ClientEarth

Transparency

The most frequent EU institutions that ClientEarth interacts with on matters related to transparency are: the European Commission (the "Commission"), the Council of the EU (the "Council"), the European Investment Bank ("EIB") and the European Chemicals Agency ("ECHA"). The input below is based mainly on ClientEarth's experience of working with these EU institutions and bodies.

I. Difficulties that ClientEarth faced in searching for and obtaining information or documents related to (decision making on) the environment held by EU institutions

In relation to searching for the information, please see the answer provided to question II.

In relation to obtaining the information, ClientEarth regularly faces the following difficulties:

1. Structural flaws in handling access to documents requests by the EU institutions, which are not in accordance with the Transparency Regulation[1]

(i) Extending the time limit to respond to requests without justification and excessive delays

In our experience, EU institutions and bodies frequently breach the Transparency Regulation when handling access to documents requests. For the vast majority of the requests submitted by ClientEarth, the EU institutions made use of Article 7(3) and Article 8(2) of the Transparency Regulation to extend the time limit for providing the initial response and the confirmatory response respectively, without providing any reasons for why recourse to these provisions were justified, i.e. that the cases were "exceptional". Furthermore, the responses are frequently still provided beyond the extended deadlines. The delays can range between a couple of days/ weeks to a year.[2]

In cases of extreme delay, ClientEarth has often faced the situation that it has to apply to the General Court for an annulment of an implied refusal, in order to safeguard its right to an effective remedy. Please see the General Court's orders in cases : T-661/21, T-792/21, T-255/20, T-354/21.

Through these practices, the EU institutions are actually blocking the public's right to prompt access to documents. Information is a perishable resource. The work of civil society and of NGOs like ClientEarth is dependent on timely access to information, especially when the information is connected to ongoing, time-sensitive decision-making processes, which is the case in environmental matters, considering the climate and biodiversity crises we face. The consequence is that civil society cannot effectively contribute to and participate in EU decision making processes, in accordance with Article 10 TEU. In this manner, the EU institutions, by deciding what information is known to the wider public, are influencing the decision that is finally taken.

(ii) Misuse of the "fair solution" procedure in Article 6(3) Transparency Regulation

ClientEarth has experience of the EU institutions misusing of the "fair solution" procedure. In particular, the institutions often seek to extend the applicable deadline when they ask for a fair solution. For example, the Commission when applying the fair solution procedure or asking for clarifications, informs that the deadline of 15 working days for handling the application will start running after the receipt of the clarifications requested, in

[1] Regulation No.1049/2001 regarding public access to European Parliament, Council and Commission documents ("Transparency Regulation")

[2] For example, the Commission provided to us the final answer to the request for access to documents Gestdem 2020/7563 one year after the deadline. See also evidence submitted to the European Ombudsman by ClientEarth regarding the time taken by the Commission to respond to access request by email of 01 June 2022.

accordance with the third paragraph of Article 2 of the Detailed rules for the application of Regulation (EC) No 1049/2001. ClientEarth has recently faced this situation in relation to Request EASE 2022/6631. We also encountered this in a request to the Council with reference Ref. 20/1615-6.3-aa/jl. Using the fair solution procedure to further extend the applicable deadlines goes against the conclusions of the CJEU in case C-127/13 P when it held that "*Regulation 1049/2001 does not allow for the possibility of derogating from the time-limits laid down in Articles 7 and 8 thereof*",[3] including when a fair solutions is sought.

It is also worth noting that the EU institutions generally use this procedure to narrow down the scope of the requests submitted. But requests are often phrased in broad terms simply because the public is not in a position to know what specific documents are held by the institutions, due to the poor information in the EU institutions databases.

2. **The EU institutions apply the exceptions from disclosure and the presumptions of confidentiality beyond the limits of the Transparency Regulation and of the CJEU case law.**

Contrary to the transparency principles enshrined in primary and secondary EU law, our experience is that EU institutions overly protect from disclosure the documents which are in their possession, resulting in unreasonably stretching the exceptions contained in the Transparency Regulation and the general presumptions of confidentiality.

Despite the mandatory obligation established by the CJEU upon the EU institutions to refuse access only when "*the risk of the interest [protected by the exception from disclosure] being so undermined must be reasonably foreseeable and must not be purely hypothetical*" and to explain "*how access to that document could specifically and actually undermine the interest protected by that exception*",[14] in practice the EU institutions are generally providing broad and vague explanations to justify the application of exceptions.

(i) Misapplication of the exceptions from disclosure as provided in Transparency Regulation and interpreted by CJEU

Protection of the ongoing decision-making processes – Article 4(3) first paragraph:

ClientEarth, as environmental NGO, in its regular activities has to monitor certain ongoing environmental decision-making processes, make analysis, generate public debates and actively participate in decision-making processes in order to rebalance the input received from vested stakeholders. Lately we have been monitoring the Green Deal legislative files, the Common Agricultural Policy, and the Common Fisheries Policy.

As the EU institutions frequently do not actively disseminate the relevant documents which fundament their decisions in a timely manner, ClientEarth has to submit requests but faces significant barriers in obtaining the relevant information while the decision-making process is still ongoing.

