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## Legal Mobilisation for Biodiversity Protection

### Assessing the Complementary Potential of the Bern Convention's Case File System and the European Commission's Infringement Procedure

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#### 11.1 Introduction

The importance of civil society actors in ensuring that breaches of environmental law are identified and reported to the bodies responsible for their compliance is difficult to overstate. Nevertheless, civil society groups continue to face severe limitations in respect of access to justice in environmental matters.<sup>1</sup> In the European regional context, the literature concerning opportunities for legal mobilisation for environmental protection has long focussed on the mobilisation of citizens in relation to European Union environmental law, largely via their national legal systems or via the European Court of Justice (CJEU).<sup>2</sup> Relatively under-explored, on the other hand, has been the role of (non-)compliance systems outside the EU's institutional structure, operating with a similar geographical scope.<sup>3</sup> In particular, the potential of the 1979 Bern Convention on European Wildlife Conservation<sup>4</sup> and its corresponding (non-)compliance mechanism known as the 'case file system' (CFS)

<sup>1</sup> M van Wolferen and M Eliantonio, 'Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-Compliance with the Aarhus Convention' in M Peeters (ed.), *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 148.

<sup>2</sup> M Eliantonio, 'The Role of NGOs in Environmental Implementation Conflicts: "Stuck in the Middle" between Infringement Proceedings and Preliminary Rulings?' (2018) 40 *Journal of European Integration* 753.

<sup>3</sup> An exception to this is the Aarhus Convention's compliance committee. See, for example, van Wolferen and Eliantonio (n 1).

<sup>4</sup> Convention on the Conservation of European Wildlife and Natural Habitats 1979, European Treaty Series 104.

seems to be overshadowed by academic discourse on the mechanisms of the EU. The core point argued in this chapter is that while the looming shadow of CJEU judgments provides an indispensable lever for NGOs seeking to protect biodiversity with the help of the law, less confrontational and civil society-oriented compliance mechanisms such as the CFS also provide important avenues for legal mobilisation.

By applying a 'legal opportunity structures' approach – one of the theoretical approaches developed within scholarship on legal mobilisation – the chapter assesses the legal opportunities offered by the CFS and the European Commission's (EC) infringement procedure. The purpose of studying legal opportunity structures is to gain an understanding of why social movements turn to litigation or (non-) compliance mechanisms in their efforts to protect biodiversity. According to Evans, Case and Givens, the main factors defining the 'openness' of legal opportunity structures are 'the nature of the available legal stock, the rules governing access to the judiciary, and resources for legal advocacy'.<sup>5</sup> Zooming in on the question of access, this chapter compares the CFS and the EC's infringement procedure, examining the participatory rights provided by each system and their respective ability to respond effectively to concerns raised by civil society actors. It takes a broad view of 'legal mobilisation', which includes mobilisation through compliance procedures within its scope. Thus, it applies a modified understanding of the openness indicators which accommodates (non-) compliance procedures. Consequently, 'access' is understood to mean 'access to the judiciary or (non-)compliance mechanism'.

From this viewpoint, distinct benefits and drawbacks of each mechanism are brought to the surface. The chapter suggests that actors can ameliorate the shortcomings of either procedure and expand their legal opportunities by shifting between the two systems. It also argues that the pursuit of a parallel mobilisation strategy in previous cases has brought to the fore the synergistic potential between the CFS and the EC's infringement procedure. Given the limited scope of the chapter, preliminary reference procedures under Article 267 TFEU as complementary mobilisation pathways are excluded from the discussion.<sup>6</sup>

<sup>5</sup> R Evans Case and TE Givens, 'Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48 *Journal of Common Market Studies* 221, 233.

<sup>6</sup> For comparative analysis of opportunities of NGOs in relation to the Commission's infringement procedure and the preliminary reference procedure see Eliantonio (n 2).

In this chapter, a brief introduction to legal mobilisation is followed by a methodology section. Subsequently, the procedural rules and practice of the CFS and the EC's infringement procedure will be outlined, serving as a primer to the comparative assessment of the participatory possibilities and capacity for effective response to complaints in each system. The chapter will then trace the development of two case files (and corresponding CJEU proceedings) initiated by the NGO BirdLife International and its national partners in Bulgaria and Malta to draw out concrete instances of interaction between the CFS and the infringement procedures (including CJEU judgments).

## 11.2 A Brief Introduction to Legal Mobilisation

The literature has produced little consensus regarding the meaning of the term 'legal mobilisation'.<sup>7</sup> Frances Zemans' definition remains the most cited: 'The law is . . . mobilised when a desire or a want is translated into a demand as an assertion of rights.'<sup>8</sup> This traditional definition is somewhat ill-suited to legal mobilisation for biodiversity protection. Its emphasis on the assertion of 'rights' complicates the concept's application to the environmental field, where litigants may often struggle to demonstrate the existence or violation of a right. Lehoucq and Taylor employ a useful definition of the term as referring to 'the use of law in an explicit, self-conscious way through the invocation of formal institutional mechanisms'.<sup>9</sup> In any event, the characterising feature of applying a 'legal mobilisation' approach is the adoption of an actor-focussed perspective in the study of these mechanisms, using one or several of the key concepts developed within the scholarly field.

Mobilisation theory has elaborated several conceptual approaches useful for understanding the behaviour of actors within various legal systems. A commonly used conceptual approach focusses on 'legal opportunity structures' stressing the influence of access by social movements to legal procedures on the emergence and success of legal actions.<sup>10</sup> Scholars of legal mobilisation unambiguously agree that the

<sup>7</sup> E Lehoucq and WK Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' (2020) 45 *Law & Social Inquiry* 166.

<sup>8</sup> F Kahn Zemans, 'Legal Mobilization: The Neglected Role of the Law in the Political System' (1983) 77 *American Political Science Review* 690, 700.

<sup>9</sup> Lehoucq and Taylor (n 7) 168.

