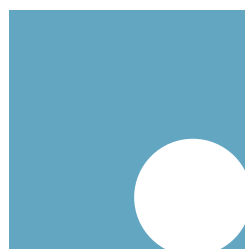
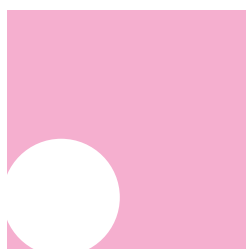
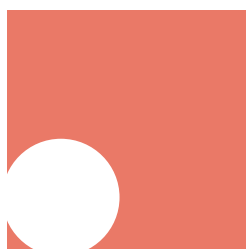
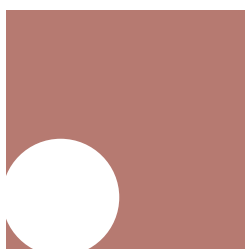


# Citizens' guide

to European complaint mechanisms



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We would also stress that we see the guide as a living document, which thanks to your help will get better and richer. We encourage you to use the guide and to send us your cases and suggestions for improvements. CEE Bankwatch Network believes that more coordinated and professional use of the complaint mechanisms will be crucial in order to increase their potential influence on national cases. Please contact us at [anelias\\_AT\\_bankwatch.org](mailto:anelias_AT_bankwatch.org) or [pippa.gallop\\_AT\\_macunlimited.net](mailto:pippa.gallop_AT_macunlimited.net) with your feedback or experiences.

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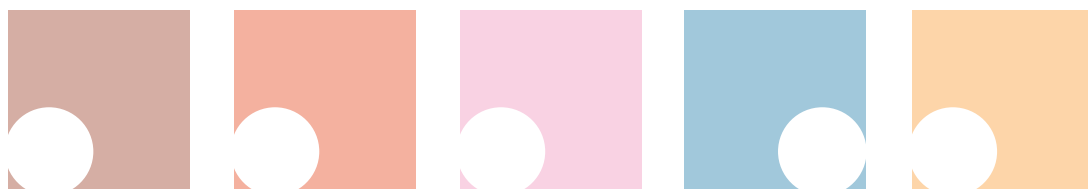
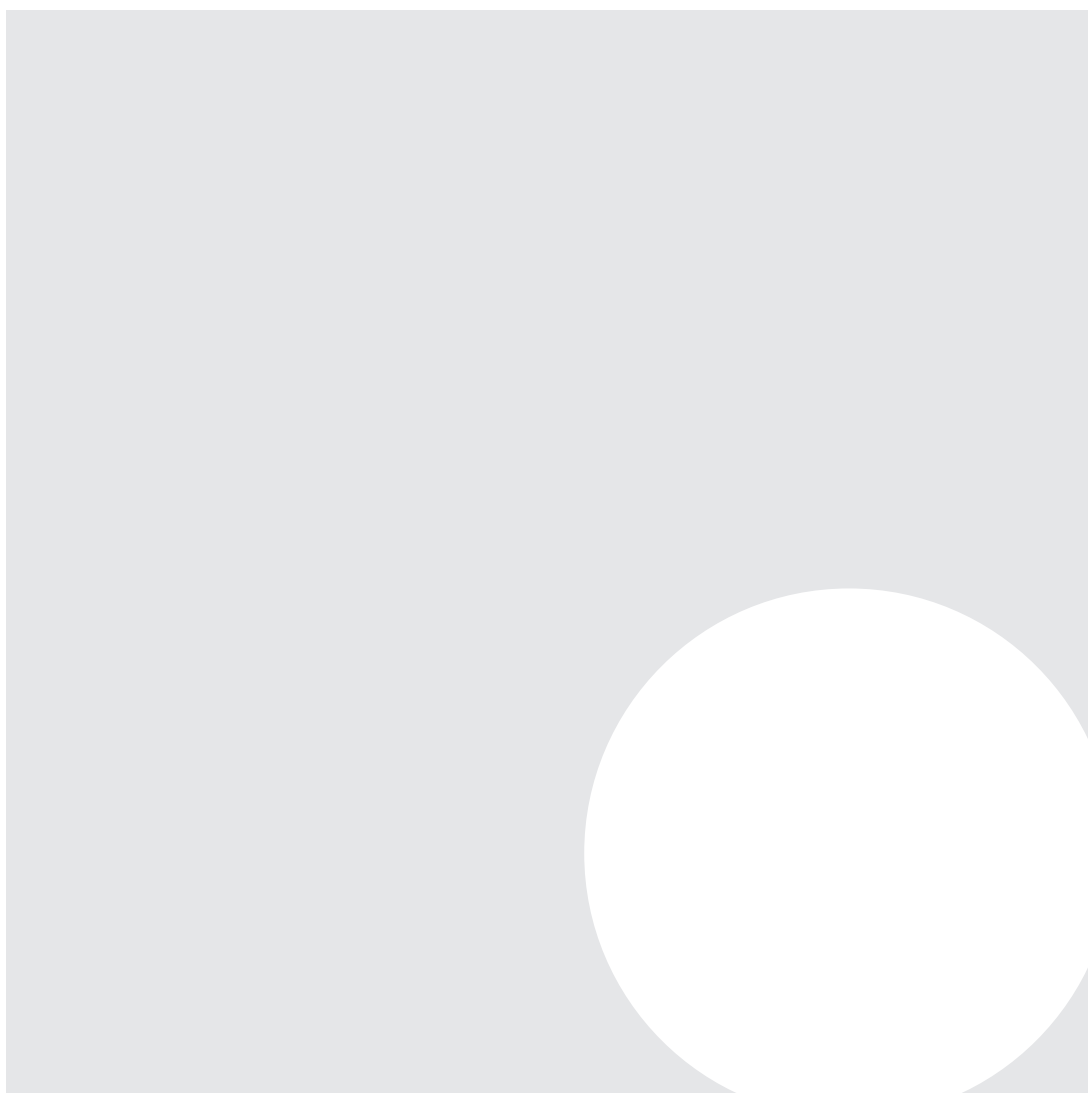
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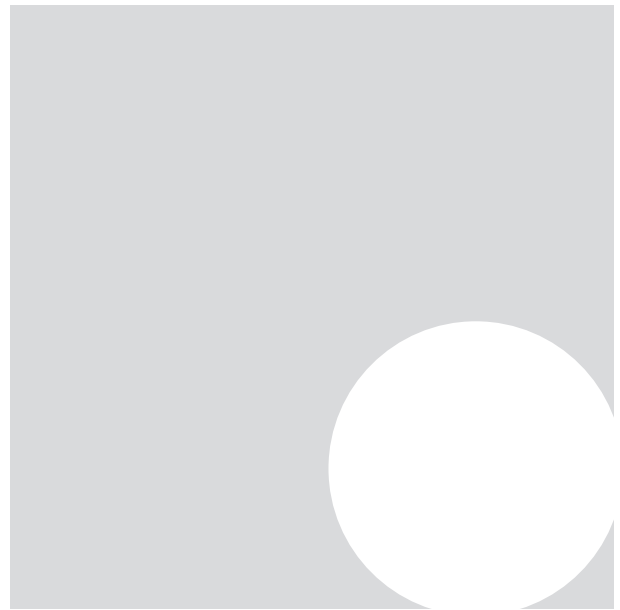
# Citizens' guide

to European complaint mechanisms



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# Rules of the complaint mechanisms

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## For each mechanism:

Introduction

Is this mechanism the best choice for this case?

Pros and Cons of the mechanism

What can it and can it not do?

Who can submit a case?

How to submit a case?

What happens when a case is accepted?

How long does a case take to be dealt with?

What outcome can you expect?



## Glossary

Aarhus Convention - Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which entered force in 2001. Its webpage is at: <http://www.unece.org/env/pp/welcome.html>

Council of the European Union - Along with the European Parliament, the Council of the European Union forms the legislative or law-making branch of the EU. It is composed of various Ministers of the Member States and has different committees concerning different policy areas, for example on energy and on competitiveness. It passes EU law on the recommendations of the European Commission and the European Parliament; the Council and the Parliament must agree on the budget; the Council seeks to achieve a common foreign, defence and economic policy for the Member States and it seeks to co-ordinate the justice system of the Member States in certain areas. It should not be confused with the European Council or the Council of Europe. Its webpage is at: <http://ue.eu.int/showPage.ASP?lang=en>

Article 133 Committee - A committee of the Council of the European Union which acts as a go-between the European Commission and Member States on trade matters. (See Chapter on ECJ)

EIA Environmental Impact Assessment - A process which must be carried out for certain categories of public and private construction projects which are deemed likely to have a significant impact on the environment. In the EU the process is governed by Directive 85/337/EEC as amended by 97/11/EC and

2003/35/EC<sup>1</sup>

EIB European Investment Bank - The financing institution of the European Union with the Member States of the EU as its members. The EIB has legal and financial autonomy within the EU but its mission is to further the objectives of the European Union by providing long-term finance for specific capital projects. Its webpage is at [www.eib.org](http://www.eib.org)

EC European Commission - The executive body of the European Union, which is responsible for initiating and proposing community legislation and policy, and overseeing the implementation of such legislation. In addition, the EC acts as the guardian of European Community law and can refer cases to the European Union's Court of Justice. The Commission is in effect the manager and executive authority of European Union policies and international trade relations, as well as managing the EU's budget. Its webpage is at [http://europa.eu.int/comm/index\\_en.htm](http://europa.eu.int/comm/index_en.htm)

ECJ European Court of Justice - The judicial body of the European Union. Its job is to make sure that EU law is uniformly interpreted in the Member States, and also to act as a Court of First Instance for cases in which people or organisations need to take legal action against the European Union institutions. For more details, see the relevant chapter of this guide. The ECJ's webpage is at: <http://www.curia.eu.int/>

EP European Parliament - Along with the Coun-

<sup>1</sup> A consolidated unofficial text of the Directive plus amendments can be found at: <http://www.scotland.gov.uk/Publications/2005/05/12110513/05243>



cil of the European Union, the EP forms the legislative branch of the European Union, which directly represents the people of the EU (rather than through national governments), amending and adopting legislation, voting on the EU budget, and supervising the European Commission by appointing its members and president. Its webpage is at: <http://www.europarl.eu.int/>

Espoo Convention - Convention on Environmental Impact Assessment in a Trans-boundary Context, which entered force in 1997 and requires Parties to notify and consult one another about projects which may have a trans-boundary impact on the environ-

ment. The website of the Convention is at: <http://www.unece.org/env/eia/eia.htm>

EU European Union - An explanation of its institutions is available at: [http://europa.eu.int/abc/panorama/howorganised/index\\_en.htm](http://europa.eu.int/abc/panorama/howorganised/index_en.htm)

MEP - Member of the European Parliament

Natural or legal person - A natural person is a human individual, whilst a legal person is an organisation such as a corporation or a non-governmental organisation which has many of the same rights and duties in law as a natural person.

## Introduction

Why have we written this, who is it designed for, and for which circumstances?

The Citizens' guide to European complaint mechanisms aims to help individuals and NGOs to successfully use existing institutional mechanisms at the European and international level to protect the environment and ensure adequate/effective use of public funds. The guide aims to summarize citizens' experiences so far with appealing to international institutions such as the EU Ombudsman and the Aarhus Convention committee. A great deal of experience has been gained in the area, but the cases have been isolated and opportunities to learn from the experience of others have not been maximised. The guide therefore will build on the existing examples and will promote further, but better, use of the complaint mechanisms.

The guide was developed with the cooperation of a number of NGOs (see the list in the acknowledgment section) and was sent for comments to several of the complaint mechanisms.

Initially the Citizens' guide will give an overview of seven complaint mechanisms: the European Parliament's Petition Committee, the European Commis-

sion - on Infringement of EU law, the European Court of Justice, the Aarhus Convention, the Bern Convention, the EU Ombudsman and OLAF. However, at a later stage we also plan to include the possibilities for appeals under the ESPOO Convention, EU court of Auditors and International Financial Institutions.

The guide covers the official procedures for submission of complaints to the 7 institutions/bodies listed above, but aims to present the existing information in a way which is easily researchable and useable for NGOs and citizens. The rules for submitting complaints are complimented with advice on writing a complaint and approaching international institutions. All of the complaint mechanisms are illustrated with at least one case study.

Finally we would like to stress that we see the guide as a living document, which thanks to your help will get better and richer. We encourage you to use the guide and to send us your cases and suggestions for improvements. CEE Bankwatch Network believes that more coordinated and professional use of the complaint mechanisms will be crucial in order to increase their potential influence on national cases.



## Why use the complaint mechanisms?

Conflicts about controversial uses of public funds for particular environmental projects are often difficult to resolve with efforts on the national level alone. Bringing the case to the attention of an international body or institution can be an effective tool for changing politics on the national level. We consider that exploring all the national administrative and legislative actions to resolve problematic cases is fundamental. The nature of the problems, however, is sometimes linked to political decisions that omit democratic principles and to loopholes in the national legislation that are almost impossible to resolve without international pressure. The use of the European complaint mechanisms should be considered as an integral part of an NGO's campaign, but when and how to use them should be subject to thorough assessment. Below are a few arguments that could help you in the assessment.

We see the following positive sides of using the complaint mechanisms:

- Making national governments more accountable. Submission of complaints is a way to draw attention to national problems on an international level. This increases the pressure on the national government to proceed on the case respecting EU standards and international law.
- Creating media interest. Complaints and the issuing of an opinion by an international body is a good occasion to attract media interest. Several of the complaint mechanisms conduct their own field visits, which are also of particular interest for the media.

- Making international bodies/institutions more active. International agreements and bodies increase their role in national policy, which makes them function more effectively. This creates practices that might be followed up and strengthened.

