

Transparent Enforcement

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IMPACT PARAGRAPH

The European Union (EU) has committed to reducing its greenhouse gas emissions in 2030 by 55% compared to 1990 and to become climate neutral by the year 2050. The EU Emissions Trading System (ETS) is one of the main tools to achieve that aim. It limits total emissions to a certain amount by means of a cap on allowances, which is reduced every year. Thereby, the EU ETS achieves its overall goal of reducing emissions. Operators of industrial installations must monitor their greenhouse gas emissions throughout the year and record them in an emissions report. This emissions report must be verified by a private third party. If the verifier attests that the emissions report is free from mistakes, the operators must compensate for their emissions with allowances that they have previously acquired. For this system to work, it is pivotal that the participating operators comply with the applicable legislation – particularly this obligation to surrender allowances according to the emissions caused – and do not cheat. 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. Moreover, the watchdog role could entail checking whether national public authorities and verifiers perform their functions correctly. However, to carry out such checks, the public must have access to the necessary information.

The main objective of this study was to determine to what extent and in which circumstances environmental information related to compliance and non-compliance with the EU ETS that is held by governmental authorities and/or private verifiers must be provided to the public upon request and to what extent governmental authorities and private verifiers provide such information in practice. To answer that question, three intermediary questions needed to be answered: (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? It was shown that most of the relevant information constitutes environmental information, which is a prerequisite for the application of the Aarhus Convention and the EU Environmental Information Directive. The entities holding the information on the compliance cycle are governmental authorities and private verifiers. It is clear that governmental authorities constitute public authorities. Even though no definitive conclusion could be reached with regard to the private verifiers, there are strong arguments in favour of considering private verifiers public authorities. However, in practice, verifiers denied that they are public

authorities. Whether any grounds of refusal apply depends on the specific conditions of each case.

From an academic perspective, this study may contribute to a deeper understanding of the right to access environmental information, both from a legal as well as from a practical perspective. The empirical part of this study showcases some of the practical barriers to exercising the right to access environmental information, in particular in cases, where the information in question is held by private entities that have been tasked with the performance of public tasks. The findings of this study are particularly relevant for the legal academic community since this is one of the few studies that investigate to what extent information on compliance with the EU ETS must be disclosed to the public and the first one to request information in practice. This study has demonstrated the complexity of exercising the right to environmental information, given the lack of the legal framework of the right to access environmental information. Some questions still need to be answered and further case law development is necessary. Alternatively, the legislator could improve the legislative framework. One of the issues that future research should focus on is the condition that must be fulfilled for a legal framework to be considered particularly precise so that actors covered by that legal framework are considered as being under the control of a public authority.

From a larger societal perspective, this study may draw the attention of the legislator to the necessity to be wary of the implications of outsourcing public tasks to private entities for the right to access environmental information and to ensure that the legal framework is sufficiently clear so that the public can effectively exercise its right. Furthermore, it may serve as inspiration for legal professionals, such as judges, when interpreting the law on access to environmental information. In that regard, the question of whether the information identified as relevant for checking compliance with the EU ETS constitutes environmental information and the question of whether the EU ETS verifiers constitute public authorities are of particular importance.

The study may also raise awareness about the issues that were examined. Primarily the question of enforcement of the EU ETS, which has, thus far, not been a priority of civil society. The study can serve as guidance for civil society when submitting requests for access to environmental information on issues related to compliance with the EU ETS. If civil society becomes more active in this area and uses the right to access environmental information to investigate also compliance with EU environmental law at large, not limited to the EU ETS, the problem of non-compliance with EU environmental law may be alleviated to a certain extent.

Finally, the results of this study may also serve private companies, as it may draw their attention to the fact that they, under certain circumstances, can be categorised as public authorities and consequently be obliged to provide environmental information upon request, unless a valid ground of refusal applies. As this study has shown, thus far, they seem largely unaware of this possibility.