by the public and the authorities taking these decisions are immune to the prospect of judicial review.

In the UK, the financial risk of losing a court challenge and having to pay the opposition’s legal expenses can amount to £100,000.

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**Am I entitled to protect the environment?⁴⁴**

A German environmental NGO challenged in a Nordrhein-Westfalen Court the partial permit that had been granted for a coal-fired project. They claimed that the project infringed German anti-pollution laws and the requirements of the water and nature protection laws, and that authorising the project would allegedly have an adverse effect on the environment as such. In that sense, the NGO was seeking to act on behalf of the environment itself.

Under German law, a party wishing to bring an action for judicial review must rely on the infringement of a substantive individual right. And for this reason, the local court considered that the NGO was not entitled to bring the action, and referred the question to the CJEU to ascertain whether the German requirements on *locus standi* were compatible with EU law in conjunction with the Aarhus Convention.

In her opinion delivered on 16th December 2010, AG Sharpston stated that by requiring that environmental NGOs complain only about the impairment of rights enjoyed by

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⁴¹ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998. It grants the public rights and imposes obligations on Parties and public authorities regarding access to information and public participation and access to justice.

⁴² Case C-427/07, Commission v Republic of Ireland [2009] I-06277, Para. 67

⁴³ Also in Case 263/08, the Court clarifies the conditions for public participation in environmental decision-making procures interpreting the articles of the EIA Directive related to access to justice as that members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337/EC, must be able to have access to a review procedure to challenge a decision taken on a request for development consent, regardless of the role they might have played in the examination of that request. Case 263/08, ECR 2009 I-09967, para. 39 and 48. Other pending cases are C-128/09 and C-240/09.

⁴⁴ Case C-115/09, Reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany) lodged on 27 March 2009 — Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen e.V. v Bezirksregierung Arnsberg , OJ 2009/C 141/46
individuals they represent, German procedural rules are against the Aarhus principles which are intended to confer a “broader standing than that” on environmental groups.

Equally, the part of the EIA Directive that reflects Aarhus means that the national system must recognise that NGOs have ‘a right’ capable of being impaired, even if that right is fictitious in a national legal system that would otherwise only recognise the impairment of substantive individual rights.

These issues are in direct connection with the selection of infringement cases and the treatment of complaints. If a complaint has no value added at EU level and the complainant NGO has no access to justice at national level, what does the complainant do? Whenever balancing the importance of a complaint, the Commission should guarantee that these elements are looked at.

All in all, one could argue that each case is different, and that creating a *numerus clausus* screening mechanism would hinder the discretionary power that is necessary to be able to treat each case as it deserves.

However, citizens need transparency and legal certainty to maintain confidence and be able to rely in that their complaints will be treated diligently. It would be helpful for the complainant to have access to a data base, where they may find similar cases and thus to a certain extent foresee the outcome of a specific complaint. This could enhance transparency, legal certainty and serve as a monitoring tool for the Commission’s discretion. It would also help reduce the number of complaints received.

### 3.4.2. Infringement procedures: strategic approach

The issuing of a letter of formal notice, a reasoned opinion and judicial actions will have to be discussed at College level.

**Intensive treatment of important infringements**

As mentioned above, in 2002, the Commission took the decision to focus more intensively in certain cases: Infringements that undermine the foundation of the rule of law, the smooth functioning of the legal system, or consisting in failure to transpose or incorrect transposition of directives.

In environmental matters, the Commission has made full use of this power for a long time\(^{45}\). It follows more intensively breaches of European Environmental Law originating in cases of non communication of transposition measures and non conformity, rather than individual non-application cases, which could be better dealt with at national level. In practice, complaints that do not fall within the scope of the selection criteria have higher chances to be closed.