<sup>10</sup> L Vanhala, 'Legal Mobilization' in *Oxford Bibliographies* (Oxford University Press 2021) 12.

procedural rules in any given legal system influence the legal opportunities available to actors wishing to mobilise the law through institutional mechanisms. Research in this tradition particularly highlights the role of standing rules or access requirements on the ability of actors to influence policy – the relaxation or elimination of such hurdles is understood as one of the key elements for this purpose.<sup>11</sup> Relatedly, legal opportunities are affected by the cost of access to dispute settlement.<sup>12</sup> A lack of funds acts as a common deterrent to legal mobilisation through compliance systems. Finally, opportunity structures are shaped by ‘the body of laws that exist in a particular field’,<sup>13</sup> which is referred to as ‘legal stock’. Far from being fixed, legal stock can develop over time, not least as a result of legal mobilisation efforts.<sup>14</sup>

### 11.3 Methodology and Case Study Selection

Both case studies trace and assess the strategic legal mobilisation of BirdLife International. This NGO stands out as the organisation involved in the highest number of complaints before the Bern Convention’s CFS (see Table 11.1). It also occupies a special position in the pan-European institutional landscape in relation to nature conservation; its organisational structure comprises a network of national partners throughout Europe and the globe.<sup>15</sup> Thus, BirdLife benefits from a vast on-the-ground presence and from a large reservoir of financial and human resources.<sup>16</sup> Additionally, and as a consequence of the foregoing factors, BirdLife is an ‘insider’ to the Bern Convention’s institutional structure. Its insider position is defined by BirdLife’s engagement with institutional activities related to the Convention. For instance, BirdLife collaborates with the Convention’s group of experts on the conservation of birds,

<sup>11</sup> R Evans Case and TE Givens, ‘Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive’ (2010) 48 *Journal of Common Market Studies* 221, 224.

<sup>12</sup> L Vanhala, ‘Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy’ (2017) 51 *Comparative Political Studies* 380, 406.

<sup>13</sup> *Ibid.*, 384.

<sup>14</sup> Evans Case and Givens (n 11); Vanhala (n 12).

<sup>15</sup> ‘About BirdLife Europe and Central Asia’ (*BirdLife International*), available at [www.birdlife.org/europe-and-central-asia/about-birdlife-europe-and-central-asia](http://www.birdlife.org/europe-and-central-asia/about-birdlife-europe-and-central-asia), accessed 9 May 2022.

<sup>16</sup> Birdlife International Europe and Central Asia, Annual Report 2022, 24, available at [www.birdlife.org/wp-content/uploads/2023/05/BirdLife-Europe-Central-Asia\\_Annual-Report-2022.pdf](http://www.birdlife.org/wp-content/uploads/2023/05/BirdLife-Europe-Central-Asia_Annual-Report-2022.pdf), accessed 29 August 2023.

Table 11.1 *Bern Convention case file system data (April 2022)*

Complainant type	Number of complaints
BirdLife	24
WWF	12
MEDASSET	7
SEH	13
Other NGOs, scientific organisations, universities, law firms	74
Community, citizen activist groups, individuals	19
Political bodies, political parties, parties to the Convention, Secretariat	10
N/A (no reports indicating the complainant found)	52

which monitors the compliance of the parties with the provisions related to bird conservation and the implementation of the Convention's species action plans.<sup>17</sup> For the purposes of this chapter, national partners of BirdLife International are treated as part of the same organisation.<sup>18</sup> The chapter's two case studies were selected from the pool of CFS complaints lodged by BirdLife International. They distinguish themselves from BirdLife's other complaints, in that the issues raised were also brought to the attention of the EC and ultimately resulted in CJEU judgments.

Although many case files are available online through the Convention's database, the chronological tracing of individual case files is cumbersome. It is not currently possible to view all files pertaining to a single case in an organised manner and some documents pertaining to the case files may be either missing or classified.<sup>19</sup> Except for internal documentation, no systematic repository of the complaints received

<sup>17</sup> 'Group of Experts on Conservation of Birds' (*Convention on the Conservation of European Wildlife and Natural Habitats*), available at [www.coe.int/en/web/bern-convention/on-the-conservation-of-birds](http://www.coe.int/en/web/bern-convention/on-the-conservation-of-birds), accessed 9 May 2022.

<sup>18</sup> Questions may arise as to whether different legal cultures in Europe influence the mobilisation strategies in different branches of Birdlife. Such questions could be addressed in future research, for example in the form of a comparative study.

<sup>19</sup> Since the writing of this chapter, the Bern Convention Secretariat has made available chronological timelines of some of its case files. See 'Case-Files' (*Council of Europe: Convention on the Conservation of European Wildlife and Natural Habitats*), available at [www.coe.int/en/web/bern-convention/case-page](http://www.coe.int/en/web/bern-convention/case-page), accessed 9 November 2022.

through the Bern Convention's CFS currently exists.<sup>20</sup> The lack of such a repository also complicates the production of a comprehensive overview of complainants involved in each case. An overview of basic facts pertaining to each file was produced in 2007 in the context of a stocktake on the rules of procedure for the CFS.<sup>21</sup> Naturally, this list only includes cases filed until 2007, excluding roughly 50 per cent of complaints. However, the Register of Bern Convention Complaints provides a complete list of complaints received since the establishment of the CFS, indicating the country concerned and the date of receipt.<sup>22</sup> With reference to this list, I searched for the complainant report attached to each individual case file with the aim of creating a general picture of the mobilisation practices of actors within the CFS. Unfortunately, the Bern Convention's database does not contain the documents for each case file and information for fifty cases overall is missing from the overview. The results are compiled in Table 11.1. Numbers are calculated on the basis of a total of 211 case files. Case files were counted twice, if submitted jointly by two complainants within different categories. For example, a complaint submitted jointly by an individual and an NGO was added as plus one to each category.

#### 11.4 The Bern Convention and the EU Birds and Habitats Directives

The Bern Convention and the EU Birds and Habitats Directives together form the linchpin of nature protection law in the European area. The Bern Convention's overarching aim is the conservation of 'wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the co-operation of several States'.<sup>23</sup> The Convention is therefore broad in focus, including not only all species but also the conservation of habitats in its scope. As an instrument of the Council of Europe, the Convention enjoys particularly wide ratification: its membership includes the Council of Europe's forty-nine member

<sup>20</sup> 'Case-File System: Reflections and Possible Restructuring in the Framework of the Bern Convention Vision and Strategic Plan for the Period to 2030', Secretariat Memorandum T-PVS/Inf(2021)30rev, 16.

<sup>21</sup> 'Analysis of the Rules of Procedure for the Case File System' (2007), Secretariat Memorandum T-PVS (2007) 6.

<sup>22</sup> 'Register of Bern Convention Complaints 2021', T-PVS/Inf(2021)5.

<sup>23</sup> Convention on the Conservation of European Wildlife and Natural Habitats.