However please take into account that:

- A complaint to an international institution is not a "magic solution". A complaint is a tool to attract attention and to create momentum for changes in power politics on a national level. However many of the international institutions do not have the power or rights to interfere in national affairs. So they could give recommendations and expert opinions on your case, but how to use their statement most effectively is up to you.
- Preparation of a good complaint is important. The complaint should be well thought-through. Strike the right balance between length of the text and the arguments provided. Support for your arguments from official communications, articles and scientific statements is welcomed. The preparation of a good complaint takes time and resources.
- Submission of the complaint is not enough. The most important part of the work starts after submission. Most of the complaint mechanisms will not pay enough attention to your case if you do not make them do so. You need to keep them updated about the development of the case on the national level or basically keep the case alive.





## IV Brief overview of the mechanisms

The complaint mechanisms covered by the citizens' guide already provide assistance for appealing on a wide range of issues. Sometimes, complaints on the same issue could be sent to more than one institution, and we hope that the ways in which these mechanisms are presented in the guide will help you to select the best approach for your case. Submitting complaints to many of the international mechanisms might be also a tactic to increase the pressure and attention on the case, but you should also consider that this might also have the opposite effect. Due to the increasing number of cases brought to these international bodies they tend not to consider cases that might be resolved or considered by another body.

We would also very much recommend looking at the different complaint mechanism opportunities even if you are at the very beginning of a national campaign. If you plan well in advance what kind of appeal you could build from your case you could be much more successful in collecting the right arguments and evidence of the violation of certain national and international legislation. Well-documented proofs are fundamental for the serious consideration of the case.

There are several areas that are well covered by the complaint mechanisms presented in the guide:

■ Enforcement of legislation (including the environmental *acquis communautaire*)

Enforcement of European legislation is the responsibility of all EU member states, but also of some of the accession countries<sup>2</sup> where commitment to implement norms similar to those of the EU are included in the Accession agreements or

similar documents. The EC is responsible for ensuring and monitoring whether the legislation is properly transposed into national law and implemented by the member states. Therefore, in case of acts or omissions which contradict EU law, EU citizens and where relevant also citizens of accession countries could write complaints to the EC and other bodies which oversee the EC, such as the European Parliament, EU Ombudsman, or European Court of Justice.

Writing a complaint to the EC using the EC Infringement procedure is the most direct and probably quickest way to raise attention to a national case of non-compliance with EU law. However, if you consider that the EC has not paid significant attention to your case and has not taken the necessary actions to ensure enforcement of Community law you could subsequently write a complaint to the European Parliament Petition Mechanism, EU Ombudsman or European Court of Justice. A petition to the EP could help in bringing more attention and pressure to the case as the EP has a supervisory role over the EC, however, we invite you to read more in the specific section of the guide about the type of results you could achieve through that type of complaint.

An appeal to the EU Ombudsman might be a good approach if you want to complain about the malfunctioning of the EC in relation to the enforcement of EU legislation. The processing of cases submitted to the Ombudsman sometimes involves investigations that make the process relatively slow and it could take more than 2 years.

The European Court of Justice is the most expensive and most difficult for citizens to use directly, but it is not impossible. Chances for success are not very high at the moment, but it does not mean that you should not try. Attempts by citizens to use

<sup>2</sup> For example Bulgaria, Romania and Croatia, and to a certain extent Macedonia, Serbia, Bosnia and Herzegovina, Montenegro and Albania.



the ECJ have already moved the Court to consider a procedure for easier access by citizens that we hope will be accepted as soon as possible.

### ■ Biodiversity protection

Protection of biodiversity is part of EU law, and specifically subject to the EU "Habitats" and EU "Birds" Directives<sup>3</sup> and therefore the mechanisms described in Point 1. could equally be used for appealing in cases of violation of these directives. In the EC Infringement procedure there are some specific possibilities linked to the fact that DG Environment has prepared a format for supplementary information to the appeal on infringement of Habitats Directive. Some environmental NGOs like WWF and BirdLife have developed very good expertise on use of the infringement procedure for biodiversity issues and have written specific handbooks on the issue<sup>4</sup>.

The Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention) could also be a very good tool for cases of biodiversity problems. The Convention was the basis for adoption of the EU Habitat and Birds Directives and subsequently provides similar principles for the conservation of biodiversity of European value. The Convention is especially important for the countries outside the EU that are signatories (as of March 2005 there were 45 Contracting Parties to the Convention). The Bern Convention Secretariat, Bureau and Standing Committee are very NGO/citizen-friendly, which makes use of the mechanism more easy and effective.

### ■ Environmental Impact Assessment implementation

The EIA process on the EU level is also regulated by an EU Directive and subsequently in cases of violation of the provisions and principles of the EU EIA Directive<sup>5</sup> you could write to the EC using the Infringement procedure; to the EP; and launch a case in the ECJ.

For deficiencies linked with the EIA procedure

there is a relatively new, but good opportunity to write a communication to the Aarhus Convention Compliance Committee. The Convention guarantees access to information, public participation in decision-making and access to justice in environmental matters. The EU ratified the Convention only in 2005 and the EU's and Member States' legalisation is not completely adapted to comply with the Convention principles. You could communicate to the Compliance Committee actions or omissions by your government in transposing and implementing the principles of the Convention. The compliance procedure is designed to improve national compliance with the Convention. Individual cases could be used as evidence for wider non-compliance by a state, but the outcome would try to remedy the state's general non-compliance and not only the individual violation. The Committee has until now been very diligent in investigating the submitted cases, though this might change in the future with the increasing number of submissions to the Convention.

### ■ Access to information

If the case on access to information concerns EU institutions the EU Ombudsman can be seen as the most relevant mechanism. EU legislation<sup>6</sup> on transparency of the EU institutions provides for submitting complaints to the EU Ombudsman if you are not satisfied by the response of an EU institution to your request for information. The EU Ombudsman also covers complaints about the transparency of the European Investment Bank.

If you are denied access to public documents on the national level we would suggest exploring the possibilities of your national legislation. In the future we aim to connect and provide information in the guide on relevant national level NGOs and guides. In case you want to raise the issue at the international level we suggest contacting the Aarhus Convention Compliance Committee as the most relevant way to approach deficiencies in national access to informa-



tion legislation. An EU Directive that will transpose the Aarhus Convention is under preparation and subsequently in the near future problems with access to public information on the national level could also be brought to the attention of the EC under the Infringement procedure, as well as to the EP and ECJ.

#### ■ Maladministration by the EU institutions

The EU Ombudsman is the most relevant contact point for such cases, as the position was created as a mechanism for enforcement of citizens' control over the EU institutions. In cases of problematic actions or inaction by the EC, it is also important to contact the European Parliament Petition Committee in their role as supervision mechanism for the EC.

#### ■ Corruption and improper use of public funds

The European Anti-fraud office (OLAF)<sup>7</sup> has been

specifically created to deal with cases of corruption and any other activities that might detrimentally affect the financial interest of the Community. The OLAF is part of the Commission and as such has strong administrative power. However, the OLAF has budgetary and administrative autonomy which makes its operations independent.

Other relevant bodies which could be involved on the subject of poor administration of EU funds are the European Parliament and its Petitions, Budget and Budget Control Committees. It is possible to send a formal complaint to the Petitions Committee, but also to forward your communication to both the Budget and Budget Control Committee in order to increase the pressure and involvement in the case.

3 Directive 92/43/EEC and 79/403/EEC

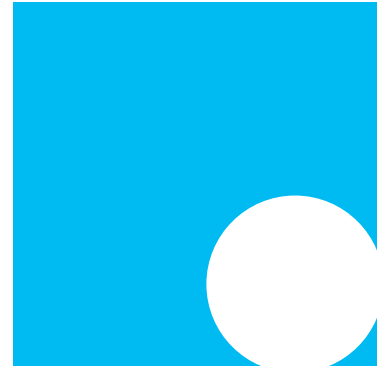
4 For more information, please see WWF, 2005, "EU Complaints vs. the Birds and Habitats Directives: Using law for Nature", Contact Alberto Arroyo Schnell – alberto.arroyo@wwf.at, www.panda.org/epo. The paper is not published.

5 Directive 85/337/EEC

6 Regulation 1049/2001 regarding public access to EC, Council and Parliament documents

7 Created with EC Decision 1999/352/EC and operating under Council Regulations 1073/1999 and 1074/1999

# 1) European Ombudsman



## Introduction

The European Ombudsman exists to deal with cases of 'maladministration' by the EU institutions. Examples of his areas of work are in cases of unnecessary delay, refusal of information, discrimination and abuse of power. The work therefore extends somewhat beyond administrative issues, and reaches into other areas (described below). A quarter of the cases he addressed in 2005 concerned lack of transparency in the EU administrations, including refusal of information<sup>8</sup>.

## Is this mechanism the best choice for this case?

The Ombudsman can only deal with cases which are directly related to the work of the EU institutions, so it is not appropriate to complain to the Ombudsman about the actions of national governments, even if they concern EU law. In 2005 the Ombudsman received 3 920 complaints, but was only able to fully deal with 627 of them because most of them concerned national or regional governments. However, in such cases the Ombudsman is still often able to transfer complaints to the competent body, or give advice on where to turn<sup>9</sup>.

The issues that can be addressed by the Ombudsman are as follows:

- Making sure that the EU Charter of Fundamental Rights (Nice Charter) is complied with by the

EU institutions, including issues of discrimination.

- Access to documents – the Ombudsman can be approached in cases when institutions have refused access to documents.

- Administration – The Ombudsman deals with cases of unanswered correspondence, late payment, and disagreements about contractual obligations. The European Code of Good Administrative Behaviour outlines what the Ombudsman expects from the institutions.

- Although the EC infringement procedure is separate, the Ombudsman may ensure that proper treatment has been given to infringement cases

- Recruitment procedures and staff rights in the institutions

## Pros and Cons of the European Ombudsman mechanism

Advantages:

- The Ombudsman has a solid record of defending people's rights at the same time as being highly respected within the EU institutions. He is likely to be motivated to act in defence of citizens' rights.

<sup>8</sup> European Ombudsman Press Release: "Ombudsman: Most Citizens Complain About Lack of Transparency" 24th April 2006, <http://www.euroombudsman.eu.int/release/en/2006-04-24.htm>

<sup>9</sup> European Ombudsman Press Release: "Ombudsman: Most Citizens Complain About Lack of Transparency" 24th April 2006, <http://www.euroombudsman.eu.int/release/en/2006-04-24.htm>



Disadvantages:

- Due to the lengthy procedure of some inquiries, the process can be rather slow, for example if disclosure of information has been a problem then often the information is needed rather sooner than the Ombudsman is able to react. But some cases can be solved in days with a simple phone call to the proper institution.
- The Ombudsman's opinion is not binding

## What can the Ombudsman do and not do?

The Ombudsman investigates complaints against:

- The European Commission
- The Council of the European Union
- The European Parliament
- The Court of Auditors
- The European Court of Justice (except in its judicial role)
- The European Economic and Social Committee
- The Committee of the Regions
- The European Central Bank
- The European Investment Bank
- Europol
- Any other Community Body

The Ombudsman cannot deal with complaints against other institutions or national governments, but tries to pass on complaints to an appropriate authority if he receives such cases.

The possibilities for the Ombudsman to take action are outlined below: He cannot change laws, and can only give his opinion to the relevant institution and ask the institution to take action. The opinion of the Ombudsman is not in any way legally binding, but he enjoys a high level of respect and his recommendations are usually taken seriously.

## Who can submit a case?

Any citizen of a Member State of the European Union or person living in a Member State can com-

plain to the Ombudsman. Businesses, associations or other bodies with a registered office in the Union can also complain. It is not necessary to be directly affected by the alleged maladministration to submit a complaint.

The European Ombudsman may decide to open an own-initiative inquiry to deal with the complaint submitted even by a person living outside the EU whenever they are affected by an European Investment Bank project.

## How to submit a case?

- First, an attempt must be made to resolve the case by contacting the institution or body concerned.
- If this is unsuccessful, a complaint can be lodged with the Ombudsman. The complaint must be made within two years of the date when the facts on which your complaint is based became known to you.
- You can write to the Ombudsman in any of the 12 Treaty languages of the Union
- Your complaint must include the following information: who you are, which institution or body of the European Community you are complaining about and the grounds for your complaint. To ensure that you provide all the necessary information, you may prefer to fill out a complaint form. You can get one from the Ombudsman's office or download one from his web site at: <http://www.euro-ombudsman.eu.int/form/en/default.htm>
- You can lodge your complaint by mail, fax or e-mail to the following address:

The European Ombudsman  
1, avenue du Président Robert Schuman  
BP 403  
F-67001 Strasbourg Cedex  
France  
Tel. (33) 388 17 23 13  
Fax (33) 388 17 90 62  
E-mail: [eo@ombudsman.europa.eu](mailto:eo@ombudsman.europa.eu)  
[www.ombudsman.europa.eu](http://www.ombudsman.europa.eu)



## How long does a case take to be dealt with?

To set a good example of public service, the Ombudsman deals with complaints as quickly as possible. He aims to:

- acknowledge the receipt of complaints within one week,
- decide whether to open an inquiry within one month,
- close inquiries within one year.

## What outcome can you expect?

There are various possible outcomes:

- When the Ombudsman tells the relevant institution about a complaint he has received, it can take steps to settle the matter itself.
- If maladministration is found and the case is not settled during the inquiry, the Ombudsman tries to find a friendly solution to satisfy you.
- If this fails, he can make a draft recommendation to the institution, calling on it to take the necessary steps to put the maladministration right.
- If the institution does not accept his recommendation, he can make a special report to the European Parliament.
- If a friendly solution is not possible and the maladministration cannot be put right, the Ombudsman can address a critical remark to the institution.

