Manual of
EUROPEAN
ENVIRONMENTAL
POLICY

Manual of European Environmental Policy

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This section is the text of the Manual as published in 2012. It is therefore important to note the following:

- The contents have not been updated since 2012 and no guarantee is given of the accuracy of the contents given potential subsequent developments.
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Institute for European Environmental Policy

Implementation and enforcement of legislation

Implementation of European Union (EU) legislation involves a number of actions by different players. The terms ‘implementation’ and ‘compliance’ are used synonymously and although Directives often talk of Member States having to introduce laws or administrative measures ‘to comply’ with the Directive, the term ‘implementation’ is used in Article 192 TFEU.

Issues of implementation can be said to begin with the drafting and adoption of EU legislation, since ambiguous or incomplete legislation may be difficult to implement. In the case of a Directive, Member States then have to transpose it into national law or administrative measures, a process described in this Manual (see below) as ‘formal compliance’. This national legislation then has to be applied in practice so that the desired ends are achieved. This can involve ensuring that a ‘competent authority’, once appointed, has adequate staff and takes the necessary steps, for example granting authorizations, drawing up plans, following procedures. It may involve investments in new products, processes and equipment by both the private and public sector. It may involve monitoring, for example of emissions or of environment quality, or of procedures followed. It may involve reporting by a regulated body to the competent authority; by the competent authority to the Member State; by the Member States to the Commission; by the Commission to the Parliament and Council[1]. It can also involve evaluation by independent bodies. A Commission communication discusses the subject [2].

Finally, implementation involves enforcement under the processes of law. This can include actions by competent authorities (including the steps taken before reference to national courts), action before the courts by third parties, complaints by third parties to the Commission that EU legislation is not being properly complied with, and action by the Commission against Member States leading to a reference to the European Court of Justice (see section on the European Institutions). The decisions of the courts and any sanctions applied are also an aspect of implementation. Although Article 192 TFEU makes implementation of Community environmental policy the responsibility principally of the Member States, there have been recent examples of EU intervention in this area.

A first example is the adoption of Directive 2004/35/EC (see section on environmental liability) which aims to establish a framework of environmental liability rules, based on the polluter pays principle, with the aim of preventing and remedying environmental damage. The Directive imposes a strict liability obligation on the operator of a list of activities regulated under existing Community environmental laws (given in Annex III), to remedy or prevent three types of damage to the environment: damage to protected species and natural habitats (sometimes referred to as ‘biodiversity damage’), water damage and land damage. It also imposes fault-based liability on all other occupational activities for damage to species and habitats. These liabilities are imposed by means of public, administrative law, rather than private, civil law, meaning that enforcement is confined to actions brought by public authorities, with private individuals and groups limited to requesting action from those authorities.

A more recent development in the area of enforcement was the long-awaited adoption in November 2008 of Directive 2008/99/EC on the protection of the environment through

criminal law (see section on environmental crime). The Directive requires Member States to make a series of environmental offences deriving from EU environmental law subject to 'effective, proportionate and dissuasive criminal penalties', but it still falls on them to determine the type and level of those penalties. It was not possible at the time of adoption of the Directive to determine the type and level of those penalties at the EC level, as the European Court of Justice had ruled (Case C-440/05) that the determination of the type and level of the criminal penalties does not fall within the Community's sphere of competence. These issues could have only be dealt with within the third pillar. However, since the entry into force of the Lisbon Treaty in December 2009 the pillar structure no longer exists enabling the EU to deal with these issues still through a Directive. If the Commission still considers that effective enforcement of Community environmental law requires some harmonization of the stringency of criminal penalties applied by the Member States, the option of proposing to amend or complement the Directive on environmental crime remains open.

As to environmental inspections, the European Commission published in 2007 a review of the implementation of Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States (COM(2007)707) see section on environmental inspections). In this review the Commission concluded 'there are still large disparities in the way environmental inspections are being carried out within the Community. Such disparities mean that the full implementation of environmental legislation in the Community can not be ensured'. As to future action, the Commission suggested that the Recommendation should be amended 'in order to improve its implementation and strengthen its effectiveness'. It did not deem appropriate to transform the criteria into legally binding requirements. Instead the Commission proposed to include specific legally binding requirements for the inspection of certain installations or activities in individual sectoral pieces of legislation. This has been taken forward, for instance, in the recast of the integrated pollution prevention and control Directive (2008/1/EC) and in the new Directive on carbon capture and storage (2009/31/EC).