Generally, the Council and the Commission refuse access based on generic, template justifications based on the institutions' space to think and the need to take decisions free from external pressures, justifications that, without any substantiation, have been dismissed by the CJEU on numerous occasions. ClientEarth holds many examples of such response should they be of assistance.

Despite the higher level of transparency guaranteed to the category of legislative documents in the sense of Article 12(2) of Transparency Regulation, and environmental information in accordance with Regulation 1367/2006 (the

[3] Case C-127/13 P, para. 25 - 26.

Aarhus Regulation) this does not in practice make any difference to the level of transparency. Although ClientEarth highlights when the requested documents fall under these categories, the institutions' assessments justifying the non-disclosure generally do not include any reference to the fact that enhanced transparency is required.

- *Non-disclosure of Impact Assessment documents and Regulatory Scrutiny Board opinions*

A frequent example of documents to which the Commission does not allow access while the decision-making process is still ongoing are its legislative impact assessment (and drafts thereof) ("IA") and the Regulatory Scrutiny Board ("RSB") opinions elaborated in respect of legislative proposals. The non-disclosure of these documents is contrary to the ruling of the CJEU in Case C-57/16 P4, in which the Court held that documents drawn up in the context of an impact assessment procedure for a legislative proposal constitute legislative documents that should be made directly accessible to the public pursuant to Article 12(2) of Transparency Regulation and that access should not be denied on request. The Commission's consistent disregard for this legal precedent is very concerning!

ClientEarth has submitted requests to access the IAs and RSB opinions for the following legislative files: revision of the Industrial Emissions Directive (Gestdem 2022/0016), Corporate Sustainable Due Diligence Directive (Gestdem 2021/4394), Deforestation Regulation (Gestdem 2021/2211), Nature Restoration Directive (Gestdem 2021/5417), Directive on the promotion of the use of energy from renewable sources: Gestdem 2021/2988), Revision of the Guidelines on State Aid for Climate, Environmental Protection and Energy 2022 and the general Block Exemption Regulation (Gestdem 2021/6434).

The only exception where we received access to the IA and RSB prior to the publication of the legislative proposal and without the exceedance of the established deadline is the request Gestdem 2021/5417, which was made in relation to the Nature Restauration Directive. This is a notable exception to what otherwise continues to be established practice to obstructing access to IAs and RSB opinions prior to adoption of the corresponding legislative proposals, a practice which runs directly contrary to the Grand Chamber judgment in case C-57/16 P.

- *No timely disclosure of documents related to the annual setting of the Total Allowable Catches ("TACs"):*

The Council has still not complied with the European Ombudsman's Recommendation in case 640/2019/TE5, that all files relating to the TAC-setting process in the lead-up to this year's and any future December Council should be made publicly available ahead of December Council, at the time when they are circulated to the Member State delegations. This should include Member State positions and all information and considerations used throughout the TAC setting process to address area mismatch between TACs and scientific advice. This also applies to all proposed and agreed TAC adjustments to account for exemptions from the landing obligation (and proposed/agreed TACs before and after adjustments), as well as calculations and underlying data. Moreover, records of relevant meetings ahead of December Council, as well as the December Council meeting itself, should be produced and made publicly available shortly after the meetings are completed, to allow for meaningful engagement of civil society in the process.[6]

(ii) Failure to balance the public interest against the protected specific protected interest

ClientEarth is very concerned that the obligation to disclose documents where there is an overriding public interest, under both the Transparency Regulation and the Aarhus Regulation, has become a dead letter in EU law. The

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0057.
[5] https://www.ombudsman.europa.eu/en/decision/en/127388
[6] For more information on the TACs setting process please see ClientEarth's report "Taking stock 2022 - are TACs set to achieve MSY": www.clientearth.org/media/rine44zc/taking-stock-2022-are-tacs-set-to-achieve-msy.pdf.

responses we receive from the institutions do not engage with our arguments on this point and the institutions do not even attempt to carry out a weighing exercise and provide reasons. Again, we have multiple examples of such responses should they be of interest. It is worth noting that, in our experience and in other cases we have observed, the institutions have never recognised a general public interest in disclosure of information otherwise covered by an exception.

(iii) Misuse of general presumptions of confidentiality

The case law of the Court of Justice has established the concept of "general presumptions of confidentiality" that cannot be found in the Transparency Regulation, nor the Aarhus Regulation[7]. Nevertheless, the Court has made it clear that general presumptions must be applied strictly, since they are an exception to the rule of the widest possible access to documents.[8] Despite this, we have experience of the Commission applying general presumptions that are not provided for by law. For example, in case C-57/16 P the Commission tried to create a new general to cover impact assessments. The Commission also tends to apply the general presumption under Article 4(2), third indent, to all documents that touch upon Member State compliance with EU environmental law obligations, including where there is no ongoing EU pilot or infringement proceedings (which is the requirement under the applicable case law). For example, in case C-612/13 the Court of Justice found that the Commission could not withhold conformity checking studies that were not connected with an ongoing infringement procedure. More recently, the Commission has withheld fisheries audit reports that were not connected to any ongoing pilot or infringement process (Gestdem 2020/4348). This matter is currently before the General Court in case T-354/21.

