

STEPPING UP ENFORCEMENT

Recommendations for a Commission
'Better Compliance' agenda to ensure the
application of EU environmental law



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SUMMARY

Compliance with EU environmental law is crucial to achieve politically agreed environmental and climate policy targets and should be a non-negotiable baseline. Currently, the implementation of cornerstone environmental legislation by Member States is poor, even decades after it entered into force, and enforcement action by the Commission is notoriously slow. It often takes years to process a well-founded complaint, sometimes only to then close it without providing reasons, or sometimes lacking entirely. During this time, the environment continues to deteriorate as does the trust in the institutions and the rule of law.

Member States and the European Parliament have repeatedly called for better enforcement and the Commission President herself made tighter enforcement part of her political guidelines and mission letters. At a time of deep ecological crisis, half-way through von der Leyen's time to deliver on her promise of swifter enforcement and with the Green Deal in full swing, it is time for a true "Better Compliance" agenda. **We provide eight actionable and tangible recommendations for how to get there.**

- 1 Real political will:** Written guidelines to reflect the "zero tolerance" promise, ensuring all important cases lead to action and depoliticising the process, ensuring that political considerations stay out of infringement procedures.
- 2 More staff:** A tenfold capacity increase in DG Environment and other relevant services as well as within the Legal Service to translate political will into action with dedicated staff for each environmental law, national experts for support and a centralisation of the process.
- 3 Full transparency:** A comprehensive, accessible and transparent public database for all infringement documents and more detailed information on the infringement decisions in press releases.
- 4 Regularity:** Monthly infringement packages, at a set date that is publicly communicated in advance. database on follow-up steps.
- 5 Swifter processes:** Complaint-handling within maximum one year with transparent and time-bound deadlines for Member States, faster overall infringement handling by the Commission and an end to the EU Pilot process.
- 6 More interim measures:** Regular use of interim measures for cases in front of the Court of Justice of the EU to avoid irreversible environmental harm and an exploration of other avenues to halt serious harm at earlier stages of the infringement process.
- 7 Systematic follow-up:** A transparent, systemic monitoring of implementation steps by Member States following a court ruling, enabled through additional resources for follow-up activities, supported by a public database on follow-up steps.
- 8 New EU environmental inspection legislation:** Binding minimum criteria for Member State inspection systems to ensure compliance with EU environmental law through site-visits and remote sensing land use surveillance tools.

Some of these steps require legislative action, others financial shifts or structural reorganisation, but all stay within the treaties of the EU. All steps together should take place through a holistic strategy that demonstrates and sustains a shift in approach and political priority. This "Better Compliance Agenda" will also help to ensure the legacy of the European Green Deal, because any (new) piece of legislation is only as good as its implementation and enforcement. **The time is now!**

A. INTRODUCTION

In her political guidelines, Commission President Ursula von der Leyen promised to uphold the rule of law, stating: *“I intend to focus on tighter enforcement.”*¹ In the initial mission letters, she then mandated Executive Vice-President Frans Timmermans with implementing this promise for the European Green Deal: *“Given that any legislation is only as good as its implementation, I want you to focus on the application and enforcement of EU law within your field. You should [...] be ready to take swift action if EU law is breached.”*²

While the implementation of EU law is first of all a national responsibility and national courts also play a key role in this process, it is ultimately the responsibility of the Commission as the guardian of the treaties to ensure that Member States comply and that adequate mechanisms are in place where they do not.³

The call for swift enforcement action is also supported by the other EU institutions. Member States have stressed the environmental law enforcement gap several times in their Council conclusions.⁴ Similarly, the European Parliament regularly calls on the Commission to foster enforcement action in the environmental field.⁵ Now that the mid-term of this Commission has passed and the Green Deal is in full swing, it is time to assess whether the Commission has delivered on those promises. In short: this report will show that, while there have been slight improvements with the Commission's infringement handling, the overall situation is still insufficient. There has not been any paradigm shift, nor have there been structural changes of the 'enforcement governance'.

There are still far too many cases where Member States do not comply with the EU's environmental acquis, even decades after having agreed on the rules. The Commission's services and in particular the colleagues of DG Environment are trying to do their best, but with the given structures and capacities the efforts often seem to be a mere drop in the ocean.⁶ The following report will shed light on the current enforcement situation (**chapter B**) and make eight concrete policy recommendations for a true “Better Compliance” agenda (**chapter C**).⁷

1 See von der Leyen's political guidelines, p. 15: https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf.

2 Mission letter to Frans Timmermans, p.3: https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-frans-timmermans-2019_en.pdf.

3 While NGOs are also actively working to push for better implementation of the EU's environmental acquis at national level, this paper focuses on EU-level improvements of the Commission's enforcement mechanism.

4 For instance, in the October 2020 Environment Council conclusions on the EU's Biodiversity Strategy for 2030, the Council “Emphasises that full implementation and enforcement of the EU environmental legislation are at the heart of the Strategy” and “Calls on the Commission and the Member States to step up efforts in this area”: <https://www.consilium.europa.eu/en/press/press-releases/2020/10/23/council-adopts-conclusions-on-the-eu-biodiversity-strategy-for-2030/>; similarly, in the December 2015 Environment Council Conclusions on the Mid-Term Review (MTR) of the EU Biodiversity Strategy 2020, Member States “call on the Commission to improve procedures and to take urgent actions to prevent, detect and sanction breaches of the Birds and Habitats Directives”: <https://www.consilium.europa.eu/en/meetings/env/2015/12/16/>.

5 See i.a. the call of the European Parliament for full implementation of the EU's Birds and Habitats Directive in the report on the EU's Biodiversity Strategy to 2030 from May 2021: https://www.europarl.europa.eu/doceo/document/A-9-2021-0179_EN.html.

