Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness

STUDY

2013
Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness

Abstract

The problems of implementation and enforcement of EU law have been longstanding. This report analyses the trends regarding the transposition of EU law and the reasons for failure to transpose on time. It assesses different tools developed at EU level to promote compliance, looking across the board at the EU Pilot and infringement procedure alongside correlation tables, scoreboards, committees, transposition and implementation plans, package meetings or national and EU inspections. As a result, recommendations on ways to improve their use are proposed.
ACKNOWLEDGMENT

The authors of this study are grateful to the Team of Senior Advisors (in alphabetical order) Dr. Ludwig Kramer, Judge Luc Lavrysen, Rodolphe Muñoz and Prof. Jo Shaw for their high level advice, commitment and support.

The authors are also grateful to Agnes Said, Liva Stokenberga, Ingmar von Homeyer, Nick Crosby, Isabell Verdier-Büschel, Dela Stella Sessi, Robert Szuchy, Gaia Pandolfi, Daina Bukele, Anne-Christine Mikaela Nejld, Ana Redondo Gonzalez and Joseph Dalby for their contributions and to Eva Limburska and Cristina Macovei for their assistance.
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LIST OF ABBREVIATIONS

BSE  Bovine Spongiform Encephalopathy
CIRCA  Communication & Information Resource Centre Administrator
CIS  Common Implementation Strategy
CJEU  Court of Justice of the European Union
CHAP  Complaints Handling – Accueil des Plaignants
EASA  European Aviation Safety Agency
EEA  European Economic Area
EFTA  European Free Trade Association
EMSA  European Maritime Safety Agency
EP  European Parliament
EU  European Union
FVO  Food and Veterinary Office
IMPEL  EU Network for the Implementation and Enforcement of Environmental Law
NGO  Non-governmental organisation
RMCEI  Recommendation on Minimum Criteria for Environmental Inspections
TEU  Treaty of the European Union
TFEU  Treaty on the Functioning of the European Union
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DEFINITIONS

The study uses specific terminology which requires definition for the sake of clarity. The following definitions are in line with the TFEU and with the terminology used by the CJEU.

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
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<tbody>
<tr>
<td>Transposition</td>
<td>The regulatory act(s) by which a piece of EU law is incorporated into the national legal order.</td>
</tr>
<tr>
<td>Application</td>
<td>The practical application of the national transposing provisions to a concrete situation or to a number of situations.</td>
</tr>
<tr>
<td>Enforcement</td>
<td>The measures taken by public authorities to ensure a correct application of the provisions of EU law. Where EU public authorities take action against a Member State in a specific case, these actions would be considered part of enforcement measures.</td>
</tr>
<tr>
<td>Evaluation</td>
<td>The actions taken by the Commission to assess the effectiveness or impact of a legislative act or one or several provisions of a legislative act.</td>
</tr>
<tr>
<td>Implementation</td>
<td>The general term covering both transposition and application.</td>
</tr>
</tbody>
</table>

1 Please note that evaluation of non-legislative acts is not covered by this project.
EXECUTIVE SUMMARY OF RECOMMENDATIONS

The problems of implementation and enforcement of EU law have been longstanding. The Commission has therefore developed an EU policy on implementation and enforcement of EU law which includes measures to promote compliance before initiating infringement procedures. The aim of the study is to assess key aspects of the implementation of EU law and the effectiveness of certain tools developed to tackle the compliance deficit more systematically and consistently throughout all EU policies.

First, this report provides some light on what are the current trends regarding the transposition of EU law and what are the reasons for Member States’ failure to transpose on time. To improve monitoring and reduce the recourse to infringement procedures, the Commission has developed the EU Pilot\(^2\). In addition, a range of measures have been put in place to assist Member States with implementation. This report assesses these tools looking across the board at correlation tables, conformity checking, scoreboards and barometers, guidelines, implementation plans, networks and committees, inspection, package meetings, fitness checks, legal reviews, and reporting.

The analysis presented in this study draws, among others, from the 2012 Commission annual report on monitoring implementation of EU law\(^3\) assessing the situation in 2011. The report notes that:

The Commission has decreased the number of new infringement procedures over the last years and opened 2900 infringement procedures in 2009, 2100 in 2010 and 1775 in 2011\(^4\). It reports a steady increase in late transposition cases over several years (2011 (1185), 2010 (855), 2009 (531)). The three policy areas with more cases of late transposition in 2011 were Transport (240 procedures), Internal Market & Services (198) and Health & Consumers (164), but in 2010 problems in transposition of EU environmental legislation were identified as particularly worrying\(^5\). On the application of EU law, the four most infringement-prone policy areas identified by the Commission in the 2012 Annual Report are: Environment (17%), Internal Market (15%), Transport (15%) and Taxation (12%).

These statistics do not give an accurate reflection of the actual EU law compliance deficit and do not reflect the full extent and cost of breaches for businesses or the economy as a whole. They only represent the most serious breaches or the complaints of the most vocal individuals or entities. The Commission currently has neither the policy nor the resources to systematically identify and enforce all cases of non implementation.

The assessment of the above mentioned tools and procedures is followed by a chapter presenting the conclusions and recommendations for their improvement. The Recommendations from that chapter are summarized below.

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1. Transposition trends and hurdles to timely transposition

The timeliness of transposition of EU legislation could be improved by the adoption of specific measures such as:

- Prior to the adoption of new EU legal instruments and during the legislative decision making procedure, Member States should initiate preparatory steps, including structural coordination and communication channels between the staff in charge of the negotiation and those responsible for the transposition and implementation of the new EU legislative act in order to determine appropriate transposition deadlines and ultimately enable transposition without undue delays.

- Following the adoption of an EU legal instrument, Member States should set adequate structures to ensure timely transposition making accountable those authorities in charge of transposition. It is suggested that Member States develop a general tool kit to guide consistent transposition of EU legal instruments.

- The use of Regulations should be considered when a legal instrument will regulate issues whose effectiveness requires an immediate effect and therefore timely transposition is crucial.

- The European Parliament (EP) should control the Commission's monitoring of enforcement of Regulations in the same way as it does with Directives and should ensure that data on implementation of Regulations are provided in the Commission's annual report on the monitoring of application of EU law. Member States should also be required to submit national legislation transposing or implementing Regulations to the Commission for control of compliance.

- The EP should contribute to the timely and accurate transposition of EU legislation by sharing the expertise gained in the legislative decision making process through pre-established links with national Parliaments.

- The number of timely transposition cases has increased as a result of the introduction of the fast track procedure of Article 260(3) of TFEU; the EP should strengthen this by ensuring that the Commission has enough resources to apply it and that the recent decision by DG Environment to dismantle its legal units does not have a negative impact on the enforcement of the transposition and application of EU law.

- Following the publication of an EU legal instrument, the Commission should systematically adopt transposition and implementation plans (TIPs) highlighting potential risks, providing guidance on the understanding of an EU legal instrument. They can be accompanied by meetings held by the Commission who should extend the invitation to an EP representative.

2. Compliance promoting tools

The effectiveness of certain tools developed to tackle the compliance deficit could be improved by the adoption of specific measures such as:

- The EP should call for a strategic approach on the use of compliance promoting tools, taking into account the characteristics of each EU legal instrument and for the Commission to report on how this approach is implemented.

- Following the Inter-Institutional Agreement, the compulsory use of correlation tables should be promoted in order to ensure better monitoring of the transposition and application of EU law. The Commission should develop them itself in case they were
not provided by Member States. As the budgetary authority, the **EP** should guarantee that the Commission has sufficient resources to ensure that correlation tables are prepared for all EU legal instruments and that all correlation tables are made public.

- The **EP** should continue its efforts aimed at the adoption of an EU legislative act enabling EU inspections or investigations on environmental law as a tool to monitor its implementation. EU inspections should complement the EU Pilot and infringement procedures enabling the Commission to gather data needed to take proper decisions on open cases and to provide evidence in cases before the CJEU. The **EP** should reconsider the role of EEA to support the Commission in carrying out this inspection role.

- The **Commission** should work for a systematic use of specific compliance promoting tools, namely the conformity checking studies, transposition and implementation plans (TIPs) and package meetings. It should ensure the systematic publication of the conformity checking studies, the TIPs and the agenda of package meetings where EP representatives would be invited to participate. The **Commission** should promote the organisation of parallel package meetings with complainants and NGOs to share relevant information on existing cases.

- The use of certain compliance promoting tools should only be promoted when specific circumstances are met: the scoreboards are tools for legal instruments whose implementation require political and public pressure; the use of targeted networks should be limited to cases where exchange of information is required for successful implementation; ex post evaluation exercise should be used in cases where there are indices that improvements in the Directive’s objectives can be achieved and reporting obligations should be required under EU laws when related to the achievement of specific objectives. Certain compliance promoting tools such as scoreboards should be used in combination with press releases provided that the confidentiality principle is respected.

3. **EU Pilot and Infringement procedure**

The EU Pilot and infringement procedure would be improved with the adoption of the following specific measures:

- The **Commission** should ensure legality and legitimacy of the pre-infringement procedure. Legitimacy can only be ensured by enabling transparency, participation of complainants and EP (see proposals below) in the EU Pilot. Legality can be ensured through the adoption of a legally binding act containing the rules governing the whole pre-infringement and infringement procedure (see proposals below).

- The **EP** should be systematically involved in the complaint-handling procedure by systematically providing the EP nominated contact point with a copy of all the letters and complaints that will be the basis of EU Pilot or infringement procedures. This measure would improve the effectiveness, transparency and efficiency of the EU Pilot.

- The **Commission** should promote the development of a clear and legal definition of the purpose of the EU Pilot following a consultation process that would enable taking into account the views of all parties, including stakeholders and complainants.

- The legitimacy of the EU Pilot should be ensured through increased transparency by providing complainants with access to the EU Pilot data base and ensuring their participation in the procedure. The **Commission** should draft clear and legally binding

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6 As per Art. 20 of the Regulation 1210/90 on the establishment of the EEA
rules which provide complainants with access to legal and factual arguments considered in the case, enabling them to contribute with information gathered.

- The **Commission** should provide the public with a user-friendly database with comprehensive information on infringements. The Commission should provide Member States with systematic access to the motivations for the acceptance or not of their responses on the compliance of a case with EU law.

- **The Commission** should propose, after a consultation process, a Regulation governing the rules of the pre-infringement and the infringement procedures.

  The Regulation should define the purpose of the EU Pilot, the content of the complaint and evidences needed to ensure effectiveness and efficient use of resources. The rules should clearly define the role of each of the parties including the Commission, Member States’ authorities and the complainants who should be involved in the EU Pilot procedure alongside the European Parliament as described above. The Regulation should establish clear time limits defining the moment of the start of EU Pilot procedure, preventing informal discussions between Member States and Commission officials prior to the start of the EU Pilot. It should also define short and precise periods for each phase of the infringement procedure and for the adoption of the relevant decisions (e.g. closure of the case). The obligation to state reasons and motivation of decisions and the right for every person to have access to her or his file, should also be dealt with.

- The Commission should promote higher effectiveness of the EU Pilot and the infringement procedure by ensuring timely start of the phases eliminating the risk of lengthy procedures and that the decision of the start of the EU Pilot or of sending the Letter of Formal Notice is not subject to prior informal communications between Commission and Member States. A strategic use of EU Pilot should be guaranteed by avoiding its use for specific clear-cut cases where dialogue would not provide a solution.

- The Commission should improve the effectiveness of the EU Pilot by introducing an internal review of the services decisions during EU Pilot and by evaluating the success of the EU Pilot on the basis of the problems solved and undesirable impacts avoided, instead of the current evaluation based on the number of cases closed before going to infringement procedure.

- The Commission should guarantee that sufficient resources are allocated to enable proper monitoring of the implementation of EU law, efficient management of complaints, the EU Pilot and infringement procedure, including a review of DG Environment decision to dismantle the legal units.

- The **EP** and the **Commission** should promote the development of awareness raising campaigns on the complaints system, EU Pilot and infringement procedures enhancing a broader use and facilitating public access to information on EU Pilot cases through the EP website.
1. INTRODUCTION

1.1. Background of the study

The European Union cannot achieve its policy goals if Member States do not apply EU law effectively on the ground. The respective responsibilities for the Commission and the Member States are conferred by the Treaties. While Member States are primarily responsible for implementing and ensuring compliance with EU law, the Commission, as the guardian of the Treaties, has the responsibility to monitor the Member States’ efforts and to ensure the correct application of the Treaties and of those acts adopted by the EU institutions pursuant to them, including by resort to formal legal procedures.

The problems of implementation and enforcement of EU law have been longstanding. The Commission has therefore developed an EU policy on implementation and enforcement of EU law, including measures to promote compliance before initiating infringement procedures. This study assesses the effectiveness of those measures.

1.1.1. The EU implementation and enforcement policy: the role of the Commission, the Member States and the European Parliament in a system based on shared responsibilities

The EU implementation and enforcement policy is based on the distribution of powers enshrined in the Treaties. Member States and the European Commission have a shared responsibility in implementing and enforcing European law which is also recognized by the Court of Justice of the European Union (CJEU) jurisprudence\(^7\).

According to Article 4(3) (sub-paragraph 2) of the Treaty of the European Union (TEU), Member States must implement the Treaty obligations and those arising from secondary legislation. Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. Furthermore Article 4(3) (sub-paragraph 1) TEU requires Member States and the Union, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties.

The role of the Commission, as guardian of the Treaties, is to ensure the correct application of those obligations (Article 17(1) TEU). Moreover, the same article states that the Commission ‘shall oversee the application of Union law under the control of the Court of Justice of the European Union’. In the light of these legal bases, the Commission plays the role of supporting and controlling Member State’s implementation in two ways: monitoring implementation by Member States and enforcing EU law once a breach has been identified.

The Treaty stipulates no specific means to develop these obligations, other than the infringement proceedings specified in Article 258 TFEU. Over time however, the Commission has defined additional means to improve the application of EU law. Several key Commission documents underpin this. In addition the Commission submits annually to the European Parliament and the Council a report on the monitoring of the implementation of EU law. The last report published in November 2012 highlights the trends in transposition and application of EU law per policy area and for each Member State in 2011.

