

EEB contribution to European Ombudsman's public consultation on transparency and participation in EU decision making related to the environment - SI/5/2022/KR

Transparency

1. Please describe any difficulties you have faced in searching for and obtaining information or documents related to (decision making on) the environment held by EU institutions.

Within the revision of the [Industrial Emissions Directive](#) and of its [Portal](#), we would like to draw the Ombudsman's attention to the shortcomings of said Portal (<https://industry.eea.europa.eu/>), specifically for the purpose of finding the information needed for benchmarking and compliance promotion. While we welcome the proposal for the creation of the Portal, as a key tool in ensuring timely and efficient access to information and transparency, we believe the current proposal is unfit for purpose and does not provide meaningful information. If the Commission is to uphold its commitments to enter the 'digital decade'¹ and allow an "evidence-based" decision-making and 'free flow of (industrial) data', it is crucial that it ensures that this new tool truly allows all stakeholders to monitor and benchmark economic actors, including the member states' decision makers, and track their progress towards the delivery of the EU green deal goals. To this purpose, the EEB has published an [analysis of a data viewer](#) and a [briefing on the shortcoming of the Portal on transparency](#) and decision making. It also released a [10 action points](#) with suggestions on how to make pollution prevention reporting fit for the digital age.

The EEB has also found great difficulties in obtaining information relating to consumption of resources (water, energy, materials). The EEB believes that there is a general lack of transparency in the dissemination of industrial plant specific information on consumption of resources, making it impossible for stakeholders to access the information necessary to track the consumption of operators and ensure they are operating within the established limits. The issue is not limited to national authorities but the European Commission plays a major role in not disseminating information that can be allocated directly to one specific industrial plant. For example, in this [report](#) by the EEB, it investigates to what extent the cost recovery principle is being implemented in coal and lignite mining countries across the EU (Germany, Poland and Czech Republic) presenting the different national approaches on water pricing for mine drainage and cooling water abstraction. This report also presents findings in relation to availability of water abstraction data in public registers and its user-friendliness.

We would also like to point out the general secrecy and absolute lack of transparency of the Council of the Working Parties on the Environment. It is virtually impossible for stakeholders to understand which member state said what on certain decisions with very far-reaching impact on environmental performance, emissions, toxic exposure. The EEB believes that the lack of Council preparatory bodies in general is an issue but considering the higher standards of access to information when that information relates to the environment, the secrecy of the Working Party on the Environment breaches the EU's obligations as a party to the Aarhus Convention. This issue is the very same in the so called expert groups, whose deliberations are deemed confidential too.

2. In your view, is the environmental information that the EU makes public up-to-date and accurate? If not, please give examples.

Following the example of the questions above, on the reporting of information on industrial emissions and resource consumption of plans, the EEB believes that although the Commission claims to make the most amount of information possible available, it is often in a way that does not allow stakeholders to make an efficient use of it. The EEB believes that often, the way in which the information is made available misses the primary purpose that the information sharing practice should serve: e.g. efforts sharing on pollution prevention at source, tracking trends, improve public accountability of decision makers and polluters to improve a situation instead of reporting on a status quo.

For a more specific example, we could come back to the reporting streams of activities regulated by the Industrial Emissions Directive and by the Portal. Firstly, we believe that EU institutions are not fully complying with the [Kiev Protocol on PRTR](#), which in its article 1 lists three objectives: “to enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers (PRTRs) [...] facilitate public participation in environmental decision-making as well as contribute to the prevention and reduction of pollution of the environment.” The Commission’s proposal on the Portal only addresses the first aspect, taking the approach to report information for the sake of making it public and complying with only a portion of its obligations, without including tools to improve sharing of information and its effective use.