States, five additional States and the European Union in its capacity as an international organisation.<sup>24</sup>

The Bern Convention was ratified in 1979, the same year as the EU Birds Directive<sup>25</sup> was adopted. These two instruments predate the Habitats Directive (1992) by more than a decade.<sup>26</sup> The Birds Directive and the Habitats Directive both essentially implement the Bern Convention into EU law, promoting a 'favourable conservation status' for species and habitat types included within their scope.<sup>27</sup> The relationship between the Bern Convention and the Habitats Directive has been deliberately synergetic from the start,<sup>28</sup> co-evolving in several ways. First, the Directive incorporated elements not included in the Convention, especially through the establishment of a co-ordinated network of protected areas throughout Europe known as the Natura 2000 network.<sup>29</sup> The Bern Convention Secretariat and Standing Committee responded to this development and followed suit through the establishment of the Emerald Network, which emulated Natura 2000 in the territories of non-EU member States party to the Bern Convention.<sup>30</sup> For EU members, the obligations relating to the networks are identical insofar as, for these States, 'Emerald Network sites are those of Natura 2000'.<sup>31</sup>

Given the overlap between the Convention and the Directives, the two instruments have naturally been the subject of ample comparison within academic literature. Authors often highlight the Bern Convention's reach within non-EU (and, indeed, non-Council of Europe) member States as the instrument's primary contemporary contribution.<sup>32</sup> Of course, it is true that the Bern Convention and its CFS constitute through their mere existence an international legal opportunity structure for citizens situated

<sup>24</sup> 'Details of Treaty No. 104' (Council of Europe Treaty Office).

<sup>25</sup> Amended in 2009, the Directive is now known as Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the Conservation of Wild Birds ('Birds Directive').

<sup>26</sup> Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora ('Habitats Directive').

<sup>27</sup> Habitats Directive Article 2; Birds Directive Articles 1 and 2.

<sup>28</sup> C Coffey, 'The EU Habitats Directive: Enhancing Synergy with Pan-European Nature Conservation and with the EU Structural Funds' in S Oberthür and T Gehring (eds), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies* (MIT Press 2006) 242.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Standing Committee, 'Resolution No 5 Concerning the Rules for the Network of Areas of Special Conservation Interest' (Council of Europe 1998).

<sup>32</sup> See, for example, Coffey (n 28).

within the Bern Convention's reach, but outside of the EU. BirdLife primarily mobilised the CFS in relation to Convention breaches that occurred in countries not subject to the Directives. Out of the twenty-four identified case files involving BirdLife, fifteen were filed in relation to non-EU countries.<sup>33</sup>

The relatively low mobilisation rate under the Bern Convention in relation to EU countries may be the result of perceptions on the part of mobilising actors that the Bern Convention's CFS lacks legal 'teeth' when compared to the more legalised options available in relation to the EU Directives.<sup>34</sup> Although disputes concerning the application of the Bern Convention can be referred to binding arbitration by the Standing Committee (the CFS's decision-making organ),<sup>35</sup> at the time of writing, this has never happened in practice.<sup>36</sup> Instead, the CFS's process has been oriented towards the facilitation of productive dialogue and the promotion of practical solutions in the form of soft recommendations.<sup>37</sup>

Nevertheless, the CFS shows that actors do continue to mobilise via the CFS, even where EU membership has given them access to EU law and the corresponding dispute settlement procedures conferred thereunder. This raises questions as to why actors to whom both the procedures under the Bern Convention and the EU Directives are available choose to direct their complaint to the Commission, the CFS, or both.

### 11.5 Mobilising for Compliance with the EU Nature Directives: The European Commission's Infringement Procedure and Referrals to Litigation before the CJEU

The implementation of EU environmental law depends heavily on engaged civil society groups able to identify breaches of EU environmental law on the ground and motivated to report them to the bodies responsible for enforcement.<sup>38</sup> Despite this, it is well known that the

<sup>33</sup> Counted by and table on file with the author.

<sup>34</sup> D Pritchard, 'Review of the Case File System', T-PVS(2000)16 (Council of Europe 2000).

<sup>35</sup> Convention on the Conservation of European Wildlife and Natural Habitats 1979 (No 104) Article 18(2).

<sup>36</sup> A Trouwborst, FM Fleurke and JDC Linnell, 'Norway's Wolf Policy and the Bern Convention on European Wildlife: Avoiding the "Manifestly Absurd"' (2017) 20 *Journal of International Wildlife Law & Policy* 155, 165.

<sup>37</sup> *Ibid.*

<sup>38</sup> European Commission 2012a, 2; 2017b, in Eliantonio (n 2) 756.



CJEU is an inhospitable environment for legal mobilisation.<sup>39</sup> Non-privileged applicants (i.e., natural and legal persons) have to satisfy strict standing requirements to directly access the Court.<sup>40</sup> Non-State actors therefore rely on alternative mobilisation avenues. One of the main pathways in the EU context is the submission of complaints to the Commission to encourage infringement procedures.

At first glance, the initiation of infringement procedures seems to provide an exceptionally open opportunity structure for complainants. Individuals or organisations can submit complaints free of charge and without having to satisfy standing requirements via an online or physical complaints form, which is available in twenty-three languages.<sup>41</sup> The complaint's submission is followed by the Commission's assessment of the potential instance of non-compliance with EU law and a subsequent informal bilateral process between the Commission and the Member State known as the EU Pilot. Should the Member State fail to respond to the Commission within the ten-week deadline afforded to it under the Pilot, the Commission has the power (but no obligation) to open a formal infringement procedure under Article 258 TFEU.

Under the formal infringement procedure, the Commission may request a response from the Member State concerning its alleged failure to comply with EU environmental law by means of a letter of formal notice. Failure on the Member State's part to issue a satisfactory response within two months entitles the Commission to request the Member State to comply with EU law by sending a reasoned opinion (Article 258 TFEU). Non-compliance with the reasoned opinion triggers the Commission's discretion to refer the case to the CJEU.

Although the outcome of litigation before the CJEU is binding, financial penalties are imposed only in case of a second infringement procedure launched in response to a State's non-compliance with the Court's judgment. The second infringement procedure comprises fewer steps than the first – the Commission commences the procedure by sending a second letter of formal notice. Upon proposal by the Commission, the

<sup>39</sup> V Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights' (2021) 58(3) *Common Market Law Review* 751.

<sup>40</sup> A Albers-Llorens, 'Remedies against the EU Institutions after Lisbon: An Era of Opportunity?' (2012) *The Cambridge Law Journal* 71 507, 513.