### Case Study: Granadilla Port, Canary Islands

Plans to build a mega-harbour at Granadilla on Tenerife, Canary Islands, have been vigorously opposed by locals and environmental groups such as Ecologistas en Accion, who argue that it is contrary to EU Directive 92/43/EEC on the Conservation of Natural Habitats, Wild Fauna and Flora. They argue that the project will have a negative environmental impact on two neighbouring natural areas which have been declared protected sites under the Directive.

Although opponents of the project were able to persuade the European Commission to examine the case in its role as “Guardian of the Treaty”, the Commission concluded that the development of the industrial harbour would not be contrary to the Directive because although it will have a negative environmental impact, there are no alternative solutions. The groups claim that a number of alternatives, such as the enlargement of the existing port of Santa Cruz, are in fact feasible, but allege that the Commission has refused to consider them.

Therefore the groups decided to contact the European Ombudsman, among others, to ask him to make sure that the alternatives are considered, and that the EC issues a report explaining why these alternatives are being dismissed.

The European Ombudsman, being impressed with receiving over 5 000 complaints on one subject, decided to open an own-initiative inquiry, and asked for an explanation from the European Commission. At the time of writing the outcome of the Ombudsman’s request is unknown, but the complaints have certainly helped to keep attention focused on the issue at the EU level.

The case was also submitted to and investigated by the European Parliament Petition mechanisms, which also played an important role in the successful resolution of the case.

For more information, see:

<http://www.ecologistasenaccion.org/granadilla/english.htm>

<http://www.euro-ombudsman.eu.int/release/en/2006-02-14.htm>

<http://www.euro-ombudsman.eu.int/granadilla/en/default.htm>

Case study: Friends of the Earth Europe win their argument that WTO disputes are not courtcases

The European Commission has been ruled guilty of “maladministration” after hiding documents



scientific concerns about the safety of genetically modified (GM) foods. The Commission falsely used the premise that World Trade Organisation (WTO) disputes should involve the secrecy levels of court cases.

The documents requested by FOEE concerned the defence strategy and the arguments of the Commission's position on the dispute at the WTO, in which the US, Argentina and Canada claimed that Europe's precautionary approach on GM foods was a barrier to trade.

The European Commission initially refused to release papers to Friends of the Earth Europe in August 2004, citing that the dispute in the WTO had to be "assimilated" to court proceedings and that the publication of the papers would have damaged their case. On 29 September 2004, FoEE submitted a confirmatory application to the Secretary-General for access to the documents. The Secretary-General sent to FoEE a letter dated 19 November 2004 confirming the Commission's initial refusal of access.

The Ombudsman rejected this argument as "not well founded, and hence amounted to an instance of maladministration." Friends of the Earth Europe argued that the WTO is not a court as disputes are ruled by trade experts who are usually chosen by the parties involved, and not judges. Unlike a court, a WTO dispute is agreed by all 148 member countries and parties can comment on the draft final ruling.

The European Commission eventually released the documents in question in February 2005. The papers outlined scientific concerns about the long term safety of GM foods and crops. Further papers, also released to Friends of the Earth Europe earlier this year, outlined these concerns in more detail, warning that cancer and allergies caused by eating GM foods cannot be ruled out and recommending that GM crops should not be grown until their long-term effects are known.

For more information, see:

<http://www.ombudsman.europa.eu/decision/en/050582.htm>

[http://www.foeeurope.org/biteback/EC\\_case.htm](http://www.foeeurope.org/biteback/EC_case.htm)

Case study: The breakdown of a British submarine's nuclear reactor in Gibraltar

The Ombudsman called on the Commission to investigate the risks posed by the breakdown of a British submarine's nuclear reactor in Gibraltar. This followed the claim by several social and political associations that the authorities had not taken the necessary health measures or given information to the public, as required under EU law. The Ombudsman transferred the complaint to the Commission to see if the situation contravened EU rules on the protection of the public against radiation risks.

The original complaints concerned the European Commission's refusal to grant the complainant access to two different reports prepared by an independent consultant -En Act International- at the request of the institution regarding compliance of the UK and Gibraltar with two Community Directives on waste (Directive 75/442/EEC) and hazardous waste (Directive 91/689/EEC), as well as with the Habitats Directive (92/43/EEC). The Commission had only agreed to release selected parts of the requested documents on the grounds that some of the information contained in the reports was covered by the exception involving the protection of public interest (inspections and investigations) provided for under the Code of Conduct concerning Public Access to Commission documents (Decision 94/90/EC).

The Ombudsman's view was that the exception based on inspections and investigations of Decision 94/90/EC should only be applied when the requested documents have been drawn up in the course of an investigation connected to an infringement proceeding. The Ombudsman concluded that the Commission wrongly refused access to Commission documents



# European Ombudsman

on the grounds that the documents in question were connected to inspections and investigations.

The Ombudsman therefore made a draft recommendation that the Commission should reconsider the complainant's applications dated 16 February 1999 and 17 May 1999, and give access to the documents requested, unless the exceptions contained in Decision 94/90/EC apply.

For more information, see:

<http://www.ombudsman.europa.eu/release/en/2001-01-25.htm>

<http://www.ombudsman.europa.eu/release/en/2001-06-12.htm>



# 2)

## European Parliament Right of Petition



### Introduction

Petitions submitted to the Petitions Committee of the European Parliament by individuals, associations or companies must be relevant to the activities of the European Union, but may be about a matter of general concern, an individual complaint, or a request for the Parliament to take a stance on a matter of public interest, so the Petitioning Mechanism has perhaps the broadest scope of all the mechanisms covered in this guide.

### Is this mechanism the best choice for this case?

The petition can relate to any area of activity of the EU, for example:

- free movement of persons, goods, services and capital,
- non-discrimination on the basis of nationality,
- equal treatment for men and women,
- environmental protection,
- tax harmonisation
- EU funds
- Other issues where the correct transposition or application of EU law is contested

It is therefore relevant to a great range of cases: for example EU funds, policies or legislation. However, as with the European Ombudsman (who only deals with alleged cases of maladministration by

EU officials) the EP cannot act as an appeal mechanism against on legal decisions of Member States.

### Pros and Cons of the mechanism

Advantages:

- Covers a broad range of subjects
- No specialist knowledge needed
- It is a parliamentary service and therefore free of cost and transparent
- Petitioners may be asked to present their case in person before the Committee
- Petitions may be submitted directly through the European Parliament web-site or by regular postal service - no requirement to submit via your MEP.

Disadvantages:

- Only available to those living/based in the EU
- The outcome is not mandatory, but can provide influential impact on Commission & Member States
- The process can take some time, partly due to the multilingual requirements of European Parliamentary business

### What can it and can it not do?

In some cases the petitioning mechanism is a way of encouraging the European Parliament to take action itself, such as adopting a recommendation or including something in some new legislation. In other cases it is more a matter of request



# European Parliament Right of Petition

ing the Parliament to ask another body, such as the European Commission, to take action.

As the European Parliament is not a court, it cannot pass judgment on or revoke legal decisions taken by Member States, so it is not an appropriate mechanism for trying to get national laws overturned.

## Who can submit a case?

You can submit a petition if you are:

- a European Union citizen,
- a non-Community resident in a European Union country,
- a member of a company, organisation or association with its headquarters in a European Union Member State.

## How to submit a case?

There are two main options: submitting the petition on paper or electronically.

A paper petition does not have to be in a standard format, but must include the following information:

- your name,
- occupation,
- nationality,
- the place of residence of each petitioner.
- signature

If the petition is being submitted on behalf of a group of people, these details must be given at least for a representative of the group.

The electronic petition format is on the European Parliament/Petition site at <http://www.europarl.eu.int/parliament/public/petition/submit.do?language=EN>

If you send appendices, they should be sent by post to the address below.

The petition must be written in one of the official languages of the European Union. A petition in another language will only be accepted if a translation or a summary of the petition's content

in an official EU language is attached.

A petition is more likely to be satisfactorily followed up if:

- There are as many signatures of affected people as possible
- The submission is clearly written and includes substantiating arguments; vaguely worded protests are difficult to assess.
- An MEP from the EP Committee on Petitions has been informed about the petition at the time of submission and is taking an interest in the case.

Send your petition to the address below and clearly mark that it is a petition for the EP:

European Parliament  
The President of the European Parliament  
Rue Wiertz  
B-1047 BRUXELLES

## What happens when a case is accepted?

- If you send your petition by email, you will receive electronic confirmation that it has been received.
- Petitions which fulfil the above criteria are entered in a general register in the order in which they are received.
- Once registered, petitions are forwarded to the Committee, which will first decide whether the subject of the petition falls within the remit of the European Union. If so it will be declared admissible and investigated by the Committee. If your petition does not fall within the remit of the European Union you will be notified by the Committee on Petitions that it is inadmissible.
- Petitions, on receipt, are given a number and entered in the general register and the main decisions taken on them during the consideration procedure are announced at plenary sittings of the European Parliament. These announcements appear in the minutes of the sitting. The name of the peti-



tioner and the number of the petition will therefore appear on the Internet. Petitions may be submitted with a request for anonymity and/or confidentiality. In any further correspondence concerning action taken on the petition, the European Parliament will communicate by post.

■ The texts of petitions entered in the register and of opinions of the Committee accompanying forwarded petitions are stored in the European Parliament archives, where they may be consulted by any Member of the European Parliament.

## How long does a case take to be dealt with?

The amount of time taken to deal with a case depends on its complexity. Petitioners should be aware that translation of submitted documents is also required and this takes time. When the Committee has, often with the help of the European Commission services, reached an assessment based upon a preliminary investigation it will place it on the agenda for discussion, or decide to deal with the matter by a written procedure. It is only possible to see when a case will be discussed by the Committee about two weeks in advance, by looking at the website at: <http://www.europarl.eu.int/activities/public/parlComm.do?language=EN> (continue through list of committees until the Committee on Petitions).

## What outcome can you expect?

Depending on the circumstances, the Committee on Petitions may:

- ask the European Commission to provide information regarding compliance with the relevant Community legislation. The Committee can then call on the Commission to take a certain action.
- refer the petition to other European Parliament committees for further action (a committee might, for example, take account of a petition in its legislative activities),

- submit a report to Parliament to be voted on in plenary,
- draw up an opinion and ask the President of the European Parliament to forward it to the Council and/or European Commission for action.
- forward the petition, via the European Parliament President, to the appropriate national authorities.
- organise a fact-finding mission to the relevant country. This is not undertaken lightly and the petition would need to demonstrate that the case is important for relations between the EU and the relevant country. By contacting the Petitions Secretariat (Mr. David Lowe, Head of Unit for the Committee on Petitions, [dlowe@europarl.eu.int](mailto:dlowe@europarl.eu.int), telephone: +32 2 42369) it is possible to find out which fact-finding missions are already arranged for the coming months, which can help you to assess whether your case might be able to become the subject of such a visit.

### Case study: M0 Motorway, Hungary

In 2005 a number of non-governmental organisations petitioned the European Parliament about the construction of the northern section of the M0 ring road between Csömör and Árpádföld in Hungary. The M0 motorway is being subsidised by the EU Cohesion Fund and loans from the European Investment Bank (EIB, even though its opponents argue that it is completely unnecessary as the M31 motorway is being built for the same role as the M0 and the M31 does not pass through residential areas.

The case has been going on for almost 15 years. Local residents and environmental organisations oppose the road's construction, but have been excluded from the process for licensing the construction of the road. The Authority on Road Traffic Control has not even acknowledged the rights



## European Parliament Right of Petition

of civil organisations and residents to be regarded as 'interested parties', breaking the rules of the Act on Polity. As a result, civil organisations and the citizens have been unable to take the case to court in Hungary, even though the construction permit allows a noise level in a residential area which would make "interior passive acoustic noise-protection" necessary, and the impact assessment acknowledges that the value of properties is going to decline on both sides of the road.

The environmental permit for the motorway's construction essentially gives exemption from complying with noise and air-emission limit values. This conflicts not only with national regulations, but also with the Council Directive on ambient air quality assessment and management (96/62 EC).

Due to being excluded from Hungarian legal remedies, the groups decided to petition the European Parliament. A petition signed by 4700 people

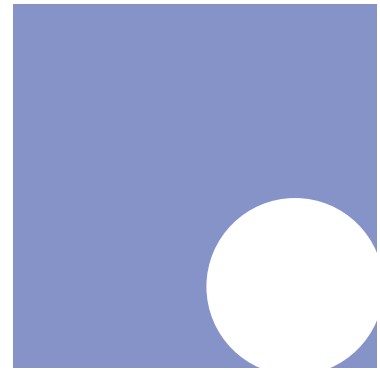
requested the Petition Committee of the European Parliament to investigate the legality of the investment into the relevant section of the motorway and to examine whether the support allocated by the Cohesion Fund has been used according to the legal requirements. It asked the Committee to press the Hungarian government to respect the directives of the European Union and Hungarian legislation.

The EP Petition Committee discussed the case at the beginning of 2006. Clean Air Action Group (Hungary) was invited to the Petition Committee to present the case as one of the groups submitting the complaint. The Petition Committee did not accept a resolution on the case at that meeting, as the information provided by the EC was not sufficient. The EC was asked to submit further arguments for its position on the case.

For more details on this case, see <http://www.bankwatch.org/project.shtml?s=307250>

# 3)

## European Commission Infringement Procedure



### Introduction

The EC can launch an infringement procedure against a Member State for failure to implement Community law. The Commission takes whatever action it deems appropriate in response to either a complaint or indications of infringements which it detects itself.

Each Member State is responsible for the implementation of Community law (adoption of implementing measures before a specified deadline, conformity and correct application) within its own legal system. Under the Treaties, the European Commission shall monitor and ensure that Community law is correctly applied. Consequently, where a Member State fails to comply with Community law, the Commission has powers of its own (action for non-compliance) to try to bring the infringement to an end and, where necessary, may refer the case to the European Court of Justice.