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\(^7\) Case C-365/97 Commission v Italy [1999] ECR I-7773, paras. 58-60.
The European Parliament also performs a crucial role. According to Article 14 TEU the European Parliament exercises functions of political control. The European Parliament has the power to control the Commission’s actions in general (Article 233 TFEU) and, as co-legislator, to monitor the Commission’s enforcement action in order to ensure implementation of the EU legislation, for example by scrutinising the Commission’s annual reports on monitoring implementation of EU law and developing relevant parliamentary resolutions. It can also request the European Commission, pursuant to Article 225 TFEU, to submit any appropriate legislative proposal on matters on which it considers that a Union act is required. Petitions and questions, received by the European Parliament under Article 227 TFEU, often trigger infringement procedures initiated by the Commission against a Member State which may eventually end up before the Court of Justice of the EU (CJEU).

1.1.2. The EU ‘compliance deficit’

Effective application of EU law in the Member States is vital to achieving the policy goals defined in the Treaties and secondary legislation. These goals generate citizens’ expectations of the benefits that the EU can bring.

Delays or incorrect application of European law weakens the system itself, reduces the chance to fully achieve policy goals and deprives citizens and businesses of potential benefits. The adoption by the EU institutions of legislation is a clear recognition that action at EU level is necessary since the costs and benefits of all legislative proposals are now systematically assessed, including the cost of a failure to act. Non-action over breaches of EU law may have further costs, beyond the economic: harming citizens’ health, putting lives or biodiversity at risk.

The Directives’ provisions set time limits by when transposing national or sub-national legislation must be adopted; and all mandatory EU measures, from Directives and Regulations to Decisions, have to be applied and enforced by national authorities by the established date. The EU must, therefore, necessarily rely on national political, administrative and judicial structures to correctly transpose, apply and enforce EU law.

However, Member State’s compliance with their EU legal obligations remains an unresolved issue. Complaints by citizens and businesses, infringement proceedings by the Commission and rulings of the CJEU are all evidence of these shortcomings in the implementation of EU law. For example, the Commission opened 2900 infringement procedures in 2009, 2100 in 2010 and 1775 in 2011. But the statistics on these enforcement instruments do not give an accurate reflection of the actual problem. They only represent the most serious breaches or the most vocal individuals or entities (those who complain). The Commission has neither the policy nor the resources to systematically identify and to enforce all cases of non-implementation. Thus, statistics on infringement procedures do not reflect the full extent and cost of breaches for businesses or the economy as a whole.
The main implementation problems identified

The existence of a ‘compliance deficit’ has been widely researched and is well acknowledged in the academic literature\(^{10}\) and by the European Commission\(^{11}\). The Commission highlights that Member States ‘may pay insufficient attention to the correct interpretation and application of the law, or be late with implementation work and the communication of national transposition measures. Member States may encounter difficulties of interpretation and choice of procedural options. These differences and difficulties of interpretation can be replicated at regional and local level. In some instances, provisions of the law may be vague or difficult to implement’\(^{12}\). The vagueness is often the unavoidable result of political compromises in the legislative process but it may have a negative effect on the transposition in the Member States.

In the area of environmental law, the Commission Communication “Implementing European Environmental Community Law”\(^{13}\) identified key implementation problems at the national level such as: insufficient attention to deadlines, insufficient transposition measures, shortcomings in national and regional administrations’ knowledge and capacities (including gaps in enforcement practices) and poor investments in pollution-abatement infrastructure.

In its 29th Annual Report on monitoring the application of EU law\(^{14}\), the Commission reports a steady increase in late transposition cases over several years (2011 (1185), 2010 (855), 2009 (531)). The three policy areas scoring highest for late transposition in 2011 were Transport (240 procedures), Internal Market & Services (198) and Health & Consumers (164). However, in 2010 transposition deadlines of EU environmental legislation were regularly missed by a large number of Member States\(^{15}\). In the last (26\(^{th}\)) edition of the Internal Market Scoreboard, the Commission concluded that for 2012, 0.6% of all Directives in the internal market field\(^{16}\) were transposed late while 0.6% were transposed incorrectly. On the application of EU law, the four most infringement-prone policy areas identified by the Commission in the 29th Annual Report are: Environment (17%), Internal Market (15%), Transport (15%) and Taxation (12%).

1.1.3. The need for stronger enforcement policy by the EU

In its 2001 White Paper on European Governance, the Commission has argued that full compliance with EU legislation is essential ‘not only for the sake of efficiency of the internal market but also to strengthen the credibility of the Union’\(^{17}\).

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\(^{11}\)Internal Market Scoreboard, No. 23, “Together for new growth”.


\(^{15}\)Report from the Commission, 28\(^{th}\) Annual report on monitoring the application of EU law (2010), COM (2011) 588 Final.

\(^{16}\)Internal Market Scoreboard, No. 26, February 2013. The Scoreboard takes into account all notifications received by 11 November 2012 for directives with a transposition deadline of 31 October 2012.

In acknowledging the existence of application problems, the Commission set up the objective of Better Regulation and pledged to "attach high priority to the application of law, to identify why difficulties in implementation and enforcement may have arisen and to assess whether the present approach to handling issues of application and enforcement can be improved."  

The EU policy for implementation and enforcement of EU law is based on the 2002 Commission Communication "Better monitoring of the application of Community Law," further developed in a Communication of 2007: "A Europe of results – Applying Community Law," and, specifically on environment policy by the 2008 Communication "Implementing European Environmental Community Law." The Commission highlights three aims: to resolve implementation and enforcement problems at an early stage; to strengthen implementation tools; and to reduce the recourse to infringement procedures. Improving implementation of EU law was also listed amongst the aims of the 2010 Commission Communication on Smart Regulation.  

More recently, implementation of EU law is specifically considered a priority objective in the proposal for a Seventh Environmental Action Programme and the 2012 Commission Communication with a view to improving knowledge and responsiveness at the national level by improving information systems and explaining how EU law is implemented and complied with in practice. However, in stark contrast with these priorities, DG Environment has recently decided to eliminate the legal units dealing with implementation and enforcement of EU environmental law.  

To improve monitoring and reduce the recourse to infringement procedures, the Commission has developed tools such as the EU Pilot. In addition, a range of measures have been put in place to assist Member States with implementation and, in the case of errors or failure, to allow the Commission to enforce EU law. This report assesses these tools and measures. It looks across the board at correlation tables, conformity checking, scoreboards and barometers, guidelines, implementation plans, networks and committees, inspection, package meetings, fitness checks, legal reviews, and reporting.  

The EU Pilot system is the administrative phase prior to the infringement procedure. It is accompanied by an IT platform which enables an exchange of information and documents. It aims to correct problems at an early stage, reducing infringement procedures; to provide more rapid answers to citizens; and to tighten up the management of existing procedures. The system replaces the cumbersome ‘pre-258 letter procedure’ passing through the Permanent Representations of Member States. Started in April 2008 in a few Member States, it now operates in all of them.  

Under this system, a Member State has ten weeks to answer a request for information concerning a potential breach of EU law or to adopt the necessary measures to comply with

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24 Communication from the Commission "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness" COM (2012) 95 final.  
it. Within ten weeks the European Commission decides whether to close the case or to open an infringement procedure. However, as there are no mandatory rules regulating this procedure, informal discussions between the Commission and Member States may still happen before sending a letter of formal notice or even before the start of the EU Pilot itself. The functioning of the EU Pilot system is explained in Section 4.1 of the study.

Infringement procedures initiated by the Commission according to Article 258 of the TFEU are structured according to the following steps:

- If the Commission considers that a Member State has failed to fulfil an obligation under the Treaty, it may send a letter of formal notice for Member State’s observations;
- When the Commission is not satisfied with the response, it will deliver a reasoned opinion stating the breaches of EU law and asking the Member State to act upon it;
- Should the Member State concerned not comply with EU law within the period laid down in the reasoned opinion, the Commission may decide to bring the matter before the CJEU.
- Specifically concerning Directives, apart from infringement cases for incorrect transposition, there are cases of non-communication of transposing measures and delayed transposition.

The litigation procedure is based on Article 260 of the TFEU under which, if the CJEU finds that a Member State has failed to fulfil an obligation under the Treaties, it will request from that Member State to take the necessary measures to comply with the judgment of the Court.

The role of citizens in the monitoring and enforcement process is critical as a source of information for the Commission regarding breaches of EU law. Individual complaints by businesses and members of the public remain the main source for the detection of breaches of European Union law. Complaints may be sent to the Commission and be the source for the start of pre-infringement or infringement procedures. Complainants’ involvement in the EU Pilot procedure is discussed under Section 4 of this report within the framework of the transparency and Commission’s own principles of good governance (openness, participation, accountability, coherence and effectiveness) required for legitimacy of any administrative action, including enforcement measures.

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26 Cases of non-communication of transposing national legislation: ‘[t]he failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure’ under Article 260 TFEU.
27 In delayed transposition cases ‘the infringement consists merely in exceeding the deadline for transposal or for replying to the letter of formal notice, leaving no room for assessing the substance of the case’. Commission Communication “Better monitoring of the application of Community law”, COM (2002) 725 final, p. 17-18.
28 European Parliament Report on the 28th annual report on monitoring the application of EU law (2010) (A7-0330/2012), p. 8, pt. 30. This is not a surprise as the Commission Communication “Relations with the complainant in respect of infringements of Community Law”, COM (2002) 141 final, pt. 5 that it ‘has regularly acknowledged the vital role played by the complainant in detecting infringements of Community law’.
1.2. **Aim and structure of the study**

The aim of the study is to assess key aspects of the implementation of EU law and the effectiveness of certain tools developed to promote compliance with EU law. In order to answer the questions in the Terms of Reference, the study is structured as follows.

In Section 2, the study provides an analysis of the **transposition trends** concerning 16 EU legal instruments from four different policy areas (namely Environment, Internal Market, Judicial Cooperation, and Citizenship and Fundamental Rights). Furthermore, Section 2 offers an analysis of the **hurdles** or barriers encountered by Member States to **timely transposition**. This part of the analysis is focused on seven representative Member States, namely Germany, Hungary, Italy, Latvia, Spain, Sweden, and the UK.

Furthermore, in Section 3, the study provides an analysis of some selected ‘**compliance-promoting**’ tools developed at EU level and an evaluation of their effectiveness in promoting compliance with EU law.

Section 4 contains, firstly, an evaluation of the **pre-infringement tools** set by the European Commission, namely the CHAP and the EU Pilot. Secondly, after a brief description of the **infringement proceedings**, an assessment of the correlation between the instances of late or non-transposition identified under Section 2 in the seven selected Member States and the launch of infringement proceedings by the Commission is provided.

Finally, **conclusions** are made on the basis of the above described analyses. These conclusions are used as a basis for **recommendations**, i.e. concrete proposals for solving the identified compliance problems, while existing **best practices** are also considered.

A graphical overview of the structure of the study is included in Annex 1.

1.3. **Methodology**

The aim of the project guided the methodology. The main steps for developing the project include the definition of:

- The role and tasks of the Board of Senior Advisors;
- The methodology and criteria followed for the identification and selection of the EU legal instruments for the study on the transposition trends contained in Section 2;
- as well as
  - The identification of the ‘compliance-promoting’ tools analysed in Section 3;
  - The selection of the representative Member States;
  - The process of creation of the templates for the stakeholder interviews.

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30 A Board of Senior Advisors was set up with the responsibility of overseeing the research and analysis conducted by the Milieu Project Management Team, the College of Europe and the national researchers. The Board provided advice on the selection of EU legal instruments and the validation of the interview templates. It was instrumental in providing advice on the study’s conclusions and recommendations.
1.3.1. Selection of the EU legal instruments

The analysis of the transposition trends contained in Section 2 and the correlation analysis in Section 4 was carried out in relation to 16 EU legal instruments from four policy areas (namely Environment, Internal Market, Judicial Cooperation, and Citizenship and Fundamental Rights). Each was selected on the basis of specific criteria. In addition to them, the to analyse transposition trends and the correlation with infringement procedures initiated by the Commission the EU legal instruments were either Directives or Framework Decisions as they require transposition by Member States. The final selection of the EU legal instruments and how the criteria apply to them is in Annex 2.

1.3.2. Definition of the Criteria

The 16 legal instruments studied were selected by reference to the most important factors affecting transposition, and with an effort to ensure a balanced representation of Directives in respect of each factor.

**Deadline for transposition:** The aim was to have a mix of ‘older’ and ‘newer’ Directives as well as Directives whose transposition deadline fell after the entry into force of the Lisbon Treaty, (which significantly strengthened the infringement proceedings.) We selected three relevant time spans: before the EU12 enlargement in 2004; from EU12 enlargement until the entry into force of the Lisbon Treaty in 2009; and post-Lisbon Treaty entry into force.

**Degree of sensitivity of the content:** Problems of transposition might flow from the political sensitivity of some of the issues dealt with or the economic or other interests at stake. The aim was to select a mix of Directives of ‘low’, ‘medium’ and ‘high’ sensitivity, taking into account that the ‘level of sensitivity’ varies for each Member State and might be subject to change over time (this study reflects the situation at the time of transposition).

**Degree of difficulty/technicality/structural changes required for implementation:** Certain Directives might be very technical and, thus, difficult to transpose or apply. Difficulty in transposition may also be due to organisational and structural changes required for its implementation, for example the need to create new bodies or structures responsible for the tasks entrusted to the Member States by the Directive. The aim of the selection is to have a balanced mix of Directives: ‘difficult transposition and application’; ‘easy transposition and difficult application’; or ‘easy transposition and application’.

**Board of Senior Advisors’ judgment:** Milieu has used the Board of Senior Advisors’ judgment on the representativeness of the selected Directives and whether they have been subject to transposition or application problems or have been subject to infringement procedures.

**Presence of ‘compliance-promoting’ tools:** Certain Directives contain provisions referring to specific ‘compliance-promoting’ tools (of either a mandatory or an optional nature). The aim was to select Directives which contain ‘compliance-promoting’ tools. The presence of the relevant tools for each of the selected Directive has been indicated in Annex 2.
1.3.3. Selection of the representative Member States

The assessment of the transposition trends and the correlated infringement procedures has been carried out with respect to seven Member States: Sweden, Germany, the United Kingdom, Italy, Hungary, Spain and Latvia. The selection of a representative sample of Member States was based on the size, type of legal system (i.e. civil law vs. common law legal systems) political structures (i.e. federal vs. unitary structures), EU membership, evidenced compliance patterns (through complaints and infringements)31.