Formal compliance with the legislation or 'transposition'

Directives usually require the Member States to transmit to the Commission within a given period a statement of the national legislation, regulations or administrative measures that give formal effect to the Directive or transpose it into national law – hence the term 'transposition'. These 'compliance letters', as they are sometimes referred to, together with departmental circulars to the relevant administrative bodies (e.g. local authorities) provide the basic raw material for an assessment of the effect of the Directives on Member State legislation. An additional source of information are 'Reasoned Opinions' sent by the Commission to the Member State governments when it believes that particular Directives are not being fully complied with.

In some cases, new or amended primary legislation has had to be introduced to comply with Directives, but often new secondary legislation is sufficient. In other cases, authorities have relied on existing primary and/or secondary legislation and have achieved compliance by taking certain administrative steps.

Compliance in practice

A Directive is binding as to certain ends to be achieved, for example that certain standards are to be met by certain dates, while leaving to the Member State the choice of methods for doing so. For a Directive to be fully implemented, not only must the Member State have introduced the necessary laws, regulations or administrative provisions to enable these ends to be achieved, but it must also ensure that the ends specified in the Directive are also achieved in practice. A distinction may therefore be drawn between formal and practical compliance, although the two will sometimes overlap. Thus, the designation of an existing body such as a local authority or the Environment Agency as the 'competent authority' for fulfilling certain functions under a Directive can be regarded as a mere formal step, but if a new body has had to be specifically created and given staff and money its creation would be a practical step as well.

It is possible to have formal compliance without practical compliance and *vice versa*. Thus, Luxembourg has ensured that there is formal compliance with a Directive concerned with titanium dioxide wastes by issuing a Decree largely repeating the Directive, but there can be no practical compliance in Luxembourg since there is no titanium dioxide production there. Conversely, there was for a time a failure of formal compliance by Britain of Directives concerned with the composition of detergents and the sulphur content of fuels since the necessary British Regulations were late in being made, but the British government argued that the failure was only one of form since in both cases the relevant industries had voluntarily taken the required practical steps to achieve the standards before the British Regulations came into force.

Although the Member States are usually obliged by Directives to inform the Commission by means of the 'compliance letters' of the steps they have taken for formal compliance, and the Commission has a duty to see that the measures adopted are adequate, there is often no obligation to inform the Commission of the practical steps taken, nor does the Commission have a formal inspectorate able to monitor what happens. The Community's interest must, however, extend beyond formal compliance alone and the Commission has made it a practice to investigate lapses in practical compliance when these are drawn to its attention. Most Directives require regular reports to be submitted to the Commission, and examination of these may disclose some practical effects of a Directive. Otherwise the principal way of finding out the effects of a Directive is to consult people on whom duties are placed or whose behaviour may have been influenced.

The infringement procedure at EU level

Article 258 TFEU (ex Article 226 TEC) gives the Commission the power to take legal action against a Member State that is not respecting its obligations under EU law. The Commission starts the infringement procedure by sending a so-called 'letter of formal notice', i.e. a request for information, to the Member State concerned which must be answered within a specified time-limit, usually two months.

If the Commission is not satisfied with the information provided by the Member State and concludes that the Member State concerned is failing to fulfil its obligations under EU law, the Commission may then send a so-called 'reasoned opinion', i.e. a formal request to comply

with the EU legislative measure, calling on the Member State to inform the Commission of the measures taken to comply within a specified time-limit, usually two months.

If a Member State fails to ensure compliance with EU legislation, the Commission may then decide to take the Member State to the European Court of Justice (ECJ). However, in over 90 per cent of infringement cases, infringement cases are solved or closed before the Member State concerned is referred to the ECJ. If the ECJ rules against a Member State, the Member State must then take the necessary measures to comply with the judgement.

Under the Lisbon Treaty, the Commission has the possibility to request the ECJ to impose a financial penalty on the Member State concerned the first time that the ECJ rules on cases in which Member States have failed to notify transposing measures by the required deadline (the so-called 'non-communication' cases). Previously, the Commission could only request the ECJ to impose a financial penalty when a case was referred back for a second time.