<sup>41</sup> 'How to Make a Complaint at EU Level' (European Commission).

Court then has the authority to impose a financial penalty in the form of a lump sum or daily payment on the Member State.<sup>42</sup>

### 11.6 Mobilising through the Bern Convention's Case File System: Access and Procedure

By comparison, in the Bern Convention's CFS, NGOs, individuals and other civil society actors can also file complaints without having to satisfy standing requirements.<sup>43</sup> This is done through complaint forms, which are followed up by a request for information, sent by the Secretariat to the party against which the complaint was issued. Should the government fail to respond within four months, the complaint is designated as a 'possible file'.<sup>44</sup> Subsequently, the case may be dropped on the basis of insufficient grounds to pursue the issue as a presumed breach or, alternatively, a case file can be formally opened, mandating special attention in relation to the case, for example in the form of on-the-spot appraisals.<sup>45</sup>

The body which decides on the status of files as well as recommendations for the resolution of disputes is the Standing Committee.<sup>46</sup> Functioning as the governing body of the Convention, the Standing Committee 'includes all contracting parties as well as observer states and organisations, both governmental and non-governmental, at the national and international level'.<sup>47</sup> Decisions of the Committee are taken by a two-thirds majority – parties are not in possession of veto powers.<sup>48</sup>

<sup>42</sup> Article 260, Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47 (TFEU), for an example see *Commission v Greece* [1992] (European Court of Justice) C-45/91 and *Commission v Greece* [2000] (European Court of Justice) C-387/97.

<sup>43</sup> Standing Committee, 'Application of the Convention: Summary of Case Files and Complaints – Reminder on the Processing of Complaints and New On-Line Form' (Convention on the Conservation of European Wildlife and Natural Habitats 2008), Secretariat Memorandum T-PVS(2008)7, 3.

<sup>44</sup> *Ibid.*, 4.

<sup>45</sup> *Ibid.*, 5.

<sup>46</sup> *Ibid.*

<sup>47</sup> 'Institutions of the Bern Convention' (*Convention on the Conservation of European Wildlife and Natural Habitats*), available at [www.coe.int/en/web/bern-convention/institutions](http://www.coe.int/en/web/bern-convention/institutions), accessed 10 May 2022.

<sup>48</sup> 'Rules of Procedure of the Standing Committee', T-PVS/Inf(2013)6, Rule 8(b).

The rules concerning voting apply to decisions to initiate on-the-spot appraisals.<sup>49</sup> Decisions regarding proposals for mediation are taken by the Standing Committee or the Bureau.<sup>50</sup>

Since the Bern Convention has come into force, the Secretariat has received 211 complaints through the CFS,<sup>51</sup> and 37 case files have formally been opened. Case files are usually formally opened where the Standing Committee considers that a breach of the Convention provisions concerns a site or species of European importance, the scope of the threat is especially broad in character or the measures needed are of an urgent nature.<sup>52</sup> However, in recent years, there has been concern on the part of the Standing Committee that the opening of a case file indicates a presumption of non-compliance with the Convention. For this reason, the Standing Committee may refrain from formally opening a case file (it may, for example, be marked as 'in stand-by'), but still initiate measures such as 'on-the-spot appraisals' and other forms of dialogue.<sup>53</sup>

One example is the case file concerning the construction of an overhead power line in an environmentally sensitive area in the Lithuanian–Polish borderland. A local NGO argued that the construction could cause a direct negative impact on some species and habitats protected under the Bern Convention and EU Directives (the power line was to be located near an EU Natura 2000 site).<sup>54</sup> Rather than opening the case file, the Standing Committee referred the matter to mediation.<sup>55</sup> This commitment to a flexible handling of cases is explicitly written into the Convention. Article 18(1) read, 'The Standing Committee shall use its best endeavours to facilitate a friendly settlement of any difficulty to which the execution of this Convention may give rise.' Thus, the decisions of the Standing Committee are nuanced, and attention may be given even to those cases which are not formally opened.

<sup>49</sup> *Ibid.*, Appendix I, para 1.

<sup>50</sup> *Ibid.*, Appendix II, para 1.

<sup>51</sup> 'Register of Bern Convention Complaints 2021' (n 22).

<sup>52</sup> Standing Committee (n 43) 4.

<sup>53</sup> 'Improving the Case-File System of the Bern Convention', T-PVS(2011)14, 6.

<sup>54</sup> 'Mediation Procedure in the Frame of Complaint Number 2013/5: Presumed Impact of a Construction of Overhead Power Line (OHL) in an Environmentally Sensitive Area in the Lithuanian–Polish Borderland', Visit Report T-PVS/Files (2015) 51.

<sup>55</sup> The possibility to initiate mediation procedures was added to the CFS in 2015 and has so far not been used in any other cases. See Standing Committee (n 43) Appendix II.

### 11.7 Comparison of the Case File System and the European Commission's Infringement Procedure from a Legal Opportunity Structures Perspective

Based on legal opportunity structures theory, it is argued that CFS's structural openness to civil society participation is the primary pull for groups seeking compliance with nature protection law in Europe. Importantly, this is relevant not only as far as the initiation of the complaint is concerned. Rather, the potential for civil society participation continues to define the legal opportunity structure for NGOs at every stage of the process. Additionally, the potential for continuous participation interacts positively with the CFS's other defining features, such as procedural flexibility. Finally, the Bern Convention's 'small sibling' relationship with the EC in environmental matters means that the CFS's welcoming approach towards actor participation extends beyond the CFS. In fact, given the synergetic potential of the two systems, mobilisation at the interface of CFS and EC infringement procedures could potentially alter the legal opportunities available to NGOs.

Previous scholarship has suggested that while the Bern Convention's CFS would be suited to cases in which State and complainant are actively willing to reach a suitable solution, the EU's more coercive mechanism would be preferable where States are not willing to act on the basis of soft recommendations.<sup>56</sup> At a Bern Convention meeting on the Convention's implementation through national case law in June 1999, Mr Dave Pritchard, representative of BirdLife International and the Royal Society for the Protection of Birds (RSPB), noted that the RSPB is more likely to engage with the Bern CFS 'where the authorities themselves agree that an intervention would be helpful, where it's more of a "problem solving atmosphere" and where the process doesn't offer anything legally binding as an outcome'.<sup>57</sup> Thus, actors can strategically choose a more or less confrontational forum for the expression of a complaint. However, Pritchard added that complaints under the CFS may easily run in parallel with complaints made in front of other bodies.<sup>58</sup>

<sup>56</sup> J Dubrulle, 'The Evolving Potential of the (Non-)Compliance Mechanisms of the Bern Convention on European Wildlife Conservation' (*Tilburg University Environmental Law*, 7 August 2016).