Non-compliance means failure by a Member State to fulfil its obligations under Community law. It may consist either of action or omission. The term "State" is taken to mean the Member State which infringes Community law, irrespective of the authority - central, regional or local - which is responsible for the non-compliance.

### Is this mechanism best choice for your case?

Complaints to EC on infringement of the Community law can be made only in cases in which there are legal obligations of a Member state that are not fulfilled and in which it is possible to provide clear evidence of this.

Sending a complaint to the EC is a way to make the Commission active on the issue and to press national authorities. However, please note that the objective of the infringements procedure is not to resolve the individual case but to oblige the member state to implement the community legislation. It is national courts and administrative bodies that are primarily responsible for ensuring that the authorities of the Member States comply with Community law. Therefore, if you are invited either prior to or in parallel with the complaint to the Commission, to seek redress from national administrative or judicial authorities and/or through the arbitration and conciliation procedures available. By using also the means of redress available at national level, you should be able to assert your rights more directly and more personally than is possible through following infringement proceedings successfully brought by the Commission, which may also take more time.



### Pros and Cons of the mechanism

#### Advantages:

- It can cover a broad range of issues (especially environmental ones) considering the number of EU Regulations, Directives and Decision that create legal obligations for implementation by member states.
- It is an important mechanism for complaints on the implementation of the Habitats and Birds Directive considering that the precautionary principles for biodiversity protection of the Habitat Directive (art. 6.2 and 6.3) have direct implementation. For more information, please see WWF, 2005, "EU Complaints vs. the Birds and Habitats Directives: Using law for Nature", Contact Alberto Arroyo Schnell - alberto.arroyo@wwf.at, www.panda.org/epo. The paper is not published.

#### Disadvantages:

- Around 80% of the complaints are closed at the very initial stage. The complaint should be well prepared and supported by enough evidence.
- There is a non-transparent negotiation process between the EC and Member State that can finish with agreement. Disclosure of these procedural details was denied by the EC as it could jeopardise the dialogue between the Members States and Commission, which often leads to a settlement.

### Who can submit a case

Anyone may lodge a complaint with the Commission against a Member State for any measure (law, regulation or administrative action) or practice attributable to a Member State which they consider incompatible with a provision or a principle of Community law. Complainants do not have to demonstrate a formal interest in bringing proceedings. Neither do they have to prove that they are principally and directly concerned by the infringement complained of. To be admissible, a complaint has to relate to an infringement of Community law by a Member State.

It cannot therefore concern a private dispute.

'The Commission departments will contact complainants and inform them in writing, after each Commission decision (formal notice, reasoned opinion, referral to the Court or closure of the case), of the steps taken in response to their complaint.....At any point during the procedure complainants may ask to explain or clarify to the Commission officials, on the spot and at their own expense, the grounds for their complaint.' (cf. point 7 de l'annexe - COM(2002)141 final).

### How to submit a case

You can obtain the official form from the EC web site: [http://ec.europa.eu/community\\_law/complaints/form/index\\_en.htm](http://ec.europa.eu/community_law/complaints/form/index_en.htm)

However, you do not have to use the official form and can send the complaint in the form of an ordinary letter to:

Commission of the European Communities  
(att. Secretary General)  
B-1049 Brussels  
Belgium.

Note: The Commission has prepared a format for supplementary information regarding the conservation issues of sites protected by the Habitats Directive. For more information please see WWF, 2005, "EU Complaints vs. the Birds and Habitats Directives: Using law for Nature", Contact Alberto Arroyo Schnell - alberto.arroyo@wwf.at, www.panda.org/epo. The paper is not published.

#### Content

Well-argued information should be provided to enable the complaint to be taken seriously. It is advisable to base arguments on precise sources (scientific reports, maps, press releases, letters of officials and so on) and to translate the relevant parts and attach them to the complaint.



## What happens when the case is accepted?

If the complaint is accepted, this could be followed by:

- Infringement procedure 226 (letter of formal notice, reasoned opinion, referral to the Court); case in the ECJ
- Infringement procedure 228 (possibly with penalty and/or lump sum payment); second case in the ECJ

**The letter of formal notice:** If the Commission considers that there may be an infringement of Community law which warrants the opening of an infringement procedure, it addresses a “letter of formal notice” to the Member State concerned, requesting it to submit its observations by a specified date (the deadline for a response is at the discretion of the Commission; it is normally two months but may be one week or less). The Member State has to adopt a position on the points of fact and of law on which the Commission bases its decision to open the infringement procedure.

**Reasoned opinion:** In the light of the reply or absence of a reply from the Member State concerned, the Commission may decide to address a “reasoned opinion” to the Member State, clearly and definitively setting out the reasons why it considers there to have been an infringement of Community law and calling on the Member State to comply with Community law within a specified period (again, the deadline for a response is at the discretion of the Commission; it is normally two months but may be one week or less).

The purpose of the above steps is to determine whether there is indeed an infringement of Community law and, if so, to resolve the case as soon as possible without having to take it to the European Court of Justice.

In the light of the reply, the Commission may also decide not to proceed with the infringement procedure, for example, where the Member State provides

credible assurances as to its intention to amend its legislation or administrative practice. Most cases tend to be resolved in this way.

**European Court of Justice:** If the Member State fails to comply with the reasoned opinion, the Commission may decide to bring the case before the European Court of Justice. On average, it takes about two years for the European Court of Justice to rule on cases brought by the Commission.

**Note:** Judgments of the European Court of Justice differ from those of national courts. At the close of the procedure, the European Court of Justice delivers a judgment stating whether there has been an infringement. The European Court of Justice can neither annul a national provision which is incompatible with Community law, nor force a national administration to respond to the request of an individual, nor order the Member State to pay damages to an individual adversely affected by an infringement of Community law. It is up to a Member State against which the European Court of Justice has given judgment to take whatever measures are necessary to comply with it, particularly to resolve the dispute which gave rise to the procedure.

**Monetary penalty:** If the Member State does not comply, the Commission may again bring the matter before the European Court of Justice seeking to have periodic penalty payments imposed on the Member State until such time as it puts an end to the infringement. The EC may propose a penalty and/or lump sum payment, but it is for the ECJ to decide whether any sanction will be applied and, if so, what amount.

## How long does it take the case to be dealt with?

- At minimum 1-2 year for the infringement procedure
- An additional 2-3 years for the decision from the ECJ



### TIPS

Having submitted a complaint, NGOs should actively follow the case, for example by:

- making all possible efforts at the national level before sending the complaint to the EC
- continuing with efforts on the national level after the submission of the complaint - this provides you with arguments for updating the EC on the development of the case and keeping the case alive
- permanently updating the EC about the development of the case after submission of the complaint
- finding out which EC staff member is dealing with your complaint. Usually there are two relevant people involved: an expert and a legal advisor
- being patient and persistent - it takes time, energy, and resources

### Case Study: Greece

On 30th January 2002, Greece was condemned by the European Court of Justice for failing to adopt and apply adequate measures to protect the breeding and resting places of the rare Mediterranean sea turtle, *Caretta caretta*, on the island of Zakynthos. In

the Commission's view, the situation remains unsatisfactory. Most of the regulatory and implementing measures provided for by Greek framework legislation (Presidential Decree) are still not in place. Furthermore, illegal constructions have not been removed from an important turtle beach at Daphni. The placing of parasols and deckchairs on this beach, as well as on two other beaches at Kalamaki and East Laganas, continues to present problems. The Commission has, therefore, decided to send Greece a first written warning under Article 228 of the Treaty, for not complying with the Court judgement.

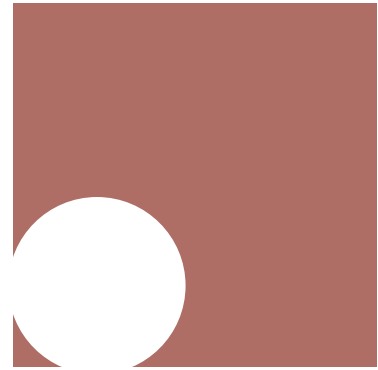
Greece is also to receive a second written warning, under Article 226 of the Treaty, for designating an insufficient number of special protection areas (SPAs) under the Wild Birds Directive as a contribution to the EU's Natura 2000 network. While some recent progress has been made and the number of designated SPAs now stands at 110, the Commission considers that a further 76 sites merit designation.

Finally, Greece is to receive a second written warning for failing to properly protect the lagoon of Messolonghi-Aitolikon, a wetland that is internationally recognized as an important habitat for wild birds. The appropriate legal framework for ensuring the effective protection of the habitat is still not in



# 4)

## Aarhus Convention Compliance Committee



### Introduction

The Aarhus Convention, which entered into force in 2001, sets out to guarantee access to information, public participation in decision-making and access to justice in environmental matters. Unlike most international environmental agreements, its compliance mechanism includes a provision for members of the public to make communications to the Committee on cases when national governments do not appear to be complying with the Convention. The Committee is then required to deal with these cases. It is not necessary to be a resident of the country concerned in order to make a communication concerning that state.

The text of the Aarhus Convention is available in several languages at: <http://www.unece.org/env/pp/treatytext.htm>

### Is this mechanism the best choice for this case?

The Committee can only deal with cases concerning states which have ratified the Convention. A list of Parties to the Convention is listed at: <http://www.unece.org/env/pp/ctreaty.htm>

A communication to the Committee may include any of the following:

- Failure by a state to take the necessary legislative or other (e.g. institutional, budgetary) measures

necessary to implement the Convention according to the provisions of its Article 3, paragraph 1,

- Legislation, regulations or other measures implementing the Convention which fail to meet the specific requirements of its provisions;

- Specific events, acts, omissions or situations which demonstrate a failure of the State authorities to comply with or enforce the Convention.

The compliance procedure is designed to improve national compliance with the Convention. Individual cases could be used as evidence for wider non-compliance by a state, but the outcome would try to remedy the state's general non-compliance and not only the individual violation. In cases where environmental information is being withheld by EU institutions, it would probably be more usual to use the EU Ombudsman.

Those considering making a communication to the Compliance Committee should consider whether the problem could be resolved by using national appeal mechanisms. The extent to which other remedies were available to the complainant will be taken into account by the Committee, though it is recognised that many national remedies are unreasonably slow or inadequate.



## Pros and Cons of the mechanism

What can it and can it not do?

Advantages:

- Any member of the public or non-governmental organisation may submit a complaint
- It is not necessary to be a citizen of the relevant state, nor to be based there.
- The remedy is not limited to the individual case but should also help others in the same situation in the future.

Disadvantages:

- The Committee can only act regarding states which are parties to the Convention
- The Committee cannot deal with cases which have arisen before the Convention entered force in a certain state, and can only accept submissions one year after the Convention enters force in any state. The Convention enters force 90 days after the state has ratified, accepted, approved or acceded to the Convention.
- States can opt out of the part of the Compliance Mechanism which allows communications from the public, however none have actually done this yet.
- The mechanism can be rather slow, especially concerning the adoption of the recommendation by the Meeting of the Parties (see below).

## Who can submit a case?

Any member of the public may submit a communication to the Committee. A communication may also be filed by a non-governmental organization. The communicant does not have to be a citizen of the state concerned, or, in the case of an organization, to be based in the state concerned.

The Committee states that it is not necessary for the communicant to be represented by a lawyer or have the communication prepared with legal assistance, but that it may improve the quality of the communication if legal advice is available to the communicant.

## How to submit a case?

A communication to the Committee should be in writing, preferably by e-mail, but it is not necessary to follow a standard format. It may be in English, French or Russian, but in practice submissions in English will be dealt with more quickly as this is the internal working language of the Committee. If a relevant document is not available in English, French or Russian, it should be translated into English and submitted along with the version in the original language. This does not have to be a certified translation, though in some cases this might be best.

Contents of a communication:

- Information on the correspondent submitting the communication:

Full name of submitting organization or person(s):

Permanent address:

Address for correspondence on this matter, if different from permanent address:

Telephone:

Fax:

E-mail:

For a group of people, provide the above information for each person and indicate one contact person.

For an organization, give the name and position of the contact person authorized to represent the organization regarding this communication.

- State concerned
- Chronological description of events and explanation of how the facts and circumstances described represent non-compliance with the Convention.
- Nature of alleged non-compliance - whether the communication concerns a specific case of a person's rights of access to information, public participation or access to justice being violated as a result of non-compliance or relates to a general failure to implement, or to implement correctly, the provisions of the Convention.



■ Provisions of the Convention relevant for the communication - articles, paragraphs, and subparagraphs of the Convention that the state is alleged to not comply with.

■ Use of domestic remedies or other international procedures - which procedures were used, which claims were made and what were the results? If no domestic procedures have been pursued, why not? Have any other international procedures have been invoked in connection with this issue?

■ Confidentiality request - Unless specifically requested, none of the information contained in a communication will be kept confidential. If you are concerned that you may be penalized, harassed or persecuted, you may request that information in the communication is kept confidential, and should indicate clearly which information is concerned. An explanation of the grounds for making a confidentiality request is optional.

■ Supporting documentation (copies, not originals)

Relevant national legislation, highlighting the most relevant provisions.

Decisions/results of other procedures.

Any other documentation substantiating the information provided.

Relevant pieces of correspondence with the authorities.

If it is absolutely necessary to include bulky documentation, highlight the parts which are essential to the case.

■ Summary - a 2-3 page summary of the communication.

■ Signature of authorised person, representative or individual communicant, and date.

■ Address of communicant

It is recommended to send the communication by e-mail, preferably with the enclosures attached. In addition, a signed copy of the communication, together with any supporting material, should be sent by post to the secretariat.

It is also a good idea to send the communication to the government of the Party concerned at the same time as submitting them to the Committee.