If, despite the first judgement of the ECJ, a Member State still fails to comply, the Commission may open a further infringement case under Article 260 TFEU (ex Article 228 TEC). Under the Lisbon Treaty, the Commission only needs to send out one written warning before referring the Member State back to the ECJ instead of replicating each of the steps that it took in the initial infringement case (i.e. sending letter of formal notice and reasoned opinion) as was the case in the past.

If the Commission does refer a Member State back to the ECJ, it can propose that the ECJ imposes financial penalties on the Member State concerned based on the duration and severity of the infringement and the size of the Member State. It can impose both a lump sum depending on the time elapsed since the original ECJ ruling and a daily penalty payment for each day after a second ECJ ruling until the infringement ends.

It should be noted however that with the publication of the Communication 'Application of Article 228 of the EC Treaty' (SEC/2005/1658), in 2005 the European Commission introduced a new tougher policy to determine fines for non-compliance with ECJ judgements, requesting the ECJ to impose both lump-sums and periodic penalties for each day of non-compliance[3]. Before that, the Commission's policy was simply to ask the ECJ to impose a penalty payment, i.e. a type of 'running' fine intended to encourage Member States to comply with the ECJ judgement as soon as possible. For instance, Greece was ordered to pay €20,000 per day until it observed a preceding judgement on waste management (C-387/97). However, this approach had one major side effect: Member States could delay taking the corrective action needed to comply with a judgement under Article 226 TEC. As long as that action was taken by the time the following case came before the ECJ under Article 228 TEC, no financial penalty would be imposed, other than a demand to pay legal costs[4].

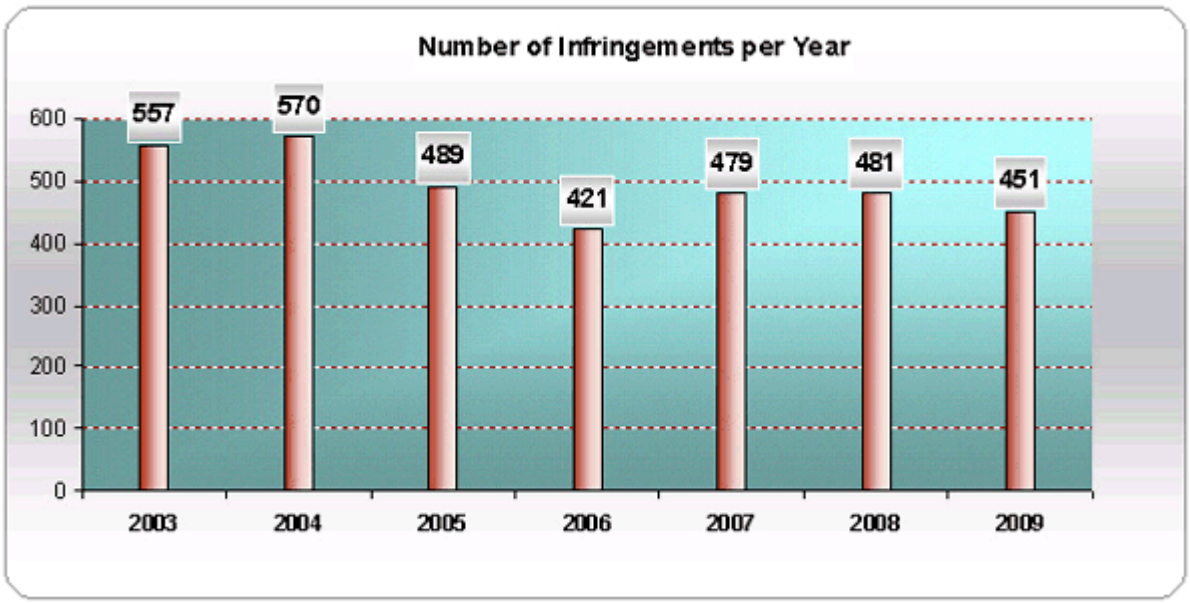
Current trends in implementation and enforcement

The analysis below indicates that despite the measures taken by the EU to improve implementation and enforcement, Member States' record of implementing EU environmental legislation remains poor and that ensuring and enforcing the full implementation of EU environmental legislation by Member States remains a major challenge.