Currently, the publication of information by the Industrial Emissions Directive and the Portal operate in parallel, but data is not used to its full potential: the tool does not allow EU-wide benchmarking of the environmental performance of industrial activities covered by the Industrial Emissions Directive (performance data is provided in different format, in tones per site and year in the Portal, whilst pollution prevention standards under the EU BREF benchmarks are mostly expressed in concentrations), permit conditions in force nor compliance information are not directly integrated, making data not comparable at Union level for similar activities in a few clicks. Data related to inputs (e.g., water and energy consumption) is not made available and information is not put in context, therefore making it difficult for citizens to understand the scale of pollution and health and hazard relevance to which they might be exposed. More importantly, it is not clear whether the operators and permit writers have taken best of the efforts to act on pollution prevention and reduction at source. Putting the performance data into context would also enable to provide for a more accurate picture of the good performers, thereby levelling the environmental playing field and making data more useful for various users. Moreover, data gathering and reporting should be integrated in a centralized tool (European Pollution Prevention Portal), due to competency issues at member states level or improper design of IT tools (lack of harmonization and efforts sharing). Now is the opportunity to make better use of current reporting requirements, improving knowledge sharing on pollution prevention efforts taken by both operators and enforcement authorities and improve public accountability.

3. The EU Aarhus Regulation obliges the EU institutions to set up public databases for the proactive and systemic dissemination of certain environmental information.[1] What, in your view, should the EU institutions do to make these databases as comprehensive and user-friendly as possible? The kind of information that the EU institutions should include within their scope is set out in Article 4 of the Aarhus Regulation. What specific information needs to be provided to meet this requirement? Should the EU institutions choose to go beyond this legal requirement? In what way?

Examples of the types of documents the EEB is calling for proactive publication off:

- Member State reports on implementation of Environmental Legislation
- Closed audit reports
- Transparency register and agenda/meeting transparency

Related to what has been said in previous questions about information on industrial pollution, its dissemination is far from being comprehensive or user friendly. It seems in many case that institutions make information available for the sake of complying with transparency on paper, but without any thought of what purpose the information could serve or how it could be beneficial for the stakeholders to have access to it. In order to effectively comply with its obligation or the setting up public databases for proactive and systemic dissemination of environmental information under the EU Aarhus Regulation, the Commission should develop metrics or indicators as to what is the “right” information to be disseminated and design the tools to allow stakeholders to obtain the relevant information in a fast and user-friendly way.

One problem that the EEB has identified that prevents a proactive and systemic dissemination of information is that EU institutions have not reached out to the main user groups as to what they are looking for (need assessments). Moreover, the Commission limits itself to publish what is strictly required which in many cases is insufficient to cover the full extent of the scope or article 4 of the Aarhus Regulation. For instance, the PRTR Protocol (IED related Portal) mentions a set of pollutants and activities, and institutions limit themselves to publicize those only. However, for the information sharing on industrial activities to be meaningful the following information should also be publicized:

- (a) benchmarking of environmental performance of the activities, notably in regard to Best Available Techniques associated emissions and performance levels;
- (b) comparability of permit conditions in force;
- (c) identification of hot spots for further pollution prevention measures, trends of progress within Member States and their competent authorities as to pollution prevention/reduction at source;
- (d) promoting compliance with environmental quality standards and track record with relevant due diligence;
- (e) improving effective public participation in decision making.

Moreover, information should also be placed in context (as to the purpose). A possible way forward as to useful metrics for industry reporting could be:

- I. ratio of lowest negative environmental impact of the activity compared to product output / service output;
- II. pollution intensities (e.g. carbon intensity, resource consumption intensity) per unit of production;

- III. performance data in the context of environmental quality index (incl. air, water, soil, hazard risk).

The indicators should enable a rating of progress on the continuous improvement of the environmental performance and safety of the installation/company/decision maker and the life-cycle environmental performance of the supply chain, including on the environmental performance indicators as described in Annex IV of Regulation (EC) 1221/2009 (EMAS Regulation) and relevant benchmarks such as Best Available Techniques conclusions. The indicators should enable a benchmarking and comparability of described actions to improve environmental performance at sector level and across the Union.

4. In some inquiries concerning public access to documents, the Ombudsman found that the EU institution concerned did not recognise that 'environmental information' was at stake and, thus, did not apply the higher transparency standards required by the EU Aarhus Regulation.[2] Have you come across this issue? If so, please provide relevant examples.