<sup>57</sup> D Pritchard, 'The Example of a Non-Governmental Organisation in United Kingdom: The Royal Society for the Protection of Birds 1999' (2000) 42 *Environmental Encounters* 93.

<sup>58</sup> *Ibid.*

While the rules for the submission of complaints to the Commission offer, on paper, a promising avenue for mobilisation,<sup>59</sup> in reality the procedure is riddled with participatory difficulties. NGOs have long lamented the lack of participation and transparency in the Commission's complaints system.<sup>60</sup> After the submission of a complaint (the receipt of which will be communicated to the complainant), complainants are excluded from the pilot phase. Communication occurs between the Commission and the Member State only.<sup>61</sup> Even after the formal opening of a complaint, individuals (and other civil society actors) have no right to participate in procedures under Article 258 TFEU.<sup>62</sup>

The exclusion of the complainant from further stages in the case of the EC's infringement procedure creates uncertainties for mobilising actors when viewed in conjunction with the Commission's ability to act as gatekeeper at every stage of the procedure. Complaints by non-State actors can encourage the Commission to initiate an infringement procedure, but whether or not it is formally opened is subject to the Commission's discretion.<sup>63</sup> This applies even where the Commission considers that a breach of EU law has occurred. Generally, the Commission states that it chooses to initiate infringement procedures only if there is an indication of a 'systemic failure' to comply with EU law.<sup>64</sup> In all other cases, the Commission pursues a decentralised approach and will generally refer the complainants to mechanisms operating at the national level.<sup>65</sup> This also means, in turn, that the Commission is less likely to consider cases in which the legislation has been implemented, but on-the-ground implementation is lacking, unless this amounts to a general and systemic lack of enforcement in relation to an issue area. Because of the Commission's wide margin of discretion and the inability of mobilising actors to continue pushing for action on the

<sup>59</sup> European Commission, 'EU Law: Better Results through Better Application', Communication from the Commission 2017/C 18/02 Annex, Section 2 'General Principles', available at [https://eur-lex.europa.eu/legal-content/SK/TXT/?amp%3Btoc=OJ%3AC%3A2017%3A018%3ATOC&uri=uriserv%3AOJ.C\\_.2017.018.01.0010.01.ENG](https://eur-lex.europa.eu/legal-content/SK/TXT/?amp%3Btoc=OJ%3AC%3A2017%3A018%3ATOC&uri=uriserv%3AOJ.C_.2017.018.01.0010.01.ENG).

<sup>60</sup> European Parliament 2013, 73–75, in Eliantonio (n 2) 756.

<sup>61</sup> S Kingston, V Heyvaert and A Čavoški, *European Environmental Law* (Cambridge University Press 2017) 191.

<sup>62</sup> Eliantonio (n 2) 753.

<sup>63</sup> European Commission (n 59) section III.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

part of the Commission through interventions, infringement procedures are not a reliable avenue for legal mobilisation.

These factors constitute a particularly difficult hurdle for applicants mobilising in relation to the Birds and Habitats Directives. The Commission noted in 2017 that the ‘majority of complaints made in relation to the [Directives] concern threats to individual sites’.<sup>66</sup> Upon request, the Directorate General for Environment stated that 1,764 complaints filed under the keyword ‘nature’ were submitted between 2009 and 2020.<sup>67</sup> By contrast, 412 of those cases reached the ‘formal notice’ stage and 93 complaints (roughly 5 per cent) resulted in a referral to the Court under Article 258 TFEU.

The Commission’s 2017 Communication goes on to elaborate that ‘the centralised enforcement mechanism currently available to the Commission is unsuited to dealing with such complaints, particularly in terms of speed of response, use of experts with local knowledge, and site visits’.<sup>68</sup> Conversely, the use of experts to carry out on-the-spot appraisals is one of the CFS’s greatest strengths. Well aware of this, the Secretariat is scaling up its efforts in this regard and has recently stated its intention to further expand its pool of experts to accommodate the widest possible range of case file processes.<sup>69</sup>

On top of this, even where a case makes it all the way to the litigation stage, it is far from guaranteed that a Member State will rectify the unlawful situation, as the Commission’s willingness or capacity to remain active on a particular issue continues to factor into the equation. A study by BirdLife International, conducted in 2020, traced the implementation of eleven conservation-related CJEU judgments, paying particular attention to the Commission’s role in following up after the court proceedings. The survey showed that the Commission followed up on the implementation of a CJEU judgment in only four of the eleven cases studied. In three of the remaining seven cases, the Commission did not follow up despite the continuation of the harmful activity in question.<sup>70</sup>

<sup>66</sup> ‘Implementing Community Environmental Law’, Communication from the Commission COM(96) 500 final (European Commission 1996).

<sup>67</sup> Email from Europe Direct to the author (7 October 2021).

<sup>68</sup> ‘Implementing Community Environmental Law’ (n 66).

<sup>69</sup> ‘Case-File System: Reflections and Possible Restructuring in the Framework of the Bern Convention Vision and Strategic Plan for the Period to 2030’ (n 20) 15.

<sup>70</sup> European Environmental Bureau and BirdLife International, ‘Implementation of Rulings for Nature Conservation: Court of Justice of the European Union Case Studies’.

Unfortunately, because civil society actors find themselves outsiders in the process, their influence on the procedure ends at the initiation stage.

By contrast, civil society actors appear as active participants in the CFS's procedure in several ways.<sup>71</sup> First of all, non-governmental actors can act as observers in the Standing Committee, the body that decides on the handling of case files.<sup>72</sup> Secondly, complainants are welcome to submit information to the Secretariat, for example in the form of reports. Third-party interventions are also possible at all stages; reports can be received in relation to open cases as well as cases in other stages of consideration (e.g., stand-by). Thirdly, civil society actors can enter directly into dynamic and in-person conversation with member States, either through mediation or within the framework of expert group meetings and other official events held within the framework of the Bern Convention.<sup>73</sup> Consequently, mobilisation through the CFS allows complainants to retain a high degree of control over complaints. As a result, actors who possess the human resources to do so continue to exert influence over the trajectory of a case from beginning to end. This is particularly helpful in light of the CFS's emphasis on flexibility, which is conducive to the elaboration of solutions that satisfy both the complainant and the government concerned.