\(^{45}\) This policy line was adopted as far as 1996 in the Communication from the Commission on implementing European Community Law COM (1996) 500 final, pa. 25. The 18\(^{th}\) Annual Report on monitoring the application of EC Law indicated that the Commission focuses on non communication, non conformity cases. Incorrect application will be dealt with whenever questions of principle or general interest or administrative practices that contravene the directives are at stake. 18\(^{th}\) Annual Report on monitoring the application of Community Law (2000), COM (2000) 309 final, p.49-50
Selective enforcement is recognised as a healthy action in a number of law enforcement environments, as long as all complaints are properly investigated. It contributes to an efficient use of the available resources, to target breaches that can be proven and won before the CJEU and to take into consideration the principles of subsidiarity and proportionality. However, it is important to remember that the challenges of environmental protection present certain particularities. The use of the discretionary power is not in dispute, however it may create a situation where neither the Commission nor the national authorities will look at a clear case of breach of European Environmental Law, and the complainant may be trapped in the system. The practical effects would consist in that environmental protection sought will arrive too late or, in worst case scenarios, never. The system needs to be adapted to this reality.

Furthermore, there is uncertainty as to what can be expected from the system of complaints at EU level, and NGOs may lose interest and confidence. Particularly for NGOs, which often dispose limited means, it is very burdensome and time consuming to prepare a case to send to the Commission. As already said, complaints are currently the greatest source of information related to breaches of the environmental acquis, while the Commission lacks the legal powers to investigate. So, if NGOs stop sending complaints because the system is unable to give proper solutions, who is going to raise awareness?

Yes, Sir, you are right, but we are unable to help

In 2003 several NGOs sent a complaint to the Commission against Italy for a potential breach of the Habitats Directive in the construction of an experimental project.

NGOs had been working for years on this case, compiling as much information as possible to be able to assist the Commission.

In 2007, the Commission decided to close the case on grounds of discretionary power and opportunity reasons.

Before the closure, complainants were conceded 4 weeks to send further comments. In order to be able to do it, NGOs requested certain documents from the Commission that only arrived once the case was formally closed.

In addition, the Commission never contested the illegality of the Member State’s actions. On the contrary, they acknowledged that construction had started without the necessary mitigation and compensation measures in place and this caused damage to the ecological value of the area in particular. What is more, in its reply letter, the Commission affirms without a doubt that the construction of the experimental projects infringed the Habitats Directive.

Transparency and justification of Commission’s decisions

Article 17.3 TEU states that the Commission must be completely independent when carrying out its responsibilities and refrain from actions incompatible with its obligations. It is established case law\(^\text{46}\) that the Commission holds a discretionary power to decide what actions to take, when and how regarding complaints or infringement cases. However, decision making is sometimes rendered difficult due to political pressure for prioritising

\(^{46}\) See supra note 5
national interests to Community interest, as it is illustrated in several cases dealt with by the European Ombudsman.

The College of Commissioners meets several times a year to discuss infringement cases. These sessions are behind closed doors. The information published regarding Commission decisions by the College includes references to cases that have been closed or to the actions taken from the letter of formal notice onwards but no information on the reasons behind the decisions.

The Commission’s discretionary power regarding the opening or closure of infringement cases has to be balanced with the need for transparency regarding the reasons in the decision making together with the necessary diligence in the treatment of complaints and respect to good governance principles.

Those principles should be applied in all stages of the procedure. Notwithstanding the fact that when infringement decisions are taken at College level it provides for a certain and positive control, decisions at this level should be properly motivated and communicated in full transparency.

In addition, decisions taken on cases during the EU Pilot phase as well as those regarding the closure of files previous to the letter of formal notice\(^\text{47}\), may be taken by the services with the subsequent risks of being influenced by non-law enforcement considerations. Transparency in the reasons behind decisions or systems to enable requests for higher level internal review of decisions regarding complaints would avoid these risks.

**Decision of the European Ombudsman on complaint 1288/99/OV against the European Commission**

In 1995, 24 inhabitants of the municipality of Parga, in Greece, complaint to the Commission against Greece for potential breach of the Environmental Impact Assessment Directive, in relation to a project for a sewerage system and biological treatment plant. This project was founded by Cohesion Funds.