The EEB has come across this issue in several instances. Specifically, in what regards industrial pollution related issues, the EEB can give the following examples:

- There are recurring confidential business information (CBI) claims problems in the context of inputs (consumption) within the EU standard making process, see more here [letter](#) and proposed [way forward on this](#) (EU BREF review framework).
- As explained in complaint 2000/2022/MIG recently submitted by the EEB regarding a denial of access to documents request by DG CLIMA, the commission erred in identifying the information that was being requested as information related to the environment. In short the Commission refused access to EU ETS best 10% installations performance data, which is clearly about emissions into the environment and therefore should fall into the scope of the Aarhus regulation. Although the EEB has not had the time or resources to analyze if this has been the case in other access to document requests it might have filed, we believe it would be highly useful to analyze whether the failure to recognize access requests as falling within the Aarhus regulation is a common practice used by the Commission to limit access to information unlawfully and therefore if it is incurring in maladministration and failing to comply with its transparency duties.
- As it can be seen in the [briefing of the EEB on the Industrial Plant Data Viewer](#) (IPDV) many countries asked for fees for permit information or very basic information. The briefing introduces the scope and the main feature of the IPDV, which allows users to access and compare data from over 3000 large combustion plants across the EU, and check whether they are doing their job to prevent pollution.
- Regarding the [Seveso Directive](#) (2012/18/EU), which aims at the prevention of major accidents involving dangerous substances, the inventory of dangerous substances is not made public for the installations covered by said Directive, despite potential accidental release and or release via the product phase which would deeply impact the environment.

Moreover, the EEB has also identified similar issues regarding chemicals regulation and the [REACH directive](#) particularly in the registration tonnage band issue. The Commission does not take into account high production volumes or widespread use to increase transparency in any of the decisions to restrict or authorize substances (which de facto are high production and/or widespread).

5. The European Commission has implementing powers (under the so-called 'comitology' procedure) that it also uses to adopt decisions that relate to the environment, such as approving active substances in pesticides.[3] The Commission submitted a proposal to amend the 'comitology' regulation in 2017, including by making public EU Member States representatives' votes in the Appeal Committee. However, the legislative process on this proposal has since stalled.[4] Meanwhile, the Commission said it is reflecting on how to ensure further transparency in comitology procedures.[5] How do you think the Commission can improve the transparency of comitology procedures, specifically concerning environmental decision-making?

Under this question we would like to bring the Ombudsman's attention to the [NEED FOR SPEED REPORT](#) by the EEB, specifically in the part that addresses the delays on prohibition of dangerous substances decisions by the Commission. The EEB report found that there is no justification or transparency on why the Commission is not meeting deadlines to make decisions on these issues. The report explains that When the EU chemicals agency, ECHA, finally recommends measures to control a hazardous chemical that is in dangerous use, the European Commission stalls these protections without explanation, normally for over 17 months. Today, recommended control measures for nearly half (45%) of 192 chemical dossiers considered in dangerous use are on hold, in one case for 13 years. But officials regularly freeze protections, without justification or explanation, or because of endless discussions and 'paralysis by analysis'. As a result, millions of tonnes of chemicals are today going into consumer products that officials know are dangerous. In general terms, the EEB has found that when the Commission COM is taking implementing rules it is really late in the process that NGO can see the actual draft, and are not given the chance to influence its substance in formalized way. In the case of chemicals, the delays in decision making creates an administrative silence that is interpreted as "positive" by the substance producers, enabling them to keep producing substances that are considered dangerous as the Commission has not effectively made a decision about the authorization.

6. In your view, are the personal and/or professional interests of external experts that the Commission consults in relation to environmental proposals, legislative or otherwise, sufficiently transparent? Please provide reasons for your view.

Since the Ombudsman's inquiry on expert groups, the EEB has, unfortunately, not been able to notice a marketable increase in transparency nor a meaningful change in balance of stakeholder groups in expert groups. The EEB strongly encourages the Ombudsman to re-open its efforts on the transparency of expert groups to ensure that the original recommendations are in fact applied. The EEB frequently encounters conflict of interest risks and imbalance within several expert groups.