Regarding flexibility of procedure, it also seems that the CFS may be better suited to deal with cases of individual non-compliance or failed enforcement, including those that do not concern 'systemic failures' of implementation. To this extent, a 2011 study by the Directorate General Environment pointed out that the absence of an EU inspectorate for the environment was hampering the Commission's ability to ensure the implementation and enforcement of EU law.<sup>74</sup> Among other options, the study explored the possibility of emulating the Bern Convention's model of experts, which consists of the selection of several pools of highly specialised experts ('expert groups') in nine distinct subject areas related to the objectives of the Convention.

<sup>71</sup> Standing Committee (n 46).

<sup>72</sup> 'Institutions of the Bern Convention' (n 47).

<sup>73</sup> 'Groups of Experts Set Up under the Bern Convention' (*Convention on the Conservation of European Wildlife and Natural Habitats*), available at [www.coe.int/en/web/bern-convention/thematic-group-of-experts](http://www.coe.int/en/web/bern-convention/thematic-group-of-experts), accessed 10 May 2022.

<sup>74</sup> At the EU level, there exists the European Union Network for the Implementation and Enforcement of EU Environmental Law, which allows at least for the exchange of ideas and best practices. For more information, see 'Welcome to IMPEL Website' (*IMPEL Website*), available at [www.impel.eu/en](http://www.impel.eu/en), accessed 9 May 2022.

Consequently, though the procedural rules of the Commission and the CFS do not preclude them from picking up the same complaints, the operational practice of these systems shows that they have developed different toolboxes for the handling of complaints. The following section illustrates this point by taking a closer look at BirdLife's interaction with the CFS and the EC in two cases of parallel mobilisation.

### 11.8 Wind Farms in Balchik and Kaliakra (Bulgaria)

The case of Balchik and Kaliakra concerns the Bulgarian Government's approval of the construction of wind farms within Emerald/Natura 2000 sites along Bulgaria's Black Sea Coast, affecting the *Via Pontica* migration route, one of Europe's important bird areas (IBA).<sup>75</sup> The initial complaint was filed in September 2004 with the Bern Convention's Standing Committee in relation to the Balchik wind farm. The case had previously undergone extensive mobilisation efforts at the national level. The Bulgarian Society for the Protection of Birds (BSPB) (in an alliance of several other NGOs) had made several efforts to prevent the acceptance of an environmental impact assessment by the public body tasked with its review (the Varna Regional Inspectorate of Environment and Water (RIEW)). This included participation in a public hearing procedure organised by RIEW<sup>76</sup> and the submission of a petition opposing the endorsement of the RIEW's decision to endorse the Environmental Impact Assessment (EIA).<sup>77</sup> Following the suspension of a case filed by the RSPB and other NGOs to challenge the RIEW's decision in July 2004, BirdLife, the RSPB and other national NGOs submitted a complaint to the Bern Convention's CFS outlining the events and inviting the Standing Committee to (a) open a file on the case and (b) adopt a recommendation annexed to the complaint, which contained detailed steps requested from the government to comply with its obligations under the

<sup>75</sup> The Important Bird and Biodiversity Area (IBA) concept was developed by Birdlife International. Key sites are identified through Birdlife's IBA programme and have been used in the European Union to designate Special Protected Areas (SPAs) under the Birds Directive. See 'Protecting Birds Where They Live and Migrate' (*BirdLife International*, 22 March 2021), available at [www.birdlife.org/projects/ibas-mapping-most-important-places/](http://www.birdlife.org/projects/ibas-mapping-most-important-places/), accessed 10 May 2022.

<sup>76</sup> 'Construction of the Balchik Wind Farm (Bulgaria)', T-PVS/Files(2004)6 Report by the NGO, para 6.

<sup>77</sup> *Ibid.*, para 9.



Convention.<sup>78</sup> The Standing Committee responded by mandating an on-the-spot appraisal of the wind farm plant, conducted in September 2005, on the basis of which it adopted Recommendation No 117 on the plan to set up a wind farm near the town of Balchik and other wind farm developments on the *Via Pontica* route.<sup>79</sup> In the following years, BirdLife continued to monitor and report to the Standing Committee on the State's failure to implement the recommendation.

Upon Bulgaria's accession to the European Union on 1 January 2007, Bulgaria automatically became subject to the provisions of the Birds and Habitats Directives.<sup>80</sup> In early 2008, the BSPB submitted a complaint to the EC.<sup>81</sup> Within the same year, the Commission issued two formal letters of notice to the Bulgarian State.<sup>82</sup> A third letter of formal notice and a reasoned opinion were issued in 2011 and 2012 respectively.<sup>83</sup> In 2014, the Commission finally referred the case to the CJEU.<sup>84</sup> The judgment of the Court found Bulgaria to be in breach of the Birds and Habitats Directives in several respects. These included Bulgaria's failure to include the IBA territories covering the Kaliakra region in the Special Protection Areas Bulgaria had established under the criteria contained in the Birds Directive, approval of the implementation of several wind power and tourism development projects in the area, and failure to properly carry out an impact assessment in relation to another six of the wind farms concerned.<sup>85</sup>

Interestingly, the Bern Convention case file remained open during the Commission's infringement procedure and after the CJEU's judgment. During the proceedings, BirdLife continued to submit reports to the CFS on the Bulgarian Government's progress in implementing the recommendations issued by the Bern Convention's Standing Committee. The NGO also encouraged the submission of reports from other

<sup>78</sup> Ibid., para 2.

<sup>79</sup> 'Recommendation of the Standing Committee on the Plan to Set up a Wind Farm near the Town of Balchik and Other Wind Farm Developments, on the Via Pontica Route (Bulgaria)', Recommendation No 117 (2005).

<sup>80</sup> European Commission, 'Enlargement and Nature Law' (*European Commission Environment*), available at [https://ec.europa.eu/environment/nature/legislation/enlargement/index\\_en.htm](https://ec.europa.eu/environment/nature/legislation/enlargement/index_en.htm), accessed 7 November 2022.

<sup>81</sup> 'Kaliakra' (*Royal Society for the Protection of Birds*, 9 November 2022), available at [www.rspb.org.uk/our-work/casework/cases/kaliakra/](http://www.rspb.org.uk/our-work/casework/cases/kaliakra/).

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> *Commission v Bulgaria* [2016] Court of Justice of the European Union C-141/14.