Table 1: Selection criteria for representative Member States

<table>
<thead>
<tr>
<th></th>
<th>Sweden</th>
<th>Germany</th>
<th>United Kingdom</th>
<th>Italy</th>
<th>Hungary</th>
<th>Latvia</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Size</td>
<td>Small</td>
<td>Big</td>
<td>Big</td>
<td>Big</td>
<td>Big</td>
<td>Small</td>
<td>Big</td>
</tr>
<tr>
<td>Type of legal system</td>
<td>Civil law</td>
<td>Civil law</td>
<td>Common law</td>
<td>Civil law</td>
<td>Civil law</td>
<td>Civil law</td>
<td>Civil law</td>
</tr>
<tr>
<td>Type of political structure</td>
<td>Unitary</td>
<td>Federal</td>
<td>Unitary with de-centralisation</td>
<td>Quasi-federal</td>
<td>Unitary</td>
<td>Unitary</td>
<td>Quasi-federal</td>
</tr>
<tr>
<td>No complaints/Infringements</td>
<td>Low</td>
<td>High</td>
<td>High</td>
<td>High</td>
<td>Low</td>
<td>Low</td>
<td>High</td>
</tr>
</tbody>
</table>

1.3.4. Templates for stakeholder interviews

Interviews have been conducted with stakeholders at national and EU level, including officials from the Commission and from the seven selected Member States. The stakeholders interviewed (Annex 3) covered the four relevant policy areas selected. In order to ensure comparability of results, three templates for interviews were developed:

- Hurdles and best practices of transposition trends and best practices (Annex 4);
- Compliance-promoting tools: used for the assessment of the selected 'compliance-promoting' tools (Annex 5);
- Pre-infringement tools: used for the analysis of the CHAP and EU Pilot (Annex 6)32.

The templates were used to carry out 39 interviews.

Some representatives of the Commission services did not answer some of the questions arguing not to have permission from the Secretariat-General to discuss those issues.

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31 According to the Report from the Commission - 28th Annual Report on monitoring the application of EU law (2010), COM (2011) 588, p. 7, the countries with highest number of complaints registered under CHAP in 2010 were: Italy (12%), Spain (11.4%), Germany (9.5%), the United Kingdom (7.5%) and France (6.9%). This reflects a high level of non-compliance, but also a high level of awareness from citizens and NGOs sending information. The UK is one of the three countries against which a highest number of infringements opened in 2010 after Greece and Italy (with the highest number). Malta, Lithuania and Latvia are the three Member States with the lowest number of open infringements procedures (25, 27 and 32 cases, respectively). For understanding the difference between complaints/EU Pilot and Infringement procedures see the Introduction of this report.

32 Please note that the effectiveness of the infringement phase is not part of this project.
2. TRANSPOSITION TRENDS AND HURDLES TO TIMELY TRANSPOSITION

This section is structured in two parts: first, it presents trends in transposition emerging from a detailed analysis of the EUR-LEX database; secondly, an analysis of interview results on the main hurdles to timely transposition.

2.1. Transposition trends

2.1.1. Introduction

Having assessed the Member States’ compliance with transposition deadlines for the 16 selected EU legal instruments (i.e. 15 Directives and one Framework Decision), under the four identified policy areas, sub-section 2.1 shows the transposition trends per policy area and per Member State.

Transposition into national legislation of the selected directives is mandatory. According to Article 288 of the TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. According to Article 291 of the TFEU, Member States shall adopt all measures of national law necessary to implement legally binding Union acts. EU Decisions are binding in its entirety. Furthermore, specifically the Framework Decision on Arrest Warrant (2002/584/JHA) needs to be transposed and national legislation communicated to the Commission and Council (Article 34). Framework Decisions in the area of judicial cooperation in criminal justice matters were originally framed under the Treaty on the European Union and although similar to Directives, the Commission could not enforce their transposition. However, from the entry into force of the Lisbon Treaty, they have been fully assimilated to Directives and their legal effects are maintained until they are amended or repealed in implementation of the Treaties.

Monitoring timely transposition is a Commission priority and is considered essential to ensure the effectiveness of European policies. Late transposition infringements have steadily increased for the past three years. However, the Commission has noted that once infringement procedures are opened, national measures are usually communicated swiftly. The fear of fines improves compliance. Officials from Commission and Member States have acknowledged in this study that potential fines imposed under Article 260(3) TFEU at the start of the procedure have acted as an incentive for Member States to transpose directives within the deadlines laid down by the legislator.

The deadline for transposition set in the Directives usually ranges between one and five years from the date the adoption or publication of the Directive. Once a State joins the Union, it must prove that it has the ability to implement effectively the obligations under the EU acquis. During the negotiation process preceding accession, conditions and timing of

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33 Article 9 of the Protocol to the Lisbon Treaty on Transitional Provisions
the adoption, implementation and enforcement of EU legislative acts are agreed and listed specifically in protocols annexed to the Accession Treaty.

2.1.2. Methodology

The analysis on Transposition Trends (i.e. Sub-section 2.1.) has been carried out primarily through desk research. It assessed the compliance with transposition deadlines in relation to the 16 selected EU legal instruments by examining relevant Commission reports and existing studies on transposition trends, and by analysing the information contained by 11 January 2013 in:

- The EUR-LEX database, under section titled ‘National Execution Measures’
- The final provisions of relevant analysed EU legal instruments
- The accession Treaties for the EU-12

The information available in the above listed sources is reflected in Table 2 below ‘Table on transposition’ differentiating between Timely transposition; Delayed transposition; and Non-communication (including the instances where non-reported information is available in the EUR-LEX database).

This data is analysed under section 2.1.3 per Legal instrument, policy area as well as per Member State. Furthermore, it is analysed on the basis of:

- Timing of the expiry of the deadline for transposition (pre-Lisbon; post-Lisbon); and
- The existence of compliance promoting tools, selected for having an impact on the timeliness of transposition (correlation tables, scoreboards, and committees).

To help understand the findings, the data is presented in this report in the form of few tables and pie charts combined with text.

However, access to the information in the internal Commission database called NIF including data on pre-infringement, infringement and court cases for each EU legal instrument, was not provided to the Project Team.

36 The section ‘National Execution Measures’ contains the national provisions communicated by Member States. The reference to national measures does not necessarily mean that they are either comprehensive or in conformity. The information on the Communicated measures includes the date of their entry into force or the date of publication. The dates indicated were taken into account regarding the timeliness of transposition.
37 The final provisions were consulted in regards to possible derogations for transposition of a certain EU legal instrument for certain Member States (e.g. Directive on Postal Services (2008/6/EC)).
38 The Accession Treaties for the EU-12 were consulted regarding possible derogations for implementation of any of the EU legal instrument.
39 Timely transposition: Adoption and communication of national transposing legislation within the mandatory deadline according to EURLex data base. It does not presume correct or complete transposition.
40 Delayed transposition: Some of the national transposing legal instruments indicated in the EURLex data base entered into force or were published after the expiration of the transposition deadline.
41 Non communication: the transposing national legislation is not indicated in the EURLex data base.
42 Please note that access was requested during the interview with the Secretariat General of the European Commission on 1 February 2013.
2.1.3. Results

The table below shows the number of cases of delayed transposition, timely transposition and cases of non-communication in all 27 Member States for each analysed EU legal instrument by 11 January 2013\textsuperscript{43}.

For the purposes of this study, Citizenship and Fundamental Rights policy area contains 4 Directives, Environmental policy has 5 Directives and 6 the Internal Market. Only one legal instrument represents Judicial Cooperation policy area due to the criteria used.

Table 2: Overview of transposition of analysed EU legal instruments

![Graph showing transposition data]

The legal instruments assessed cover a time frame of about 13 years (from 1999 to 2012) according to their date of entry into force. From the information presented, it is clear that there is a continuous trend of delayed transposition. The data compiled shows that:

- Transposition in three quarters of the cases is delayed (74%);
- National legislation transposing EU law is rarely adopted on time (16% of cases);
- In 10% of the cases, the information is not communicated to the Commission\textsuperscript{44}.

Some extreme examples to be noted: The Energy Performance of Buildings Directive (considered under Environment policy) appears the extreme case of delayed transposition closely followed by the Water Framework Directive, the Internal Market in Electricity Directive, the Mutual Recognition of Qualifications Directive and the Citizenship Directive. However, some Directives have a better record of timely transposition such as the Internal Market Directives on Postal Services (2008/6/EC) and on Posted Workers (96/71/EC).

\textsuperscript{43} By then, 11 January 2013 no information on national transposing legislation for Directive on Postal Services (2008/6/EC) under internal market was found. However, transposing legislation was due on 31 December 2012 for the following countries: Czech Republic; Greece; Cyprus; Latvia; Lithuania; Luxembourg; Hungary; Malta; Poland; Romania; and Slovakia due to a legal derogation. On 11 April 2013 data was available showing that all countries except for Cyprus, Lithuania and Romania, did transpose the Directive on time.

\textsuperscript{44} This information might reflect a problem of access to information.
1. The timing of transposition

The Treaty of Lisbon entered into force on 1 December 2009. One of the novelties in Article 260(3) of the TFEU aims at acting as an incentive for Member States to transpose directives within the deadlines laid down by the legislator. This section looks at the potential impact of this provision in ensuring timely transposition.

This provision enables the Court to ‘...impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission’ when the Member State failed to notify national measures of transposition of EU Directives. Article 260(3) concerns both the total and the partial failure to notify any transposition measure.

The transposition deadline for six Directives out of the 16 selected EU legal instruments expired after the entry into force of the Lisbon Treaty. They are the following:

- Air Quality Directive (2008/50/EC);
- Waste Framework Directive (2008/98/EC);
- Services Directive (2006/123/EC);
- Directive on Award of Public Contracts (2007/66/EC);
- Directive on Postal Services (2008/6/EC);
- Directive on Internal Market in Electricity (2009/72/EC); and

For nine legal instruments, the transposition deadline expired prior to the entry into force of the Lisbon Treaty. They are as follows:

- Water Framework Directive (2000/60/EC);
- Public Participation Directive (2003/35/EC);
- Decision on Arrest Warrant (2002/584/JHA);
- Transparency Directive (2004/109/EC);
- Mutual Recognition of Professional Qualifications Directive (2005/36/EC);
- Race Directive (2000/43/EC); and
- Citizenship Directive (2004/38/EC);

Finally, for the Directive on Posted Workers (96/71/EC), the transposition deadline for all Member States expired prior to the entry into force of the Lisbon Treaty apart from Cyprus, Latvia, Malta, Slovenia and Slovakia, for which the deadline for transposition expired on 1 May 2011.

The data on timeliness of transposition suggest that the Lisbon Treaty’s improvements for speeding up transposition (Article 260(3) of TFEU) are already yielding results. Indeed, the number of timely transposition cases for the selected legal instruments has increased (from 10% to 24%) after the entry into force of the Lisbon Treaty. Furthermore, the number of delayed transposition cases has decreased (from 77% to 69%) as has the failure to communicate cases (decreasing from 13% to 7%).

46 Commission Communication “Implementation of Article 260(3) of the Treaty”, SEC(2010) 1371. In this Communication, the Commission committed to examine Member States’ performance in transposing directives within the time limits and present it in its Annual Report on the application of Union Law. If the results show no significant improvement, the Commission will adjust its policy set out in this Communication
47 According to the provisions of the Directives and the Accession Treaties for the EU–12 Member States.
2. Results per Policy Area

For each analysed policy area (consisting of the selected EU legal instruments) the distribution amongst delayed transposition, timely transposition and cases of non-communication is shown in the table below.

**Table 3: Overview of transposition of analysed EU legal instruments**

![Pie charts showing transposition status by policy area](image)

The data provided by our analysis regarding the 16 analysed EU legal instruments refers specifically to their transposition without referring to existing potential infringement cases. This study covers only a small segment of EU legal instruments and unlike the Commission’s Annual Report on implementation, which takes a one year time frame, this report covers many years, since the selected legal instruments entered into force over the period 1999 – 2012.

The results show that while the continuous trend of late transposition occurred in all the selected policy areas, this problem is more acute for environmental Directives. The transposition of the five analysed Environment Directives was delayed in 91% of cases. Out of the six Internal Market instruments analysed, transposition in 73% of cases was delayed and, likewise, out of the four legal instruments covering Citizenship and Fundamental Rights, transposition was delayed in 73% of cases.

3. Results per Member State

The table below indicates the number of cases of delayed transposition, timely transposition and non-communication of transposing legislation for the analysed EU legal instruments in all 27 Member States. On average each Member State has about 13.5 cases out of 16 (approx. 84%) with problems on the timing of the transposition (74%) or the communication of the national legislation (10%). This shows that, essentially, all Member States have serious problems of timely transposition regarding the EU legal instruments we
have analysed.

Some particular cases stand out. Ireland had the biggest share of problems, with a 100% record of delayed transposition and failure to communicate. Belgium, Greece, Cyprus, Luxembourg, Austria and Portugal followed, with such problems in 15 cases out of the 16 studied. On the other hand, the lowest number of delayed transposition and failure to communicate information cases was observed in Romania (10 out of 16 cases in total), Bulgaria and Sweden (11 out of 16 cases in total). The constitutional set up of Member States differs greatly. In some of the Member States with systems or structures where the competence to adopt transposing legislation may fall under various governmental levels, the delays of transposition may be higher. The most evident examples are Belgium, Austria and United Kingdom which show a higher percentage of delayed or unreported cases (approx. 90%) than the average for all Member States (approx. 84%).

It is observed that in several cases, EU-12 Member States\(^\text{48}\) did not transpose certain EU legal instruments prior to joining the EU despite the fact that joining the EU was conditional upon transposition and implementation of the EU acquis. For example Bulgaria, Czech Republic, Estonia, Cyprus, Latvia, Hungary, Poland Romania, Slovenia and Slovakia had not transposed the Water Framework Directive 2000/60/EC\(^\text{49}\) before joining the EU.