Submissions should be sent to:

“Communication to the Aarhus Convention’s Compliance Committee”

Mr. Jeremy Wates

Secretary to the Aarhus Convention

United Nations Economic Commission for Europe

Environment and Human Settlement Division

Room 332, Palais des Nations

CH-1211 Geneva 10, Switzerland

Phone: +41 22 917 2384

Fax: +41 22 907 0107

E-mail: [jeremy.wates@unece.org](mailto:jeremy.wates@unece.org)

## What happens when a case is accepted?

■ Receipt of the communication

Each communication received by the secretariat addressed to the Compliance Committee is registered and a receipt is sent to the recipient.

■ Forwarding the communication to the Committee

If a communication, or an essential part of the supporting documentation, is not received in English, the secretariat will delay forwarding it to the Committee until an English version is available. The secretariat verifies that all necessary information is provided in the communication, and circulates the communication and supporting documents to the members of the Committee. If the communication lacks information, the secretariat tries to obtain the missing information from the communicant before forwarding the communication.

If communications are submitted less than two weeks before a meeting of the Committee, the Committee cannot usually consider their admissibility at that meeting. The dates of the upcoming meetings are listed on the Committee’s web site at



## Aarhus Convention Compliance Committee

<http://www.unece.org/env/pp/compliance.htm>

### ■ Posting data sheet on the website

When forwarding a communication, the secretariat will add a data sheet providing basic information about the communication and a 150-word summary of the communication. This will be posted on the website at the same time.

### ■ Admissibility

Submissions to the Committee are not accepted if they are:

- (a) Anonymous.
- (b) An abuse of the right to make such a communication.
- (c) Manifestly unreasonable.
- (d) Incompatible with the decision on review of compliance (decision I/7) or with the Convention.
- (e) Concerning a State which is not a Party to the Convention.
- (f) Concerning a Party which has opted out of the provisions for public communications to the Compliance Committee.

If the criteria for acceptability are not fulfilled, the Committee will either dismiss the communication and inform the communicant, or decide that a further opportunity should be provided for the communicant to fulfil the criteria.

### ■ Contacting the state concerned

If the criteria are fulfilled, the Committee provisionally accepts the communication. The communication is then brought to the attention of the accused state. The secretariat sends all the documents related to the communication to the Aarhus Convention's national focal point of the state concerned with copies to the state's Permanent Mission to the United Nations in Geneva and to the communicant.

The secretariat forwards the communication to the Committee in electronic form, usually before receiving the signed hard copy by post, but normally waits for the signed copy of the communication to arrive before forwarding it to the Party concerned.

The communication and the supporting documentation are not made publicly available until they have been sent to the Party concerned.

After this, communications which have preliminarily been accepted will be posted on the web site with no editorial changes or amendments. Communications which are not accepted are not put on the web site.

### ■ Response by the Party

When the Party receives the letter from the secretariat, it should submit written explanations and describe any response it may have made. The Party may also submit comments on the admissibility of the communication. This must be done within five months.

### ■ Consideration by the Committee

When the Party responds, the Committee first considers any comments that the Party might have made about the admissibility of the communication. If not persuaded to change its provisional opinion, the Committee confirms acceptance of the communication and considers the allegations. If it is persuaded that the communication is inadmissible or that there is some doubt over the matter, it reverses or suspends its provisional decision and informs the communicant, providing a further opportunity for comment, and where necessary seeking further information to enable it to reach a decision.

If no response has been received from the Party within five months of the communication being forwarded to it, the Committee will confirm the admissibility of the communication and consider the claims made.

### What outcome can you expect?

If the Committee decides that the communication and the response of the Party do not provide sufficient information, the Committee may:

Request further information from the communicant, the Party concerned, or other sources;

With the agreement of the Party concerned, gather



information in the territory of that Party;  
 Seek the services of experts and advisers;  
 Decide to hold a hearing.

When the Committee discusses the facts of the matter, the meeting is open to the public. The Party concerned and the communicant are notified of the time and place where their case will be discussed and are entitled to participate in the discussion. In some particular cases, financial support to cover travel and accommodation may be provided.

After the open meeting, the Committee will decide in another meeting whether or not the Party concerned is or has been failing to comply with the Convention. These discussions are generally closed to the public, including the Party and the communicant, but in exceptional cases where the meeting is open, all interested parties are informed beforehand.

If the Committee decides that the Party is or has been failing to comply with the Convention, it will then consider what measures would be appropriate. The draft conclusions, draft measures and possibly draft recommendations of the Committee are sent to the Party concerned and to the communicant. Both parties are then allowed to submit their comments on the draft conclusions through the secretariat and the Committee will take the comments into account when finalizing its consideration of the matter.

The measures that the Committee can suggest to remedy non-compliance include:

- (a) Providing advice and facilitating assistance to the Party concerned regarding its implementation of the Convention
- (b) Making recommendations to the Party concerned
- (c) Requesting the Party to submit a strategy, including a time schedule, to the Committee for compliance with the Convention and to report on the implementation of this strategy
- (d) In matters concerning a specific situation of non-compliance, making recommendations on specific

measures to address the matter raised in the communication

- (e) Issuing declarations of non-compliance
- (f) Issuing cautions.

Once the Committee has reached its final conclusions on the communication, these are communicated to the Party and the communicant. In any case, all measures proposed by the Committee are subject to decision by the Meeting of the Parties (see below). However, in cases where the Committee considers that there is a need to address a compliance issue more urgently, it may take the measures (a)-(d) above without awaiting the adoption of the Meeting of the Parties. This requires that the Party concerned has been consulted on the necessity of addressing the matter without delay and on the suggested measures. The Committee may only take the measures included in (b)-(d) above only with the agreement of the Party concerned.

For every ordinary Meeting of the Parties, the Committee is required to submit a report. This contains information concerning communications, including any interim measures suggested pending the consideration by the Meeting of the Parties, as well as measures suggested for adoption by the Meeting of the Parties. The Committee tries to reach decisions by consensus but where this is not possible the different views are also outlined in the report. The reports are on the Convention's web site.

#### ■ Consideration by the Meeting of the Parties

The Meeting of the Parties makes the final decision on specific measures aimed at bringing about full compliance with the Convention. These decisions of the Meeting of the Parties are communicated directly to the parties concerned and made public.

#### ■ Follow-up to measures decided by the Meeting of the Parties

The Meeting of the Parties may decide to give



a mandate to the Committee to monitor the implementation, e.g. of a strategy to achieve compliance, and the Committee reports to the meeting of the parties.

Procedures on Receipt of a Communication: see box at the end of this chapter

### How long does a case take to be dealt with?

The cases submitted so far have taken between 9 months and 1 year from the submission of the complaint to the adoption of the Committee's findings. The timing varies according to whether extra information needs to be requested, and according to how long the response from the relevant government takes. In addition the time between the Committee's conclusions and the Meeting of the Parties can be quite large, as there are 2-3 years between ordinary Meetings of the Parties.

#### Case study: Danube-Black Sea Canal, Ukraine

In May 2004 Ecopravo-Lviv (now Environment-People-Law - EPL) filed a complaint to the Compliance Committee of the Aarhus Convention regarding violations of citizens' environmental rights in the process of planning and construction of the Danube - Black Sea canal by Ukraine. EPL claimed that by failing to provide for proper public participation in decision-making on the environmental impact assessment and failing to provide access to relevant documentation Ukraine was in non-compliance of Article 6 of the Convention.

EPL presented the case in two instances of the domestic court system, winning in the first but losing in the appeal court. A complaint to the Espoo Convention's Implementation Committee was rejected on procedural grounds in December 2003. EPL was therefore able to show that the other available instruments for addressing the issue had been used.

The actual work in preparing the communication for the Aarhus Committee took around 40 hours, but

this was helped by having spent a lot of time on preparing the case for earlier legal procedures and by having decided much earlier that they would probably need to approach the Aarhus Committee. This meant that when the time came most of the information had already been gathered.

In May 2004 the Government of Romania submitted its own official complaint to the Compliance Committee of the Aarhus Convention.

After being notified by the Committee, the Ukrainian government did not make any comments on the case, so there was no challenge to the admissibility of the case and no response to its allegations. In February 2005 the Committee found that Ukraine was not in compliance with article 3, 4 and 6 of the Convention. The Committee made several recommendations, requesting Ukraine to bring its legislation and practice into compliance with the Convention, requesting it to submit a strategy (including timetable) for transposing the Convention's provisions into national law and developing practical mechanisms and implementing legislation that sets out clear procedures for implementation of various requirements under the Convention. All of these were upheld and adopted by the Meeting of Parties in Almaty, 2005. The Government of Ukraine has not reacted in any way to the outcomes of the compliance procedures. For this reason, the Compliance Committee is following up this case with further actions.

EPL comments that those considering approaching the Committee should take into account the amount of work that needs to be done before preparing the actual communication, such as writing information requests and waiting for responses, and that care should be taken to write the communication as clearly as possible, following the suggested format.

For more information on the case see EPL's website at:

[http://www.epl.org.ua/a\\_cases\\_Danube\\_C.htm](http://www.epl.org.ua/a_cases_Danube_C.htm)



### Case Study: Importing Radioactive Waste, Kazakhstan

In 2001, the President of the national nuclear company Kazatomprom, Mr. M. Jakishev, proposed a legislative amendment to the Parliament which would allow the import and disposal of foreign low- and medium-level radioactive waste in Kazakhstan. The statement in the press referred to a feasibility study justifying the proposed amendments. In November 2002, Green Salvation, a non-governmental ecological organisation, requested Mr. Jakishev, in writing, to provide the calculations justifying his statement to the press. There was no response and Green Salvation filed a lawsuit in one of the Almaty district courts in February 2003. After various hearings and decisions about the jurisdiction of the case, the case began in May 2003 but was dismissed on 13 June 2003 on procedural grounds for lack of standing. The decision stated that a non-governmental organization could only represent the interests of its individual members in court and that it had failed to present a power of attorney from the individuals whose interest it represented. The decision was unsuccessfully appealed six times, including to three offices of the public prosecutor.

In February 2004, Green Salvation submitted a communication to the Aarhus Committee alleging non-compliance by Kazakhstan with its obligations under Article 4, Paragraphs 1 and 7, Article 6, Paragraph 6, and Article 9, Paragraph 1, of the Aarhus Convention. Preparation of the case took 2-3 weeks. The communication was preliminarily accepted by the Committee.

In October 2004 the Kazakh government responded, claiming that:

- Green Salvation did not qualify as “the public concerned” within the meaning of Article 2, Paragraph 5 of the Convention for the type of decision-making process in question;
- At the end of 2002, the information requested by

Green Salvation from Kazatomprom did not relate to any currently ongoing decision-making procedure, as the matter was not under consideration by the Government;

- The national nuclear company Kazatomprom did not fall under the definition of “public authority” within the meaning of Article 2, Paragraph 2, of the Convention.

Therefore the Kazakh government claimed that the case was not admissible for review of compliance under the Convention.

After reviewing the arguments and consulting further with both Green Salvation and the Kazakh government, the Committee decided to accept the communication, as it found that the points put forward by the Kazakh government were related to the facts of the case rather than the admissibility of the communication. The draft findings and recommendations were forwarded to the Kazakh government and to Green Salvation and both parties submitted comments.

The Committee found that the Kazakh government’s argument that the document did not relate to ongoing decision-making was irrelevant to Articles 4 and 9 of the Convention. It also found that Green Salvation (and therefore any NGO) is included in the definition of “the public”, as set out in Article 2, Paragraph 4 of the Convention and that the national nuclear company Kazatomprom falls under the definition of a “public authority”, as set out in Article 2, Paragraphs 2 (b) and 2 (c), and is therefore not exempt from the Convention’s provisions. The information requested from Kazatomprom, in particular the feasibility study of the draft amendments, was also found to fall under the definition of Article 2, Paragraph 3 (b) of the Convention. Therefore it Kazatomprom’s refusal to provide the information was found to be a violation of the Convention.

The Kazakh government had also argued that it is a general practice for an information request to include reasons for which such information is requested, but the Committee pointed out that Article



# Aarhus Convention Compliance Committee

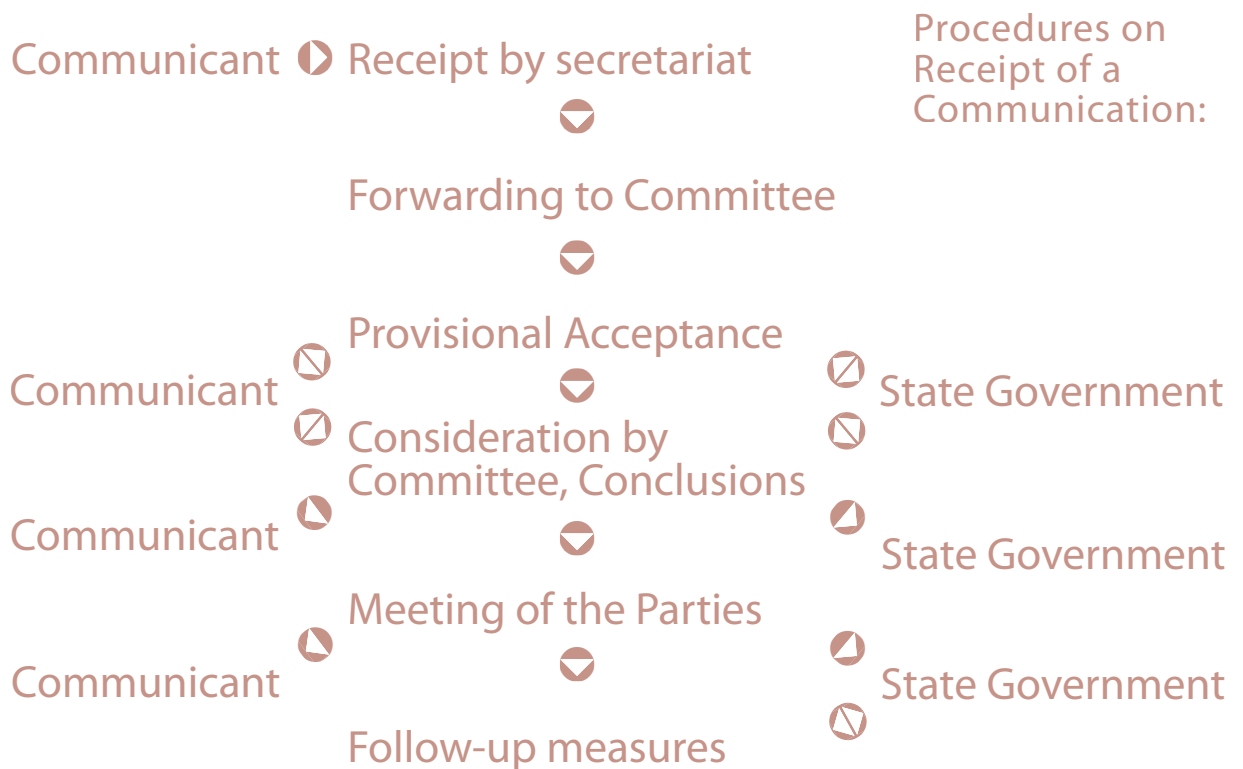
4, paragraph 1 (a), of the Convention explicitly rules out making such justification a requirement.