6 A similar assessment is to be found with Prof. Massimo Condinanzi, Associate Prof. Jacopo Alberti and Research Fellow Camilla Burelli, who are concluding, in January 2022: “We believe that a credible reform to enhance the infringement procedure in the short term is possible”: <https://www.politico.eu/article/reform-watchdog-eu-law-european-commission>. Also in January 2022, Prof. Daniel Kelemen and Assistant Prof. Tommaso Pavone are urging for bigger reforms, stressing: “To ensure that the politicisation of the Commission does not undermine its legal role as the guardian of the treaties, it may be wise to consider reforms that would insulate its enforcement function from its policymaking role”: <https://www.politico.eu/article/curious-case-eu-disappearing-infringement>.

7 Given the background of the authors, the examples mostly stem from the field of nature protection and often from Germany. However, there are also many similar problems in other areas of environmental legislation and the recommendations are applicable to all fields of environmental law.

Such an agenda is needed so that the Commission can deliver on its zero-tolerance promise in its second half-term, in order to achieve the objectives anchored in the legislation. The achievement of these objectives is directly compromised through ongoing non-compliance with legal obligations. At the time of a deep ecological and climate crisis, existing legal obligations must be a non-negotiable baseline and should also be enforced as such. Fitness checks of cornerstone EU environmental legislation, such as the Birds and the Habitats Directives (BHD) or the Water Framework Directive (WFD), have concluded that the legislation is fit for purpose and stressed the need for proper implementation.⁸

In addition to the environmental problems, (tolerating) non-compliance is also a broader rule of law problem and risks threatening respect for EU law and the Commission's credibility more broadly. Finally, an EU that legislates but fails to enforce is an EU that lets down those citizens that believe in it. At a time when the EU, democracy and the rule of law are all called into question, maintaining citizens' faith in their institutions is paramount.

B. A QUICK PICTURE OF THE CURRENT ENFORCEMENT SITUATION

Before providing policy recommendations to improve the Commission's enforcement efforts, this chapter outlines the current compliance and enforcement situation on the ground. Here, reports from national NGOs and the media show that several severe cases are ongoing for a long time without seeing concrete enforcement action. Further, there are many detailed and actionable complaints⁹ to the Commission indicating breaches of EU law by civil society, which are either pending for a long time, not taken up by the Commission at all, or are not advancing within a reasonable timespan.

To name some examples:



Often, human activities harmful to e.g. biodiversity are ongoing despite them implicitly being in breach of EU law. One example is unsustainable fishing (similar issues are to be found with agriculture or forestry). In a press release from October 2020, the French NGO France Nature Environnement (FNE) mentions 90,000 dead dolphins over 30 years for the north-eastern Atlantic.¹⁰ Marks from fishing nets suggest that fishing activities are responsible for wounding and killing the protected species which would mean a breach of the Habitats Directive. By now, there are no obvious reactions by Member States, and the Commission has for long-time also not been very active in putting an end to these activities. NGOs are hence focusing ever more on legal actions.¹¹

8 WFD fitness check outcomes (2020): https://ec.europa.eu/info/publications/fitness-check-water-framework-directive-and-floods-directive_en; BHD fitness check outcomes (2016): https://ec.europa.eu/environment/nature/legislation/fitness_check/index_en.htm.

9 Being aware of the work needed to obtain evidence and the burden of proof, NGOs often go to great lengths to provide well-developed, actionable complaints that are backed up by solid evidence. Of course, there are also examples where complaints are too vague to trigger imminent action from the Commission.

10 See the press release from FNE (in French): <https://fne.asso.fr/communique-presse/honteux-la-france-poursuit-le-massacre-des-dauphins-au-mepris-du-droit-et-de-la>.

11 See the summary of FNE's report e.g. in this article (in French): https://www.lemonde.fr/planete/article/2021/12/06/deux-ong-annoncent-attaquer-l-etat-devant-le-conseil-d-etat-pour-mieux-proteger-les-dauphins_6104860_3244.html; note also that in July 2020 an infringement procedure was started against France, Spain and Sweden, aiming at avoiding unsustainable by-catches of dolphin and porpoise species, see: https://ec.europa.eu/commission/presscorner/detail/en/INF_20_1212.

On a more technical level relating to the implementation of procedural EU environmental law, the Commission has ignored several stakeholder complaints for a long time. One example are the rules for Environmental Impact Assessments (EIAs) which Germany watered down for certain building procedures, ignoring the corresponding Directive. In 2017, together with other institutions, NABU filed a Commission complaint but in 2021, the Commission announced it was closing the case, ignoring the fact that unsatisfying building rules are still in place, and that there are assessments showing that based on those rules, several building permits were granted without an EIA.¹²

There are many other examples of insufficient enforcement action. In 2017, the German NGOs BUND and NABU filed a complaint to the Commission on different provisions of the Water Framework Directive (WFD).¹³ The complaint inter alia showed that the measures foreseen in the action programmes of several German regions were not sufficient to achieve the overall objective of a good water status. While the Commission opened two pilot procedures on the WFD in late 2020 (though not specifically targeted at Germany), by early 2022 there have still not been concrete steps in response to the complaint. Another well founded complaint from NABU on the failure of Germany to maintain or achieve an adequate population level of the Grey Partridge, as foreseen under Art. 2 of the Birds Directive (BD), that was submitted in October 2020¹⁴ has so far not seen any concrete steps either. Meanwhile, the long-term population trend of the species (1980-2016) is minus 91% in Germany. And even in cases where the Commission has started infringement procedures, e.g. on logging in Natura 2000 sites in Romania, there is often a big delay between the complaint and Commission action during which the harmful activity continues and habitats are being irreversibly destroyed.¹⁵

Turning to the overall compliance situation, the state of implementation of EU environmental law is rather grim. Starting with the EU's Birds and Habitats Directives (from 1979 and 1992), the Nitrate Directive (from 1991) or the Water Framework Directive (from 2000), the key provisions of those acts are not yet reached, even decades after entering into force.

12 See the press release from the UVP Gesellschaft (in German) with link to the complaint: <https://www.uvp.de/de/alle-news-uvp-recht/964-eu-beschwerde-baugb>.