Table 4: Overview of transposition per Member State

<table>
<thead>
<tr>
<th>Member State</th>
<th>Delayed Transposition</th>
<th>Timely Transposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>BE</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>DK</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>IE</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>FR</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>LV</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>HU</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>AT</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>RO</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>FI</td>
<td>10</td>
<td>10</td>
</tr>
</tbody>
</table>

The study compared the overall number of delayed transposition, timely transposition and non-communication cases for each of the 16 analysed EU legal instruments in EU-15 Member States\(^\text{50}\) and in the EU-12. The information shows a very small difference between both groups: EU-12 Member States have a slightly lower percentage of delayed transposition cases (by 7%), but a slightly higher percentage of non-communication cases (by 2%).

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\(^{48}\) The EU - 12 Member States: Member States which joint the EU after May 2004 are the following: Bulgaria, Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Romania, Slovenia, Slovakia.


\(^{50}\) The EU - 15 Member States: Member States which acceded to the EU prior to 1 May 2004 are the following: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, Netherlands, Portugal, Spain, Sweden and United Kingdom.
4. Results in relation to the presence of ‘compliance-promoting’ tools

Several of the 16 analysed EU legal instruments contain one or more compliance-promoting tools (See section 3). The overview of all selected compliance-promoting tools per analysed EU legal instrument is contained in Annex 2 of this study. The tools aim to support the application and transposition of EU legal instruments. Regarding transposition, three compliance-promoting tools are relevant:\vspace{-3em}

- Correlation tables;
- Scoreboards; and
- Committees composed of Member States chaired by the Commission.

The assessment shows that while correlation tables and scoreboards have a positive impact and improve transposition of EU law, the Committees do not. The reason could be that some Member States representatives may form coalitions to defend national interests, thus delaying transposition. However, Committees are found more useful during the application phase (see section 3). The data obtained shows that:

- The percentage of timely transposition is 14% higher of those EU legal instruments for which correlation tables are requested in the recitals of the Directive. Similarly, the number of cases of non-communication of transposing legislation is 8% lower.
- Timely transposition of EU legal instruments subject to scoreboards\(^{52}\) is 6% higher than the rest. Similarly the number of cases of non-communication is 9% lower.
- Those legal instruments without a committee set up have fewer cases of delayed transposition (64%) compared to 80% when there is a Committee.

2.1.4. Correlation tables

Correlation tables present how each provision of an EU legal instrument is transposed into national law (see also description of correlation tables under section 3).

Under the “Better law making” agreement\(^ {53}\), EU institutions agreed to require the Council to encourage Member States to draw correlation tables. However, given the systematic refusal of Member States to include the obligation to prepare correlation tables in the text of the Directives and their systematic move to the (non binding) recitals, the agreement was modified. The new Framework Agreement on relations between the European Parliament and the European Commission\(^ {54}\) published in 2010 calls on the Commission and the European Parliament to endeavour to include compulsory correlation tables in order to ensure better monitoring of the transposition and application of EU law (Point 44 of the Agreement).

Out of the 16 Directives analysed in this study, 7 include recitals referring to correlation tables as follows:

\(^{51}\) Analysis of other tools relevant for transposition (i.e. conformity checking studies or TIPs) have not been included due to lack of publicly available information.

\(^{52}\) Internal Market policy and the Water Framework Directive.


\(^{54}\) Interinstitutional Agreement: Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304. 20.11.2010
Policy Department Policy Department C: Citizens' Rights and Constitutional Affairs

- Air Quality Directive (2008/50/EC);
- Waste Framework Directive (2008/98/EC);
- Services Directive (2006/123/EC);
- Directive on Postal Services (2008/6/EC);
- Directive on Internal Market in Electricity (2009/72/EC);
- Directive on Award of Public Contracts (2007/66/EC); and
- Equal Treatment Directive (2004/113/EC)).

The following analysed EU legal instruments do not include recitals referring to the Correlation tables:

- Public Participation Directive (2003/35/EC);
- Water Framework Directive (2000/60/EC);
- Transparency Directive (2004/109/EC);
- Mutual Recognition of Professional Qualifications (2005/36/EC);
- Decision on Arrest Warrant (2002/584/JHA);
- Citizenship Directive (2004/38/EC);
- Race Directive (2000/43/EC); and
- Directive on Posted Workers (96/71/EC).

The data collected shows that in those cases where Member States are encouraged by a relevant EU legal instrument to draw up and publish correlation tables for the transposition, the percentage of timely transposition is higher (by 14%) and the percentage of cases of failure to communicate the transposing legislation is lower (by 8%).

2.1.5. Barometers and Scoreboards

Barometers or Scoreboards provide an evaluation of the performance of Member States in meeting specific obligations under an EU instrument. They enable a comparison amongst Member States, which gives this tool a political edge, increasing its effectiveness. They are regularly updated but each update does not reflect previous non-compliance. They may be used to present Member States’ progress on the Directive’s transposition or in its application (See section 3).

Scoreboards reflect only whether or not a Member State has communicated the transposing legislation and does not make any judgment on the quality of the transposition (correct or not). In relation to the Directives selected for this study, scoreboards are used to assess the transposition of the Water Framework Directive (2000/60/EC)\(^5\)\(^5\) and of the legal instruments that make up the Internal Market policy area (although the scoreboards do not specify which instruments are included in the statistics presented). A scoreboard for

internal market EU legal instruments is a tool aiming at supporting Member States in an area where the number of cases of delayed transposition and non-communication are quite high (See Section 2.1.3)

The study shows that the percentage of timely transposition is 6% higher amongst the analysed EU legal instruments that use scoreboards/barometers (Internal Market policy area and the Water Framework Directive) than for the rest and a lower number of cases of non-communication (9%). It is worth to note that the Water Framework Directive is one of the few directives out of the 16 EU legal instruments analysed for which there were no cases of non-communication.

2.1.6. Committees

Committees are established legally and are composed of Member States representatives chaired by the representative of the Commission to assist the implementation of the relevant Directive. The representatives of Member States at the Committees meetings may benefit from discussions on issues related to the transposition and exchange information and best practices or evaluate actions through a ‘peer review’ mechanism, such as in the case of the Services Directive (2006/123/EC). (For more information, see description of correlation tables under section 3).

The following EU legal instruments stipulate that the Commission will be assisted by a Committee for the purposes of implementing the Directive:

- Services Directive (2006/123/EC)
- Directive on Postal Services (2008/6/EC)
- Directive on Internal Market in Electricity (2009/72/EC)
- Directive on Award of Public Contracts (2007/66/EC)
- Mutual Recognition of Professional Qualifications (2005/36/EC)
- Air Quality Directive (2008/50/EC)

The data gathered evidenced that Committees do not help improving transposition with 15% more of cases of failure to communicate the transposing legislation. Where no Committee was foreseen, we found less cases of delayed transposition (16%). According to interviewees this might be due to the fact that some Member States representatives may form coalitions within the Committees to defend national interests, thus delaying transposition or even blocking implementation.
2.2. Hurdles to timely transposition

This section contains the analysis of the interviews carried out both at national and EU level concerning the hurdles to timely transposition.

2.2.1. Methodology

The analysis of the barriers to timely transposition encountered by Member States is based on interviews with representatives of the Commission and Member States carried out on the basis of a questionnaire (Annex 4).

The interviewees were invited to give their views on the main hurdles to timely transposition. The questionnaire proposed the following list of problems which may represent hurdles to (timely) transposition. They are divided in two types: EU level barriers and national barriers. The interviewees were given the opportunity to indicate other hurdles than those pre-identified in the questionnaire.

Table 5: Selection criteria for representative Member States

<table>
<thead>
<tr>
<th>EU level</th>
<th>National level</th>
</tr>
</thead>
<tbody>
<tr>
<td>A - Provisions of EU law are vague or lack clarity;</td>
<td>Political</td>
</tr>
<tr>
<td>B - The subject matter is complex and technically challenging.</td>
<td>1.- The subject matter is perceived as unimportant/low in the political agenda;</td>
</tr>
<tr>
<td></td>
<td>2.- The directive is subject to political sensitivity, reflecting political division;</td>
</tr>
<tr>
<td></td>
<td>3.- National economic interests are involved;</td>
</tr>
<tr>
<td></td>
<td>4.- There are problems specific to a particular policy area: please comment regarding areas of Environment (including climate and energy legislation); Internal market; Judicial Cooperation; Citizenship and Fundamental Rights.</td>
</tr>
<tr>
<td></td>
<td>Institutional and administrative</td>
</tr>
<tr>
<td>5.- There are shortcomings in knowledge and capacities (financial, human) in the different levels (please specify which ones) of the administration;</td>
<td>6.- There is confusion regarding the choice of policy/legal options in the Directive;</td>
</tr>
<tr>
<td>6.- There is confusion regarding the choice of policy/legal options in the Directive;</td>
<td>7.- There are problems in aligning the respective legal act with existing legislation;</td>
</tr>
<tr>
<td>7.- There are problems in aligning the respective legal act with existing legislation;</td>
<td>8.- There is institutional competition between services/the competences are unclear;</td>
</tr>
<tr>
<td>8.a.- Horizontally(e.g. among different ministries);</td>
<td>8.b.- Vertically (e.g. among Federal, Regional or local levels of governance)</td>
</tr>
<tr>
<td>8.b.- Vertically (e.g. among Federal, Regional or local levels of governance)</td>
<td>9.- There is need for involvement of national, regional, local levels of governance).</td>
</tr>
<tr>
<td></td>
<td>Procedural and legal</td>
</tr>
<tr>
<td>10.- Conviction that the legal system already complies with the Directive’s provisions;</td>
<td>11.- Extent of changes required in national law;</td>
</tr>
<tr>
<td>11.- Extent of changes required in national law;</td>
<td>12.- Differences of interpretation: the understanding or interpretation of a provision of EU law by the national authorities differs with the EU institutions understanding;</td>
</tr>
<tr>
<td>12.- Differences of interpretation: the understanding or interpretation of a provision of EU law by the national authorities differs with the EU institutions understanding;</td>
<td>13.- Speed of national legislative processes;</td>
</tr>
<tr>
<td>13.- Speed of national legislative processes;</td>
<td>14.- Attempts to match transposition with other legislative provisions or policies;</td>
</tr>
<tr>
<td>14.- Attempts to match transposition with other legislative provisions or policies;</td>
<td>15.- Insufficient attention to deadlines.</td>
</tr>
</tbody>
</table>

Interviewees were asked in addition, whether any trade-offs between time and quality of transposition could be identified.
2.2.2. Results

The information on the hurdles to timely transposition in practice is based on the results from the interviews. The table below gives an overview of the responses received, divided by level (i.e. EU and Member State level) and by policy area.

Table 6: Overview of the responses received, divided by level and by policy area

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>EU</th>
<th>Member States</th>
<th>Policy Area</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Internal Market</td>
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<td></td>
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<td>Judicial Cooperation</td>
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<td>Environment</td>
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<td>Citizenship and</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Fundamental Rights</td>
</tr>
<tr>
<td>Interviews</td>
<td>39</td>
<td>7</td>
<td>32</td>
<td>10</td>
</tr>
<tr>
<td>conducted</td>
<td></td>
<td></td>
<td></td>
<td>7</td>
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<tr>
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<td>9</td>
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<td></td>
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</tbody>
</table>

The responses are based on 39 interviews to officials from the Commission and from the seven selected Member States working on the four different policy areas.

It is worth noting that some officials of the Commission services did not answer some of the questions arguing that they were not allowed to discuss them by the Secretariat-General.

1. EU vs. Member States views on reasons for delayed transposition

Considering all responses from the interviewees to the questions related to the EU level barriers to timely transposition, we can conclude that the responses point almost equally to the vagueness or lack of clarity of the Directive’s provisions (41%) and to the complexity/technical nature of EU law (37%).

The responses provided show differences between Member States officials and Commission officials with respect to the EU-related hurdles to (timely) transposition of EU legislation. While at Commission level, only 25% of the respondents believe that delays in transposition are due to the vagueness or lack clarity of EU law provisions, that number almost doubles at Member State level (approx. 44%). Both EU and national officials acknowledged that the need for a political compromise during the legislative procedures is the root cause of such lack of clarity. On the other hand, the technicality of the Directives is recognised as a source of hurdles to timely transposition with similar score (37%) by EU and national officials. It was also suggested by both groups that timely transposition could improve if more planning and coordination during the negotiations of the Directive could be carried out, particularly when defining deadlines.

In relation to the hurdles to timely transposition at national level, interviewed officials at both EU and Member State level consider that the main barriers to timely transposition are:

- The extent of changes required in national law; and
- The speed of the national legislative process.

36 ‘General’ in this table means that a person interviewed did not represent a certain analysed policy area per se. For example, representatives of the Secretariat-General of the Commission were included in this category.
By contrast, the least reported hurdle was insufficient attention to deadlines by Member States.

Member State officials highlight the need to follow sometimes complex national legislative procedures as the main barrier to timely transposition. Furthermore, the interviewees underlined that the need (e.g. in Sweden) to consult relevant stakeholders must also to be taken into account.

In general, EU officials considered that one single response as a ‘one-size-fits-all’ justification for delayed transposition cannot be provided, as problems vary by Member State and by policy area. For example, the federal structure and the need for coordination between different levels of government has been reported as a problem for timely transposition in Italy and Germany but not in Spain where the responsibility for the adoption of transposing legislation falls on the State.

2. Hurdles to timely transposition: views from the different policy areas

The responses reported per policy area do not differ greatly in relation to the barriers for timely transposition. It is worth mentioning, however, that in the Judicial Cooperation policy area, vagueness or lack of clarity of EU law was twice as often considered a reason for delay than in all the policy areas.

In relation to the national level barriers, the procedural reasons are considered behind most of the cases of late transposition. In the Citizenship and Fundamental Rights, Internal Market and Judicial Cooperation Policy areas, officials highlighted that the extent of changes required to national law is the most common hurdle. Political reasons are highlighted by officials in the Internal Market and Judicial Cooperation policies and specifically the lack of priority given to EU law issues. In the Environment policy, the most pressing hurdles are legal and procedural, namely the differences of interpretation or understanding of EU law provisions, the slow rhythm of the national legislative processes and the extent of changes required in national law.