The Commission also applies the general presumption to basic information on the existence of EU pilot cases. Indeed, the Commission still has not complied with the European Ombudsman's recommendation that resulted from case 452/2018/AMF and therefore it is still very difficult for the public to scrutinise how the Commission exercises its role as guardian of the treaties, and exert pressure on their governments to comply with EU environmental law.

II. The environmental information that the EU makes public is often not up-to-date

Information is not up-to-date: as information is frequently published (or disclosed upon request) following a lengthy delay and after the relevant decision-making processes have come to an end (or in some cases not published at all), we find it is reasonably to conclude that information published by the EU institutions is often out of date.

- Documents connected to trilogues: trilogues are still highly opaque processes to which the civil society has very limited access while the process is ongoing.

  - *The revision of the Fisheries Control Regulation 1224/2009:* the trilogues are ongoing for more than one year and a half and it is still unclear when this process will finalise. Since the trilogues started, there has been no document published by any of the institutions in respect of the positions of the EU institutions involved (Commission, EU Parliament and Council). There is no formal means by which the public can access the current status of the legislative process and the amendments to the institutions' negotiating positions that are being discussed by elected representatives.

[7] Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies ("Aarhus Regulation").
[8] As confirmed by the CJEU (inter alia., Case C-562/14 P, para. 25 and Case C-57/16P, para. 81), the general presumptions of confidentiality must be applied and interpreted strictly, as they restrict the fundamental principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation 1049/2001[8]. The CJEU also confirmed that there are recognised only 5 (five) such presumptions, which have very limited application.

The proposal for a CAP Strategic Plans Regulation (adopted: Regulation 2021/2115): the Commission and the European Parliament have not published information on the institutions' positions proactively; the European Parliament provided access to a version of the four-column document after we requested access to it that was outdated by the time it was disclosed. During the trilogue discussions, the Council was the only institution that was proactively publishing the four-column documents, yet with delays

III. The public databases held by the EU institutions:

- ***Commission's database:***

The Commission register of documents only includes those documents that reach the level of the college of the Commission (COM, C, SWD etc). The many other documents which reach the Commission's DGs or which are sent out or produced by the DGs are not organised in a register, despite the requirement for all DG documents to be archived. Therefore, the Commission's register is not in compliance with Articles 11 and 12 of the Transparency Regulation and Article 4 of the Aarhus Regulation.

Apart from that, our experience is that documents are disseminated in an inconsistent manner as each DG has its own practice of disseminating the information in terms of the category of documents published and also the platform used. Information is dispersed on multiple websites/ platforms and is posted in an unstructured manner, making it difficult to understand what information publicly available, what documents exist, which is the latest information available and also difficult or impossible to compare similar data.

Example: Inconsistent practice on the publication of:

- *Audit reports on the implementation of EU legislation* following audits carried out by the Commission: DG Mare does not proactively disseminates such documents and rarely discloses them following access requests, while DG SANTE is proactively disseminating generally all .[9]
- *Member States' reports on the implementation of EU law*: there are DGs that publish such type of reports, yet there are still DGs that do not publish or disclose such reports. For example, DG Mare, following the Recommendation of the European Ombudsman in the Case 452/2018/AMF[10] started publishing the Member States' five-yearly reports on the implementation of the fisheries control regulation, elaborated in accordance with Annex XXXVII of the Implementing Regulation No. 404/2011.[11]

As regards the Commission's new access to document platform: the fact that documents previously disclosed to other users are accessible to all other registered users of the platform is a positive feature. Nevertheless, the availability of the documents only to registered users represents an unnecessary barrier. In addition, it seems that the documents which are found on the new database for registered users are not also listed/available in the classical documents register to which unrestricted access is granted.[12] The multiple databases definitely lead to confusion as regards the documents that exist in the Commission's databases.

- ***Council of EU database:***

[9] https://ec.europa.eu/food/audits-analysis/audit-report
[10] https://www.ombudsman.europa.eu/fr/decision/en/122854
[11] https://circabc.europa.eu/ui/group/be3aa2c6-c65e-4c06-bd62-7967611bf2d2/library/c42a6e36-4a04-4565-94de-a0b8de4c56fc?p=2&n=10&sort=modified_DESC.
[12] https://ec.europa.eu/transparency/documents-register/

ClientEarth refers to its complaint regarding the Council's documents register in case CASE OI/4/2020/TE[13]. Despite the decision taken by the European Ombudsman in that case, the Council has not improved the usability of the register and still does not list in its database the WK documents that exist.

Even after disclosing specific documents following access requests, the respective documents are not frequently published in the databases, as requested by the Transparency Regulation.