In addition the Committee expressed concern about the lack of regulations providing clear guidance to the Kazakh judiciary about the meaning of an expeditious (quick) procedure in cases related to access to information, since the number and time of judicial decisions in this case could not be regarded as expeditious, as required for appeal procedures under Article 9, Paragraph 1 of the Convention. It was therefore pointed out that this Article has not been properly transposed into the national legislation.

The Committee concluded that Kazakhstan was not in compliance with Article 4, Paragraphs 1 and 2; Article 9, Paragraph 1; and Article 3, Paragraph 1 of the Convention. It requested the Government of Kazakhstan to submit a strategy for transposing the Convention's provisions into national law and developing practical mechanisms and implementing leg-

islation. It recommended training for officials on the implementation of the Memo on Processing Public Requests for Environmental Information prepared by the Kazakh Ministry of the Environment, and to report on the measures taken. Finally, it also requested the relevant bodies of the Aarhus Convention and other international organisations to provide advice and assistance to Kazakhstan as necessary in the implementation of the measures.

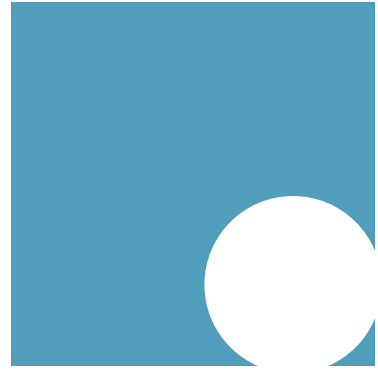
For more information see Green Salvation's website at: [www.greensalvation.org](http://www.greensalvation.org)





# 5)

## European Court of Justice



### Introduction

The European Court of Justice (ECJ) deals with disputes and upholds the Treaties of the European Union. Its job is to ensure that European law is uniformly interpreted and applied throughout the Union. It has jurisdiction in disputes involving Member States, EU institutions, businesses and individuals.

It deals with cases referred to it by the Commission, Member States or national courts, which need a ruling on the applications of EU law, but it also acts as a Court of First Instance - in other words, it can hear certain categories of cases which are directly brought before it. This guide mainly refers to the Court of First Instance, as this is the court which hears cases brought directly by individuals or organisations. Individuals can bring cases to the European Court of Justice only indirectly, through national court cases which require a ruling on a point of EU law, or as an appeal against a decision made by the Court of First Instance. In addition, it is possible to ask the European Commission to bring a case in the European Court of Justice through its infringement procedure (see separate section in Infringement Procedure). This has the advantage of getting round the difficult issue of 'lack of standing' (explained below), and transfers the possible financial burden onto the EC, but the individual or organisation making the complaint has no control

over whether the case is brought to court or not, or whether it is dealt with in some other manner.

Cases brought before the Court of First Instance can challenge decisions or acts of the EU institutions, and can be about any subject involving the EU institutions. There are three kinds of cases which can be brought before the Court of First Instance:

- Actions for annulment, against acts (Directives, Regulations, Decisions) of the Community institutions by which the applicant is directly and individually affected.
- Actions for failure to act, against inaction by the Community institutions, for example if a Member State is violating EU law and, after being requested, the Commission has done nothing about it.
- Actions for damages, for the reparation of damage caused by unlawful conduct on the part of a Community institution.

The court cases may concern all subjects concerning the EU institutions, for example:

- agriculture
- State aid
- competition
- commercial policy
- regional policy
- social policy
- institutional law
- trademark law
- transport
- Staff Regulations



Individuals or organisations can only bring cases against EU institutions, not against Member States or other individuals or organisations. It is important to note that the ECJ cannot overturn decisions made by national courts, but can act as an appeal court for judgements made in the Court of First Instance.

## Is this mechanism the best choice for this case?

There are currently rather few instances in which citizens and NGOs might consider bringing a case to the ECJ. It is particularly difficult for NGOs to bring cases because the complainant should be directly and individually affected by the decision or act in question. There are some proposed changes which may be implemented in the future, which would make the ECJ more useful in terms of the Aarhus Convention's intentions to improve citizens' access to justice on environmental matters.

The main issue that NGOs are directly affected by, which could be relevant, is access to information. In a case where information has been refused to a certain person, it is possible for that person to bring a case, as they have been individually affected. In these cases, however, it is more usual - and free of charge - to approach the EU Ombudsman.

In addition, since individuals and organisations cannot bring cases against Member States for violations of or failure to implement EU law, the usual procedure in such a case would be to use the EC Infringement Procedure. However, if this fails, as in the case study of the Baku-Ceyhan Oil Pipeline case below, it may then be possible to bring a case against the EC for failure to act.

## Pros and Cons of the mechanism

### What can it and can it not do?

Advantages:

- Its decisions are binding and unlike in most other

mechanisms, they are enforceable.

- It is possible to get cases brought through the European Commission, which can solve the 'standing' and financial issues. (However, see also disadvantages...)

Disadvantages:

- It is difficult for individuals and NGOs to have their cases accepted, as they lack 'standing'. Those bringing a case should be directly and individually affected by the issue that they seek to resolve.
- It requires professional legal advice
- It can cost a lot of money in lawyers' fees, though a party who is unable to afford the costs may apply for legal aid.
- It is a slow process.
- Individuals or groups trying to persuade the European Commission to initiate a court case instead of doing it themselves cannot control whether this will actually happen, and if so, when or how.

## Who can submit a case?

In theory anyone can submit a case, but it must be shown that the complainant has been directly and individually affected by an EU institution's decision or act. In practice this limits the likelihood of cases being brought by public interest groups and individuals.

## How to submit a case?

You will need legal advice in order to make an application to the court. The action must be brought before the Court by written application addressed to the Registry. As soon as it is received, the application is entered in the Court register. The Registrar publishes a notice of the action and of the applicant's claims in the Official Journal of the European Union.

The address to which applications should be submitted is:



Registry of the Court of First Instance  
Rue du Fort Niedergrünwald  
L-2925 Luxembourg  
Tel.: (+352) 4303-1  
Fax: (+352) 4303 2100  
E-mail: CFI.Registry@curia.eu.int

## What happens when a case is accepted?

The procedure before the court has a written and an oral phase. It starts with an exchange of statements between the parties. The application is sent to the defendant, who has one month to lodge a defence, after which the applicant may submit a reply and the defendant may once again respond (in each case within a month). One judge, known as the “judge-rapporteur”, takes personal charge of proceedings and prepares a report on the case, which is used by the Court to decide whether any preparatory inquiry is necessary, and is disclosed at the public hearing.

At the hearing, which is conducted in a language chosen by the applicant and simultaneously translated into other official languages of the EU, the parties’ lawyers put their case to the judges, who can question them. The judges then deliberate and deliver their verdict. Judgments of the court are decided by a majority and pronounced at a public hearing. Dissenting opinions are not read out.

## How long does a case take to be dealt with?

According to the Court of First Instance’s own statistics, between 2001 and 2005, cases generally took between 15 and 25 months to be completed, depending on the type of case.

## What outcome can you expect?

Since the ECJ is a court, the decisions it makes are binding and enforceable, so if the application

is accepted and the case is successful, the results should be either:

- the annulment of the contested Decision, Regulation or Directive,
- action regarding the issue on which the EU institution had previously failed to act
- compensation for the damage caused by the decision or act of the EU institution concerned.

### Case Study: WWF European Policy Office Vs Council of the European Union

In 2004, the World Wide Fund for Nature European Policy Office took the Council of the European Union to the ECJ over its refusal to release documents held by its “Article 133 Committee”. The Committee is a highly influential external trade body which covers the middle ground between EU Member States and the European Commission, which negotiates trade agreements on the behalf of the Member States. WWF is concerned about many aspects of the Committee, such as its apparent secrecy, the seeming lack of legal basis for its existence and the uncertainty surrounding its remit and membership.

In February 2004, a letter was sent to the European Council asking for a document on the future of the EU trade policy entitled WTO - Sustainability and Trade after Cancun. On two occasions, the council, on the grounds of “sensitivity of the information requested”, refused to provide the document, which included information provided to members of the Article 133 Committee by the European Commission. WWF believes that the European Council was wrong in its assessment of the sensitivity of the relevant information and failed to provide adequate reasons for its refusal.

WWF argues that the right of access applies to documents held and produced by the Article 133 Committee, as it does for any other European Community institution. The council maintains that one of the exemption clauses in EC Regulation 1049/



# European Court of Justice

2001 prevents it from providing the document in its entirety. However, WWF argues that the council has erred in its judgment about the exemption clauses and that access to some parts of the document must still be possible. It hopes that the case will force the decision not to release the document on the Article 133 committee to be overturned.

The case is still pending, and it is hoped that if successful the work of the Article 133 Committee will be opened up to increased public scrutiny.

A summary of the case is available <http://www.curia.eu.int/en/content/juris/t2.htm> under case T-264/04

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## Case Study: Baku-Ceyhan Oil Pipeline

Korkmaz, the Kurdish Human Rights Project, and the Corner House Vs. the European Commission

In January 2004, a landowner affected by the controversial Baku-Tbilisi-Ceyhan (BTC) Oil Pipeline, together with the KHRP and the Corner House (British NGOs) filed a case against the European Commission at the ECJ.

The BTC pipeline involves legal agreements between BP and the Turkish government which the applicants believe break Turkey's obligations under its EU Accession Partnership. Under the agreements, Turkey exempts the pipeline consortium

from all Turkish laws that might affect the project. Turkey would also be obliged to compensate the consortium if new laws were introduced that affected the "Economic Equilibrium" or profitability of the project. This not only creates a conflict in cases of human rights and environmental violations, but also conflicts with Turkey's aim of EU accession. In order to receive EU accession funds, Turkey has an obligation to move its laws closer to those of the EU and to accept the primacy of EU legislation.

Since the applicants claim that the BTC agreements move Turkey in the opposite direction, the European Commission should have a duty to act in relation to EU pre-accession funding to Turkey.

In July 2003 the NGOs complained to the European Commission about the BTC agreements and the Commission undertook to review the complaint in its annual report on Turkey's progress towards accession. However, it failed to do so.

Therefore the Corner House and the KHRP, together with a landowner directly affected by the project, applied to the Court of First Instance of the European Court of Justice to take the Commission to court under Articles 230 and 232 of the European Community Treaty. The case was brought in an attempt to rectify the inaction of the Commission.

In March 2006, the case was declared inadmissible as the Court of First Instance found that the decision which the applicants requested the Court to review did not constitute a decision open to judicial review. The Court considered that the Commission's decision regarding pre-accession financing was a matter of discretion and internal concern alone, which could not be challenged by individuals.

The application to the ECJ can be downloaded from the Baku-Ceyhan Campaign Website at [www.bakuceyhan.org.uk/publications/ECJ\\_Application.doc](http://www.bakuceyhan.org.uk/publications/ECJ_Application.doc)

# 6)

## Bern Convention



### Introduction

The Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention) was adopted in Bern, Switzerland in 1979, and came into force in 1982. The principal aims of the Convention are to ensure conservation and protection of all wild plant and animal species and their natural habitats (listed in Appendices I and II of the Convention), to increase cooperation between contracting parties, and to afford special protection to the most vulnerable or threatened species (including migratory species) (listed in Appendix 3). To this end the Convention imposes legal obligations on contracting parties, protecting over 500 wild plant species and more than 1000 wild animal species. As of March 2005 there were 45 Contracting Parties to the Convention (<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=104&CM=8&DF=4/27/2006&CL=ENG>).

The Convention was the basis for the adoption of the EU Habitats and Bird Directives<sup>10</sup>. It also launched the creation of the EMERALD<sup>11</sup> Network for protection of “areas of special conservation interest”, which is based on the same principles as the EU’s Natura 2000, and represents its de facto extension to non-Community countries.

The bodies of the Convention are: the Secretariat, Bureau, and Standing Committee<sup>12</sup>.