3. Trade-offs between timely and accurate transposition

Interviewees were asked to consider whether there were trade-offs between timely and accurate transposition of EU law. The responses received by the EU and Member State officials differ greatly.

Generally speaking, EU officials do not believe that shorter deadlines lead to a lower quality of transposition and vice-versa. EU officials are convinced that Member States have mechanisms to adjust transposition deadlines to their needs or internal procedures. Specifically, Member States can negotiate longer transposition deadlines during the legislative procedure prior to the adoption of the final text. Based on the past experience, Commission officials believe that those Member States that have difficulties in timely transposition also experience difficulties later on with their correct transposition or application. Furthermore, existing deadlines generally leave Member States about 2 years for transposition which seems enough time to transpose EU legal instruments correctly and in a timely manner. They highlight that the desired effects of the Directive according to its objectives might be jeopardised if a too long period for the adoption of transposing legislation is agreed. On the other hand, interviewed officials of certain Member States

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rightly point out that in cases where an immediate effect is required, Regulations should be used rather than the Directives (Italy, UK).

Some Member States argue that longer deadlines for transposition would contribute to a better transposition of EU legal instruments in practice. However, officials of some Member States (Latvia, Spain and UK) pointed out that transposition and accuracy are separate issues; a Directive will not necessarily be better transposed, if later transposed. This is especially true in the case of the UK where the authorities are encouraged to communicate transposition only on the deadline specified in the directive, even if legislation is ready before (Transposition Guidance: How to implement European Directives effectively\(^{58}\)). Some officials highlight that deadlines are sometimes set up in the Directives (e.g. Spain) without proper consideration at national level during the negotiations of the EU legislative procedure. This is due to lack of proper planning and coordination between national services in charge of the negotiation and those dealing with transposition or implementation. Officials of some Member States (e.g. Germany) consider that internal processes (e.g. elections) are often underestimated when setting transposition deadlines and may hamper the timely transposition (e.g. Germany, Italy\(^{59}\) and Sweden).

On the other hand, several interviewees from other Member States, such as Hungary and Latvia, believe that the existing deadlines are sufficiently long to allow Member States to transpose EU legal instruments on time.

4. Key trends on quality of transposition

Interviewees were also invited to give their opinion on key trends regarding the quality of transposition of EU legislation. The opinions of EU and Member State officials differ.

Interviewed Commission officials consider that while quality and timeliness of transposition can be improved, existing means to do so have not been fully exploited. For example, in the area of the Internal Market, the EU officials report that Member States should be better organised during preparatory phases when deadlines are agreed- by ensuring the proper coordination of their different services including the Permanent Representations and national civil servants in charge of implementation or transposition. However, it has been admitted that there have been improvement in the area of Internal Market relation to timeliness of transposition of EU legal instruments. In the area of Environment, it has been observed that Member States (especially EU-12) tend to resolve the problems before infringement proceedings are initiated. This area has experienced progress in the quality and timeliness of the transposition over the past several years.

Some Member States feel that the Commission is encouraging literal transposition by providing short deadlines for EU legislation transposition. Furthermore, the introduction of the fast-track infringement proceedings in case of failure to transpose might lead Member States to privilege timeliness over quality. However, as it was reported by an Italian official, literal transposition does not mean that the quality of transposition is worst. Some Member

\(^{58}\)http://www.bis.gov.uk/assets/BISCore/better-regulation/docs/T/11-775-transposition-guidance.pdf, p. 10, accessed on 6 March 2013. UK Common Commencement Dates (i.e. dates when new legislation is introduced) fall on 6 April and 1 October. Common Commencement Dates do not apply to UK legislation which is implementing a Directive. However, bringing implementation forward by a matter of weeks to coincide with a Common Commencement Date can be justified if it can be demonstrated that the benefit of early implementation outweighs the cost.

\(^{59}\) For example, the Italian respondents pointed out that the fact the transposition of EU obligation often happens with a delegated act by the Government implies that the process cannot start before the delegation law has been issued by the Parliament. This often contributes to delays.
States are concerned that introduction of shorter deadlines and more EU legislation might hamper Member States’ ability to transpose the EU legislation timely and properly (UK – Internal Market).

However, it may seem that introduction of the EU Pilot combined with political pressure may have encouraged Member States to improve timeliness and quality of the transposition. Many interviewed Member State officials reported the introduction of new approaches to improve Member States’ performance with regard to timeliness and quality of transposition. For example, in Sweden, lawyers are included in the negotiation delegation of certain EU legal instruments, helping to reduce legal hurdles during the transposition. The Swedish government is looking into possibilities of adopting a fast-track procedure for the adoption of legislation transposing certain EU legal instruments (e.g. in the Internal Market). In Spain, a political control system for monitoring timely transposition has been set up and this issue is the first point on the agenda of the Secretaries of State weekly meeting which precedes the Council of Ministries meeting. Responsible Ministries are made accountable for late transposition. Efforts to improve the quality of transposition include the adoption of guidelines requiring the development of impact assessments of EU law in the national system.
3. COMPLIANCE-PROMOTING TOOLS AND THEIR EFFECTIVENESS

This section provides an assessment of the effectiveness of selected compliance-promoting tools based on the results of the interviews. Each tool is presented prior to the assessment.

3.1. Introduction

‘Compliance-promoting’ tools are instruments aimed at enhancing timely and accurate implementation of EU legal instruments. The first and, originally, the sole compliance-promoting and enforcement tool envisaged by the Treaty of Rome was the infringement proceedings mechanism, currently contained in Article 258 TFEU. Since then, many other promoting tools have been developed under different legal bases, such as provisions in secondary EU legal instruments (e.g. referring to committees, correlation tables, etc.), or the general Article 17 TEU recognising the Commission’s role as the guardian of the Treaties (used as basis, e.g., to introduce conformity-checking studies).

Compliance-promoting tools can be classified according to the phase of the policy cycle in which they are used. For example, correlation tables pertain to the transposition phase, scoreboards to both transposition and the application phases, implementation plans and guidelines to the application phase, inspections to the enforcement phase, and fitness checks to the evaluation phase.

3.2. Methodology

The assessment of the compliance-promoting tools effectiveness is based on the results of the interviews with officials of the Commission and the seven Member States following a common questionnaire (see Annex 5 of the study) to ensure comparability. Effectiveness is measured on the basis of interviewees’ rating of each tool (on a scale from 1 to 360). It should be noted here that interviewees’ responses differed greatly in quality and level of detail provided.

The rating of the effectiveness of each compliance promoting tool is presented in a table and explained in the sub-section ‘Assessment of effectiveness’.

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60 Whereby 1 represents ‘not useful/effective’, 2 ‘somewhat useful/effective’; and 3 ‘very useful/effective’.
Table 7: Breakdown of responses concerning compliance promoting tools

<table>
<thead>
<tr>
<th>Policy Area</th>
<th>Total</th>
<th>EU officials</th>
<th>Member States Officials</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Internal Market</td>
<td></td>
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<tr>
<td>Judicial Cooperation</td>
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<td></td>
</tr>
<tr>
<td>Environment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Citizenship and Fundamental Rights</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>General61</td>
<td>39</td>
<td>7</td>
<td>32</td>
</tr>
<tr>
<td>Interviews conducted</td>
<td>10</td>
<td>7</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>9</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

3.3. Overview on the ‘compliance-promoting’ tools

3.3.1. A general assessment of the ‘compliance-promoting’ tools

In general, the overall rating to the compliance promoting tools is relatively high (2.44 out of 3). As a general note, compliance promoting tools were almost always perceived as more effective by the interviewed EU officials than by the interviewed Member State officials (the only exception being package meetings).

An interesting remark from the survey regarding the compliance-promoting tools was that the best results in promoting compliance can be achieved through a more strategic use of the different compliance-promoting tools and a tailor-made combination for specific legal instruments. The choice of tools would therefore depend on the nature of each relevant EU legal instruments, taking into account proportionality (some tools may be too cumbersome and imply disproportionate administrative costs).

3.3.2. Correlation tables

1. Description

Correlation tables present in a systematic manner how each provision of a Directive is transposed into national law.

The existence of correlation tables is linked to the prerequisite that Member States communicate the transposing measures of each Directive to the Commission on the basis of the principle of sincere cooperation under Article 4, TEU. According to EU law, there is no legal obligation to transpose a Directive in one single piece of legislation. Moreover, some Member States have a federal structure, hence transposition is made regionally, which means that the list of transposing laws and acts may be very extensive. Correlation tables is a tool that helps Member States ensuring that the Directive is fully and correctly transposed while facilitating the control of transposition quality by the Commission and accelerating the procedure for transposition conformity checking.

There is currently no legal obligation for Member States to submit correlation tables. Their development has been a longstanding request by the Commission and the European

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61 ‘General’ in this table means that a person interviewed did not represent a certain analysed policy area per se. For example, representatives of the Secretariat-General of the Commission were included in this category.
Parliament. In 2003, the Inter-institutional agreement on better law-making\textsuperscript{62}, referred officially for the first time to correlation tables. It requested (point 34 of the Agreement) the Council to \textbf{encourage} Member States to draw up by themselves and in the interest of the Union, their own tables illustrating, as far as possible, the correlation between EU directives and the transposition measures. Member States were encouraged to make these tables public.

On this basis, the Commission started to introduce in the text of some of the Directives the requirement of the correlation tables. However, the Council would systematically move this requirement on the recitals of the Directives, in order to prevent them from being compulsory and subject to judicial scrutiny.

Given the systematic refusal by Member States to make the submission of correlation tables a mandatory obligation as requested by the Commission and the European Parliament, these two institutions agreed in the 2010 Framework Agreement on relations between the European Parliament and the European Commission\textsuperscript{63} to endeavour to include compulsory correlation tables (para. 44 of the Agreement) in order to ensure better monitoring of the transposition and application of Union law. The Agreement enables the Commission to request them by introducing it in the legislative proposals rather than waiting for the Council to “encourage” Member States.

There is no commonly agreed template or mandatory content for correlation tables. Thus, certain Member States may provide very detailed correlation tables containing useful information (comments, assessment of each provision etc.), while others only submit a list of provisions or legal acts.

Correlation tables are generally not publicly available. They are sent by Member States to the Commission as part of a confidential bilateral exchange, hence they are sometimes disclosed on a case by case basis. However, nothing prevents the Commission from doing it systematically. In fact Article 12 of Access to documents Regulation 1049/2001, could be interpreted as requiring the Commission to publish this information in electronic form without any prior request for access.

\textbf{2. Examples of use}

The European Commission systematically includes now the request for correlation tables in the text of legislative proposals, and have been systematically moved by the Council to the recitals with few exceptions such as the Directive on Environmental Crimes\textsuperscript{64}. Among the analysed EU legal instruments the following contain a reference to correlation tables in the recitals:

\textbf{Environment}

- Air Quality Directive (2008/50/EC);
- Waste Framework Directive (2008/98/EC);

\textsuperscript{62}European Parliament, Council, Commission, \textit{“Interinstitutional agreement on better law-making”}, OJ C 321.

\textsuperscript{63}Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304.

\textsuperscript{64}Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L 328/28. Correlation tables helped timely transposition of the Directive (26% of the cases were transposed on time) and reduced the number of cases of non communication to the minimum (one country).
Internal Market
- Services Directive (2006/123/EC);
- Directive on Postal Services (2008/6/EC);
- Directive on Internal Market in Electricity (2009/72/EC);
- Directive on Award of Public Contracts (2007/66/EC);

Citizenship and Fundamental Rights

3. Assessment of Effectiveness

The table below indicates the average effectiveness score of correlation tables, sub-divided by EU and Member States level.

<table>
<thead>
<tr>
<th>Description</th>
<th>Effectiveness rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall received rating for correlation tables</td>
<td>2.49</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
<td>2.86</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
<td>2.11</td>
</tr>
</tbody>
</table>

The table indicates that the overall rating for correlation tables is higher than the overall rating for all compliance promoting tools (2.44). However, the difference in the estimates between, on one hand, EU officials, and on the other hand, Member States officials, is quite big (EU officials found correlation tables more useful than Member State officials).

In general, Commission officials appreciate the overview of the transposing legislation provided by correlation tables, including the transposition deficiencies. Furthermore, they see correlation tables as useful for reducing the time and costs of ensuring conformity and encouraging Member States’ alignment with EU law. The main weaknesses of the correlation tables, according to Commission officials, are that they are not mandatorily communicated to the Commission; nor do they specify if their transposition is correct, which is done by the conformity checking studies. Many of the interviewed Commission officials expressed the wish that correlation tables be made mandatory, especially in cases of complex directives, and that a standard format is developed to ensure consistency. The interviewed officials dealing with Environment policy announced their intention to make correlation tables available to the public alongside their explanatory notes.

The interviewed Member States officials agree with the Commission officials that correlation tables provide a useful overview of transposing legislation. Furthermore, Member States feel that correlation tables provide them with a ‘transposition control’ mechanism, and thus contribute to correct transposition. They consider such tables help by: a) clarifying the obligations (Italy – Citizenship and Fundamental Rights) b) providing detailed and precise information on how each provision is transposed and plan any additional measures needed for full transposition (Hungary – Internal Market, Spain-general) c) facilitating the communication between the Commission and Member States regarding transposition (Germany – Environment).
However, Member States officials consider that correlation tables are not as effective as EU interviewees do. They are sometimes seen as time-and-resources consuming and in essence slowing down the transposition process. However, some Member States produce them systematically for internal purposes even if they are reluctant to share them with the Commission. In a couple of cases (Germany – Environment; Spain – General) officials feared also that the Commission puts too much emphasis on the verbatim transposition restricting, therefore, Member States’ flexibility for the transposition.

There is a division between Member States regarding the correlation tables’ mandatory nature. While some consider that their used should be promoted but not be mandatory, others believe that their effectiveness depends on Member States’ willingness to cooperate and should be made mandatory in order to harmonise responses and future updates when new legislation is adopted.

The lack of a standard format is also considered a major drawback. Member States regret that, in general, correlation tables produced by the Commission do not specify whether the transposition is correct (this is done by conformity checking studies) and that they are sometimes too difficult to fill out. National officials call for a consistent template of correlation tables to be used systematically throughout all EU policies with flexibility as required.