- ***ECHA's database:***

ECHA does not publish much of the environmental information in its possession, such as the (i) quantity (tonnage bands) of chemicals manufactured/used per individual registrant and (ii) information detailing the scenarios anticipating how, where and to what extent humans and environment will be exposed to the chemicals registered. Furthermore, information on the presence of substances of very high concern in articles remains insufficient, as well as on the control of registrations. In addition, key information that is part of the authorization process is still redacted, preventing third parties from contributing meaningfully to the decision-making process. ClientEarth published a detailed report on ECHA transparency: "*10 years in: time for ECHA to disseminate strategic information to empower third parties*".[14]

- ***EIB's database:***

The EIB maintains a Public Register, which contains limited information on the projects that it finances. However, this Public Register does not contain sufficient information for CSOs and the public to monitor the EIB's activities and to provide input, in particular on social and environmental aspects. This issue has recently been the subject of three related complaints to the European Ombudsman: cases (Case 1065/2020/PB,[15] Case 1251/2020/PB,[16] Case 1252/2020/PB[17]).

short summary of some of the main issues:

- For certain projects that the EIB considers confidential, it does not even publish in the Register that they are under appraisal. The European Ombudsman suggested that the EIB at least indicate for ALL projects the existence, nature and location and provide a justification in case any further information about them is confidential.[18] However, the EIB has not accepted that suggestion.
- In relation to projects that the EIB finances via intermediaries (below Euro 25 million), EIB does not usually conduct a project-specific appraisal of the loans itself but fully relies on the financial intermediary institution. The European Ombudsman therefore suggested that the EIB should, at the least, provide the name, place and nature of any projects that have a significant impact on the environment.[19] However, the EIB has not accepted that suggestion.
- The EIB does not publish any environmental and social information about the projects it intends to finance during the appraisal stage. The EIB only publishes a Environmental and Social Data Sheets (ESDS) after the project has already been approved by the Board of Directors, meaning that the financing will go ahead. This means that the public and CSOs have no possibility to give input into the decision-making of the Bank.

[13] https://www.ombudsman.europa.eu/en/decision/en/139715
[14] https://www.clientearth.org/media/r2momo10/10-years-in-time-for-echa-to-disseminate-strategic-information-to-empower-third-parties-ce-en.pdf.
[15] https://www.ombudsman.europa.eu/en/decision/en/155107.
[16] https://www.ombudsman.europa.eu/en/case/en/57457.
[17] https://www.ombudsman.europa.eu/en/decision/en/155110.
[18] Decision on Case 1065/2020, paras 58-59 and suggestion 6 (at the end of the document)
[19] Decision on Case 1065/2020, paras 17-18.

- The European Ombudsman was not able to conclude that the ESDS contained all relevant environmental information and therefore suggested that the EIB publish the underlying factual information related to projects that have a significant impact on the environment.[20] The EIB did not accept these suggestions, meaning that even after the decision is taken, the underlying appraisal documentation remains hidden.
- The EIB does not publish reports it draws up in relation to monitoring whether projects that it finances comply with all conditions. The European Ombudsman had suggested to change this practice[21] but the EIB again did not accept this suggestion.

As a result, it is currently extremely difficult for the public and CSOs to understand what the EIB intends to finance and why, to provide input into the EIB's decision-making procedures on financing and to verify whether the Bank actually lives up to its commitments as the EU Climate Bank and to its obligations under EU law.

General recommendations for the improvement of the EU institutions' databases relating to environmental information:

- EU institutions need to proactively publish the environmental information they hold in a timely manner to ensure it is up-to-date so that it can be used by the public on whose behalf it is collected.
- Better search criteria and functions: documents need to have meaningful titles/ descriptions and need to be properly tagged so that it is clear what they contain and also that they can be found through the database even if one does not know about their existence (e.g. adding meaningful keywords, titles and description to each document published). This is currently missing from EU institutions' databases. For example, when one relevant document relating to an EU decision making process is identified, the database should easily enable the searcher to identify quickly all the other documents that are connected to the same process.
- Publication of the documents in a consistent manner, covering all categories of documents that the EU institutions possess.

Documents that should be published in online registers in accordance with Article 4 of Aarhus Regulation (non-exhaustive):

- All legislative documents with decision-makers' positions while the process is ongoing (at all stages of EU legislative and comitology processes), including Member State positions; non-papers; institutions' positions; meeting agendas and minutes;
- List of ongoing and finalised pilot procedures opened by the Commission against Member States, in line with the European Ombudsman's recommendations;
- Reasoned opinions and letters of formal notice in infringement proceedings;
- All reports submitted by the Member States to the EU institutions in relation to the implementation of EU environmental legislation;
- Commission appraisals on the state of transposition and implementation of EU environmental rules, including audit reports;
- All meetings between EU officials and third parties, together with meeting agendas and reports;
- Impact Assessment and Regulatory Scrutiny Board opinions elaborated in relation to legislative proposals related to the environment, before the respective proposal is adopted;
- The evidence base of all EU environmental decision-making;
- Details of all EU subsidies and state aid affecting the environment.

[20] Decision on Case 1065/2020, paras 22-23 and suggestion 1 (at the end of the document).
[21] Decision on Case 1065/2020, para. 28.

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IV. EU institutions regularly deny that requested documents contain "environmental information"

ClientEarth has also faced situations when the EU Institutions rejected the qualification of the information included in the requested documents as being "environmental information".