BirdLife International/ RSPB have made an in-

teresting overview of the Bern Convention file system and compared it with the Ramsar Convention and EU equivalent processes. For more information please see: “Review of the case file system (Bern Convention)”, paper by D E Pritchard, BirdLife International / RSPB, [http://www.ramsar.org/sc/25/key\\_sc25\\_docs03a1.htm](http://www.ramsar.org/sc/25/key_sc25_docs03a1.htm)

### Is this mechanism best choice for your case?

A complaint to the Bern Convention could be made for any case that has led or might lead to damage to the species protected according to the Convention such as:

- Projects that might affect protected species and habitats (even for projects at a very preliminary stage of development)
- Governmental failure to take administrative and legislative action to ensure protection of the protected biodiversity

### Pros and Cons of the mechanism

Advantages:

- The Bern Convention is ratified by many countries outside the EU and stipulates legal obligations for them to ensure conservation of biodiversity of European value
- The Convention can provide an effective mecha-

<sup>10</sup> To implement the Bern Convention in Europe, the European Community adopted Council Directive 79/409/EEC on the Conservation of Wild Birds (the EC Birds Directive) in 1979, and Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (the EC Habitats Directive) in 1992. Among other things the Directives provide for the establishment of a European network of protected areas (Natura 2000), to tackle the continuing losses of European biodiversity on land, at the coast and in the sea to human activities.



# Bern Convention

nism for conflict resolution, at the invitation of the respective country, making its own on-the-spot appraisal of many of the cases drawn to its attention.

■ Meetings of the Convention Parties are especially open to NGOs

Disadvantages:

■ The Convention has less legal power than the EU Directives.

## Who can submit a case?

A Contracting Party, an individual, a non-governmental organisation or a group of private persons may make a complaint about one or more Contracting Parties' failure to comply with one or more provisions of the Convention.

## How to submit a case

Send a letter to the Secretariat, Bureau or Chairman of the Bureau of the Standing Committee of. The complaint should not be anonymous.

Content

There are no special requirements for the format and the content of the complaint. We recommend you, however, to include a good overview of the habitats and species (with reference to the list of habitats and species in the Convention Annexes) that might be affected.

## What happens when the case is accepted?

The Bern Convention Standing committee could:

- Adopt specific recommendations regarding a case
- Recommend that the Secretariat conducts an on-the-spot visit
- Open a case file on the specific case and make specific recommendations
- Make general recommendations following on-the-spot appraisals

Admissibility is decided by the Secretariat, on the basis of the information available to it, and if necessary requesting further information from the complainant. The Committee informs the Contracting Party (-ies) and decides whether to act on the complaint. The Secretariat examines, taking account of any procedures that may be pending at national and/or international level, whether the complaint is sufficiently serious to warrant examination at the international level.

The procedure: Where it decides on such action, the Secretariat forwards the complaint to the Contracting Party or Parties concerned, seeking their opinion and, if necessary, further information. It informs the Bureau of the action taken. The Contracting Parties must respond to the Secretariat's request within a period of about four months. It is not said what happens if they fail to reply.

In the light of the reply received, the Secretariat decides, in agreement with the Bureau, whether there are grounds for placing the complaint on the agenda for the next meeting of the Standing Committee. The Contracting Party or Parties concerned are informed of this at least two months before the date of the meeting.

At the meeting of the Standing Committee, the Secretariat or - with the consent of the Chairman or a Contracting Party - an observer concerned in the matter, explains the complaint

A Recommendation:

should be implemented by the Contracting party and the Contracting party should report at least annually on the progress on implementation

Recommendations are adopted during the annual meetings of the Standing Committee based on a proposal by the Secretariat, Contracting Party and observers (incl. NGOs) when supported by the Country Delegation (Rule 9 of the Rules of procedures)

The recommendations adopted are communicated to the Contracting Parties for implementa-

<sup>11</sup> The Emerald Network is an ecological network made up of "areas of special conservation interest", which was launched by the Council of Europe as part of its work under the Bern Convention. It is to be set up in each Contracting Party or observer state to the Convention. It involves all the European Union states, some non-Community states and a number of African states (Tunisia, Morocco, Senegal and Burkina Faso are Contracting Parties; Algeria, Cape Verde, and Mauritania have been invited to accede).



tion and are public.

An On-the-Spot Appraisal:

is conducted by a member of the Convention secretariat and an independent biodiversity specialist. The Secretariat staff taking part in the mission is very important as it could cover any “political” negotiations, alongside specialist experts. The Bern Convention mission meets all concerned parties and makes its own on-the-spot assessment of the biodiversity endangered. The Ministry of Environment of the visited country hosts the Bern Convention mission and NGOs concerned should officially request a meeting with the mission through their Ministry of the Environment. ( Rule 11 of the Rules of Procedure)

An On-the-Spot Appraisal may be decided on in cases of urgency between the sessions of the Standing Committee by the Bureau with the agreement of the Contracting Party concerned

The Standing Committee may also decide it on during its annual meetings. The request for on-the-spot appraisal might be requested by the Secretariat, Contracting Party and observer (incl. NGOs) when supported by the Country Delegation (rule 9 of the Rules of procedures)

Open file against Contracting Party

An open file means that the Convention Bureau will undertake on-going monitoring of the case concerned. The Contracting party is responsible for submitting a report on the development of the case at least once a year, but in most cases twice a year, for the spring and autumn meetings of the Convention Bureau. Unfortunately, governments are not always diligent in submitting reports on the file and if this is the case the issue might be delayed by one year (e.g the case is discussed only on the next meeting of Standing Committee in a year’s time). A “shadow” report from the complainant for the development of the case could be important to keep the issue in the agenda of the Standing Committee meeting and to provoke the relevant government to

submit its own report.

Standing Committee decisions, by convention, are reached by consensus, so a complain against a Contracting party which does not wish a file to be opened might simply be blocked. Under the rules the possibility exists for this to be overridden by majority vote, but such would be resorted to only as a rare “crisis move”.

Closing of files

If, after it has examined the report made by the expert following an on-the-spot enquiry or the report forwarded by the Contracting Party concerned as part of the follow-up to a specific recommendation, the Standing Committee finds that the difficulties relating to implementation of the Convention have been resolved, it decides by consensus, or in the absence of consensus by a two-thirds majority of the votes cast, as required under Rule 8 b. of the Rules of Procedure, to close the file. In “certain cases of particular gravity” the arbitration procedure contained in the Convention may be activated.

## How long does it take the case to be dealt with?

At minimum 1 year

### Tips:

Once submitted the complainant should actively follow the case, for example by:

- writing their own regular reports on the development of the case, ideally for both the spring and autumn meetings of the Bureau (submission by March and August in order to be discussed at the April and September meetings of the Bureau)
- requesting participation at the Standing Committee meeting (late November-early December in Strasbourg) as part of the delegation of NGOs that are accepted as observers (WWF, BirdLife, European Habitats Forum). A request for participation should be submitted before the September meeting of the Bureau.

<sup>12</sup> The Convention establishes a Standing Committee on which the Parties are represented by their delegates. The Committee’s principal task is to monitor the provisions of this Convention in the light of development of the wild flora and the assessment of its needs. For this purpose, the Standing Committee is especially competent to make recommendations to the Parties and amendments to the appendices where these protected species are specified.



# Bern Convention

■ Making proposals for the recommendation and for the opening of a file on a certain case and advocating to other Contracting parties (Country delegations) to support the proposal. The advocacy should be carried out before and during the Standing Committee meeting.

## Case Study: Struma Motorway through Kresna gorge, Bulgaria

In 2001, a group of Bulgarian Environmental NGOs submitted a complaint to the Bern Convention regarding the Kresna gorge which is endangered by construction of the Struma Motorway. The Bern Convention entered into force in Bulgaria in 1999.

A number of species and habitats protected according to the Bern Convention would be directly affected by the plans of the Bulgarian government to construct the Struma Motorway through the Kresna gorge. The complaint stressed: the lack of thorough assessment of the impact of the motorway on the protected biodiversity; the lack of assessment of alternative routes; the lack of transparency and public involvement in the development of the case. The Kresna gorge was identified as a future EMERALD and NATURA 2000 site by the CORINE biotopes program carried out in Bulgaria 1994-1997. However, only a small part of the Kresna gorge had legal protection in 2001.

In 2002 the Bern Convention conducted an on-the-spot appraisal on the Kresna case. Bulgarian NGOs requested a meeting with the mission of the Bern Convention and the meeting was attended by more than 15 NGOs and specialists from the Bulgarian Academy of Science. The group of NGOs also joined the field visit of the Bern Convention mission.

At the 22nd meeting of the Bern Convention Standing Committee (December 2002) the report from on-the-spot appraisal was presented and a recommendation to the Bulgarian Government was

adopted demanding comprehensive EIA, alternatives, protection of the gorge and dialogue with the public.

Since 2002 the group of Bulgarian NGOs working on the Kresna case ([www.kresna.org](http://www.kresna.org)) has been submitting regular reports for the spring and autumn meeting of the Convention Bureau and has also attended the Standing Committee meetings in December.

At the 24th meeting of the Standing Committee as a result of the NGOs' request, supported by the Swiss Delegation, a case file was opened in relation to the Bulgarian government.

The recommendations of the Bern Convention have been used a number of times to ensure that NGOs' recommendations are taken into account and in some cases to guarantee real protection of the Kresna gorge. The alternative route outside Kresna gorge developed by the Bulgarian NGOs in 2002 was included as an official alternative for construction of the Motorway. At the end of 2005 the Bulgarian Minister of Environment issued a ban on activities (such as small hydro-dams, clear cutting, exploration and exploitation of natural resources, wood-coal production and so on) that might affect protected habitats and species, based on the implementation of the precautionary principle for sites that will be designated as protected. In 2006 Bulgarian NGOs and citizens of Kresna were consulted about the scope of the EIA report for Struma Motorway.

## Case Study: Threats to the European endemic White-headed duck by the introduced Ruddy duck (*Oxyura jamaicensis*)

BirdLife UK submitted a complaint to the Bern Convention Secretariat in 1997 regarding the absence of measures by the UK Government (and other governments) against the proliferation of the introduced Ruddy Duck which interbreeds with the European endemic White-headed duck (*Oxyura leu-*





cocephala). In 1998 the Bern Convention Standing Committee decided that this was a very serious issue and required urgent action by Parties and particularly by the United Kingdom. It encouraged the United Kingdom to implement without delay the recommendations (No61/1998) of the Convention and opened a file on control of the Ruddy Duck.

In 1999 UK Government informed the Bern Convention that it had started 3-year trial to examine

conditions under which the Ruddy Duck could be eradicated within 10 years. Subsequently several other countries such as Portugal, Spain and France also took measures. Therefore the Convention closed the file and asked UK Government to inform the Standing Committee regularly of the control measures taken. BirdLife International considers the case as a good example of the case file system working well.

# 7)

## European Anti-Fraud Office (OLAF)



### Introduction

The mission of the European Anti-Fraud Office (OLAF) is to protect the interests of the European Union, to fight fraud, corruption and any other irregular activity, including misconduct within the European Institutions. This mandate covers all Community revenues and expenditures<sup>13</sup>. It includes the general budget, budgets administered by the Communities or on their behalf and certain funds not covered by the budget<sup>14</sup>, administered by the Community agencies for their own account. It also extends to all measures affecting or liable to affect the Community's assets. Finally, it covers other, non-financial interests. OLAF also supplies Member States, accession countries and third countries with the necessary support and technical know-how to help them in their anti-fraud activities, and cooperates closely with international organizations with parallel interests.

OLAF has three main tasks:

- 1) investigations and coordination/assistance;
- 2) intelligence
- 3) development of Community anti-fraud policy.

OLAF is part of the EC, which enables it to execute the Commission's powers, but OLAF is endowed with budgetary and administrative independence.

Bodies of the OLAF involved in investigations

are: Director General, The Investigations and Operations Executive Board (Executive Board), Investigations and Operations Department (Directorate B), Head of the relevant Unit, evaluator and in some cases representatives of other directorates.

### Is this mechanism best choice for your case?

OLAF is in principle the only body that can ensure that the Community's financial interest can be protected in the framework of a (preliminary) administrative internal investigation. OLAF has to aim for 'zero tolerance' in relation to suspected fraud, irregularities and corruption within the EU Institutions and this therefore implies that OLAF must consider internal cases to be particularly important.

With regard to external matters, OLAF has wider latitude to decide whether to open an investigation. Its discretion must be applied taking account of the principles of subsidiarity and proportionality, and of whether OLAF is the only or the most appropriate body to handle the matter. (A detailed list of criteria for opening cases on external matters and prioritization of both internal and external cases can be found in the OLAF manual – 2005, p.62 and p.63.) [http://bookshop.eu.int/eubookshop/FileCache/PUBPDF/OB6705953ENC/OB6705953ENC\\_002.pdf#search=%22OLAF%20manual%22](http://bookshop.eu.int/eubookshop/FileCache/PUBPDF/OB6705953ENC/OB6705953ENC_002.pdf#search=%22OLAF%20manual%22)

<sup>13</sup> This includes subsidies and aid paid by the European Agricultural Guidance and Guarantee Fund (EAGGF) and by the Structural Actions (European Social Fund, European Regional Development Fund, EAGGF – Guidance Section, Financial Instrument for Fisheries Guidance, Cohesion Fund and the Instrument for Structural Policies for Pre-accession)



## Pros and Cons of the mechanism

### Advantages:

Independency and accuracy.

### Disadvantages

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## Who can submit a case

Everyone. A Free Phone has been set up to encourage members of the public to provide information to OLAF, free of charge. The messages from the Free Phone are recorded and reviewed by investigators. Where the caller requests to be called back, the investigator on duty should contact the person during the listening session and record further details. OLAF is also obliged to verify information from anonymous sources. But OLAF does not guarantee the treatment of the informant and his/her anonymity once the case has been passed to national judicial or prosecution authorities.

EU officials and other EU staff (temporary staff, auxiliary staff, local staff, contract staff and special advisers) of the Community organs are under a legal obligation to come forward to OLAF with information they have discovered in the course of or in connection with their duties concerning matters which give rise to a presumption of the existence of possible illegal activity, including fraud, corruption, or a serious failure to comply with the professional obligations of officials. Such officials are protected according to the internal rules for whistleblowers.