13 BUND/NABU complaint on the WFD (in German): <https://www.nabu.de/imperia/md/content/nabude/lebendige-fluesse/170810-nabu-eu-beschwerde-wrrl.pdf>.

14 NABU complaint on the Grey Partridge (in English): https://www.nabu.de/imperia/md/content/nabude/vogelschutz/agrarvoegel/301002_beschwerde_ec_rebhuhn_eng.pdf.

15 In November 2018, the campaign Save Paradise Forests, supported i.a. by the NGO Euronatur, brought to the Commission the issue of logging activities in Romanian Natura 2000 sites with a banner protest (followed up by a proper complaint), see: <https://twitter.com/EuroNaturORG/status/1060456895905820672>. The Commission reacted with a Letter of Formal Notice in 2019 and the Reasoned Opinion in February 2020, see: https://ec.europa.eu/commission/presscorner/detail/EN/INF_20_202. So, even with relative Commission action, it is unclear which progress was made since February 2020. In total, by now a timespan of at least 3.5 years passed by since the first alarm, during which Romania is still continuing the criticised logging activities. Meanwhile, in February 2022, several NGOs assessed data which is showing the ongoing habitat degradation, see this report by Euronatur, Agent Green, ClientEarth etc.: https://www.saveparadiseforests.eu/wp-content/uploads/2022/02/Investigation-into-habitat-degradation-in-Natura-2000-sites_Feb-2022.pdf.





Under the Habitats Directive (HD), Member States are obliged to take conservation measures within Natura 2000 areas to not only avoid the deterioration of the habitats, but also to maintain or restore natural habitats and species at favourable conservation status (Art. 6.1, 6.2 and 2.2 HD). The reality, however, is a complete lack of (adequate) conservation measures so that the overall conservation status of habitats remains unfavourable and is often even deteriorating, with 81% of habitats in 'poor' or 'bad' conservation status.¹⁶ While over the past years, several steps to enforce the Birds and Habitats Directives have been taken e.g. on the completion of the Natura 2000 network (and further clarification also could be achieved through national NGO action leading to preliminary rulings), these steps are still far from enough to ensure the full implementation of the legislation.



Similarly, the Water Framework Directive (WFD), inter alia, requires Member States to take measures to achieve a good status of water bodies (Art. 11 and 4 WFD). The reality, however, is that the measures needed to end the deterioration and to improve the status are not being taken, hence there was - if at all - only little progress with improving the status of the water bodies. This Member State inaction risks the overall legitimacy of the Directive, as the different management cycles foreseen for exceptional derogations come to an end and the final 2027 deadline for achieving the WFD's objective is approaching. Commission enforcement action on the WFD has been very limited, if not inexistent.¹⁷



The state of compliance with the EU's Nitrate Directive is similarly discouraging. The Directive sets clear thresholds to reduce water pollution by agricultural activities. Yet, the foreseen levels are still exceeded in many regions of Europe. Rather than taking the simple measure of reducing livestock numbers to achieve compliance, Member States are creating diversions with pseudo actions that are not enforceable on the ground nor going to deliver actual results.

This grim situation is also backed up by the Commission's data on Member States' implementation of EU law (also showing the Commission's complaint handling), which has been considered for this report. One aspect concerns the mere number of complaints and infringements handled by the Commission. Compared to other policy sectors, despite the heightened urgency of environmental action and compliance, the percentage of environmental complaints handled is quite significantly lower than the overall percentage of complaints in all policy areas handled in a given year.¹⁸ More specific aspects, such as the situation of staff development in the Commission's environmental services or the duration of infringement procedures, are discussed in the following sections.

¹⁶ EEA, State of Nature in the EU, 2020: <https://www.eea.europa.eu/publications/state-of-nature-in-the-eu-2020>.

¹⁷ Given that key provisions of the WFD are precise enough, the fact that the WFD is a "framework Directive" is no excuse neither.

¹⁸ An assessment of Commission numbers show a difference of about 10% every year between 2016 - 2019, see the annual Rule of Law reports: https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en.

C. EIGHT POLICY RECOMMENDATIONS FOR A “BETTER COMPLIANCE” AGENDA

This chapter lays out policy recommendations that the von der Leyen Commission should start implementing during the second half of its mandate. They are standalone and complementary but are of course all built upon political will as laid out in the first recommendation.

I. Political will, anchored in a written commitment

At the most fundamental level, political will is needed to deliver on the zero-tolerance promise. Without the understanding that there is a (structural) compliance issue in the field of environmental law which has to be solved, nothing will change. For the sake of transparency and communication, internally within the Commission and externally towards the Member States, this political will needs to be laid down in writing in the corresponding Commission communications.

Currently, the Commission's 2016 “EU Law: Better Results through Better Application” communication¹⁹, which seeks to set out how the Commission will step up its efforts on enforcement, generally acknowledges the need for a stronger focus on enforcement to serve the general interest. The communication then stays rather vague, referring to “a wide array of tools” to assist Member States in their efforts to implement EU law. A clear focus on infringement procedures or references to “zero tolerance” are missing. Instead the communication reads “the Commission enjoys discretionary power in deciding whether or not, and when, to start an infringement procedure.”²⁰ In a 2018 communication “EU actions to improve environmental compliance and governance” which seeks to complement the 2016 communication, the Commission also recognised the problem of insufficient implementation but failed to set out impactful steps that also address the enforcement gap.²¹ Instead, it focused on soft measures such as guidance documents and information-exchange which did not improve the situation.

Art. 17 of the Treaty of the European Union (TEU) clearly states that the Commission shall ensure the application of the Treaties and of measures adopted pursuant to them.²² While the Commission might view itself as a (more) ‘political’ organ, this political dimension should only be limited to political questions. In its role as ‘guardian of the treaties’, in contrast, it should not pick specific infringement cases over others for political reasons. Doing so by keeping clear of infringements against certain Member States or on certain thematic issues for political reasons undermines the guardianship role and endangers the rule of law.²³ Similarly, national elections or the fact that a Member State holds the Presidency of the Council of the EU should be irrelevant. Zero tolerance means a quasi-automatic way of starting an infringement procedure. Focusing on horizontal topics should not become an excuse for not going after individual cases. Often, individual cases of non-compliance open the door for others to follow. Regularly, such cases are also of general importance because of the overarching value of the protected environmental good.²⁴

19 See: https://ec.europa.eu/info/publications/communication-commission-eu-law-better-results-through-better-application_en.

