

BirdLife Position on Improving the European Commission's Complaints and Infringements Process

Adopted by the Birds and Habitats Direct Task Force on 14 May 2013

Summary

The EU complaints mechanism is a fundamental link between EU citizens, civil society and the European Commission (EC), enabling the latter's role as 'Guardian of the EU Treaty' and all related Community legislation. One of the main reasons for slow progress in halting the loss of biodiversity is the slow and inadequate implementation of the EU Birds and Habitats Directives in the Member States.

BirdLife Europe and its national Partners believe that complaints to the EC should only be a last resort if other ways to secure Member State compliance fail. However, we have still developed extensive experience with the complaints and infringements system through our work informing the EC of potential breaches in particular of the EU Birds and Habitats Directives. We believe that although the system is effective overall, it is hampered by the speed at which cases progress or are resolved, the opaqueness of the process to the average citizen and lack of transparency in decision making and reporting.

In this position paper BirdLife Europe asks for:

1. More resources to be allocated by the European Commission to processing and resolving complaints and infringements concerning the environment.
2. A new Communication of the European Commission, expanding on the current Communication COM 2012/154 on 'Updating the Handling of Relations with the Complainant in Respect of the Application of Union Law' to include:
 - A clear explanation of the "EU Pilot" process, and introduction of a target of 80% of complaints to be either successfully resolved (closed) or progressed to the "Letter of Formal Notice (LFN)" stage within 20 weeks of the opening of the Pilot case file.
 - The introduction of targets to progress the majority of cases within the formal infringement proceedings within set timescales.
 - A written commitment and policy to progress infringement cases if Member States delay responding to formal legal warnings despite given deadlines, or do not do so adequately.
 - A commitment to send reasoned written justification to complainants if the Commission goes against the wishes of a complainant to close a complaint/infringement case.
 - A policy to ask the ECJ for interim measures to stop damaging activities on Natura 2000 sites until an infringement case is resolved where priority and/or un-recreatable habitats or endangered species are at risk.
 - A commitment to consult complainants when the Commission wish to close a so called "Article 260 case", if the preceding "Article 258 case" had been triggered by their complaint.
 - An expansion of annual reporting on progress of cases within the EU Pilot scheme and formal infringements process. The monitoring and reporting should take into account the performance targets outlined above.
3. Increased European Commission capability to identify and follow-up complaints and infringements of EU environmental legislation on the ground, backed up through a new Environmental Inspections Regulation.

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The Importance of the Complaints and Infringements Process

1. The European Commission's (EC) complaints system is a key process of direct accountability and feedback between the EC and European citizens. It allows citizens and civil society to inform the EC of potential breaches of European law by Member State (MS) governments. This is of particular importance regarding the environment as breaches can directly affect citizens' lives and the places where they live. One of the main reasons for slow progress in halting the loss of biodiversity is the slow and inadequate implementation of the EU Birds and Habitats Directives in the Member States. Any breach of EU law also provides an unfair advantage to the Member State against others in the common market. Infringement procedures are therefore also a key tool to ensure a "level playing field" across the EU in economic terms.
2. Citizens and civil society are the main source of this information on potential infringements and therefore a key information source that enables the EC to act as 'Guardian of the EU Treaty' and all related EU legislation. The complaints process also allows Member State governments to be informed of problems under their responsibility and gives them an opportunity to resolve them. If issues raised in complaints cannot or will not be resolved by the relevant MS, then the infringements process allows the EC to take cases to the European Court of Justice (ECJ), the judgements of which ensure breaches are rectified by the offending MSs and also provide a growing body of case law detailing how European law should be interpreted. As such, the complaints and infringements process is an important element in the enforcement of the EU's body of legislation ("acquis communautaire"). Last but not least it should be noted that infringement procedures and ECJ rulings resulting from those, often provide important precedents that encourage Member State compliance in many other cases (and thus the avoidance of many more complaints) across the EU.
3. For these reasons, it is important that the complaints and infringements process is efficient, transparent and accountable.