Infringements

Environmental infringement procedures still account for approximately one third of all open cases for non-communication, non-conformity or bad application of EU law in the EU-27. At the end of 2009, DG Environment had 451 open infringement files under investigation (see Figure 1. Number of infringement files per year dealt with by **DG Environment**). Infringement files are those in which the first step in legal action under Article 258 TFEU has been taken through the issuing of a letter of formal notice. Over the past five years the number of open cases dealt with by DG Environment has remained fairly the same.

Figure 1. Number of infringement files per year dealt with by DG Environment



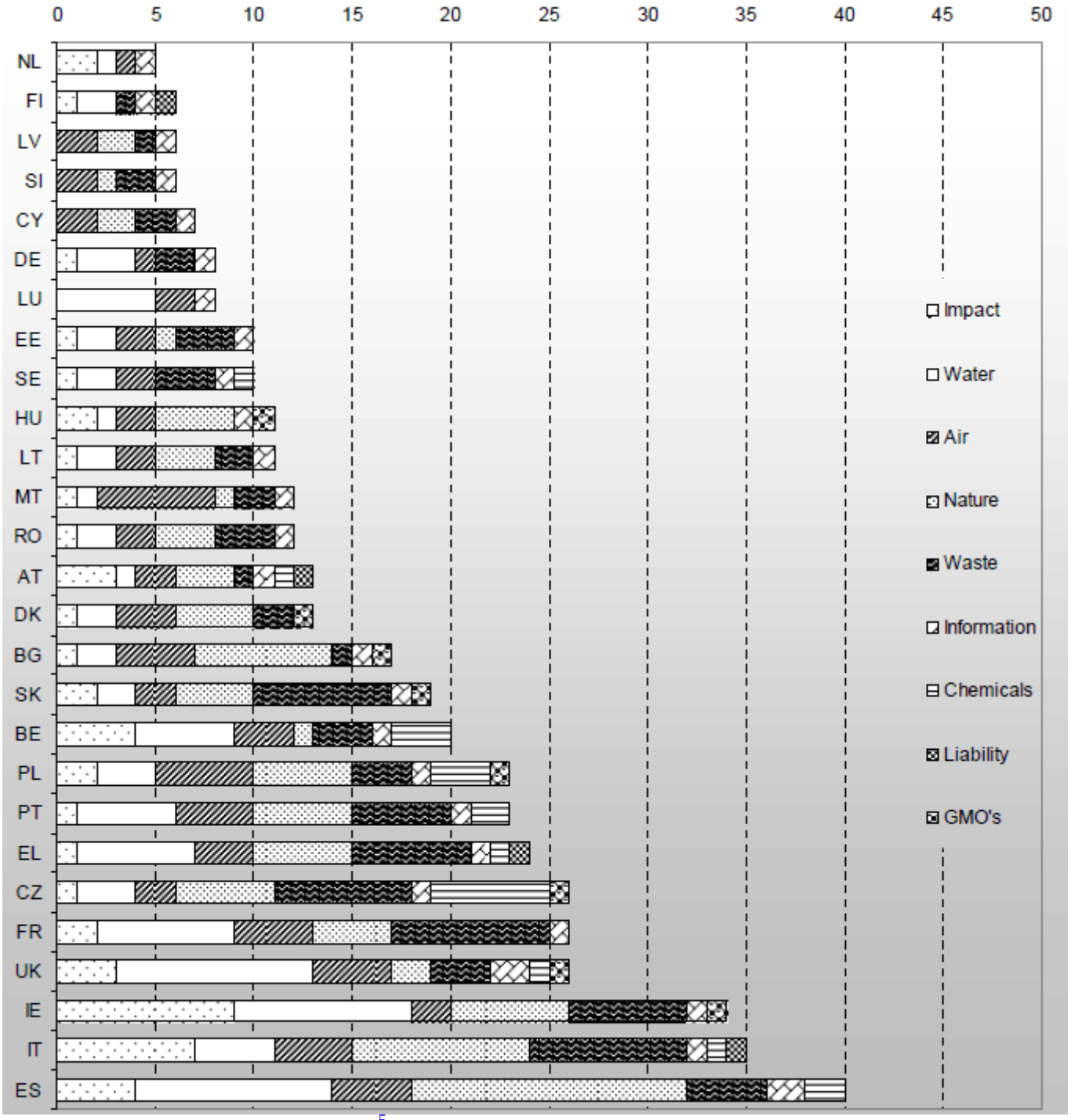
Source: European Commission, DG Environment, http://ec.europa.eu/environment/legal/law/statistics.htm