Other proposals from Member States concern the Commission’s role with regard to correlation tables. While one Member State official (Germany – Environment) believes that the correlation tables should be drawn up by the Commission, others consider that they should be the responsibility of Member States under the Commission’s control evaluated on the basis of the Directive’s aim (Sweden – Environment).

### 3.3.3. Barometers and scoreboards

#### 1. Description

Barometers or Scoreboards provide an evaluation of the performance of a Member State in meeting specific obligations under an EU law instrument (either transposition or application). They are a tool that provides information that is regularly updated to reflect the actual state of play. However, each of the updates does not reflect previous situations of non-compliance. They enable a comparison amongst Member States which makes this tool politically effective. Both barometers and scoreboards represent a tool to monitor and encourage the implementation of certain provisions of key Directives, compare implementation by different Member States and enhance transparency before citizens. They present simple information so that with a glimpse, it is possible to ascertain whether Member States comply with a specific Directive’s obligation.

#### 2. Examples of use

Barometers and scoreboards have mostly been used in the areas of Environment and the Internal Market.

For example, the Natura 2000 Barometer[^65] gives an overview of the progress made by the Member States in designating sites for the establishment of the Natura 2000 network of

nature conservation areas. It was developed by the Commission services on the basis of the information obtained from Member States regarding the implementation of the Birds Directive and Habitats Directive until beginning of 2011. Another example from the area of Environment is that of the Water Scoreboards (2003-2007) that were developed to monitor the transposition and implementation of the Water Framework Directive (2000/60/EC). A more recent example is the Scoreboard for the transposition of Directive 2010/63/EU on the protection of animals used for scientific purposes.

The progress of Member States is presented in a simple manner: as a table listing selected legal obligations with corresponding entries, showing which Member States have implemented the specific provision.

In the area of Internal Market, the European Commission publishes the EU Internal Market Scoreboard every six months presenting an account of the transposition of internal market measures, highlighting those which have not yet been transposed. The Scoreboards rank all 27 Member States with the 'early adopters' at the top and the 'laggards' at the bottom. In addition, Scoreboards contain best practices in Member States.

3. Assessment of Effectiveness

The table below indicates the average effectiveness score of scoreboards and barometers, sub-divided by EU and Member State level.

<table>
<thead>
<tr>
<th>Description</th>
<th>Effectiveness rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall received rating for barometers and scoreboards</td>
<td>2.37</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
<td>2.5</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
<td>2.23</td>
</tr>
</tbody>
</table>

The overall score for barometers and scoreboards is lower than the average score (2.44). As it is the case with regard to the great majority of other compliance promoting tools, interviewed EU officials graded effectiveness of barometers and scoreboards higher than their counterparts in the Member States.

The most prominent strength of Scoreboards and Barometers highlighted by the interviewed Commission officials is the political pressure generated by the comparison with other Member States, including media coverage. The Scoreboards’ effectiveness need to be evaluated for what they are: an awareness raising tool to present information in a simple manner without much detail. They cannot be legally challenged but enable the Commission to achieve a higher level of transparency and to apply peer pressure.

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69http://ec.europa.eu/environment/chemicals/lab_animals/transposition_en.htm, accessed on 12 April 2013
70 The Internal Market Scoreboard at http://ec.europa.eu/internal_market/score/index_en.htm#score, accessed on 12 April 2013.
They are considered to be very efficient in combination with press coverage (Internal Market). They are just a partial reflection of the state of affairs as they are focused on few specific provisions. Certain Commission officials (Citizenship and Fundamental Rights) also see scoreboards as an effective way of identifying transposition shortcomings early and of tracking the evolution of problems by comparing the different updates. For example, according to EU officials, Internal Market Scoreboards show that since their first publication 15 years ago, the rate of failure to transpose EU legislation has decreased from 20% to below 1%.

**National officials** consider peer and public pressure as the main strength of barometers and scoreboards. Some national also singled out the positive competition generated amongst Member States (Spain – General; Hungary – Internal Market and Environment; UK – Internal Market). Some interviewees consider, as Commission officials do, that Scoreboards are useful in offering a quick global overview of the situation of certain EU legal obligations (UK – Internal Market; Sweden – Judicial Cooperation). However, it seems that some national officials are not familiar with the methodology used by the Commission for the evaluation and development of barometers and scoreboards (Hungary – Environment). They also noted that benchmarks used for evaluation (Germany – Internal Market and Citizenship and Fundamental Rights) or the criteria for selecting the EU legal instruments that are covered by policy scoreboards are neither clear nor publicly available (Hungary – Internal Market; Italy – Citizenship and Fundamental Rights). Furthermore, some national officials do not consider these tools altogether useful to promote compliance (Sweden – Internal Market and Environment).

As for possible improvements, several interviewees call for their extension to other policy areas and for the Internal Market Scoreboard to incorporate other legal instruments. While some interviewed EU officials, consider that they are mainly relevant for policy areas, others consider that scoreboards are almost meaningless unless they are related to strategic obligations in individual EU legal instruments (Environment). National officials call for the information in Scoreboards to be as concrete as possible (Sweden – Judicial Cooperation), including the quality of implementation (Sweden – Judicial Cooperation); and for a more strategic use weighted according to their economic impact (UK – Internal Market).

### 3.3.4. Conformity checking

#### 1. Description

As the Guardian of the Treaties, the Commission checks compliance of the Member States’ transposition measures (when they have been communicated) with EU law. The assessment is done horizontally for all Member States and is usually presented jointly through studies which serve to highlight possible inconsistencies in the way Member States have transposed EU law. Often, these studies undertaken by subcontractors. Conformity checking studies are only occasionally made available to the public on a case by case basis.
2. Examples of use

The Commission stated in its 2008 Communication on implementation of environmental law\(^1\) that non-conformity with EU legislation represents a risk for correct implementation and therefore these cases would be considered a priority and treated immediately. Conformity checking is an activity of control prior to any enforcement measure to be carried out by the European Commission for some EU Directives. In practice, conformity checking studies are not drafted for every EU legal instruments requiring transposition. They tend to be drafted for complex directives (e.g. framework directives such as Waste Framework Directive (2008/98/EC)). According to the DG Environment Management Plan for 2010\(^2\), 63 conformity checking studies were carried in 2009\(^3\). However they are not publically available and there is a pending case in the CJEU on this issue.

3. Assessment of Effectiveness

The table below indicates the average effectiveness score of conformity checking, subdivided by EU vs. Member State level.

<table>
<thead>
<tr>
<th>Description</th>
<th>Effectiveness rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall received rating for conformity checking</td>
<td>2.4</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
<td>3</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
<td>1.81</td>
</tr>
</tbody>
</table>

Overall rating for conformity checking roughly falls in the average of the rating received for all compliance promoting tools (2.44). However, nowhere else does the score on the effectiveness differ so much between the EU’s and Member State’s rating. While all interviewed EU officials gave it the highest score, in Member States there was a high prevalence of non-reported and non-familiarity with this compliance promoting tool (twelve out of 32). Furthermore, those national officials who gave their responses considered it as the least effective of all compliance promoting tools.

All **Commission officials** state that conformity checking provides an overview of the quality of transposing legislation, and is usually considered an extension of correlation tables. In the area of Citizenship and Fundamental Rights, the interviewed Commission officials felt that conformity checking provides information about the quality of the transposition that can be used horizontally enabling some political pressure. Weaknesses were found to be link to the quality of the conformity checking studies themselves (Internal Market) and the fact that they are not always carried out on time (Citizenship and Fundamental Rights). Commission officials believe that conformity checking should always be carried out by a native speaker of the language used in the respective Member State (Internal Market).

**Officials in Member States** value the overview of the quality of transposing legislation and detailed analysis of Member States’ legislation provided by the conformity checking

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\(^2\) Management plan 2010, DG Environment, 0703 Development and implementation of EU Environmental policy and legislation, Specific Objective 4, p.22.

\(^3\)Information on the conformity checking studies carried out can be found at [http://ec.europa.eu/environment/legal/law/compliance.htm](http://ec.europa.eu/environment/legal/law/compliance.htm), accessed on 20 March 2013.
Member States are calling for conformity-checking studies to put more emphasis on effective transposition rather than verbatim transposition (Spain – General). The Commission should aim at analysing the legislation with a focus on the aims of the provisions (Sweden – Environment). Certain officials call for more significant involvement of Member States when studies are drafted (Germany – Internal Market; Citizenship and Fundamental Rights). They call for the Commission to improve the visibility of these conformity checking studies.

### 3.3.5. Guidelines

#### 1. Description

Commission Guidelines are non-legally binding documents usually adopted as Commission Communications. The importance of the guidelines was also recognised in the TFEU as the Treaty itself calls for adoption of various guidelines on different occasions\(^74\) (e.g. Article 5 TFEU). They are also developed when secondary law provisions request them. However, a commonly agreed definition of guidelines does not exist. In general, they aim at ensuring a harmonised approach and at clarifying the Commission position on the interpretation and implementation requirements of specific Directives’ provisions which could guide the enforcement measures that the Commission might take. Guidelines have also been developed in some cases where the implementation of certain provisions of a Directive varied too much across Member States and could potentially raise distortions in the market.

Despite the fact that guidelines are non-legally binding, Member States usually comply with them when implementing the EU acquis according to an interviewed EU official (Environment). Officials note that prospects of initiation of infringement procedures by the Commission might explain Member States approach since the CJEU also takes the content of the guidelines into consideration when deciding on relevant cases.

#### 2. Examples of use

Amongst the assessed EU legal acts in the area of Environment:

- The Air Quality Directive 2008/50/EC requires the Commission to ‘publish guidelines for demonstration and subtraction of exceedances attributable to natural sources’ (Article 20(3)). It also calls for guidelines to further define specific aspects required under Articles 21 or 28 of the Directive;

\(^{74}\) According to Article 5 TFEU, the Union is required to define guidelines for coordination of economic and employment policies.
• Article 29(5) of the Waste Framework Directive (2008/98/EC), another of the analysed EU legal instruments, states that the Commission has to develop guidelines in order to assist Member States in the preparation of waste management programmes or their own waste prevention programmes to be approved at the beginning of 2011; and

• In addition, the Water Framework Directive (2000/60/EC), another analysed EU legal instrument, states that the Commission could adopt guidelines on the implementation of certain provisions of the Directive (Article 20(1)) such as the evaluation of water status. In total, 27 different guidance documents and technical reports75 have been produced to assist stakeholders to implement the Water Framework Directive.

In relation to the analysed Internal Market legal instruments

• The Directive on the full accomplishment of the Internal Market with regard to postal services (Postal Services Directive (2008/6/EC) requires national regulatory authorities to develop guidelines for harmonised application of rules regarding universal service and fair market conditions; and

• The Directive on common rules for internal market in electricity (2009/72/EC) requires the Commission to develop guidelines as an implementing measure.

3. Assessment of Effectiveness

The table below indicates the average effectiveness score of guidelines sub-divided by EU vs. Member State level.

Table 11: Effectiveness score of guidelines

<table>
<thead>
<tr>
<th>Description</th>
<th>Effectiveness rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall received rating for guidelines</td>
<td>2.52</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
<td>2.57</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
<td>2.46</td>
</tr>
</tbody>
</table>

Guidelines are generally assessed above average in their effectiveness as a compliance promoting tool. As it is the case with the majority of other compliance promoting tools, the interviewed Commission officials consider guidelines to be more effective than what their counterparts in Member States do. In terms of effectiveness, guidelines have scored the highest out of any other compliance promoting tools in the environmental policy area.

**EU officials** consider them very useful to ensure a consistent and harmonized approach in the implementation of complex pieces of legislation and to explain the Commission’s position. On the other hand, their biggest weakness, according to Commission officials, is that they are not legally binding and they are sometimes too vague (Internal Market and Citizenship and Fundamental Rights). Indeed, Member States are generally consulted while Guidelines are being drafted and compromises on key issues might require non-specific and vague wording. An improvement, according to Commission officials (Environment), might be brought with the introduction of a public consultation process when drafting guidelines.

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The prevailing understanding among the interviewed **Member State officials** of the Commission guidelines is that they are effective because they explain the Commission’s position (thus ‘safeguarding’ Member States against possible future infringement cases) and give the background to the adoption of certain provisions and explanation of certain terms (UK – Internal Market), including references to case law (Sweden – Citizenship and Fundamental Rights). National interviewees consider that the key weakness of Guidelines is that they are not legally binding (Germany – Environment; Hungary – Environment and Citizenship and Fundamental Rights; Italy – Judicial Cooperation; Sweden – Environment). Furthermore, similarly with EU officials, they highlighted their vagueness (Germany – Environment; Hungary – Citizenship and Fundamental Rights; etc.) and the fact that they are published late (Sweden – Internal Market).

Member States suggest that the Commission, when drafting guidelines, should put emphasis on their quality (Germany – Environment) and that they should be written in simple and clear language. They should be updated; and, when drafting guidelines, the Commission should consult relevant stakeholders and practitioners in Member States.

### 3.3.6. Networks and committees

#### 1. Description

**Networks** are informal bodies composed of representatives of Member States in charge of the implementation of specific EU laws chaired or facilitated by the Commission. The general aim of these Networks is to enhance cooperation and promote the correct implementation of the specific Directives. The national representatives voluntarily participate in Networks to share experience and problems with implementation. Networks can also include representatives of relevant stakeholders.

**Committees** are established through legal provisions in EU legal instruments. They are composed of Member States representatives chaired by the Commission and have the task of assisting the Commission with the implementation of a specific Directive. Committees provide formal opinions (through voting) on proposals for implementing acts. Certain Directives include provisions requiring Committee involvement for the development of implementing acts. The adoption of implementing measures prior to the Lisbon Treaty required Committees to follow the rules under the Comitology Decision\(^{76}\) established for each type of committee i.e. the Advisory, the Management and the Regulatory Committees. The Lisbon Treaty changed the rules for implementing acts under Article 291 of the TFEU leading to the adoption of Regulation n. 182/2011\(^{77}\). However, Committees may be composed by experts on technical issues who may be asked to provide ad hoc technical advice during the meetings on issues including proposals for delegated acts (not subject to comitology as per Article 290, TFEU) or may carry out ‘peer review’ activities for the implementation of measures at national level such as in the case of the Services Directive (2006/123/EC).