20 See the Communication, page 14.

21 EU actions to improve environmental compliance and governance, COM/2018/010 final: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52018DC0010>; see also the criticism of the European Economic and Social Committee thereof in its opinion from May 2018: <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/actions-improve-environmental-compliance-and-governance-communication>.

22 TFEU: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12008M017>.

23 In the above quoted article (n.6), Kelemen et al suggest: “Just as prosecutors’ offices in domestic settings are expected to be protected from government pressure, so too, perhaps, should decisions to launch infringements in the Commission be insulated from its political leadership.”

24 In March 2020, NABU for instance filed a complaint to the Commission, arguing with corresponding data that the offshore wind

Policy recommendations

- ▶ Depoliticise the infringement process and ensure that national elections, Council Presidencies, and political considerations more broadly do not impact decisions on infringement procedures.
- ▶ Adjust the Commission's guidelines such as the communication on "EU Law: Better Results through Better Application", to reflect the "zero tolerance" promise, to focus on the role of infringements, and to introduce a quasi-automatic way to start infringement procedures once a Member State is breaching EU law.
- ▶ Ensure that the focus on horizontal cases does not prevent the Commission from starting infringements on individual ones, which are regularly also of general importance.

II. Appropriate enforcement capacity in the Commission services

What really matters to translate the political will into practice is the capacity to deal with the issue and to deliver on 'zero tolerance'. Despite an ever-growing need to tackle the two biggest crises of humanity - the interconnected climate and biodiversity crises - and a stated prioritisation of environmental matters through Ursula von der Leyen's European Green Deal (EGD), this has not been reflected in more resources being made available to do this work within the Commission. While significant additional tasks came in for the Commission services, and in particular those dealing with environmental issues through the EGD (the EGD Communication²⁵ itself lists about 50 key actions in its Annex, which are often broader strategies, again followed up by several actions and legislative initiatives), there was very limited additional staffing for the environmental services which was not even able to compensate for the cuts over the last decades.

On the contrary, the staff capacity of DG Environment has overall even been reducing over the last years: For the year 2009, DG Environment had 687 staff members²⁶ which corresponds to a share of 2.1% of all Commission staff. For 2014, this number was reduced to 500 people, corresponding to 1.5% of all Commission staff. For 2019, the number continued decreasing to 449 people, the share to 1.4%, for 2021 the number decreased further to 439 people, the relative number sticking with 1.4%.²⁷ A slight increase from 2020 to 2021 could therefore not even bring the staff number back to the 2019 level. Other DGs, such as DG Agri or DG Competition, still have much higher relative (and absolute) staff numbers (respectively 2.7% and 2.6% of all Commission staff in 2021), without those policy fields being 'more important' according to Ursula von der Leyen's political guidelines for her term.

On paper, the figures for another service involved in infringement procedures, the Commission's Legal Service, show that staff have remained fairly stable over the past years. However, environmental issues are being dealt with along with files on the internal market for goods, energy including Euratom, enterprise and the customs union by a team of only 16 members of the Legal Service.

park "Butendiek", built without appropriate Art. 6.4 Habitats Directive assessment, is impacting seabirds in the Natura 2000 site it was built in. By October 2021, the complaint is officially still pending without any concrete reaction. The Commission already indicated that it might be missing the horizontal aspect. The Natura 2000 site is one of the few in Germany for the impacted seabirds (*Gavia stellata* and *Gavia arctica*). It might only be a complaint on one specific site, but as the impact is happening for a huge part of the German species population, this case can be of overarching interest. For more details see (in German): <https://www.nabu.de/natur-und-landschaft/meere/offshore-windparks/butendiek/23109.html>.

25 See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576150542719&uri=COM%3A2019%3A640%3AFIN>.

26 At the time, there was no separate DG Clima. Still, this does not change the picture for the number of colleagues working on the "classical" environmental law discussed here, as colleagues from DG Clima mostly got new additional files.

27 See the staff development according to the official numbers (from 2016 onwards), previous years via Access to Document request sent by email: https://ec.europa.eu/info/about-european-commission/organisational-structure/commission-staff_en.

It seems that there are only 1-2 people dealing with nature issues within the Legal Service, which suggests that this may also create a bottleneck.²⁸ For instance, in its February 2021 infringement package, the Commission announced that it would refer Germany to the Court of Justice of the EU (CJEU) for its insufficient protection of Natura 2000 areas.²⁹ However, it then took another full year for the Commission to act on this commitment, only submitting the application to Court in February 2022 (C-116/22).

Policy recommendations

- ▶ Significantly increase (as a minimum by a factor of 10) the staff capacity of DG Environment and other environmentally relevant services such as DG Sante and DG Clima, and of the environmental team within the Commission's Legal Service to reflect the urgency of the full enforcement of environmental legislation needed to address the ecological and climate crisis.
- ▶ Ensure effective restructuring and coordination amongst the different units engaged in the infringement handling, i.e. the thematic desk officers and the internal legal experts of the DGs, to better deliver on infringement procedures. For that, legal desks should only focus on enforcement action. It furthermore is important that enforcement action is centralised as much as possible in a single unit, creating a lot of synergies
- ▶ For each major environmental law, there should be dedicated staff allocated for the enforcement thereof, split even further into the law's main obligations.
- ▶ National experts familiar with the language and circumstances in each Member State should be available to support the enforcement efforts.