It is however remarkable that the number of open infringement cases did not rise significantly after the accession of 10 new Member States in 2004. This might be explained partially by the fact that case loads (for new Member States) often build up over time. Furthermore local environmental groups and citizens in new Member States have fewer financial resources and skills for submitting complaints to the Commission and thus for pushing the Commission to open infringement procedures. However, the new Member States already cover a significant number of open infringement cases. In 2008, the 12 new Member States (including Bulgaria and Romania which joined the EU in 2007) accounted for 149 cases out of a total number of 481 cases dealt with by DG Environment. In 2009 there were 160 cases out of 451. This implies that the number of open infringement cases relating to older Member States has dropped significantly. The question is whether this is the result of improved implementation by the (old) Member States or whether this is the result of other factors (such as the Commission's policies towards addressing infringements).

At the end of 2009, Spain had the highest number of on-going infringements cases (40), most relating to nature legislation (14) followed by water legislation (10) (see Figure 2). Italy and Ireland had more than 30 open infringements each and the Czech Republic, France and the

UK had 26 each. The Netherlands had the lowest number of infringements in the EU-15. The high number of infringements indicates that the implementation of environmental legislation remains far from satisfactory.

Figure 2. Infringements of EU environmental legislation by Member State and by sector



Source: European Commission, 2010[5]

ECJ judgements

The number of judgements of the European Court of Justice (ECJ) in environmental matters has been continuously increasing over the years (see Table 1). From 2000 to 2004 the number

of judgements in environmental matters increased from 21 to 63. In 2005 the number of judgements decreased compared to the years before but increased since then to 63 in 2007. The recent increase of judgements is mainly due to the Commission more systematically examining the cases of non-transposition and incorrect transposition and individuals applying more frequently to the ECJ.

The greatest number of judgements since 2002 feature in the areas of nature protection, waste and water. As for nature protection, in some cases individuals had applied to the ECJ as they opposed the inclusion of their land in the Community lists of Natura 2000, though they were not successful. Waste treatment and waste disposal remain problematic in most Member States.

Table 1. Number of ECJ judgements in environmental matters from 1990-2007

1990	11	2000	21
1991	17	2001	23
1992	7	2002	47
1993	12	2003	56
1994	14	2004	63
1995	7	2005	43
1996	29	2006	52
1997	20	2007	63
1998	34		
1999	23		

Source: Krämer (2008)[9]

Table 2. Number of ECJ judgements that had not been implemented by the end of the year (all legal bases)

	2002	2003	2004	2005	2006	2007	2008	2009	2010
France	13	17	18	14	7	6	8	4	5
Italy	6	6	14	12	8	19	18	11	13
Ireland	8	6	8	9	7	10	11	13	8
Spain	4	6	4	9	7	8	6	6	6
UK	4	3	6	7	8	6	3	5	1
Belgium	6	8	6	5	3	6	5	3	2
Greece	4	4	5	7	6	5	7	10	10
Luxembourg	5	6	1	-	6	7	4	3	2
Portugal	1	3	5	4	4	4	3	4	6
Germany	3	4	5	3	1	2	1	-	-
Austria	1	1	4	5	5	4	1	3	1
Netherlands	2	4	4	3	-	-	-	2	2
Finland	-	1	3	2	3	3	1	1	-
Sweden	1	1	2	1	1	1	-	1	1
Denmark	-	1	1	-	-	-	-	-	-
Total	**58**	**71**	**86**	**81**	**66**	**81**	**68**	**66**	**57**

Source: Krämer (2008)4, 28th Annual Report on Monitoring the Application of EU law (SEC(2011)1094), 27th Annual Report (SEC(2010)1143) and 26th Annual Report (SEC(2009)1684/2)

In addition, the number of cases of non-compliance by Member States (EU-15) with ECJ judgements increased in the first half of the 2000s and has fluctuated since then between 66 and 81 cases. Every year the European Commission publishes a list of judgements which had not yet been complied with, as Annex V to the Annual Reports on Monitoring the Application of Community Law. By the end of 2010, 57 judgements had not yet been implemented. Table 2 shows the figures for the last nine years.