The Commission investigated the case, and in 1997 and 1998 it stated that the construction of the plant had started without the definite approval of the EIA, and subsequently that the Directive had been breach and infringement proceedings would follow together with the suspension of the funds.

In May 1998, the head of the Legal Affairs Unit, a Greek national, added a note to the Commission’s files stating that due to new elements, it was established that the Directive had not been breached and therefore, the Commission lifted the suspension on the Funds. Meanwhile, the complainant forwarded further information to the Commission, which replied in December 1998 confirming that it was still considering the case. There was no mention as to the lifting of the suspension or the closure of the case.

The Ombudsman’s inquiry revealed that in the period preceding the closure of the case, the official in question took a political position back in his home country and that the information on his appointment was made public already on 30 November 1998, two months before taking leave on personal grounds.

\(^{47}\) See supra note 37
In April 1999, the Commission informed the complainant of its decision to close the file because the construction permit had been granted in 1986, before the Directive came into force.

In October 1999, one of the complainants addressed the European Ombudsman, who found the following in his investigation:

*It appears from the above considerations that the Commission was wrong to consider that Directive 85/337/EEC was not applicable to the project in question, because the application for consent which led to the authorisation of the project...was formally lodged on 28 February 1995, i.e. after the entry into force of Directive 85/337/EEC*.48

The Ombudsman considers that, from the point of view of the complainant, who did not know that the official in question was on annual and later on unpaid leave on personal grounds, and who had moreover recently received a letter signed by the official on 9 December 1998 stating that the case was still being investigated, there appear to be sufficient reasons to mistrust the impartial and proper handling of the case by the Commission and to question that the official in question did not conduct himself solely with the interests of the Communities in mind. In fact it would be difficult for any citizen in any Member State not to doubt the impartiality of the Commission’s actions as the Guardian of the treaty if a Commission official who is deeply involved in dealing with an infringement case also holds a post in a political party in the very Member State that the case concerns and acts publicly in that capacity at a time when the case is being dealt with. In the eyes of European citizens, this kind of incident may put at risk the reputation of the Commission as Guardian of the Treaty, responsible for promoting the rule of Community law.49

In his concluding remarks, the EO states, among others, that:

*The Ombudsman therefore finds that the Commission, as Guardian of the Treaty, has failed to secure that this case was dealt with impartially and properly. This constitutes an instance of maladministration.*

However, the Ombudsman’s decision was brought before the European Court of Justice in relation to its conclusions and the damages caused to a Commission’s official.

- Under Case T-412/05 M. v European Ombudsman, the Court did not judge about whether there was maladministration by the Commission in the treatment of the case but condemned the Ombudsman50 for having disclosed the name of the Commission official linking it to the conclusions of maladministration in the treatment of the complaint. The Ombudsman had to pay EUR 10,000 damages to the official.

- Under Order T-42/0451 and Case C-167/06 P52, Ermioni Komninou and Others v Commission the Court ruled that the elements of the case did not allow to establish a breach of the rules of impartiality in the treatment of complaint 1995/4923 due to the participation of the official in the decision to close the case. In particular, the Court

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48 Decision of the European Ombudsman on complaint 1288/99/OV against the European Commission, at paragraph 2.16.

49 See supra note 48 at para 3.7

50 Ermioni Komninou and Others v Commission of the European Communities, Case C-167/06 P, [2007] ECR I-00141, paragraph 44

51 Ermioni Komninou and Others v Commission of the European Communities, supra note 50, paragraphs 37-38

52 Ermioni Komninou and Others v Commission of the European Communities, supra note 50, paragraph 58
ruled in paragraph 58 that the final decision to close the infringement procedure against Greece was formally taken when the official in question was on holidays, after re-examination of the case by other officials and after a visit on-the-spot and a public debate in March 1999.