III. Transparency of infringement documents and the overall process

Art. 1 TEU clearly states *"This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."*³⁰

Yet, when it comes to decisions on the infringement process, there is very limited public information on the ongoing procedures, making it difficult for civil society to act as a watchdog and to support the Commission in its role as the guardian of the treaties. While there is a database for infringement decisions³¹ and short press releases are summing-up the infringement packages,³² both contain very limited information. The database only provides the infringement number, name, decision date, type of decision, Member State, policy area and whether it is an open case. Only for some decisions, a link to a press release or a short memo is provided. The letter of formal notice or the reasoned opinion itself, as well as answers by the Member State, are not made public. Complaints by the public or NGOs (i.e. pre-infringements stage) are not integrated in this database, neither are the so called pilot procedures which are still being used despite opposite communication.³³ Information on whether or not a complaint has already been filed on a certain issue or the Commission's responses to those are not publicly available either.

28 For the organisational structure see: https://op.europa.eu/en/web/who-is-who/organization/-/organization/SJ/COM_CRF_231760.

29 See: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_412.

30 See: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:en:PDF>.

31 See: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm.

32 See: <https://ec.europa.eu/commission/presscorner/home/EN?keywords=&dotyp=851#news-block>.

33 In the "Better results through better application" Communication, the conclusion was that "the Commission will launch infringement procedures without relying on the EU Pilot problem-solving mechanism, unless recourse to EU Pilot is seen as useful in a given case."

As of March 2022, out of the 9880 infringement decisions (relating to 3825 cases) recorded under the policy area 'Environment', only 190 contain a press release (corresponding to 1,9%) and 778 a link to a short memo (corresponding to 7.9%).³⁴ Yet, there have been improvements regarding the provision of short memos; in recent years, at least for the nature cases, memos have been provided for almost all infringement decisions. Regrettably, this is not the case for decisions to close cases where no information on the reasons for closing the case is provided.

Access to information is a core pillar of the Aarhus Convention and the EU has implemented the EU-level obligations of this part of the Convention through the Aarhus Regulation.³⁵ However, under the current interpretation of the EU legal framework on access to information,³⁶ access to infringement proceeding documents has been denied on the basis of the ongoing investigation exception (Art. 4.2 Regulation 1049/2001).³⁷ It is questionable to what extent this is compatible with the more narrow exception under Art.4.4(c) of the Aarhus Convention which only permits the refusal of a request for environmental information if the disclosure would 'adversely affect' the course of justice.³⁸

However, as also outlined by Advocate General Bobeck, a different approach to the current EU framework, one that focuses more on general rules of transparency, including the Charter of Fundamental Rights of the EU, as well as operational and practical problems with denying access to documents in this context, would also be possible.³⁹ Similarly, the European Ombudsman has made recommendations to improve the transparency of the infringements process following an investigation in 2016-17.⁴⁰

More broadly, the argument that the infringement procedure requires confidentiality does not hold up. The infringement procedure is not a negotiation process but the enforcement of clear legal obligations. In the environmental context, these legal obligations do not only concern the parties involved but are of broad public interest as the Commission is acting as guardian of the treaties, often acting based upon complaints coming from the public itself. Thus, the public is not an external party that seeks to obtain information about matters that it is not concerned by but should be the main beneficiary of the infringement action.

In addition, more accessible and public data on infringements is likely to improve and strengthen the process through enhanced scrutiny as well as support and expertise from civil society and stakeholders, thus directly contributing to the overall aim of ensuring compliance. Especially given that the secrecy arrangement has failed to deliver to ensure the timely and proper compliance of Member States,⁴¹ it seems that the effectiveness of the infringement process could be greatly improved through increased transparency of the process and documents involved – all with little additional administrative work.

34 See the Commission's infringement database: https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&DG=ENV&title=&submit=Search. While there is a disclaimer on the site that 'press releases and memo notes issued prior to 17/01/2012 are not accessible directly via this tool and can be found in the press release database', a search for press releases on the policy area 'Environment' prior to 17 January 2012 yields no results.

35 See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1367-20211028>.

36 Regulation 1049/2001 (A2I) and Art. 6.1 of Regulation 1367/2006 (Aarhus).

37 See also J+E investigation and position paper 'Thanks for nothing - Transparency of the EU Pilot and Infringement Procedures' (2017): http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2017/Thanks_for_Nothing_final.pdf.

38 See also: http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2015/Access_to_Documents_Memo_to_EC_final_submitted.pdf.

39 C-213/15 P - Commission v Breyer, Opinion of Advocate General Bobek, 21 December 2016: <https://curia.europa.eu>.

40 Decision of the European Ombudsman setting out suggestions following her strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission's handling of infringement complaints, <https://www.ombudsman.europa.eu/en/decision/en/83646>.

41 Cf. chapter B above, as well as ongoing cases of non-compliance despite CJEU judgments: <https://eeb.org/library/implementation-of-rulings-for-nature-conservation-court-of-justice-of-the-european-union-case-studies/>.

In addition, by having a potentially preventative and compliance-improving effect upon other Member States, increased transparency could further improve the overall compliance with EU law and increase the effectiveness and impact of enforcement measures.

Lastly, most of the underlying data that the infringement documents contain is likely to be “environmental information” that should be published or at least available upon request through the Member States in any case. For instance, Member States are already obliged to proactively disseminate progress reports on the implementation of environmental obligations⁴² or on environmental impact assessments.⁴³ Providing access to documents where the Member States outlines to the Commission how it is e.g. meeting its EIA obligations should thus not be confidential. On top, information transmitted by Member States as part of infringement proceedings, is often public data (e.g. on the state of nature in Natura 2000 sites or the existence of corresponding management plans) or just mere legal opinion of the Member State which does not justify confidentiality.