The Commission and Council have denied that the information at issue in the following requests constitutes "environmental information:

- In request Gestdem 2017/141 the requested documents concerned the existence of ongoing EU Pilot dialogues with any Member States on potential breaches of the Fisheries Control Regulation. In relation to the Commission's manner of handling this request, the European Ombusdman opened a case[22], in which it was recommended to the institution: *"to give effect to the active dissemination of environmental information foreseen in the Aarhus Regulation and bearing in mind the principles of good administration, the Ombudsman suggested that the Commission proactively publish the Member State reports on the implementation of the Fisheries Control Regulation".*
- In Request Gestdem 2020/4348, which was submitted to the Commission, the documents requested concerned finalised audit reports in respect of audits carried out since 1 January 2015 in France and Denmark, regarding compliance with the catch registration and data validation systems requirements established under the framework of the Control Regulation. This case is currently before the General Court (T- 354/21);
- In Request Gestdem 2020/7660 which was submitted to the Commission, the documents requested concerned the Member States positions and voting positions expressed in the Standing Committee on Plants, Animals, Food and Feed in relation to the renewal/ non-renewal of certain active substances. This case is currently before the General Court (T-395/21).
- In Request Ref. 30/c/01/2021-PRO-vk, submitted to the Council, the document requested concerned the opinion of the Council Legal Service concerning the scope of the application of the Commission proposal for a Regulation amending the "Aarhus Regulation" (Regulation (EC) No 1367/2006) and the advice of the Aarhus Convention Compliance Committee on the proposal. This case is currently before the General Court (T- 681/21).

We find it very disappointing that the EU institutions are trying to restrict the definition of "environmental information", despite the clear wording of the definition in Article 2 of the Aarhus Regulation.

V. Improvement of the transparency of comitology procedures, specifically concerning environmental information:

We fully agree with the European Ombudsman's position on access to comitology documents in her Bee Guidance decision. Additionally, the Comitology and Delegated Acts databases of the Commission are difficult to navigate and are not user-friendly. In addition to this, they do not contain all of the information needed to participate effectively in the very important environmental decision-making that takes place through comitology procedures and to hold Member States accountable for their votes in these committees.

For ClientEarth's purposes, the most important information that must be recorded and made accessible to the public is records of the Member States positions and voting records. Meaningful meeting reports or minutes should also be accessible to the public, in order to follow the decision-making procedures and understand why certain decisions are continuously postponed. This would also be consistent with Article 2 of the Transparency Regulation and the reasoning of the then Court of First Instance in case *T-264/04 WWF European Policy Programme v the Council of the European Union* (see further section VII.3 below).

[22] European Ombudsman Case 452/2018/AMF: www.ombudsman.europa.eu/fr/decision/en/122854#_ftn1

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VII. Please raise any further issues you have observed in the transparency of decision making relating to the environment.

1. **Absence of Impact Assessments ("IA") conducted for certain proposals**:

Impact assessments constitute the rule for all legislative activities, which are expected to have significant economic, environmental or social impacts.[23]

Recently we noticed that several proposals have not been accompanied by IA and RSB opinions, such as: RepowerEU and, in state aid matters, the Communication on Important Projects of Common European Interest ("IPCEI")[24].These EU laws have undeniably significant environmental impact, as recognised also by Commission in relation to each of these.

As regards the justification provided by the Commission regarding the lack of an IA for the RepowerEU Plan, the Commission invoked "political sensitivity" and "urgency" as justifications for its omission to undertake an impact assessment. With regards to the former, it is particularly due to the "politically sensitive" nature of those amendments (which could lead to significant environmental degradation, as well as major land use changes with socioeconomic consequences for local communities) that the need for an impact assessment and an in-depth opinion by the Regulatory Scrutiny Board are imperative. Neither the "urgency" argument seems convincing, as the impact assessments "must not lead to undue delays in the law-making process"[25] and, in any case, when viewed in the broader context of the ordinary legislative procedure and the long-term objective of the proposal, the time added for the completion of an impact assessment is a good investment. As a more general observation, the political choice of the Commission sets a dangerous precedent that risks disrupting rule of law across EU legislative procedures, including through the abuse of the malleable concepts of "urgency" and/or "political sensitivity" for the advancement of other industries' private financial interests.

As regards the IPCEIs, these concern very important and innovative projects such as very recently hydrogen projects which will undeniably have an environmental impact, as recognized by the Commission.[26]The CJEU also recently ruled in C-594/18P that compliance with environmental law is a matter of compatibility of aid measures with the internal market.