Member states are also obliged to inform OLAF on irregularities linked to areas of Community interest as the Common Agriculture Policy and legislation, EU funds (Cohesion, Structural, Pre-accession funds) and so on. In such cases OLAF should be informed as soon as possible and as minimum when the information for the irregularities is subject of primary administrative or juridical finding on national level.

## How to submit a case

Initial information may be received at OLAF in written form, such as a letter<sup>15</sup> or note from another DG or other source, or in oral form (for example on the Free Phone). Information that may give rise to the opening of a case may also be developed internally, on a proactive basis. Information that is received orally must be put in writing in a Note to the file and registered. In accordance with the Commission's Code of Good Administrative Behaviour, all communications received by OLAF should be acknowledged by letter within 15 working days of their registration by OLAF. Please check also the OLAF official web site as OLAF is preparing a further "channel" for communicating information to OLAF. ([http://ec.europa.eu/anti\\_fraud/](http://ec.europa.eu/anti_fraud/))

### Content

OLAF can decide to open a case only if it has competence to act and if the grounds for suspicion are sufficiently serious. Therefore it is recommended that your complaint is backed with credible arguments and facts.

## What happens when the case is accepted

### Admissibility:

After registration of the initial information it is passed on to the Head of Unit in the relevant sector, who assigns the initial assessment to an evaluator. Information received by OLAF must always be subject to the assessment procedure, except where a Head of Unit decides that the issue falls outside the competence of OLAF.

The initial assessment serves to analyse the information initially received at OLAF in order to make a recommendation as to whether a case should be opened and must indicate whether the case is of high, average or low priority within the work plan of the investigator(s). The initial assessment of a case should be completed within two months of receipt.

<sup>14</sup> The Development Funds administered by the Commission and the European Investment Bank are also included, as are certain funds not covered by the budget, and which are administered for their own account by Community bodies which do not have institutional status. Although not yet specified by law, the concept of assets of the Communities can be understood to include movable and immovable property of the Community organs exchange reserves allocated to the European Central Bank ("ECB"), and bonds issued by the European Investment Bank ("EIB").

<sup>15</sup> OLAF mailing address: OLAF, European Commission, B-1049 Bruxelles, BELGIQUE

ing the initial information. In some cases extended initial assessment might be required as for example when a case concerns Structural Funds - an area where clarifications should be made with the Member States. In urgent cases the investigator may meet the Head of the Unit to carry out an oral assessment that should be documented within 48 hours.

The case is formally opened by a decision of the Investigations and Operations Executive Board (Executive Board). The Executive Board meets every week, mostly on Tuesday mornings. Specific provisions apply for cases of extreme urgency.

OLAF classifies its cases under four administrative categories: internal investigations, external investigations, coordination cases, and criminal assistance cases. If the recommendation is not to open a case it should be classified in one of three categories: monitoring cases, non-cases, and prima facie non-cases.

Internal investigations:

Internal investigations are administrative investigations within the Community organs.

External investigations: External investigations are administrative investigations outside the Community organs for the purpose of detecting fraud or other irregular conduct of natural or legal persons. They may be carried out under either horizontal or sectoral legislation. Such cases are classified as external investigations where OLAF is providing the majority of the investigative input.

Coordination cases: Coordination cases are cases that could be the subject of an external investigation, but where OLAF's role is to contribute to investigations being carried out by other national or Community Services by, among other things, facilitating the gathering and exchange of information and ensuring operationality. No investigations are carried out by OLAF in these cases.

Criminal Assistance cases: Criminal assistance cases are cases within the legal competence of OLAF in which competent authorities of a Member State, candidate country or third country carry out a crimi-

nal investigation and request OLAF's assistance, or OLAF offers its assistance. No investigations are carried out by OLAF in these cases.

Monitoring cases: Monitoring cases are cases where OLAF would be competent to conduct an external investigation, but in which a Member State or other authority is in a better position to do so (and is usually already doing so). Monitoring cases are passed directly to the authority judged competent to handle them. No OLAF investigation resources are required, but, as the interests of the EU are at stake, OLAF will follow up, via appropriate follow-up unit.

Non-cases: A matter is classified as a non-case where there is no need for OLAF to take any investigation, coordination, assistance or monitoring action.

Prima Facie Non-Cases: Where information is received which clearly and unequivocally does not fall within the competence of OLAF, then the responsible Head of Unit may propose not to refer the information for assessment.

The investigation process

OLAF internal investigations have power:

- to have immediate and unannounced access to any information and to any premises;
- to inspect the accounts;
- to take a copy of and obtain extracts from any document or the contents of any data medium and to assume custody of such documents or data;
- to request oral information from members and staff;
- to carry out on-the-spot inspections at the premises of economic operators to detect transnational irregularities or irregularities that involve economic operators (according to Regulation 2185/96).

The European Investment Bank and the European Central Bank are subject to internal investigation although both the ECB and the EIB have set up their own internal institutional apparatus for fighting fraud.



More details regarding community organs subject to OLAF internal investigations are available on p. 81-86 of the OLAF manual.

#### Closing a case

At the conclusion of an investigation, the investigator in charge must prepare a Final Case Report, presenting the findings, including legal provisions infringed and conclusions and actions proposed<sup>16</sup>. In cases where there has been limited investigation activity where no irregularity has been found and no follow-up is required, a Simplified Final Case Report may be completed.

In some instances, the initial information that triggered a case may have come from an individual who may have an interest in the outcome. It is OLAF's practice not to provide such individuals with any information about the investigation while it is still in course.

Upon completion of the case it is good administrative practice to send a brief letter to such person, informing him of the completion of the case and, in general terms, of its main results, using the Completion of investigation letter. However, the letter should not reveal any confidential information or professional secrets.

#### Follow-up stage

Normally, cases move from the investigation stage to the follow-up stage once the decision has been taken to close the case. Follow-up activities may, however, begin while the investigation is still ongoing, if this is deemed necessary. Follow-up includes various activities designed to ensure that the competent Community and national authorities have executed the legislative, administrative, financial or judicial measures recommended by OLAF. The follow up activities are responsibility of the Head of Unit from Directorate A, or the Head of Unit 0.4.

The follow-up phase normally consists of the following steps:

- The file to the appropriate follow-up unit, and the case is assigned to a follow up agent.
- The responsible follow-up agent makes a complete check of the contents of the file and follow-up activities are coordinated with the responsible investigator and/or magistrate, particularly with respect to the Commission services involved;
- For direct expenditure cases that have been passed on to national judicial authorities for penal proceedings, the responsible follow-up agent evaluates the possibility for a civil action by the Commission;
- The responsible follow-up agent contacts the competent Member State authorities, the authorising DG, DG BUDG, Unit 0.4 and the Legal Service to establish the status of implementation of recommendations in the Final Case Report (administrative/financial/legislative), to encourage them to take necessary measures, and if necessary, to assist them with implementation of recommendations;
- The responsible follow-up agent monitors application of administrative sanctions and execution of the recovery procedures through regular contact with the competent Member State authorities, authorizing DGs, DG BUDG, Unit 0.4, and the Legal Service, as appropriate;
- Once the administrative sanctions and procedures for recovery are finalised, the responsible follow-up agent prepares the Report on the Closure of the Follow-up Stage.

### How long it takes the case to be dealt with

The duration of the follow-up phase varies according to the circumstances and complexity of the case. If court procedures are involved, the follow-up phase can often be very protracted.

[Case Study: Water Supply Project in Paraguay \(OLAF Report 2004\)](#)

In early 2004, the European Commission Delega-

<sup>16</sup> The elements of the final report are: i. Case history; ii. Executive Summary; iii. Recommendation for follow-up; iv. Result of the investigation; v. Legal evaluation of the facts.

tion to Paraguay informed OLAF of the alleged misappropriation of Community funds that were intended to improve the water supply system in 50 local authorities of that country. An external audit at the end of 2003 had indicated that about 90 % of the EC funds transferred to the project had been diverted to a bank account belonging to a foundation that was not involved in the project. The relevant Paraguayan authorities had reported the matter formally to the Public Prosecutor's Office, which began a judicial enquiry in January 2004.

OLAF opened an external investigation and carried out an on-the-spot inspection of the use of these EC funds in Paraguay. An in-depth analysis of the relevant documentation, in close cooperation with the Prosecutor, identified an additional fraudulent practice; the declared sub-contractors for one part of the project turned out not to exist, and the work was carried out by a company controlled by one of the directors of the project. It is also possible that the expenditure was significantly inflated. A Paraguayan lawyer has been appointed to defend the EC's interests in the ongoing criminal proceedings.

Case Study: Lesotho Highlands Water Project (OLAF Report 2004)

The Lesotho Highlands Water Project (LHWP) is a multi purpose project comprising dams, water transfer tunnels and an underground hydroelectric power plant. The project was developed in several

phases to supply water to South Africa and indirectly to produce electricity for Lesotho. The EU has been involved in this project since the 1980s. The European Development Fund (EDF) provided financing of € 61 million and the European Investment Bank (EIB) € 122 million. Other donors included the World Bank and the Government of Lesotho.

It appears that one Lesotho official was in a position to influence the awarding of contracts. Following legal proceedings in Lesotho, several bank accounts were identified in Switzerland containing more than € 3 million considered to be from bribes. The official was found guilty and sentenced to 15 years' imprisonment. In 2003, following a meeting and exchange of information with the Prosecutor in charge of the case in Lesotho, OLAF opened its own external investigation into the allegations and at the same time provided assistance to the Prosecuting Authorities of Lesotho. These and other ongoing enquiries have assisted the Lesotho authorities to continue to examine further suspect transactions and contributed towards a guilty plea by a multinational company to corruption charges in Lesotho. Two other companies have been convicted in Lesotho and OLAF is continuing its enquiries into the activities of other companies.

For further reading: European Anti-fraud office website OLAF <http://ec.europa.eu/dgs/olaf/>

## VI Conclusion

Complaint mechanisms are an expression of the development of democratic systems. It is our democratic right to use them when we see actions or omissions which contravene legislation against the environment and fundamental human rights. As with all democratic processes they also require active involvement in order to make them work properly, which means that when submitting a complaint it is necessary to consider the time and resources it takes to follow the procedure's development and to plan the follow up actions once the complaint is closed. It is our responsibility therefore to be system-

atic and determined once we decide to use the compliance mechanisms. Improper use of the complaint mechanisms (such as complaining about issues that might be resolved by other means, lack of input to the procedure and lack of reaction to the final judgment) might be more damaging than the lack of use. We hope therefore that the Citizens' guide will be a motivation for bringing more well-prepared and strategic cases that will contribute to the improvement of both national /EU legislation and complaint mechanisms.



## VII Further reading/websites

### European Ombudsman:

The European Ombudsman's own Citizens' Guide is at: [www.ombudsman.europa.eu/guide/pdf/en/guide\\_en.pdf](http://www.ombudsman.europa.eu/guide/pdf/en/guide_en.pdf)

### Aarhus Convention:

More information concerning the Convention is available on the Convention's web site: <http://www.unece.org/env/pp>

More information concerning the Compliance Committee and all relevant documentation is available at: <http://www.unece.org/env/pp/compliance.htm>

### European Court of Justice:

European Court of Justice Website: <http://www.curia.eu.int/en/transitpage.htm>

Frequently Asked Questions: [http://curia.eu.int/en/instit/presentationfr/index\\_cje.htm](http://curia.eu.int/en/instit/presentationfr/index_cje.htm)

### Bern Convention

Bern Convention web site: [http://www.coe.int/t/e/cultural\\_co-operation/environment/nature\\_and\\_biological\\_diversity/Nature\\_protection/index.asp#TopOfPage](http://www.coe.int/t/e/cultural_co-operation/environment/nature_and_biological_diversity/Nature_protection/index.asp#TopOfPage)

The case file system from the Bern Convention web site: [http://www.coe.int/t/e/cultural\\_co-operation/environment/nature\\_and\\_biological\\_diversity/nature\\_protection/case\\_files.asp#TopOfPage](http://www.coe.int/t/e/cultural_co-operation/environment/nature_and_biological_diversity/nature_protection/case_files.asp#TopOfPage)

Review of the case file system (Bern Convention), paper by D E Pritchard, BirdLife International / RSPB:

[http://www.ramsar.org/sc/25/key\\_sc25\\_docs03a1.htm](http://www.ramsar.org/sc/25/key_sc25_docs03a1.htm)

### Organisations mentioned in the guide:

Balkani Wildlife Society [www.balkani.org](http://www.balkani.org)

CEE Bankwatch Network [www.bankwatch.org](http://www.bankwatch.org)

Ecologistas en Accion [www.ecologistasenaccion.org](http://www.ecologistasenaccion.org)

The Corner House [www.thecornerhouse.org.uk](http://www.thecornerhouse.org.uk)

The Baku-Ceyhan Campaign [www.bakuceyhan.org.uk](http://www.bakuceyhan.org.uk)

Friends of the Earth International [www.foei.org](http://www.foei.org)

Environment-People-Law, formerly Ecopravo Lviv, Ukraine <http://www.epl.org.ua>

Green Salvation, Kazakhstan [www.greensalvation.org](http://www.greensalvation.org)

Hnuti Duha [www.hnutiduha.cz](http://www.hnutiduha.cz) (Czech only)

The Kurdish Human Rights Project [www.khrp.org](http://www.khrp.org)

World Wide Fund for Nature (WWF) [www.panda.org](http://www.panda.org)

Royal Society for Protection of Birds [www.rspb.org.uk](http://www.rspb.org.uk)

Environmental Law Service / Justice and Environment [www.eps.cz](http://www.eps.cz), [www.justiceandenvironment.org](http://www.justiceandenvironment.org)