Improvements Needed to the EC Complaints and Infringements System

4. The BirdLife Partnership in Europe has extensive experience of the EC's complaints and infringements process and currently has about 60 live BirdLife Partner-instigated cases being investigated by the EC's Directorate General for the Environment (DG ENV). Although we believe that overall the current systems are effective and appreciate the diligence of DG ENV staff in trying to resolve and progress complaints and infringements, we have identified a number of issues (see Annex II) that urgently need addressing in order to make the complaints/infringements process:
 - faster and thus more effective in achieving compliance,
 - more understandable to complainants ; and
 - more transparent.
5. BirdLife Europe believes that these need to be addressed through:
 - A. More staff resources to process and progress case files;
 - B. A new expanded Communication on the complaints and Infringements process, incorporating expanded reporting; and
 - C. Increased EC capacity to investigate complaints and infringements on the ground.
6. Our specific asks under the three actions are detailed below:

A. More resources to be allocated by the European Commission to processing and resolving complaints and infringements concerning the environment.

Justification:- Amongst EU policy areas, the environment has one of the largest complaint case loads¹. Some of the current delays in the processing of environmental complaints and infringement files are due to staff capacity issues in DG ENV. Whilst we acknowledge the funding restrictions on the Commission in the present financial climate, if environmental implementation and enforcement is to be addressed properly further staff resources need to be made available to ensure that the majority of case files can be progressed in good time. This could include a greater role for other DG ENV units in technical assistance, or greater use of external contracts.

B. Produce a new EC Communication, expanding on the current Communication COM 2012/154² on 'Updating the Handling of Relations with the Complainant in Respect of the Application of Union Law' (which updated COM 2002/141³) to include:

- (1) A clear explanation of the "EU Pilot" process, and introduction of a target of 80% of complaints to be either successfully resolved (closed) or progressed to the "Letter of Formal Notice (LFN)" stage within 20 weeks of the opening of the Pilot case file. Furthermore, a commitment for all cases to be closed or progressed from Pilot to the first formal infringement stage within one year of registration of the complaint.**

Justification:- The Evaluation Reports of the EU Pilot⁴ state that there are 10 week deadlines for responses from Member States and evaluation by the Commission services respectively. There should be targets to resolve or start formal proceedings for the large majority of cases, within the deadlines the Commission has set. Despite the target in the existing COM 2012/154 to resolve or progress complaints to first formal infringement stage within a year, this does not occur in all cases – this should be the outside limit for even the most complex complaint files.

- (2) The introduction of targets to progress cases within the formal infringement proceedings within set timescales, including. For instance:**
- a. 80% of infringement cases to be closed or progressed to Reasoned Opinion (RO) stage within 6 months of an LFN being issued,**
 - b. 80% of infringement cases to be closed or referred to the ECJ within 6 months of an RO being issued.**

Whilst providing flexibility on deadlines in those cases that need it.

Justification:- Some infringement cases take many years to progress, in which time damaging activities degrade protected sites and compromise protected species populations. Some cases fail to progress at all but are not closed, creating frustration and uncertainty for complainants and other affected parties (eg:- infrastructure project proponents). Setting targets which aim to resolve the majority of infringement cases within a sensible time period, whilst retaining enough flexibility to allow extra time in very complicated cases, or those cases where negotiation can lead to successful outcomes without the need for referral to court, should reduce the prevalence of this happening.

- (3) A written commitment and policy to progress infringement cases if Member States delay responding to formal legal warnings despite given deadlines, or do not do so adequately.**

¹ P.8 30th Annual Report on Monitoring the Application of EU Law (2012)

² http://ec.europa.eu/eu_law/docs/docs_infringements/annual_report_30/com_2013_726_en.pdf

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0154:FIN:EN:PDF>

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0141:FIN:EN:PDF>

⁴ http://ec.europa.eu/eu_law/docs/docs_infringements/eu_pilot_en.pdf

Justification:- Member States should not be able to play for time by delay or obfuscation, especially where such delay may mean further damage and deterioration to sites.

- (4) A policy to ask the ECJ for interim measures to stop damaging activities on Natura 2000 sites until an infringement case is resolved where priority and/or un-recreatable habitats or endangered species are at risk.**

Justification:- In some cases, urgent legal measures are required to stop damage from occurring, particularly where irreversible damage to critical natural capital is likely⁵.