Policy recommendations

- ▶ Publish the infringement decision letters sent by the Commission and the replies by the Member States for each infringement step taken.
- ▶ Improve the information provided on the infringement decisions in the memos, adding at least the provisions breached, the steps taken by the Member States, a more detailed summary of the facts and, where applicable, the complaint the case is based on.
- ▶ Establish a comprehensive, accessible and coherent database where the key letters and documents relating to each infringement file are made publicly available within a clear and limited timespan. Each case should have an overview page for the steps taken by the Commission, the reaction by the Member States, the relevant deadlines, the letters, key accompanying documents and the Commission's reasoning for the steps taken (or not taken). Pilot procedures and citizens' complaints that have been registered by the Commission should be added to the database, too.⁴⁴
- ▶ Publish information about bilateral meetings, package meetings or civil dialogues on ongoing infringement cases at least two weeks in advance and directly alert local civil society organisations to provide civil society with an opportunity to join or at least to provide the Commission with information.

IV. Regularity of infringement packages

Currently, infringement packages are released irregularly without advance notice. This makes it difficult for civil society to keep track, to plan ahead and to support the Commission in an effective way. In addition, without clear and regular dates that are transparently communicated, political considerations can lead to delays.

The regular publication of infringement packages demonstrates a clear political commitment, contributes to enforcement actions becoming a regular and depoliticised measure while also improving accountability and the transparency of the process. Having clearly communicated deadlines can also help to improve the timeliness of enforcement measures, reducing the duration of the procedures and providing opportunities for the timely follow-up with Member State deadlines. A look into the Commission's press releases shows that between February 2020 and February 2021, there appeared to be a rough regularity of infringement packages being released every 2 to 3 months.⁴⁵

42 Art. 7 Directive 2003/4/EC on public access to environmental information.

43 Art. 6 Directive 2011/92 as amended by Directive 2014/52/EU on the assessment of the effects of certain public and private projects on the environment (EIA Directive).

44 To do so, the Commission could work on its NIF (infringements) and CHAP (complaints) databases and publish them.

45 In 2020, in total there have been 6 infringement packages. The same holds for 2021. See the press releases of the Commission: <https://ec.europa.eu/commission/presscorner/home/en?keywords=%26dotyp=8516&pagenumber=1#news-block>.

However, there was no transparency ahead of the publication and delays for various packages. No infringement package was released between February and June 2021 although more packages followed in July, September, October, and December 2021, as well as in February and April 2022. However, overall, this rhythm is still far away from a monthly release, which was once envisaged when the Commission named them “monthly infringement packages”. A release every 2 to 3 months is not sufficient. There is no shortage of cases, as our assessment and the Commission's own annual reports on the “Monitoring of the application of EU law” show.

Policy recommendations

- ▶ Release infringement packages on a monthly basis.
- ▶ Release infringement packages on a fixed date, e.g. every second Thursday of the month.
- ▶ Make the publication date for infringement packages publicly available in advance.⁴⁶

V. Duration of complaint handling and infringement procedures

The Commission can only be an effective guardian of the treaties if it acts quickly. This holds, on the one hand, for the proper process of an infringement procedure, which it can start on its own. It also holds for the handling of citizens' and NGO complaints, which are foreseen as a tool to inform the Commission and to trigger infringement procedures.

As to the duration of complaint handling, the core issue is that the timespan foreseen in the Commission's communication “EU Law: Better results through better application”, for environmental complaints is exceeded in most cases. The Annex to this communication provides: “As a general rule, the Commission will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than 1 year from the date of registration of the complaint, provided that all required information has been submitted by the complainant.”⁴⁷ In practice, complaints often stay untouched for several years, despite them being well-substantiated. For instance, a NABU complaint submitted in 2014, has still not been taken up today, 8 years later.⁴⁸ As outlined in chapter B, there are other examples (from 2017 and 2020) of several years passing since the submission of complaints with continued inaction by the Commission.

Since 2014, the overall average duration for complaints has been 41 weeks and 101 weeks for infringements, which has not meaningfully improved with the average time being 40 weeks for complaints and 98 weeks for infringements in 2020.⁴⁹ The above examples (chapter B) clearly exceed those average time spans for handling a complaint, and the below examples also show that the average two-year time span for handling the whole infringement process is regularly exceeded in environmental matters.

The issue of not acting fast enough, hence not ensuring an effective reaction to non-compliance, also holds for cases where the Commission already opened an infringement procedure (one positive example, where the Commission acted fast, running through the infringement procedure to then start the Court case, and accompanying it with interims measures is the case around the Polish logging in the Bialowieza forest, C-441/17).

46 Where there are exceptional reasons to justify the delay of the infringement decisions or publication of the package, these reasons should be communicated as far in advance as possible and a new date should be set.

47 See: https://ec.europa.eu/info/publications/communication-commission-eu-law-better-results-through-better-application_en.

48 The 2014 complaint relates to the loss of meadow breeding birds, a breach of Art. 2 BD and was registered by the Commission under CHAP2014/01471.

49 Data based on the Commission's annual reports on the application of EU law: https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en.

Here, the time lag not only leads to the ongoing degradation of environmental goods protected by EU law in the specific case throughout the delay. Worse, it can create a situation where those not complying with environmental law can count on the slowness of the Commission process to extract value from their unlawful activity before having to comply, or to create irreversible “facts on the ground” (e.g. unlawfully built infrastructures are rarely demolished even if the CJEU finds they have been built illegally).

Long procedures also contribute to more structural problems that can make it impossible to meet the overall targets of fundamental EU environmental law obligations such as under the WFD (where not reaching the good water status by the given deadlines even risks that the Directive itself is seen to be not fit for purpose, instead of acknowledging that it is an implementation problem). An ongoing lax enforcement of key obligations (even when these are not of a systemic nature but ‘merely’ relate to one key area) can undermine the implementation of a broader target. Some examples where the Commission already opened infringement procedures, yet the overall duration of the different steps taken is too long to effectively protect the environment, are:

 One case highlighting a probably still average, yet questionable duration is based on NABU's complaint on the loss of grassland in Natura 2000. This complaint was filed in 2014 (CHAP2014/01271). In June 2018, the Commission started a pilot procedure. The letter of formal notice followed in July 2019 (INFR2019/2145). In October 2020, the Commission sent the reasoned opinion. From the first Commission measure after the complaint (pilot procedure) until today, more than 3 years have passed during which grassland habitats are likely to still be deteriorating or at least not improving.