<sup>85</sup> Ibid., para 98.

ornithological organisations.<sup>86</sup> In fact, mobilisation through the CFS and the consistent submission of information to the Committee has resulted in the creation of a detailed public record of the case. At the same time, BirdLife mobilised the Bern Convention's Standing Committee in its position as an insider in the international institutional structure. More specifically, a 2010 report submitted by BirdLife requests the Standing Committee to 'urge the [EC], immediately, to progress . . . the particular infringement case on lack of adequate protection of Kaliakra'.<sup>87</sup> This was just prior to the issuance of the Commission's additional letter of notice.

Since the 2016 judgment, regular complainant reports have been submitted to the Bern CFS, evidencing a shift from rights-claiming to monitoring the judgment's enforcement. It seems that in this case, due to its on-the-ground presence, the BSPB finds itself in a better position to monitor treaty enforcement than the treaty body itself.<sup>88</sup> Additionally, co-operation between the national NGO, its international network and the Bern Convention enables efficient flow of information between the local and the international or regional level.<sup>89</sup> Before 2016, complainant and NGO reports were submitted jointly to the CFS by the RSPB and BSPB. Since 2016, with the beginning of the monitoring period, all complainant reports have been submitted to the CFS solely by the BSPB – the Bulgarian arm of BirdLife with an active presence at the site in question.

In parallel, the RSPB continued its involvement in the case through its insider role within the institutional structure of the Convention. For example, in 2018, an on-the-spot appraisal (OSA) of Balchik and Kaliakra mandated by the Standing Committee was led by Pritchard, a key figure in the RSPB's involvement through the Bern Convention.<sup>90</sup> The OSA mission's report notes that the CJEU's judgment in Case C-141/14 refrains from prescribing specific remedies or outlining in detail the actions Bulgaria should take following the judgment.<sup>91</sup> This differs

<sup>86</sup> See F Liechi, 'Construction of the Kaliakra Wind Farm Parks', T-PVS/Files(2006)8.

<sup>87</sup> 'Wind Farms in Balchik and Kaliakra: Via Pontica (Bulgaria)', Report by the NGO T-PVS/Files(2010)22.

<sup>88</sup> See also J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge University Press 2000) 564.

<sup>89</sup> ME Keck and K Sikkink, 'Transnational Advocacy Networks in International and Regional Politics' (2002) 51 *International Social Science Journal* 89, 92.

<sup>90</sup> 'Wind Farms in Balchik and Kaliakra (Bulgaria)' (2018), On-the-spot appraisal report T-PVS/Files(2018)25.

<sup>91</sup> *Ibid.*

starkly from the recommendations made on the basis of the OSA itself. Despite their soft character, the recommendations are very specific, including deadlines for the submission of progress reports, funding goals and the inclusion of stakeholders in the process of implementing the CJEU judgment.<sup>92</sup> In this case, parallel participation in the EU and Bern processes appears to have yielded valuable results for the NGO. BirdLife was provided with the opportunity to back its claim on the legal obligations contained in an authoritative judgment by the European Court of Justice, while remaining actively involved in the monitoring of enforcement through the complementary system of the Bern Convention via its local partners, thus leveraging the cumulative effect of both mobilisation strategies to exert pressure on the Bulgarian Government.

On top of this, the Bulgarian example demonstrates that the special status of some NGOs as key partners of the Convention means that some organisations, including BirdLife, are able to actively influence the Convention's policy development in ways that feed back into their mobilisation opportunities. Reports submitted by the Group of Experts on Conservation of Birds and, indeed, BirdLife International in its capacity as an individual organisation, can be adopted as recommendations by the Convention's Standing Committee.<sup>93</sup> Two years prior to the submission of the Balchik complaint, the Secretariat had tasked BirdLife International with the production of a report, completed in 2003, analysing the effects of windfarms on birds and providing guidance on environmental impact assessment and site selection criteria.<sup>94</sup>

The Bern Convention Standing Committee regularly adopts recommendations based on reports provided by BirdLife. Recommendation No 117(2005) on the plan to set up a wind farm near the town of Balchik and other wind farm developments, on the *Via Pontica* route, for example, explicitly draws on the findings contained in BirdLife's 2003 report on wind farms and birds,<sup>95</sup> including guidance on environmental assessment criteria and site selection issues. In the recommendation, the Standing Committee explicitly requests the Bulgarian Government to take into account BirdLife's report and to involve and

<sup>92</sup> *Ibid.*, 17.

<sup>93</sup> Standing Committee (n 43) Rule 9(b).

<sup>94</sup> BirdLife International, 'Windfarms and Birds: An Analysis of the Effects of Windfarms on Birds, and Guidance on Environmental Assessment Criteria and Site Selection Issues', Secretariat Memorandum T-PVS/Inf (2002) 30 and T-PVS/Inf(2003)12.

<sup>95</sup> *Ibid.*

consider the views of NGOs in the performance of future environmental impact assessments.<sup>96</sup> The recommendations of the Bern Convention Standing Committee, despite their 'soft' legal form and title, are important in that they provide concrete substantive content to the Convention's provisions.<sup>97</sup> Consequently, BirdLife's involvement through the submission of information to the Bern Convention system simultaneously allows the organisation to strengthen the legal basis on which it relies in its claims.

### 11.9 Presumed Illegal Killing of Birds in Malta

Bird killing in Malta has been a perpetual and notorious problem. At the time of writing, in late April 2022, yet another spring hunting season draws to a close. The issue of bird killing in Malta has been subjected to international attention for more than a decade. Several distinct issues have been repeatedly brought to the attention of the Commission and the CFS: both spring hunting of quail and turtle-dove (hereafter referred to as 'spring hunting'), and the autumn hunting and trapping of quail, turtle-dove and golden plovers, as well as song thrush (hereafter referred to as 'autumn hunting') and finch trapping.

In the context of the trapping of golden plovers and song thrush, and the trapping of finches, respectively, BirdLife Malta has contended that these practices should be addressed together, as the continuation of one practice risks its exploitation as a cover for the illegal continuation of the other.<sup>98</sup> While the Commission has addressed them separately, the CFS has treated all issues as part of a single case file. The following paragraphs therefore refer to the general CFS file at times, and to individual issues whenever possible.

The issue of spring hunting was first considered by the Commission in 2006. This culminated in a referral of Malta to the Court, which found the State in violation of the Birds Directive in its 2009 judgment.<sup>99</sup> In a separate infringement procedure opened in 2011, the Commission also

<sup>96</sup> 'Recommendation of the Standing Committee on the Plan to Set up a Wind Farm near the Town of Balchik and Other Wind Farm Developments, on the Via Pontica Route (Bulgaria)' (n 79).