- (5) A commitment to send reasoned written justification to complainants if the Commission goes against the wishes of a complainant to close a complaint/infringement case.**
- (6) A commitment to consult complainants when the Commission wish to close a so called "Article 260 case", if the preceding "Article 258 case" had been triggered by their complaint.**

Justification:- In the interests of transparency and good-decision making, the Commission should aim to provide full reasoned justification of closure of cases to complainants.

- (7) A recognition in the Communication of the complimentary role of the Bern Convention's case file system, and a commitment to work collaboratively with the Convention in investigating cases, where this is appropriate.**

Justification:- The EU Birds and Habitats Directives implement EU Member State's commitments under the Convention. The Convention's case file system to investigate potential breaches of party commitments is a complementary system that often works in parallel to EU complaints and infringements. Closer working could have efficiency benefits, for example through joint on-the-ground investigative missions.

- (8) An expansion of annual reporting⁶ on progress of cases within the EU Pilot scheme and formal infringements process. The monitoring and reporting should take into account the performance targets outlined below:-**
- a. **Percentage of cases dealt with within the 10 week MS response and Services evaluation deadlines respectively (under EU Pilot),**
 - b. **Average time taken to progress complaint cases to LFN or close them.**
 - c. **Percentage of complaints either closed or progressed to LFN within one year.**
 - d. **Percentage of MS responses to formal infringement notices received within deadlines.**
 - e. **Average time taken to progress cases from LFN to RO (or closure) and from RO to referral to ECJ (or closure).**
 - f. **Percentage of cases progressed within 6 months between LFN to Reasoned Opinion / RO to referral to ECJ.**

Justification:- by expanding reporting on complaint and infringement procedures, the Commission, European Parliament and civil society will have a better understanding of how well the systems are working, and whether further actions need to be taken to improve effectiveness or make the processes more efficient.

⁵ For instance see C-193/07 Commission vs Poland

<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-193/07&td=ALL>

⁶ Within the Annual Report on Monitoring the Application of EU Law

http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm

- C. Increased European Commission capability to identify and follow-up complaints and infringements of EU environmental legislation on the ground:⁷**
- (1) The EC needs to be able to subcontract vetted independent consultants, preferably from another country, who have authorised access to sites and documents in country to investigate complaint/infringement cases on the ground in a MS. A duty to comply with the requests of EC-sanctioned inspectors should be enshrined in the Environmental Inspections Regulation.**
 - (2) In addition, resources should be made available for the use of earth observation (and other remote sensing) data as part of the EC inspection function. This may be of particular use in identifying and assessing breaches arising out of land-use change and conversion.**

Justification:- The EC needs to be able to investigate individual infringement cases “on the ground”, as often they cannot rely solely on the information provided by complainants and/or MSs to fully understand and pursue infringements.

⁷ See BirdLife Europe Position Paper on ‘Improvements Needed to Environmental Inspection Regimes in the European Union’ - http://www.birdlife.org/europe/pdfs/201309_Position_EnvironmentalInspectionsRegimes.pdf

Annex I - Glossary

Article 258 Case – This Article of the Lisbon Treaty allows the EC to bring infringement cases before the ECJ where a member state has not complied with a Reasoned Opinion and after being given the opportunity to submit its observations (LFN).

Article 260 Case – This Article of the Lisbon Treaty allows the ECJ to require Member States to take the necessary measures to comply with a judgement of the court. If the Member State does not take measures to comply with the judgement, the EC can bring a shortened infringement procedure (consisting of only one legal warning – Reasoned Opinion) against them, and if taken to court the ECJ can impose daily fines and/or a lump sum until this is addressed. In transposition cases, the EC can suggest the amount of any fines/sum appropriate.

Compliance – the proper implementation of duties arising out of European Union law. Member State governments have the final responsibility to ensure compliance occurs in their countries.

Complaint – Information formally submitted to the EC detailing possible instances of non-compliance with EU law. Often this will be via the official EC complaint form, usually once all national-level complaint and legal processes have been exhausted. A complaint will be registered by the EC and investigated either leading to resolution and closure, or the opening of a formal infringement case file.