2. State aid decisions on IPCEIs are not published

Even though IPCEIs are deemed to be in the EU's interest and are required to have positive spill-over effects (so they benefit across the EU), the state aid decisions approving the financing of those projects have not all been published since 2019; whereas state aid decisions are normally published quite soon after they are adopted.[27]

More recently in September 2022, the Commission approved for the first time state aid to a new hydrogen IPCEI. As clearly presented by the Commission the project is considered beneficial for the environment and supporting the Green Deal objectives,[28] yet such state aid decision are still not published. This prevents citizens and even market

[23] As enshrined in Article 13 (Chapter III) of the Inter-institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (13 April 2016)
[24] For other state aid communications the Commission has drawn IAs, for example for the revision of Guidelines on State aid for Climate, environmental protection and energy: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12616-State-aid-for-environmental-protection-and-energy-revised-guidelines_en
[25] C-128/17, para 83; Art 12 Inter-Institutional Agreement
[26] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5676
[27] For instance, to this date, none of the public versions of the decisions adopted on 9 December 2019 in respect of the Summer IPCEI Batteries notified by France (SA.54794), Sweden (SA.54796), Germany (SA.54801), Italy (SA.54806), Poland (SA.54808), Finland (SA. 54809) have been published in the State aid register.
[28] Idem.

participants from having a full picture of the projects and their financing, but also to check that the Commission actually complied with the state aid communication: Without a decision published, one cannot know if the rules were applied correctly, hindering access to justice rights and *de facto* exonerating the Commission from judicial review.

3. Minutes of significant meetings either do not exist or are not disclosed

It is beyond doubt that the public cannot access documents that simply do not exist. Therefore, if the EU institutions record their activities, the public cannot know about them. The then Court of First Instance made it clear that such a practice of avoiding keeping records breaches Article 2 of the Transparency Regulation. In Case T-264/04 *WWF European Policy Programme v the Council of the European Union*, the Court of First Instance held that "*it would be contrary to the requirement of transparency which underlies Regulation No 1049/2001 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities*".

- ***ECHA meeting minutes of Socio Economic Assessment Committee ("SEAC") do not reflect the actual debates during the meetings.***

Currently there are not appropriate and accurate records of the debates during the SEAC plenaries, but only high-level notes. This means that there is no transparency in relation to the discussions held in SEAC among the members, including the concerns and disagreements expressed, which are essential for the public and the Commission to understand the development of the decision making process. For NGO stakeholder observers, it is a significant issue as they are not allowed to report on the content of the discussions outside the plenary if such are not included in the minutes. In this context, there is no action NGOs can further take, due to confidentiality rules and the lack of transparency around the SEAC process.

- ***Comitology meetings***

As mentioned above, the Comitology and Delegated Act registers only hold very general information about the meetings that take place. They do note neither the positions of the Member State and Commission representatives, nor the voting records.

- ***Council Working Party Meetings***

The same is true of the Council Working Party meetings. This was documented in ClientEarth's complaint to the European Ombudsman in case 640/2019/TE.

4. Commission's failure to conduct a climate consistency assessment pursuant to Article 6(4) of the European Climate Law

Article 6(4) of the European Climate Law[29], provides that the Commission has the obligation to perform a climate consistency assessment of any draft measure or legislative proposal, taking into account the climate-neutrality objective set out in Article 2(1) and the progress on adaptation as referred to in Article 5. ClientEarth has argued that the Commission breached its obligation to conduct and publish a climate consistency assessment prior to adopting

[29] Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ L 243, 9.7.2021, p. 1–17.

a measure with climate impacts (respectively the RePower EU initiative, the fifth list of Projects of Common Interest and the complementary delegated act on climate change mitigation under the EU Taxonomy).[30]

In response[31], the Commission stated: "*as regards the consistency assessment carried out in respect of the Proposal in accordance with Article 6(4) of Regulation 2021/1119, it would go beyond the scope of the European Climate Law if the Commission were to include a climate consistency assessment for all of the many measures it takes. The Commission should be obliged to carry out a climate consistency assessment only if it carries out an impact assessment. The Commission should have some discretion when it comes to whether or not to carry out an impact assessment, and the Better Regulation Guidelines provide some guidance in this regard*" (emphasis added)

This position, should it be reiterated and establish the Commission's interpretation of its obligation under Article 6(4) of the European Climate Law, is concerning to us in several respects related to potential maladministration in preparing measures, both for lack of transparency and for failure to comply with a procedural obligation. Art. 6(4) European Climate Law applies to "any draft measure or legislative proposal, including budgetary proposals", not only those preceded by Impact Assessment. The fact that the Commission has recently decided to not prepare Impact Assessments on various important proposals (see above), makes this issue worse.

Participation

VIII. The Commission's improvements needed for the involvement of civil society in the preparation and implementation of the policies with an impact on the environment

Ensure adequate transparency in respect of the consultations done by the Commission: Names of the consulted experts and inputs provided should be public. Ensure proper involvement of NGOs in such consultations on equal footing as vested stakeholders.