For further information, please read [here](#).

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

The EEB would like to point out the general lack of information about ongoing infringement cases, specifically regarding compliance with EU environmental law. Currently, the implementation of cornerstone environmental legislation by Member States is poor 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. In [this publication](#) the EEB provides eight actionable and tangible recommendations, including on transparency issues.

Another general issue relevant to this consultation could be the “green oath” principle in the EU Green Deal Communication, as so far it remains unclear what it means and how public servants apply this in their daily work. This could improve the transparency and accountability of the institution as the oath could imply a duty to do the right thing instead of merely reporting better on how institutions take decisions against the public interest.

Participation

8. What could the Commission improve regarding the involvement of civil society in the preparation and implementation of the policies with an impact on the environment, for example in 'Civil Dialogue Groups' in the context of the EU's Common Agricultural Policy, or 'Domestic Advisory Groups' in the context of the implementation of Free Trade Agreements?

In this point we would like to highlight the [report on improvement of public participation](#) by the EEB, which highlights key participation barriers in the EU and provides case studies to illustrate this. The report points out the need for diverse contributions of stakeholders to shape policy, to avoid economic interests dominating over environmental ones, and to preserve the public interest. The phenomenon of ‘squeezing of civil society’ is looked at both at Member State and EU level. It includes conclusions and recommendations and provides insights useful to the European Commission.

On another note, a general improvement of the transparency of working groups would be greatly welcomed, as sharing of detailed information in advance (such as meeting agendas) and granting of access to meeting minutes could enormously help NGO and civil society to get involved in EU policy making.

Specifically for some working groups, we have noticed a non-justified anonymisation and lack of transparency such as in [CARACAL](#) or REACH related meetings. Moreover, this practice is inconsistent as in some instances the names of stakeholders including those of competent authorities are published, while in others not. The institutions do not justify this decision, and use an “automatic anonymisation” principle as a generalised practice, that NGO have to fight each and every time and which goes completely against principles of transparency and access to information.

- For instance, REACH meetings, where legislative decisions on restrictions on chemicals are taken, are closed meetings between Commission and Member states in this NGO and civil society have no access. The voting results do not mention the opinion of each state and the

minutes rarely contain meaningful information, preventing any form of transparency or accountability.

- So far in the EU Ecolabelling Board the minutes reflect to each MS intervention and the names of the stakeholders, thus there is no justification for this anonymisation practice.
- There is a similar transparency issue in the [Sevilla process](#).

9. Under the EU Aarhus Regulation, EU institutions are required to provide early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment and to take the outcome of the public participation into account. Are you aware of issues in this regard, such as instances where EU institutions did not adequately adhere to this obligation? If so, please provide relevant examples.

As it is highlighted in the Report by the EEB [on improvement of public participation](#), mentioned above, the space given to civil society in some member states does not reflect the commitments taken with the ratification of the Aarhus Convention, an agreement that ensures that NGOs and the public have access to information, public participation and access to justice on environmental matters. The EEB believes that the Commission needs to make sure that public participation is respected in the EU. It is its role as the guardian of the treaty to do so. In recent years, changes to legislation and in political orientation have sometimes drastically limited the public participation of some NGOs in the EU. More information in the series [Implement for Life](#).

Moreover, we would like to mention that there is a general feeling of “citizenwashing” among CSO/NGO when it comes to EU public participation initiatives. As the EEB explains in [this article](#) it could be said that the Commission frequently uses public consultations as a box ticking exercise without any intention of taking the input into account in a meaningful way.

From the perspective of industrial pollution, we can mention the following examples:

Ex 1) the Commission has not sufficiently taken into account the position of the civil society when designing their new Portal Regulation (mentioned above).