EU Pilot – Is the process used by the EC to investigate possible infringements arising out of nearly all complaints (or own initiative cases) with the relevant Member State. Information and questions are submitted to Member States via a database, with their responses, and EC assessments also stored in this one application. There is a 10 week nominal deadline for MS responses, and a 10 week nominal deadline for the EC to assess the response and either close the case file or progress it to the first formal infringement stage.

European Court of Justice (ECJ) – If a MS fails to address an infringement to the EC's satisfaction after two legal warnings, the Commission can refer the case to the ECJ for judgement. Once referred, the case of the Commission and Member State will be heard by a judge at a hearing. In complex cases a legal opinion may be given by an Advocate General to guide the judge.

Infringement – a formally recognised case of non-compliance characterised by formal legal warning(s) from the EC to a Member State to rectify the issue, which may lead to the case being referred to the European Court of Justice if not addressed.

Letter of Formal Notice (LFN) – the first formal legal warning sent to Member States regarding a breach of EU law. This sets out the legal grounds of the infringement and usually requires MSs to respond within 2 months detailing how the infringement is being addressed.

Reasoned Opinion (RO) – the second formal legal warning sent to Member States following an unsatisfactory response to a Letter of Formal Warning. This sets out the legal grounds of infringement against the member state in detail and again usually requires an MS response with 2 months.

Transposition – The correct and full incorporation of duties arising out of a European Directive into a Member State's legislation.

Annex II - The Status Quo on the EC Complaints and Infringements System

The EC's Current Policy on Complaints and Infringements

The Commission's complaint procedure is set out in EC Communication COM (2012) 154 '*Updating the handling of relations with the complainant in respect of the application of Union law*'⁸, released in April 2012. This replaces COM (2002) 141 on '*Relations with the Complainant in Respect of Infringements of Community Law*'⁹. COM (2012) 154 takes into account the new CHAP complaint registry system, changes as a result of adoption of the Lisbon Treaty, and corrects various translation errors in the original. However, it makes no mention of the EU Pilot complaints system.

The Communication sets out a commitment on how the Commission services (both the Secretariat General and the DGs), will deal with complaints from NGOs and citizens on alleged infringements of EU law. It deals with general commitments for registering or rejecting complaints, for keeping the complainant informed about the status of a complaint, relations with the complainant, and some basic deadlines for processing and access to documents.

These rules are not legally binding on the Commission services and there is seemingly quite a lot of variability in how cases are processed particularly in relation to deadlines and timescales, and to a certain extent in relation to information provided to the complainant. The Communication does act as a commitment, however, on how the Commission wants to deal with complaints, and so if it does not follow the procedures set out in the Communication, complainants do have the option to complain to the European Ombudsman on maladministration grounds.

The Political Context

The European Parliament has been consistently critical of the EC complaints system, and has repeatedly asked the Commission to introduce a regulation on infringements procedures¹⁰. Its latest response¹¹ to the EC's Annual monitoring of the application of EU law report¹² deplores the lack of even a mention of the EU Pilot scheme in the revised Communication (2012) 154, even though it is now the primary route through which complaints are processed, and over 80% of cases within this scheme are closed after receiving an initial response from the Member State. The Commission has resisted the regulation of the procedure saying that it would jeopardise their discretionary power to organise the way in which it manages infringement proceedings in accordance with the Lisbon Treaty, an assertion that the Parliament disputes.¹³

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0154:FIN:EN:PDF>

⁹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0141:FIN:EN:PDF>

¹⁰ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0442+0+DOC+XML+V0//EN> also <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0377&language=EN> and <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0437+0+DOC+XML+V0//EN>

¹¹ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0442+0+DOC+XML+V0//EN>

¹² 29th Annual Report on monitoring the application of EU law (2011) [COM(2012) 714] http://ec.europa.eu/eu_law/infringements/infringements_annual_report_29_en.htm

¹³ The only environment NGO in Brussels to be closely involved in advocacy work on the complaint and infringement issues is Client Earth. They have worked with the European Parliament on this issue, and have been critical of the pilot scheme (citing delays in processing and negotiations, reliance on Member States for information who are generally the source of the infringement and lack of transparency). They favour the formalisation of the process within a regulation.