This particular case is used exclusively as a means of illustrating what type of problems may arise in the absence of systems that ensure transparency and control of decisions and good governance regarding complaints and infringement cases. It has no intention to judge or interpret the actions of the Commission in this case as an institution or any official personally involved.

Moreover, the Commission's discretionary power to decide about complaints and infringement cases does not exclude a requirement to explain the reasons why decisions are taken, following the principles of transparency and good governance.

Belatedly, the need for resources has led to the use of national experts working in DG Environment on temporary secondment by their governments. Member States' experts on secondment, who will ultimately return to their countries to continue their careers as public servants, may be dealing with complaints affecting their own countries. This system does not provide with adequate mechanisms to control that decisions are not taken under pressure to consider national interests but rather motivated by Community environmental objectives.

4. CONCLUDING REMARKS

Once and for all, the EU needs a uniform, transparent, independent and reliable enforcement policy for environment. The system as it currently states falls short of these characteristics and it should be urgently improved for the following reasons:

- Fulfilment of the Treaty obligations, especially Article 17.1 TEU: the Commission should fully commit to its role of guardian of the Treaties, especially in a field with so many disparities among Member States in terms of implementation and enforcement of environmental legislation at national level.

- Attainment of the Treaty objectives for environment protection embodied in Article 191 TFEU. Environment protection represents incomparable challenges that cannot be addressed using the same mechanisms as in other areas of law. The environment has no owner and full participation of NGOs should be guaranteed.

- The avoidance of distortion of the internal market: one negative effect of the lack of uniform and harmonized implementing measures and enforcement is the distortion of the internal market. Disparities in environmental law implementation and enforcement cause competitive disadvantages to those companies making business in Member State with stricter enforcement rules. Levelling the playing field will avoid distortions.

- Credibility of the system for citizens: their participation in general and the commitment of NGOs in particular, has proven essential to discover implementation issues. Given the lack of investigatory powers, the Commission cannot afford losing one of the major supports it has.
Both, the European Parliament and the European Ombudsman also have a role to play:

- The Parliament has been requesting improvements of the system on the bases of the Annual Reports issued by the Commission\textsuperscript{53}. More particularly, in its Resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term, it calls for the Commission to provide full information and documentation of its meetings with national experts on the preparation and implementation of EU Law, and to prepare a summary about all infringement procedures\textsuperscript{54}.

- The Ombudsman’s decisions have been criticized for not having legal teeth; however, his role has proven decisive: he has played an important role in the drafting of Communication (2002) 141 as well as in the creation of the CHAP Registry\textsuperscript{55}. He has also raised awareness in cases where the Commission has taken decisions on political grounds. His influence should not be underestimated when it comes to monitoring the correct functioning of the administrative procedures linked with Article 258 TFEU and the effects of the EU Pilot procedure in relation to complainants.

In order to achieve a uniform and transparent administrative procedure, legally binding rules are needed in order to give legal certainty for complainants and citizens in general. At this moment, efforts to assess this need should be coupled with others, like the recast of Communication (2002) 141. This is a unique opportunity for the Commission to improve the current rules, provide the EU Pilot with a complete procedure that takes into consideration the rights of complainants, and set the scenario for further legally binding rules. The Parliament and the Ombudsman should participate actively in the elaboration of this document by two means: using the consultation and control powers in order to monitor the Commission’s next steps and preparing specific and constructive proposals for the improvement the system.

\textsuperscript{53} See for instance European Parliament Resolution of 16 May 2006 on the Commission’s 21st and 22nd Annual reports on monitoring the application of Community law (2003 and 2004) (2005/2150(INI)) based on the “Frassoni Report” issued by the Committee on Legal Affairs.

\textsuperscript{54} European Parliament resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term, P7_TA(2010)0009, P 3.(b) and (e).

\textsuperscript{55} See Decision of the European Ombudsman closing his own-initiative inquiry OI/3/2009/MHZ concerning the European Commission
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