 Cases that overall take even longer are linked to the implementation of the EU's Nitrate Directive. This Directive stems from 1991 and as of today, in several Member States the nitrate levels foreseen for groundwater are exceeded. Against Germany, the Commission started the infringement with the letter of formal notice in November 1994 (INFR1994/2237). The reasoned opinion followed in June 1998, and in July 1999 the Commission referred the case to the Court. The case was officially closed in 2003, taking roughly 10 years overall. Yet, even today, the Commission is still communicating with Germany on the implementation of the Court ruling and Germany is still not complying with the nitrate levels.

 For other examples, see e.g. the above-mentioned cases (chapter B) on logging in Natura 2000 sites in Romania or the breach of species protection provisions through fishing in France.

The above examples illustrate that the delays are a systemic problem, likely also due to the low staff capacity, leading to continued deterioration of the environment despite already submitted complaints or ongoing infringement procedures. Therefore, fundamental changes to the complaint and infringement-handling practices are necessary.



Policy recommendations

- ▶ Handle citizen and NGO complaints from the registration to Commission enforcement action or closure within one year, sticking with the already existing deadline. Complaints that are well-prepared with sufficient data should even be handled faster, e.g. aiming at a reaction within 6 months, to not lose time to effectively protect the environment. There must be safeguards to ensure that Commission services do not just close complaints in order to comply with the deadlines, but that closing a complaint is the exception and justifications are given to the complainant.
- ▶ Completely give up the EU Pilot mechanism as this pre-procedure is opaque and has proven to just add time without delivering results.⁵⁰ Ongoing pilot procedures should be taken up as proper infringement procedures as compliance issues already seem to have been established.
- ▶ Set transparent and time-bound targets to reduce the duration for handling the pre-litigation phase of the infringement proceedings for environmental law, given the often irreversible harm done and the urgency to ensure the proper implementation of the acquis. The aim should be to ensure an average duration of less than one year from the first Commission enforcement action on, also in the field of environmental law.

VI. Interim measures

In many cases, significant and often irreversible harm is caused to the environment during the long duration of the infringement process, also in cases where there is little doubt that the Member State is in breach of EU environmental law.

Art. 279 TFEU empowers the Court to impose interim measures in cases before it. In the few environmental cases where the Commission has called for interim measures,⁵¹ these have had a positive effect in at least pausing the harmful activity. A positive example of the Commission acting quickly is the imposition of interim measures in the Bialowieza case where the Commission brought an action against Poland in front of the CJEU and with it asked the Court to order Poland to stop logging for the duration of the proceedings in July 2017.⁵² Seven days later, the Court provisionally granted the order for interim measures which was then confirmed in November 2017, along with penalty payments if Poland did not respect the order.⁵³ Shortly after the November order, harvesters left the forest.⁵⁴ While compliance issues remain in the Bialowieza forest, the case demonstrated the quick impact and benefits interim measures can have in protecting key ecosystems.

However, a main limitation of the Art. 279 TFEU interim measure powers is that they can only be invoked once the case has been brought to the CJEU, not during the earlier steps of the infringement proceedings. As it often takes years for a case to get to the CJEU, other measures that can already be used during the earlier infringement process should be explored.

50 Even the Commission acknowledges that the EU Pilot tends to add lengthy steps to the infringement procedure, see the Communication: Better results through better application, p. 18. On the lack of transparency of the EU Pilots, see also Justice and Environment, "Thanks for Nothing", Opinion 2017: http://www.justiceandenvironment.org/fileadmin/user_upload/Publications/2017/Thanks_for_Nothing_final.pdf.

51 Commission v Malta C-76/08 R; Commission v Italy, C-573/08 R; and Commission v Poland C-441/17 R.

52 C-441/17 R.

53 See: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=196944&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1889802>.

54 See: <https://www.clientearth.org/latest/latest-updates/stories/saving-bialowieza/>.

Under EU competition law, in some cases, the Commission itself is authorised to take interim measures, as outlined in Art. 8 of the EU Merger Regulation or Art. 8 of the Competition Regulation 1/2003. These powers are the codification of implied powers established in the Camera Care case of 1980 (Case 792/79 R), authorising the Commission to impose interim measures where there was a prima facie breach of competition law and an urgency as well as necessity to avoid serious and irreparable damage.⁵⁵ While the ruling was set in the context of EU competition law, similar, if not even stronger, arguments could be made in the environmental context.

Policy recommendations

- ▶ Make more regular use of interim measures under Art. 279 TFEU for cases that are in front of the CJEU where there are risks of serious and/or irreversible environmental harm during the time of the proceedings. Interim measures should form part of the enforcement toolbox and be demanded by the Commission more regularly
- ▶ Explore other avenues of halting harmful practices during infringement proceedings, already before the Member State is referred to the CJEU. Inspiration could be drawn from competition law where interim measures were interpreted as implied and now directly integrated into legislation. For that, a new legislative basis for the environmental acquis might be helpful.

VII. Follow-Ups

After other attempts to urge a Member State to comply with EU law have failed, a referral to the CJEU is a key tool to enforce EU environmental obligations and rulings by the CJEU have played an important role for nature protection in the EU. However, in some cases, the harmful activities continue, despite a clear ruling from the highest court in the EU establishing their unlawfulness. This is not only detrimental for the environment but also undermines respect for the rule of law.

Unfortunately, there are too many cases where there is inadequate or no implementation action of court rulings on the ground. In an EEB-BirdLife research report,⁵⁶ in five out of eleven cases assessed, the follow-up to the CJEU rulings was found to be very unsatisfactory, either because no action was taken to stop harmful activities with these even intensifying in some instances, or because there was merely a very limited reduction of the harmful activity. In three of the eleven cases, some positive implementation action was taken, but this was not sufficient to comply with the ruling. Only in three other cases, there was positive follow-up with the harmful activity stopping or being removed entirely.