BirdLife Europe's Experience of the Complaints and Infringements System

BirdLife Europe has around 60 live environmental complaints/infringements with the Commission. Most information partners send in is registered as a complaint and investigated by DG ENV. For BirdLife, only a small minority of complaints are closed before formal infringement proceedings are started, and this is generally when issues are seemingly resolved to the satisfaction of the Commission and complainant before they are advanced to LFN. However, although the majority of BirdLife cases do progress to at least the first formal infringement stage (Letter of Formal Notice), the time it takes to get to this formal stage, and then for cases to progress further (to eventual referral to court) is very variable and in some cases takes many years (eg:- Bulgarian Kaliakra complaint, submitted February 2008, Letter of Formal Notice issued November 2008, Reasoned Opinion in June 2012, referral to ECJ October 2013, Portuguese Windfarm EIA complaint, submitted January 2011, LFN April 2012, no further advancement to date).

The Commission makes a commitment in the Communication to try to take cases to either Letter of Formal Notice, or to close them within a year of registration, but this is not achieved in many cases (eg: Slovakian D1 Motorway complaint – submitted May 2009, no LFN up to when the case was seemingly resolved in 2013, Portuguese Marine SPA complaint – submitted March 2012, no resolution or progress to formal infringement to date). This is also now seemingly at odds with the Pilot System benchmarks to resolve cases (either by closure or opening formal infringement procedures) within 20 weeks. Commission information also states that infringement actions themselves take, on average 24 months from first formal action to referral to court (COM (2009)675). This means many cases take longer than this, and this statistic excludes the initial informal exploratory and negotiation period (which can itself take up to a year, sometimes more). Delays in the complaint and infringement process are therefore the main weakness that BirdLife has identified in the current complaints system, which our asks aim to address. Provision of deadlines and targets for case progression should improve the system, but the limited staff resources in the B and D departments of DG ENV are also a key issue.

There are however other reasons for delays to progression of complaints/infringements, often due to the Commission not being able to obtain objective independent information. This would not be dealt with by a new Complaints Communication, but would rely on new Commission resources for Inspection, and potentially new powers within a new Environmental Inspections Regulation¹⁴ (a proposal for which is due from the Commission in late 2013).

Good information exchange between the Commission and BirdLife partner complainants is also important to successful and timely resolution of cases. Relationships between desk-officers and partners can vary, and this is to an extent dependent on how pro-active BirdLife is in contacting them and feeding them information, but also on how collaborative individual desk-officers are. This informal exchange of information does sometimes break down or prove inadequate, particularly in some of the more politically-charged cases, when access to information can become an issue (eg:- Sabor Dam, Portugal and Venice Flood Barrier, Italy). Formal access to complaint documents (formal notices, MS responses, internal EC reviews) is dealt with under Regulation 1049/2001¹⁵ (currently under review), and so would not be dealt with directly under any reformulation of the complaint procedures.

Sometimes there is a lack of reasoned justification for closure of cases (for example in the above Sabor and Venice cases), which is de-motivating and frustrating when BirdLife partners have spent significant resources gathering information on complaint cases and have supported case files with information over many years. In at least one instance (Valloni e Steppe Pedegarganiche, Italy) an Article 260 case (those opened against a MS that has not complied with an ECJ judgement) has been closed with no warning or justification to the original complainant, even though the original Article 258

¹⁴ See BirdLife Europe Position Paper on Environmental Inspections -

http://www.birdlife.org/europe/pdfs/201309_Position_EnvironmentallInspectionsRegimes.pdf

¹⁵ http://www.europarl.europa.eu/RegData/PDF/r1049_en.pdf. There are threats to the existing access to infringement documents in the current review, although in reality the limited access already allowed is nearly always strongly resisted by the Commission in access to info requests.

case was based wholly on the information that they had provided. Increased transparency in decision making is therefore required.

Although the Commission reports annually on the implementation of EU law, this reporting does not generally include information on the details of how quickly complaint and infringement cases progress through the system. There is therefore a limited amount of information in the public realm to allow EU citizens, civil society and Parliament to understand how efficiently the system is working, another element of transparency which should be improved.