Frequently, no input or very limited input from the NGOs in consultations performed by the Commission

- ***The revision process of the Communication on Important Projects of Common European Interest ("IPCEI")***

The revision process of the IPCEI is a clear example illustrating the lack of transparency in relation to the targeted consultation conducted and also the non-involvement of the NGO sector in the consultation. According to the IPCEI Fitness *Check report,[32] prior to the revision of the IPCEI, the Commission conducted a targeted consultation[33] to which: "a total of 35 replies were submitted in the context of the targeted consultation: 18 from Member States or public authorities, 8 from private companies or business organisations, 2 from research organisations /universities, 5 from trade associations and 2 from "other" types of respondents (experts contributing in their personal capacity or as member of the Strategic Forum)*". The Commission did not publish who are the respondents that were consulted, nor the content of their response to the targeted consultation.[34]This example also illustrates the lack of involvement

[30] See ClientEarth's internal review requests and the Commission's replies in the Repository of internal review requests, items 66 and 70, at: https://environment.ec.europa.eu/law-and-governance/aarhus/requests-internal-review_en and ClientEarth's application for access to documents of 24 May 2022 – GESTDEM 2022/3007.
[31] Commission's letter of 10 October 2022, Ref. Ares(2022)6999785; Also see paragraph 52 of the Commission's reply (Repository of internal review requests, item 66). The Commission has not yet replied to our internal review request concerning the complementary delegated act under the EU Taxonomy (Repository of internal review requests, item 70).
[32] IPCEI Fitness Check report of 30 October 2020.
[33] That took place between 9 August 2019 and 31 October 2019.
[34] Following an express question addressed by ClientEarth by email to EU Commission (DG COMP), the latter confirmed that it does not make publicly available these documents.

by the Commission of NGOs in closed targeted consultations in certain fields that are deemed to be relevant only for the Member States and the industry (IPCEIs have concerned so far batteries, microelectronics and hydrogen).

In this field there is also the Strategic Forum for Important Projects of Common European Interest, which is the decision making forum for IPCEI, which is also not sufficiently transparent. For example, civil society could not apply for membership to it and its meetings were not public. In this context, we consider that the power given to the industry to decide on the strategic value chains and IPCEIs raises serious conflict of interest issues.[35] This lack of transparency prevented us from understanding what the industry and member States or other experts consulted in the targeted consultation thoughts the problems or positive aspects of IPCEIs and the rules around them could be.

- ***Consultations performed by the Commission on the Single Plastic Use Directive No. 2019/904***

The number of NGOs invited to stakeholder workshops is usually very low compared to the number of industry representatives. At the stakeholder workshop working on establishing the markings for some products under the Single-Use Plastics Directive the percentage of NGOs that were consulted was very low: 2% of the total respondents.[36]

In addition, in online workshops the questions from stakeholders that are answered by the Commission are selected using an online tool that allows participants to vote for questions. Only the questions with the highest numbers of votes were answered. Since most of the participants in the workshop are industry representatives, this way of choosing the questions amplified the imbalance in their favour.

- ***ECHA: NGOs that received the statute of stakeholder observers are a minority compared to the industry stakeholders.***

NGOs that qualified as ECHA stakeholder observers amount to 8%, whereas industry stakeholders amount to 76%.

- ***Limited consultation in relation to certain EU laws legislation adopted in the Fisheries area***

The revision of the EU Fisheries Control Regulation (EC) No 1224/2009 and the adoption of the new European Maritime Fisheries and Aquaculture Fund No. 1380/2013 have been conducted by the Commission also without public consultations.[37]

The Commission should systematically consult with civil society in the elaboration of its priorities for controlling the compliance of the effective implementation of the Common Fisheries Policy by the Member States. For instance it is difficult to understand why the Commission has not focused its future audits on the implementation of the Mediterranean Regulation (Regulation No. 1967/2006) by the Member States, since today, more than 75% of the fish stocks in this sea are overexploited. We are unable to understand which indicators are used to determine the audit priorities.

IX. The obligation of EU institution to ensure the public participation for plans and programmes – issues observed: No input provided by ClientEarth on this question.

[35] For more on ClientEarth's feedback on how the revision of the IPCEI was conducted please consult *Roadmap on the revision of the Communication on Important Projects of Common European Interest,* Dec. 2020 available at: www.clientearth.org/media/x5olvn3p/revision-of-ipcei-communication_clientearth-21-12-2020.pdf.
[36] According to the document transmitted by the Commission following the workshop by email: "Stakeholder workshop background document: Harmonised marking on certain single-use plastic products 25.November 2019."
[37] For more information in this sense please see *Joint NGO letter to Mr. Timmermans on the revision of the EU Fisheries Control System* available at: https://www.clientearth.org/latest/documents/joint-ngo-letter-to-mr-timmermans-on-the-revision-of-the-eu-fisheries-control-system/

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X. REPowerEU - what should the Commission do to ensure an adequate level of public participation[38]:

1. **Elaborate an Impact Assessment**

As mentioned in the answer provided at Question VIII above, the REPowerEU Plan had no Impact Assessment conducted, which considering the significant environmental impact of the law, should have been the case.

2. **Perform an adequate call for evidence**

The Call for Evidence (and accompanying questionnaire) and the RES Simplify Study[39] performed was significantly narrower than the scope and likely impacts of the proposal. This had the effect that the evidence collected could not serve as a legitimate basis for the proposed measures. This also does not appear to be consistent with Chapter III of the Inter-Institutional Agreement, Article 5 of Regulation 1367/2006 and several principles of EU law.