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2. Examples of use

The IMPEL (EU Network for the Implementation and Enforcement of Environmental Law) is an example of a Network\(^\text{78}\) bringing together the environmental inspection authorities of the EU Member States, acceding and candidate countries of the EU, EEA (European Economic Area) and EFTA (European Free Trade Association) countries\(^\text{79}\). It was set up in 1992 and aims at improving monitoring of implementation of environmental law. IMPEL’s work is linked to the implementation of the Recommendation on minimum criteria for Environmental Inspections (RMCEI)\(^\text{80}\).

Furthermore, ‘GreenForce’, established in December 2005, is an informal network which aims at promoting the implementation of EU nature and forestry laws and policies. It is composed of representatives from Member States’ nature and forestry bodies overseeing implementation and enforcement as well as the Commission. A network for the Common Implementation Strategy (CIS) of the Water Framework Directive (2000/60/EC) and the Floods Directive\(^\text{81}\) was set up due to their complex technical requirements and the geographical circumstances of the European river basins. This Strategy network gathers Member States, EU institutions and stakeholders in a platform to exchange information, discuss and decide on critical issues of the Directive’s implementation. It is supported by the Water Framework Directive CIRCA (Communication & Information Resource Centre Administrator) site.

It is worth noting that these Committees should not be confused with EP Committees. Committees also exist in practice alongside various Networks. The following analysed EU legal instruments stipulate that the Commission will be assisted by a Committee:

**Environment:**
- Water Framework Directive (2000/60/EC);
- Air Quality Directive (2008/50/EC);
- Waste Framework Directive (2008/98/EC);

**Internal Market:**
- Services Directive (2006/123/EC);
- Transparency Directive (2004/109/EC);
- Directive on Postal Services (2008/6/EC);
- Directive on Internal Market in Electricity (2009/72/EC);
- Directive on Award of Public Contracts (2007/66/EC);

**Judicial Cooperation:**

\(^\text{78}\) More information on the network is accessible on the following link: http://impel.eu/.


Under the Services Directive (2006/123/EC), the Commission has set up a network gathering Member States’ officials, in order to facilitate the exchange of enquiries and responses among Member States. Furthermore, the Commission uses expert groups or independent bodies\textsuperscript{82} in several policy areas to get advice on the implementation of EU law.

3. Assessment of Effectiveness

The table below indicates the average effectiveness score of guidelines sub-divided by EU vs. Member State level.

<table>
<thead>
<tr>
<th>Description</th>
<th>Effectiveness rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall received rating for networks and committees</td>
<td>2.69</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
<td>2.83</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
<td>2.55</td>
</tr>
</tbody>
</table>

The effectiveness score attributed by officials to Networks and Committees is the highest out of all the analysed EU compliance promoting tools. Networks and Committees are considered especially effective in the area of Citizenship and Fundamental Rights with scores of 3 and 2.67 on the EU and Member State level respectively. It is worth noting the difference with the low effectiveness rate of committees for transposition (section 2).

The Commission officials believe that Networks and Committees are very effective in facilitating the exchange of best practices and problem solutions since they gather the people engaged in the implementation on the ground work facing the implementation problems. According to one of the interviewed officials (Environment), committee meetings may lead to a softening of the Commission’s position. The Commission’s interest in maintaining satisfactory relations with Member States may lead it to soften its position ‘for the greater good’ when opposed by a significant number of Member States. Possible improvements to this tool put forward by the Commission are limited to the idea of including other stakeholders in the work of Networks and Committees.

Member States’ officials considered the effectiveness of Networks and Committees dependent on a Member State’s readiness to cooperate (Germany – Environment and Citizenship and Fundamental Rights; Latvia – Environment; etc.) and time consuming (Germany – Environment; Spain – Environment) for a small impact. The exchange of best practice and solutions to problems is noted by national officials as the most prominent strength (Hungary – Environment, Internal Market; Italy – Judicial Cooperation; etc.). Since solutions may not be necessarily transferable from one Member State to another, conducting meetings between Member States with similar legal systems could improve their effectiveness (Sweden – Judicial Cooperation). Some Member State officials call for meetings (Germany – Environment) focused on key issues with a strengthened strategic role of working groups. Some interviewees feel that work of networks and committees should be formalised and better structured (Hungary – Internal Market; Italy – Citizenship and Fundamental Rights). A combination of Networks and Committees with implementation plans would add value to these tools (UK - Internal Market).

\textsuperscript{82} For example, please see \url{http://www.equineteurope.org/}, accessed on 20 February 2013.
3.3.7. Implementation plans

1. Description

Implementation plans are documents enabling the planning of the appropriate measures that need to be put in place at Member State level to ensure achievement of the objectives of a Directive. They may concern individual provisions or the entire Directive. In most cases, Member States have the obligation to communicate the plans which should be checked by the Commission in relation to their effectiveness towards their objectives\(^{83}\).

Transposition and Implementation Plans (TIPs) are also prepared by the Commission to assist Member States in the transposition and implementation of Directives. According to the Commission, TIPs identify all main risks for the timely and correct implementation of a new Directive and the appropriate actions to counter those risks. TIPs help Commission and Member States to anticipate challenges in the context of a specific piece of legislation. A strict definition of TIPs is not provided and they may include variations of different tools such as checklists, guidelines, and scoreboards.

2. Examples of use

Developing TIPs on the side of the Commission is part of the Commission’s ‘Smart Regulation’ approach. Since 2008, risk-based Transposition Implementation Plans\(^ {84}\) are systematically prepared for all new important environmental directives. Furthermore, the Commission now requires TIPs to be developed in every Directive on health and consumer protection. It is customary to develop implementation plans also in the areas of enterprise and industry policy and, to a certain extent, for internal market measures.

In practice, according to the interviews conducted with the Commission officials, TIPs issued by the Commission seem to have been used in the case of the Services Directive (2006/123/EC) and the Industrial Emissions Directive\(^ {85}\). As far as implementation plans to be prepared by the Member States are concerned, in the area of Environment, according to Article 23 of the Air Quality Directive (2008/50/EC), Member States must implement plans and programmes in order to achieve the limit values of certain atmospheric pollutants, such as dangerous airborne particles (PM10) within a deadline. These plans and programmes covering given zones or agglomerations must be submitted to the Commission no later than two years after the end of the year when the limit values were exceeded and the Commission must be informed every three years of the progress of the plan or programme. The Commission has the obligation to regularly check the implementation of the plans or programmes by examining their progress and the trends in air pollution.

Article 28(2) of the Waste Framework Directive (2008/98/EC) requires Member States to develop implementation plans that would ‘set out an analysis of the current waste management situation in the geographical entity concerned, as well as the measures to be taken to improve environmentally sound preparing for re-use, recycling, recovery and

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\(^{84}\) Transposition Implementation Plan is an inventory and planning of proactive measures tool to be taken during the transposition period in order to ensure timely and complete transposition and proper application of a directive with a particular focus on provisions likely to pose difficulties.

disposal of waste and an evaluation of how the plan will support the implementation of the objectives and provisions of this Directive.

3. Assessment of Effectiveness

The table below indicates the average effectiveness score of implementation plans subdivided by EU vs. Member State level.

**Table 13: Effectiveness score of implementation plans**

<table>
<thead>
<tr>
<th>Description</th>
<th>Effectiveness rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall received rating for implementation plans</td>
<td>2.5</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
<td>2.75</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
<td>2.24</td>
</tr>
</tbody>
</table>

The effectiveness score of implementation plans given by interviewed officials is considered to be average. Responses given by these officials focused mostly on the TIPs.

At **EU level**, while no strengths and weaknesses were identified for implementation plans, some improvements were proposed concerning mostly TIPs. The main suggestions include a proposal to make them systematically public (Environment) and to require similar types of TIPs at Member States level to be enforced by the Commission (Internal Market).

Many interviewed **Member State officials** felt that TIPs are useful tools (Spain – General and Environment; Hungary – Internal Market, Judicial Cooperation and Citizenship and Fundamental Rights; Sweden – Judicial Cooperation; UK – Internal Market). However, their effectiveness depends on Member States’ readiness to apply them as well as on its constitutional set-up (Germany – Environment).

3.3.8. Package Meetings

1. Description

Package meetings between the Commission and individual Member States are a tool to identify ways to solve compliance problems subject to infringement procedures, and to obtain information about specific potential breaches. These meetings are an initiative of the Commission to improve the management of complaints (prior to infringement phase or during the infringement phase) by promoting a more direct dialogue with the representatives of the Member States at national, regional or local level and understand the barriers to compliance. They are organised on ad hoc basis and will cover pre-infringement or infringement cases at any stage (before or after Letter of Formal Notice or Reasoned opinion) on a specific policy concerning the specific Member State. They take place in the relevant Member State and may involve representatives of central, regional or local authorities. Some Commission officials have developed the practice of having parallel meetings with national NGOs in order to discuss implementation and enforcement problems in the country.
2. Examples of use

In practice, package meetings are organised to discuss all compliance issues emerging on a specific policy area in a specific country while they do not take place in all policy areas. They cover all the EU legal instruments comprising a policy area. They are particularly and most often used in the environmental field.

3. Assessment of Effectiveness

The table below indicates the average effectiveness score of package meetings sub-divided by EU vs. Member State level.

**Table 14: Effectiveness score of package meetings**

<table>
<thead>
<tr>
<th>Description</th>
<th>Effectiveness rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall received rating for package meetings</td>
<td>2.59</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
<td>2.5</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
<td>2.67</td>
</tr>
</tbody>
</table>

This is the only analysed compliance-promoting tool where interviewed Member States’ officials have evaluated its effectiveness higher than their EU counterparts. In general, the score was rather high.

**Commission officials** acknowledged that package meetings are not organised systematically in every policy area and for all Member States. There are countries where many package meetings are conducted (e.g. Poland, Romania, Bulgaria) and others where no package meetings take place (e.g. Scandinavia, the Baltic countries). The strengths of the tool, as identified by EU officials, are that it provides a better understanding of problems and offers a chance to meet all competent authorities with whom the Commission needs to share information. Formalisation of the process was the only improvement proposed by the Commission interviewed officials.

Interviewed **Member State officials** feel that package meetings contribute to a better understanding of problems and constitute a forum for dialogue between the Commission and a wide array of competent authorities, including local or regional level which proves to be very useful for quasi-federal Member States (Spain – General). They also provide for a better understanding of the Commission’s position on a variety of EU Pilot or infringement cases. One Member State official finds package meetings to be very resource efficient (Sweden – Environment). With regard to the weaknesses, Member States officials feel that package meetings cannot solve political questions but improve the understanding of the cases (Germany – Environment). Sometimes they are process-oriented rather than problem solving-oriented (Sweden – Judicial Cooperation) but generally national officials call for a more systematic use of package meetings and to be better structured.
3.3.9. Inspections

1. Description

Member States are often required by EU law to monitor the implementation of legislation through inspections. It is then up to the Member States to designate the competent authorities and to monitor the frequency and appropriateness of inspections.

Currently, the only instrument at EU level providing for common rules on environmental inspections at national level and strengthening implementation of environmental legislation is the Recommendation providing Minimum Criteria for Environmental Inspections (RMCEI). However, according to Article 288 of the TFEU Recommendations do not have a binding force. Disparities in the application of the RMCEI have been spotted at national level, given Member States’ different concepts of inspections, or interpretations of the criteria established in the RMCEI. According to the European Parliament 2008 Resolution, the problems of implementation of the RMCEI makes it impossible to have a high level of (environmental) protection throughout the EU and creates an uneven level playing field, which may lead to distortions in competition.

The Council Conclusions adopted on 20 December 2010 requested for ‘improving environmental policy instruments’, urged the Commission to enhance implementation and enforcement of EU law and called for a clarification and harmonization of existing rules, i.e. the RMCEI.

In relation to the EU level inspection, the Commission is currently entitled to examine compliance on the ground through inspections in a few areas. The 28th Annual Commission report on application of EU law refers to these areas, for example, the collection of the Union’s own resources from VAT, which is the responsibility of the budget services assisted by experts from the taxation field. It also refers to food safety, animal health and welfare requirements which can be checked on the spot by the Food and Veterinary Office (FVO) of the Commission. Specialised EU agencies in cooperation with the Commission maritime and air transport services inspect safety and security in the maritime and aviation sector. Nuclear installations are also subject to periodic inspections by the Commission service.

Commission inspection powers are not legally based on the Treaty provisions. The Treaty does not confer either inspections or investigative powers to the Commission in environmental matters. Nor does it confer these powers in the above-mentioned areas where Commission officials are entitled to investigate on. However, a legally binding act is generally required.

The need for further monitoring/inspections/investigation powers at EU level (i.e. by the Commission) in the environmental policy is currently under discussion. DG Environment is has just held a public consultation on the revision of the EU legal framework on environmental inspection (February – May 2013). The consultations are held with various stakeholders such as competent national authorities, NGOs, businesses, etc. According to
the available information[91], the Commission plans to propose a new horizontal binding instrument on environmental inspections, after the full impact assessment has been carried out, later this year. Ongoing discussions refer to the need for a legislative act to provide for the Commission investigation powers on the implementation of EU environmental law and related infringement procedures. The role of the European Environmental Agency (EEA) to support the Commission in carrying out these inspections was discussed during the adoption of the Regulation establishing the EEA.

2. Examples of use

National inspections:

Several EU Directives in the area of environmental protection contain obligations for Member States to carrying out national level inspection. For example, Article 34 of the Waste Framework Directive (2008/98/EC) requires appropriate periodic inspections by competent authorities on establishments of undertakings carrying out waste treatment operations, professional transport or collection of waste, or production of hazardous waste.

Similarly, in the area of Internal Market, the Services Directive (2006/123/EC) contains several provisions on checks and inspections. For instance, Article 29 specifies the information obligations for inspections of establishments via other Member States. Article 31 (b) establishes the conditions for checks and inspections in cases where a provider moves temporarily to a Member State or provides services on a Member State other than where it was established. The Transparency Directive (2004/109/EC) contains a provision (Art. 24 (4) (i)) establishing the Member States competence to carry out on-site inspections in its territory according to national law to verify compliance with the Directive.

