

# Transparent Enforcement

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## SUMMARY

The EU Emissions Trading System (ETS) is one of the major EU legal instruments to reduce greenhouse gas emissions. Compliance with the EU ETS is ensured by a set of measures called the compliance cycle. All installations covered by the EU ETS must obtain a permit. Operators of installations must monitor the emissions themselves and record them in an emissions report. This emissions report must be verified by a third party, the verifier. Only where the verifier approves the emissions report, may the operator surrender allowances and thereby pay for its emissions. The overall aim of reducing emissions is achieved by reducing the total number of allowances each year.

Thus, the EU ETS legislator made a choice to rely on private parties for the verification of the reporting of emissions. For the system to achieve its aim – reducing overall greenhouse gas emissions, the absence of cheating is crucial. In addition to the controls by private verifiers and national public authorities, the public, including journalists, NGOs and individuals, may play a watchdog role. The public could try to identify anomalies in the compliance cycle or indications for instances of non-compliance with the EU ETS legislation and bring these issues to the attention of the authorities responsible for enforcement and/or the public at large. However, to play this watchdog role, transparency of the compliance cycle is particularly important. Therefore, this thesis aims to answer the following question: to what extent and in which circumstances must environmental information related to compliance and non-compliance with the EU ETS, that is held by governmental authorities and/or private verifiers, be provided to the public upon request and to what extent do governmental authorities and private verifiers provide such information in practice?

This study illustrates that the information on the EU ETS that is publicly available would be insufficient to determine whether individual operators comply with the EU ETS rules. The following information is relevant in this context: the greenhouse gas permit, the emissions report, the internal verification documentation, the verification report and other information provided by the operator to the verifier. Given that this information is not publicly available, the question arises of whether it must be disclosed upon request. The Aarhus Convention and the Environmental Information Directive provide a general right to access environmental information. At the national level, Germany has implemented the Convention and the Directive by means of the Umweltinformationsgesetz. In England, the Environmental Information Regulations implement the UK's obligations stemming from the Aarhus Convention. Despite

the Brexit, looking at England is still relevant, since the United Kingdom continues to be a party to the Aarhus Convention and the legislation that was adopted to implement the Environmental Information Directive has not changed since the United Kingdom left the EU. In this context, three central questions arise: (1) is the relevant information environmental information? (2) are the entities that hold the information public authorities? (3) Do any of the grounds of refusal apply?

The definition of environmental information, as set out at the level of international law, EU law and national law of Germany and the United Kingdom is very broad, and this study argues that it is very likely that all of the relevant information constitutes environmental information. The definition of public authorities is also rather broad and includes not only traditional governmental authorities but, under certain circumstances, also private entities. The relevant compliance information is held by both governmental authorities and private verifiers. Regarding verifiers, the question arises whether they are covered by the obligation, set out in the Aarhus Convention and the Environmental Information Directive, to provide access to information, which would be the case if they constituted public authorities. In this regard, there are two crucial questions: first, do verifiers perform public administrative functions, and second, are verifiers under the control of a public authority? While these questions currently cannot be answered with certainty, from a teleological point of view, it could be argued that verifiers are public authorities, since they perform functions that are in the public interest and that are traditionally carried out by the state.

As a next step, this study examined the grounds based on which a request for access to environmental information may be refused. Both the Aarhus Convention and the Environmental Information Directive provide several grounds based on which requests for environmental information may be refused. It is not possible to determine in a general way whether the ground of refusal applies to the information identified as relevant for checking compliance with the EU ETS. It depends on the specific circumstances of each individual case and the assessment of the public authority addressed with a request for environmental information whether a ground of refusal applies. In the course of this assessment, public authorities must also determine whether there is an overriding interest in disclosure. Where the requested information relates to emissions into the environment, an overriding public interest is presumed.

Partially, these findings were also confirmed by a small-scale empirical study. Both German and British governmental authorities treat the relevant information as environmental information and disclose it upon request. Only in a few instances, were the requests for

environmental information denied. In contrast, verifiers from both countries do not see themselves as public authorities. However, this research has shown that there can be confusion among verifiers, which can be an indication of the complexity of the question of whether verifiers are public authorities.

Finally, this thesis has illustrated that while the EU legislator has chosen to outsource such an important part of the compliance cycle to private actors, it did not provide sufficient legal certainty regarding the implications for provisions on access to environmental information.