<sup>97</sup> S Jen, 'The Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979): Procedures of Application in Practice' (1999) 2 *Journal of International Wildlife Law & Policy* 224, 229.

<sup>98</sup> 'Presumed Illegal Killing of Birds in Malta', Report by the NGO T-PVS/Files(2015) 7.

<sup>99</sup> *Commission v Malta* [2009] Court of Justice of the European Union, C-557/15.

issued a formal notice and reasoned opinion addressing the issue of autumn hunting in Malta to the Maltese Government. In 2012, an individual submitted a complaint to the Bern Convention Secretariat, alleging a violation of Articles 6–9 of the Bern Convention by the Maltese Government in relation to spring hunting.<sup>100</sup> Following the complaint, BirdLife Malta became involved in the case by submitting a reaction to the Maltese Government's response to the complaint.<sup>101</sup> Two months later, the European Union submitted a report to the CFS.<sup>102</sup> The report first stressed the primary responsibility of the Member State and then went on to reassure the Convention's Secretariat of the Commission's continued attention towards the issue and communication with the Maltese Government. It specified that the Commission had received a detailed report on the hunting derogations in the 2013 season. The final paragraph then goes on to explain that no such reports had been received for the years 2009–2011 and that the Commission intended to formally request these reports in the following weeks. Although it is doubtful whether the exchange between Bern and the Commission had any practical effects (in fact, the Commission closed the case concerning spring hunting in 2015 and remained inactive in the procedure concerning autumn hunting until its closure in 2021), this dynamic further illustrates the potential use of the CFS in relation to the Commission. In this case, it seems that the CFS also functioned as a means to obtain and make public information on both the progress of the situation in Malta and the involvement of the Commission in bringing the State into compliance with its obligations.

Although this case file was never formally opened, the Bern Convention Secretariat remained engaged in the case by facilitating communication between the NGO and the government. Despite the file being kept in stand-by, mobilisation through the CFS enabled direct dialogue between the representatives of the State in question and non-governmental organisations acting as complainants. The 5th Meeting of the Select Group of Experts on Conservation of Wild Birds (2015), at

<sup>100</sup> Though initially triggered in relation to spring hunting, both hunting seasons and finch trapping are discussed in tandem in the reports submitted to the CFS in relation to the case file. See 'Presumed Illegal Killing of Birds in Malta' Report by the Complainant T-PVS/Files(2013)11.

<sup>101</sup> 'Presumed Illegal Killing of Birds in Malta', Report by the NGO T-PVS/Files(2013)23. Birdlife remained involved and continued to submit reports concerning this issue.

<sup>102</sup> 'Presumed Illegal Killing of Birds in Malta', Report by the European Union T-PVS/Files (2013)28.

which members of both the NGO and the government were present, discussed progress regarding the 2012/7 complaint concerning the presumed illegal killing of birds in Malta.<sup>103</sup> Thus, the Bern Convention's expert group was able to facilitate further discussion of the complaint.

Additionally, BirdLife occasionally used the CFS where action by the EC stagnated. In a presentation before the Bern Convention's Secretariat, BirdLife highlighted that the EC 'appears uninterested in challenging the derogation further' and 'needs to impose a ban on trapping'.<sup>104</sup> Birdlife called on the Council of Europe and the parties to the Bern Convention to continue monitoring the situation to ensure progress regarding the proper implementation of both the Bern Convention and the Birds Directive.<sup>105</sup> A similar interplay can be observed regarding the problem of finch trapping, which was first picked up by the Commission in 2014. Reports to the CFS by BirdLife Malta around this time make explicit mention of the infringement procedure, asking that the 'complaint on stand-by [with the Bern Convention] should remain open along the lines of the European Commission raising its concerns via an infringement process on the matter'.<sup>106</sup> More specifically, the NGO called on the Bern Convention to encourage the EC to stand against the Maltese Government's derogation permitting the trapping of finches.<sup>107</sup> Significantly, in this case, BirdLife Malta also asked the Bern Convention to conduct investigations into the consequences of Malta's derogation from the Birds Directive, precisely with a view to aiding the case pending before the European Court of Justice.<sup>108</sup> Arguably, this request indicates the perceived complementary value of the CFS's practically oriented approach, even where CJEU proceedings are on the horizon.

### 11.10 Conclusion

The Bern Convention's Secretariat is well aware of the danger posed by overlaps between the EC's activities and its own CFS and has stressed the importance of further developing existing synergies to avoid duplication.

<sup>103</sup> '5th Meeting of the Group of Experts on the Conservation of Birds', Meeting Report T-PVS(2015)25, 10.

<sup>104</sup> N Barbara and W Van Den Bosche, 'Complaint in Stand-by No 2012/7: ILLEGAL KILLING OF BIRDS IN MALTA'.

<sup>105</sup> Ibid.

<sup>106</sup> 'Presumed Illegal Killing of Birds in Malta', Report by the NGO T-PVS/Files(2015) 44, 5.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid., 7.

Noting the Commission's superior position in terms of power and resources, the Secretariat expressed some concerns regarding the added value of its CFS for EU parties. At the same time, the Secretariat highlighted the potential benefit of acting as a first point of contact for claimants and promoting action on the part of its 'big brother' the Commission where it cannot facilitate resolution on its own.<sup>109</sup> In the future, it is expected that the Bern Convention will seek dialogue with the Commission to ascertain how synergies can be nourished.<sup>110</sup>

From a legal mobilisation perspective, this would be a very welcome development. The possibility of a CJEU referral and the related threat of hefty financial penalties will never be replaced by a non-coercive compliance system. Nevertheless, this chapter concludes that less coercive compliance systems are important mobilisation venues for civil society actors. The case studies indicate that the degree of participation offered to civil society by the CFS in the handling of individual complaints and in its programme of work provides NGOs with a unique structure to mobilise the law in their triple role as policymakers, complainants and watchdogs. While still far from an ideal system of access to justice in environmental matters, it appears that actors can to some extent use the CFS to fill the gaps left by the Commission's infringement proceedings.

<sup>109</sup> 'Case-File System: Reflections and Possible Restructuring in the Framework of the Bern Convention Vision and Strategic Plan for the Period to 2030' (n 20) 15.

<sup>110</sup> *Ibid.*