Another problematic issue is the rather long duration of ECJ litigation. According to figures of Krämer[6], ECJ procedures under Article 226 TEC (Commission v Member State) in the period 2006-2007 took on average 18 months, procedures under Article 230 TEC (individuals or Member States against EU institution) 21 months and procedures under Article 234 TEC (preliminary rulings) 19 months. With regard to procedures under Article 226, the average duration of the procedure varies according to the type of non-compliance. Whereas procedures in relation to non-transposition on average took only nine months in the period 2006-2007, procedures in relation to incorrect transposition and incorrect application took 19 and 21 months respectively.

However, the length of the procedure before the ECJ cannot be looked at separately. At least for procedures under Article 226, the length of the pre-ECJ or prejudicial procedure should also be taken into account (see above section on the infringement procedure at EU level). If this pre-judicial procedure is taken into account, the total length of procedures under Article 226 becomes considerably longer. According to Krämer[6], procedures under Article 226 in 2006-2007 took on average 47 months, i.e. almost four years. Procedures in relation to non-transposition took on average 26 months, whereas procedures in relation to incorrect transposition and application took 51 and 52 months respectively.

This lengthy nature of litigation does not encourage a more effective implementation and enforcement of EU environmental law. Firstly, Member States which do not correctly transpose or apply EU environmental law, can be assured that it takes a long time before they are judged by the ECJ. It is not just the infringement procedure that might take a long time, it also takes the Commission a while after the adoption of the (incorrect) national legislation to start the procedure under Article 226. Secondly, delays in complying with EU environmental law become even longer when Member States do not comply with Article 226 judgements either. Between 1992 and 2007, the ECJ issued six judgements on environmental matters under Article 228 and its predecessor, Article 171 TEC. 'The average time-span between the dispatch of the letter of formal notice under the Article 226 and the judgement under Article 228 was 136 months, thus more than eleven years'[6]. As a result of the long duration of the infringement procedures, the deterrent effect of these procedures on Member States is reduced or in other words there is little incentive for Member States to take corrective action promptly[6].

On the other hand, the lengthy nature of the infringement procedures under Article 226 and 228 TEC has an impact on the European Commission's enforcement behaviour. In some cases the Commission does not start infringement procedures against a Member State, as an ECJ judgement would come (far) too late, i.e. when the environmental damage has already been done and cannot be repaired. This occurs particularly in cases where EU environmental law is not applied, for instance the realisation of infrastructure projects within a special protection area, the construction of a motorway without carrying out an environmental impact assessment, the refusal to grant access to environmental information, etc[5, 6].

Reporting implementation

In line with the provisions laid down in the Standardised Reporting Directive 91/692/EEC, a number of environmental Directives covering a wide range of areas (water, waste, air quality …) require Member States to send information on implementation to the Commission every three years in the form of a sectoral report covering other related Directives. The number of Directives addressed by Directive 91/692/EEC is declining as they are revised or repealed and the reporting obligations are incorporated into the texts of the new legislation.

The report is to be drawn up on the basis of a questionnaire or outline to be drafted by the Commission, assisted by an advisory committee. The questionnaire or outline is to be sent to the Member States six months before the start of the period which the report is to cover, and the report is to be submitted to the Commission within nine months of the end of the three-year period it covers. The Commission is to publish a Community report on implementation within nine months of receiving the national reports. Some information relating to the air quality, drinking water and surface water Directives must be submitted annually by the Member States. In adopting measures to implement the Directive, Member States are to make reference to the Directive. The European Environment Agency has also been given Agency an explicit role in developing reporting requirements, for further information on this topic please see the section on European Environment Agency and other Supporting Agencies.

The Commission's new strategy towards implementation and enforcement

On 18 November 2008, the European Commission published a 'Communication on implementing European Community environmental law' (COM(2008)773), which had been announced in the mid-term review of the 6th Environmental Action Programme in April 2007 but had been delayed due to disagreements between Commission services. It is the first time since 1996 that the Commission issues a statement of its policy in this field, in which it plays a key role as 'guardian of the treaties'.