There is currently no systemic oversight of the steps taken by Member States to ensure that the judgments are implemented on the ground. It is not transparent for the public what actions have followed to ensure the compliance with the CJEU rulings and it also seems that the Commission is not always fully aware of the developments (or lack thereof) on the ground. While the Commission does occasionally make use of Art. 260 TFEU notices regarding the failure of a Member State to comply with the judgement,⁵⁷ there does not seem to be a monitoring that leads to such notices to be issued as a standard procedure after a certain amount of time has passed without adequate steps taken by the Member State.

55 See: https://www.coleurope.eu/sites/default/files/uploads/event/interim_measures_gclc_mantzari_final.pdf; and also: https://www.concurrences.com/IMG/pdf/alec_j_burnside_adam_kidane_-_interim_measures_-_an_overview_of_eu_and_national_case_law.pdf?42067/88ef3e2932cc547cc56d9630b273aca4582c3a7a.

56 For the full study, see: <https://eeb.org/library/implementation-of-rulings-for-nature-conservation-court-of-justice-of-the-european-union-case-studies/>.

57 E.g. an Art. 260 letter of formal notice to Portugal as part of the December 2021 infringement package, see: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

Policy recommendations

- ▶ Systematically monitor the implementation steps by Member States following CJEU rulings, including through on the ground audits, to provide an overview of the steps towards the end of the harmful activity, the restoration of the affected habitats and the effective and secure long-term management of the site.
- ▶ To increase the transparency, put in place and manage a public database monitoring the steps taken by Member States to implement environmental infringement and preliminary reference judgments. This database should include all follow-up inquiries by the Commission and resulting activities.
- ▶ Allocate additional resources to the Commission's Services specifically for the improved follow-up of infringement processes and CJEU rulings.
- ▶ Establish a clear policy on timely Art. 260.2 TFEU notices where Member States fail to comply with the judgement 6 months after the ruling.
- ▶ In cases of non-transposition, make use of Art.260.3 TFEU to ask the Court to impose a lump sum or penalty payment to be paid by the Member State.

VIII. New EU legislation on environmental inspections

As legislation is only as good as it is implemented, inspections can be key to identifying where implementation (not transposition) is poor to then enable enforcement. Inspections can therefore be seen as a subset of both enforcement and compliance promotion. It is the process of checking whether EU law is being complied with, and whether any breaches are occurring. It can include systematic and targeted monitoring and investigation. At present, the tools for inspections at EU and Member State level are incomplete and not sufficiently effective. This need has already some time ago been acknowledged by the Commission when considering the idea of EU inspection legislation (which was then buried in the second term of the Barroso Commission).⁵⁸ The need for a new regulatory framework for inspections was also acknowledged by different statements of the Council and the European Parliament.⁵⁹

Given that inspections have, in principle, proven to be effective in the field where they are undertaken (e.g. on monitoring the application of EU's fisheries provisions),⁶⁰ with the fundamental changes and paradigm shift needed, the Commission should take up the old ideas and put forward new EU legislation on environmental inspections.

This legislation could stick to the principle that inspections should primarily be undertaken at Member State level. It would establish minimum standards for the Member States to ensure effective inspections and grant the Commission certain powers to oversee Member State inspection practices and control breaches of EU law, to overall support Member States in implementation and compliance issues.

58 See e.g. the following indications, pointing to the Commission fearing resistance from the UK: <https://www.theguardian.com/environment/2015/nov/10/eu-drops-proposed-law-to-tackle-illegal-trade-in-wildlife-and-toxic-waste>.

59 For further details, see the list at the Commission's own website: <https://ec.europa.eu/environment/legal/law/inspections.htm>.

60 See e.g. joint NGO report 'Measuring the success of Remote Electronic Monitoring programmes in European waters' (2021): <http://www.transparentfisheries.org/wp-content/uploads/2021/02/EU-Fisheries-Control-Coalition-REM-paper.pdf>.

Policy recommendations

- ▶ Establish binding minimum criteria for Member State inspection systems through new EU legislation on environmental inspections in the form of an EU Regulation. These criteria should foresee at least an obligation for Member States to carry out regular risk assessments to identify the most important areas for inspection activities. Those assessments should be undertaken in a transparent way, with stakeholder participation.
- ▶ Establish an obligation for Member States to develop environmental inspection plans, which list the activities and controls covered by EU environmental law, ensure systematic inspection of land management and land-use, provide those inspections include site-visits with appropriate legal provisions giving inspectors access to land. The new EU law should further require Member States to demonstrate that they have sufficient staff capacity and the necessary expertise available to carry out inspections at local, regional and Member State level.
- ▶ Ensure Commission oversight of Member States' inspection systems, inter alia through a system of independent inspectors (either based on consultants contracted by the Commission and then preferably from another Member State, or Commission-based) is needed. Those inspectors would assess the quality of a Member State's inspection system and support the Commission in investigating infringement cases, inter alia through access to sites and documents.
- ▶ Make use of modern and effective remote sensing land use surveillance tools to enable the better assessment of the situation on the ground during the whole infringement process.

D. CONCLUSIONS

This report has demonstrated that there are major systemic issues with the enforcement of EU environmental law. While the implementation and compliance gap on the Member States' ground is huge, the problem is clear. Similarly, the wide array of solutions to address the challenge are also clear. Our recommendations provide concrete steps in several areas to improve the enforcement situation. The Commission now needs to implement those steps.

Some of the steps require legislative action, others financial shifts or structural reorganisation, but all stay within the treaties of the EU. All steps together should take place through a holistic strategy that demonstrates and sustains a shift in approach and political priority.

There are roughly two more years remaining for the von der Leyen Commission to make those changes happen, to move the EU towards a more transparent and effective Union for its citizens. Given the dimension of change needed, it also is clear that von der Leyen herself must make the "Better Compliance Agenda" her personal "Chefsache".

This "Better Compliance Agenda" will also help to ensure the legacy of the European Green Deal, because any (new) piece of legislation is only as good as its implementation and enforcement. Von der Leyen will have the full support of civil society for it, and she will boost trust in the future of Europe. **The time is now!**