3. **Conduct proper Stakeholder Participation**

The public consultation process followed for the development of the proposal was not "open and transparent". Civil society and environmental organizations were neither included among the "target audience", nor consulted for the drafting of the industry-led RES Simplify Study.[40] Only an insignificant amount of public authorities have provided their input in the questionnaire, despite the unprecedented changes that the proposed measures would bring to their functions. The only stakeholder group that was provided with early and effective opportunities to participate was the energy sector (renewable energy producing companies, energy communities, and branch organisations). Consequently, the input provided in the consultation was not comprehensive and the stakeholder consultation exercise incomplete. Such a process cannot lead to well-informed decision-making on matters which touch the existing environmental acquis.

XI. Other issues observed in the way the EU institutions facilitate public participation in decision making relating to the environment.

1. **Final decisions taken by the Commission disregarding the public consultation input**

Despite gathering the civil society's input through public consultations, final decision are often taken disregarding the expressed concerns without any justifications. For example, a consultation on the PCI list is usually organised by the Commission. NGOs have constantly raised the issue of the environmental impacts of gas projects, urging the limitation or the discard of gas projects from the PCI list. In response, the Commission is still adding gas projects to the PCI list, without any express response or no reaction or a specific explanation from the Commission on why it did not duly assess their complete environmental impact. There is no transparent explanation of how the input received from the public consultations influences the elaboration of the PCI lists.

2. **Consultations performed post publication of the legislative proposal**

Over the last 3 years, ClientEarth has observed a new practice of the Commission to conduct so-called "Feedback Consultations" after having published a legislative proposal. These consultations have been conducted for

[38] More on ClientEarth's input in this sense please see "RePower EU Proposal for a REDII amendment" available at: https://www.clientearth.org/media/itejqaby/clientearth_repowereu-permitting-amendments-briefing_july-2022.pdf.
[39] Published on 18 Jan 2020: ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13334-Renewable-energy-projects-permit-granting-processes-power-purchase-agreements/public-consultation_en
[40] Co-written by WindEurope and SolarPower Europe, two entities with significant financial stakes on the outcome of the file

instance for the Proposals for a European Climate Law,[41] the amendment of the Aarhus Regulation, the Regulation on agricultural statistics[42] or the revision of the Air Quality Directive (still ongoing).[43] These are just some examples; it appears to have become a general practice of the Commission.

The problematic aspect of these consultations is that the public is being told: "All feedback received will be summarized by the Commission and presented to the European Parliament and Council with the aim of feeding into the legislative debate."[44] A similar message appears when feedback is provided.[45]

However, there is no public evidence of the presentation of such a summary to the European Parliament and Council. Based on ClientEarth's experience, neither Members of the European Parliament involved in the legislative process nor representatives of the EU Member States in the Council were able to recount any clear instances of such a summary being provided.

Should it be correct that such a summary is not provided in any traceable way to the other legislative institutions, the public is being misled by this statement by the Commission. If the feedback received is only used for internal purposes of the Commission, this would in itself not be problematic but should be clearly indicated. It should also be made clear, as this may not be commonly known by the general public, that the Commission is determining its position in the legislative process with its legislative proposal. This way the public would be in a better position to decide whether to participate or not and what to focus on in its reply.

3. ECHA: Poor involvement of NGOs in Socio Economic Assessment Committee ("SEAC")

ClientEarth is a stakeholder observer in ECHA meetings and is attending the SEAC meetings in this quality. We have observed the following issues:

- Documents essential for the discussions in plenary are published either late (on the same day, during the meeting or even after the meeting). This is a systematic issue which leaves NGOs with no time to prepare constructive interventions according to the Code of Conduct[46]. This hinders NGOs in effectively getting involved in the meetings as we do not have enough time to assess the issues discussed.
- NGOs that are stakeholder observers are not proactively consulted on documents opened for comments.
- Interventions from NGOs are regularly declined or cut off while ongoing by the Chair.
- When NGO STOs are consulted, their comments are rarely turned into concrete changes in the content of a guidance document or SEAC/RAC opinion for example, whereas the contributions from industry receive more consideration.
- Derogatory regimes to main restrictions are added by the SEAC without justification, consultation of stakeholder observers or prior RAC assessment. In principle, SEAC is supposed to give its opinion on a restriction dossier prepared by ECHA or a Member State; it is not supposed to add to it. Often however, SEAC decides to add derogatory regimes in its opinion on the restriction, based on the contributions of industry to public consultations. This is problematic because we are not able to provide comments on those derogations – they are just added last minute and will be assessed as such by the Commission without all stakeholders having been able to comment on it, as the process requires.

[41] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12108-European-climate-law-achieving-climate-neutrality-by-2050_en .
[42] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12257-Farming-statistics-agricultural-inputs-and-outputs-updated-rules-_en
[43] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12677-Air-quality-revision-of-EU-rules_en .
[44] Ibid.
[45] "The Commission will present a summary of the feedback received to the Parliament and Council so that your views can be part of the legislative debate."
[46] https://echa.europa.eu/documents/10162/17203/conduct_code_stakeholder_observers_en.pdf/039e8710-5035-497d-aa3a-9047cb4c49c4