Ex 2: the draft of the Commission implementing rules on the IED reporting have not been elaborated in consultation with NGO and other public interest bodies, despite being the main user of that information

Ex 3: Art 32 TNP of the IED, see [here](#) the findings of the Compliance Committee, to which an NGO sent a communication alleging the failure of the European Union to comply with the Aarhus Convention’s provisions on public participation in decision-making. Specifically, the communicant alleged that the Industrial Emissions Directive does not fulfil the requirements for public participation in decision-making stipulated in article 6 (1) (a) and (10) of the Convention in cases where a permit issued under the Directive is reconsidered or updated.

Ex 4: there are further measures with far reaching impact on environmental performance e.g. the Transformation Plans proposed under Art 27d of the revised IED proposal are not subject to mandatory public participation, although this is a about how and when the industry (installation) will transform to clean, circular and climate neutral (production).

10. What should the Commission do to ensure an adequate level of public participation as regards the measures to be adopted in the context of REPowerEU and the Nature Protection Package?

In general terms, the way and timeframe in which the **RePowerEU proposal** (revision of the Renewable Energy Directive – REDIV) was presented highly limited any type of public participation and democratic decision making. The use of the procedure under Art.122 TFEU involved no public consultation and no involvement of the European Parliament in its adoption. Moreover, presenting this proposal when the Renewable Energy Directive was already being discussed has made the law-making process further intricate and confusing for a lot of citizens and civil society representatives to follow and understand, let alone participate in.

Similarly, the way the decision-making process has been set in this framework completely prevents public participation, as one of the key elements of the proposal is to exempt renewables projects from Environmental Impact Assessments (EIAs) and Appropriate assessments (AAs) under the Birds and Habitats Directive, which usually has strong public participation criteria. The EIA demonstrate how the public's view is taken into account and thus excluding this possibility will fundamentally undermine public participation and prevent the public from ensuring the environmental safeguards are fully complied with and EIAs are not scraped.

To this regard, there are also some other elements worth mentioning:

- There should be a specific article on public participation. In the [process of drawing up go-to areas for renewables](#), real public [participation and engagement needs to be ensured to avoid social backlash](#), ensure the expertise of the community can input to the plans and to ensure compliance with the Aarhus Convention. In the approval of renewables projects often times the lack of provisions on public participation do not speed up the process; on the contrary, they generate conflict with local communities that have not been consulted and challenge the projects because of the lack of transparency, which ultimately slows down and stops the projects. Therefore, strengthening public participation giving public adequate time frames and access to the relevant information on projects (specially in digital format) is key for renewables projects to be effectively and timely implemented.
- The Commission should ensure proper public participation opportunities as a matter of good administration principles despite shorter permitting deadlines, which usually lead to further reductions in the time available for the public to express their views and concerns towards specific projects. None of the RePowerEU aspects exempt the EU from its obligations as a party to the Aarhus Convention.

Regarding adequate public participation for the **Nature Restoration Law**:

The [EEB's NRL reaction letter](#), highlighted the need to ensure the full and effective participation of the public in the preparation of National Restoration Plans. Member States should ensure that the public is adequately informed on the outcomes of the different preparatory mapping and identification processes undertaken under Art.11.

A concrete measure that could contribute to furthering public participation is to add an additional article to ensure proper access to information and full public participation rights should be added. This is crucial to ensure local expertise and knowledge contribute to the National Restoration Plans

and the acceptance of the restoration measures (also from the farming and forestry stakeholders, they are making a lot of noise about this at the moment, of course).

11. Please raise any further issues you have observed in the way the EU institutions facilitate public participation in decision making relating to the environment.

The EEB has grave concerns about the role of the Regulatory Scrutiny Board. The board is a non-elected entity with an imbalanced composition of members. It sits outside any reasonable checks and balances of the EU legislative procedure and exercises a *de facto* veto right on any legislative initiative. Numerous access to documents requests concerning the board's reports have been either denied or severely delayed. There is close to no information available about the working methods of the board and how it arrives at its conclusions. In similar vein, it is not transparent how the board's independence from the rest of the European Commission is guaranteed. Lastly, the EEB is under the impression that the Regulatory Scrutiny Board disproportionately stops environmental policy and has an industry friendly bias in its work.

Example: Client earth case C-57/16 P, of 2018 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0057>

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