In a general Communication on 'Better monitoring of the application of Community law', published in 2002 (COM(2002)725), the Commission first specified the 'priority criteria' it would apply in the exercise of its discretion on how to deal with infringements of Community law brought to its attention by citizen complaints. These general criteria seemed to exclude most cases of environmental non-compliance reported by citizens from priority attention: only 'damage to the environment with implications for human health' and 'cases of systematic incorrect application detected by a series of separate complaints by individuals' with respect to the same piece of legislation, or cases of failure to transpose or incorrect transposition which affect a large segment of the public, would fall within the criteria.

The general criteria for 'prioritisation and acceleration in infringements management' were refocused in another Communication published in 2007 (COM(2007)502), in which the Commission stated: 'Priority should be attached to those infringements which present the greatest risks, widespread impact for citizens and businesses and the most persistent infringements confirmed by the Court'. Apart from cases of non-communication of national measures and non-compliance with Court judgments, the Commission intended to prioritise 'breaches of Community law (…) raising issues of principle or having particularly far-reaching negative impact for citizens, such as those concerning the application of Treaty

principles and main elements of framework regulations and directives'. The 2007 Communication announced that this general guidance would be further specified for each sector, and this is what the latest Communication published on 18 November 2008 now does for the environment sector.

The 2008 Communication tends to downplay the importance of enforcement action through infringement proceedings before the Court of Justice and instead stresses a combination of measures aimed at prevention of breaches. The Commission intends to cooperate closely with Member States to help them implement EU environmental legislation and 'solve problems highlighted by citizens and NGOs' through such measures as guidance documents, regular dialogue and support activities. On a trial basis, the Commission will post environmental experts in its Representations in Madrid, Lisbon, Rome and Warsaw 'to help national officials as well as citizens' in implementing environmental legislation.

Where the preventive approach has failed, the Commission will focus its enforcement activities in a way which it describes as more 'strategic', by giving priority to addressing those breaches of EU environmental law that it considers to be 'fundamental' or 'systemic'. In selecting those cases, it intends to apply the following criteria:

- Non-conformity of key legislation viewed as presenting a significant risk for correct implementation of environmental rules and hence their overall effectiveness.
- Systemic breaches of environmental quality or other environmental protection requirements presenting serious adverse consequences or risks for human health and wellbeing or for aspects of nature that have high ecological value.
- Breaches of core, strategic obligations on which fulfilment of other obligations depends.
- Breaches concerning big infrastructure projects or interventions involving EU funding or significant adverse impacts.

The Communication also stresses the importance of enforcement through national courts in the Member States and, in this respect, the Commission refers to its 2003 proposal for a Directive on access to justice in environmental matters, which is still pending before the Council. It reiterates its 'view that Community environmental law would be better and more consistently enforced if the proposed Directive were adopted'.

'EU pilot' project

The Communication in particular mentions the 'EU pilot' project, an initiative the Commission was already implementing at the time of this Communication's publication. In fact, this initiative was already announced by the Commission through its Communication 'A Europe of Results – Applying Community Law' (COM(2007)502). The 'EU pilot' project is a problem-solving mechanism in which the Commission and 15 Member States work closely together and more consistently to produce quicker and better responses to information requests, complaints and petitions with the ultimate aim to correct infringements of EU law at an early stage, wherever possible, without the necessity for recourse to infringement proceedings. In order to enable communication between the Commission and the Member States a confidential on-line database was established. Under EU Pilot the enquiry or complaint will be first examined by the responsible service in the Commission and then forwarded to the Member State authority concerned with any questions or indications identified by the Commission service.

According to a first evaluation published in March 2010 (COM(2010)70), the EU pilot is starting to contribute positively to cooperation between the Commission and the 15 participating Member States in responding to information requests and solving problems of citizens, civil society and business. It has established in particular an active network of contact points within Commission services and national authorities reinforcing oversight of the management of enquiry and complaint files and increasing coordination and cooperation between the Commission and Member States.

Participation in the EU pilot scheme has now been extended to 25 Member States.

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