EU Inspections:

After the Erika accident, Regulation EC No 725/2004 on enhancing ship and port facility security[92] was adopted. The Regulation enabled the Commission to carry out inspections, in cooperation with the Member State focal point, to monitor its application. The European Maritime Safety Agency (EMSA)[93] in Lisbon was set up to provide technical assistance to the Commission for these inspections[94].

In 1996 the mad cow disease death toll, mainly in Britain, triggered the alarms at EU level. The European Parliament created a BSE Committee that adopted a "conditional motion of censure" on the Commission, which then set up a horizontal group composed of eight Commissioners to assess and decide on corrective actions. Such actions were taken and the Food Veterinary Office (FVO) was created with inspection powers to check on compliance with the requirements of EU food safety and quality, animal health and welfare and plant health legislation.

The European Aviation Safety Agency (EASA)\textsuperscript{95} assists the Commission in the monitoring of the implementation of aviation safety rules. Pursuant to article 46 of the Regulation, the Agency may itself conduct or allocate to national aviation authorities or qualified entities all necessary investigation of undertakings. The Agency carries out Standardisation Inspections in EASA Member States in accordance with the Commission.

3. Assessment of Effectiveness

The table below indicated the average effectiveness score of inspections sub-divided by EU vs. Member State level.

<table>
<thead>
<tr>
<th>Description</th>
<th>Effectiveness rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall received rating for inspections</td>
<td>2.5</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
<td>3</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
<td>1.99</td>
</tr>
</tbody>
</table>

Apart from conformity checking, nowhere else do EU and Member States’ opinions differ so much in terms of the effectiveness of a compliance-promoting tool as they do in respect of inspections. Furthermore, this is the only compliance promoting tool where the interviewed officials were asked to give their rating on the effectiveness of both EU and Member State inspection having in mind the limited competences at EU level.

The strength attributed to EU level inspection identified by the EU officials interviewed was their recognition of their findings by the courts (Environment) and their deterrent effect on operators and Member States to comply with rules. No weaknesses were pointed out and no proposals for improvements were put forward. They also recognised the effectiveness of national inspection to enforce implementation of EU law.

Concerning national inspections, one of the strengths put forward Member States’ officials is that inspections verify compliance on practical level, therefore improving enforcement of EU legislation. In terms of its weaknesses, interviewees felt that inspections may be sometimes time and resource consuming (Germany – Environment) and that there is a lack of understanding about the role and purpose of the inspection authorities by the private sector (Latvia – Environment). Proposals from national officials were also directed towards the introduction of EU level (environmental) inspection (e.g. Spain and Hungary) highlighting that the lack of EU environmental inspections is a weakness. Some interviewees, however, (Germany – Environment; Spain – General) feel that EU environmental inspection is neither legitimate nor feasible. They propose that, instead, the improvements of national inspections should be carried out through IMPEL and better cooperation between inspection and permitting authorities across the EU. Other interviewees thought that the national inspections should be more frequent and systematic (Spain) and that more effort should be placed in dissemination of information on what inspections entails (Latvia – Environment).

3.3.10. Fitness checks

1. Description

Fitness checks are evaluation tools assessing whether the regulatory framework for a policy sector is fit for purpose. Their aim is to identify excessive administrative burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time, and to help identify the cumulative impact of legislation. Their findings serve as a basis for drawing policy conclusions on the future of the relevant regulatory framework\(^\text{96}\). 

2. Examples of use

In 2010, pilot fitness checks exercises were started in four policy areas: Environment, Transport, Employment and Social policy, and in Industrial policy. In the area of Environment, ‘fitness checks’ are conducted in the area of EU freshwater policy, primarily Water Framework Directive (2000/60/EC). The Commission Staff Working Document on Fitness Checks of EU Freshwater Policy\(^\text{97}\) was published in November 2012. The aim of this document is to provide a comprehensive presentation of the evidence obtained from the Fitness Check on freshwater policy through analytical research and stakeholder consultation\(^\text{98}\). It analyses the relevant, effectiveness, efficiency and coherence of EU Freshwater Policy.

3. Assessment of Effectiveness

The table below indicated the average effectiveness score of fitness checks sub-divided by EU vs. Member State level.

<table>
<thead>
<tr>
<th>Table 16: Effectiveness score of fitness checks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description</td>
</tr>
<tr>
<td>Overall received rating for fitness checks</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
</tr>
</tbody>
</table>

According to the analysis carried out, fitness checks are perceived by EU and national officials as a below average compliance promoting tool in terms of their effectiveness although the score was higher among Member States in the area of Internal Market.

According to the interviews with the Commission officials, fitness checks constitute a rather comprehensive and complete system for monitoring of the implementation of EU legislation. However, in certain cases fitness checks have a limited value as they depend on the information provided by Member States..

On the Member State level, interviewees feel that fitness checks help identify needs for new instruments (Germany – Environment) and that they are very useful with regard to complex Directives (UK – Internal Market). The also pointed out to their low efficiency on time and resources (UK – Internal Market; Latvia – Judicial Cooperation) as well as to the vagueness of the tool (Germany – Environment). One of the interviewees highlighted the

\(^{96}\) http://ec.europa.eu/dgs/secretariat_general/evaluation/docs/fitness_check_en.pdf, accessed on 12 April 2013


risk that this tool may be used to water down legislative acts and reduce environmental protection objectives (Spain – Environment. Furthermore, they should not be carried out for new Directives whose implementation periods are too short to allow taking lessons (Spain – General). Directives with greater economic impact should also be given priority (UK – Internal Market).

3.3.11. Legal reviews

1. Description

Legal reviews are tools aiming at setting deadlines by which a specific clause or legislative act will be reviewed or amended. In most cases, legal reviews are linked to reporting obligations which provide information on barriers to good implementation or elements of a legal instrument that need to be modified.

2. Examples of use

In the area of Environment, Article 19(2) of the Water Framework Directive (2000/60/EC) requires the Commission to review the Directive at the latest 19 years after the date of its entry into force and to propose any necessary amendments to it.

In the area of Internal Market, Article 22(2) of the Transparency Directive (2004/109/EC) states that the Commission will review the implementation of certain provisions of the Directive and, propose ways to further facilitate compliance. Further, Article 33 of the Directive establishes an obligation of the Commission to evaluate the implementation of the Directive in a broader context of the functioning of the European financial markets.

In the area of Judicial Cooperation, Article 34(4) of the Council Framework Decision on Arrest Warrant (2002/584/JHA) states that the Commission must review the practical application of the provisions of the Decision.

3. Assessment of Effectiveness

The table below indicates the average effectiveness score of legal reviews sub-divided by EU vs. Member State level.

<table>
<thead>
<tr>
<th>Table 17: Effectiveness score of legal reviews</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description</td>
</tr>
<tr>
<td>Overall received rating for legal reviews</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
</tr>
</tbody>
</table>

Just as it was the case with the fitness checks, legal reviews are considered by the interviewees as below average tools in terms of their effectiveness. The Commission has a mandate to review EU legal instruments at all times.

According to interviews with the Commission officials, legal reviews clauses in practice may have limited impact. Legal reviews are considered especially important regarding policy areas experiencing constant changes (e.g. Internal Market). However, effectiveness
of this tool ultimately depends on carrying them out after sufficient period of implementation.

**Member States** recognised that the effectiveness of this tool depends on Member States’ readiness to report. Furthermore, Member State officials regard this tool as time and resource consuming (Germany – Environment; Latvia – Internal Market and Judicial Cooperation). Some interviewees feel that legal reviews are conducted too soon (Sweden – Judicial Cooperation, etc.), while they do not assess the legislation in terms of the impact that it was designed to have (UK – Internal Market). Uncovering new problems and analysing outstanding issues were recognised as the strengths of this tool. Similar comments were also made as for fitness checks, namely the risk that legal reviews of EU legislation might actually serve for watering down its objectives.

As a general recommendation, Member States officials feel that more attention should be placed on the timing of legal reviews. Furthermore, they should only be used for key EU acts and not on a regularly basis, in order to avoid unnecessary burdens on human and financial resources (Germany – Environment). It is also suggested that the impact assessment required for the new legislative act should assess how to measure success, instead of just looking at costs and benefits (UK – Internal Market).

### 3.3.12. Reporting obligations

#### 1. Description

In many cases the Commission is required by specific provisions of EU legislative acts to submit to the EP and the Council a report on the implementation of certain aspects or a Directive. The Commission in most cases will be entitled to accompany the report with appropriate proposals for amendments or new pieces of legislation. The Commission publishes an annual Report on the application of EU law. Similarly, Member States are required to communicate to the Commission a report on the implementation of all or some of a Directive's provision. Those reports should be made public and are used as the basis of the Commission report on the Directive.

Specifically in the Environmental area, with the aim of rationalising and improving the transmission of information through reports concerning certain environmental Directives, the EU adopted Directive 91/692/EEC of 23 December 1991 standardizing and rationalizing reports on the implementation of certain Directives relating to the environment.

#### 2. Examples of use

In the area of environmental policy, Article 15 of the Water Framework Directive (2000/60/EC) set up reporting obligations for the Member States vis-à-vis the Commission and other Member States. The article also specifies the timeframe and content requirements of the reports.

Reporting requirements also exist in the area of Internal Market. The Postal Services Directive (2008/6/EC) requires the European Commission to submit by a specific deadline to the EP and the Council a report regarding developments in the internal market of postal

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services and other developments in the sector. The Directive also sets a timeframe for the reporting.

Reporting requirements are also present in the area of Judicial Cooperation (e.g. Article 34(3) of the Council Framework Decision (2002/584/JHA) on the European arrest warrant).

In the area of Citizenship & Fundamental Rights, Article 16 of the Equal Treatment Directive (2004/113/EC) required Member States to communicate all available information concerning the application of the Directive to the Commission by 21 December 2009 and every five years thereafter. The Commission was asked to draw up a summary report including ‘a review of the current practices of Member States in relation to Article 5 with regard to the use of sex as a factor in the calculation of premiums and benefits’ by 21 December 2010 but it has been postponed to 2014.\(^\text{100}\)

3. Assessment of Effectiveness

The table below indicated the average effectiveness score of reporting obligations subdivided by EU vs. Member State level and by policy area.

**Table 18: Effectiveness score of reporting obligations**

<table>
<thead>
<tr>
<th>Description</th>
<th>Effectiveness rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall received rating for reporting obligations</td>
<td>2.28</td>
</tr>
<tr>
<td>Rating received by interviewed EU officials</td>
<td>2.43</td>
</tr>
<tr>
<td>Rating received by interviewed Member States officials</td>
<td>2.12</td>
</tr>
</tbody>
</table>

Reporting obligations are rated lower than the average rate (2.44) in terms of their effectiveness. EU officials working in Environment policy scored this tool considerably lower than his counterparts in Member States. In the other policy areas, scores given by interviewed EU officials are higher than the ones given by Member State officials.

Reporting obligations are closely connected to legal reviews and fitness checks. According to the interviews with the Commission officials, their effectiveness depends on Member States’ reported information. Reports offer an overview of transposition and application of a legal instrument and constitute the basis for applying peer and public pressure. On the other hand, they can be very time and resource consuming. Reporting obligations could be better realised if the national feedback contained more precise information.

The opportunity for a holistic overview of transposition and application in a Member State through publishing the relevant information publicly available and enabling peer and public pressure are considered the main strengths of reporting obligations by Member States officials. Added value is the fact that reporting obligations provide for comparison between Member States. However, the effectiveness of this tool depends on whether data is comparable and sufficiently reliable, and if it can be processed in a uniform IT-format and is analysed with a view to develop practical recommendations according to interviewed Member State officials (Germany – Environment). Member State officials also feel that the Commission requests certain information without any coordination and that it is not

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sufficiently taking into account how time and resource consuming this compliance promoting tool is.

Member States’ officials proposed some improvements such as better coordination and a simplification of reporting obligations. Further, data should be comparable and streamlined with case reporting needs under different overlap (Latvia – Environment) and should be dovetailed with data provided for the INSPIRE Directive\textsuperscript{101}. Finally, it has been suggested that fulfilled reporting obligations should be “rewarded” with useful information and analysis in return (Germany – Environment).

3.3.13. Other possible compliance promoting tools

In addition to identified compliance promoting tools, several other possible compliance promoting tools were identified in the course of the interviews.

- **Press releases** were identified as a very useful tool for application of peer pressure and to raise awareness of possible shortcomings in their legislation and practice.

- In the area of Internal Market, interviewed Commission officials considered useful the organisation of **high level workshops** in Member State between a Commissioner (once enters in office) and high ranking national officials followed by technical meetings.

- In the area of Environment, at the Member State level, **conformity checklists** are reported to be very useful. They were used for the first time for the Floods Directive (2007/60/EC). Conformity checklists are planned to be used for all new environmental directives in the future.

- In addition compliance promoting tools could be introduced by EU Member States themselves ultimately contributing to the better implementation of EU legislation. In federal Member States (e.g. Germany), introduction of **round-table discussions at the planning** stage in order to deal with **sub-national issues** was reported as a tool helping transposition and application.

- Finally, it is worth mentioning that there are improvements which do not necessarily constitute, strictly speaking, a ‘compliance-promoting’ tool, but contribute to their effectiveness. Designating a Member State contact point where all the information pertaining to transposition of EU legislation can be accessed would enhance the effectiveness of the EU legislation.

An assessment of the different tools and their effectiveness in improving compliance with EU law is presented in Section 5 under Conclusions and Recommendations.

Conclusions

This section provides an assessment based on Commission and Member States’ officials views on the effectiveness of compliance promoting tools developed by the Commission to promote monitoring and improve full implementation.

Package Meetings are considered to be the most useful compliance promoting tool while Fitness Checks are considered to be least effective one. In general, compliance promoting tools are considered to be effective.

Certain compliance promoting tools should be mandatory for all EU legal instruments. Correlation tables should be compulsory given their key role in ensuring correct transposition. Further action concerning inspections, especially EU level inspections, should be encouraged.

Proposals to improve effectiveness of the compliance promoting tools include their use in a more strategic way, tailored to fit the specific needs of each EU legal instrument. For example, scoreboards should be used only for legal instruments whose implementation requires political and public pressure while networks should be limited to cases where exchange of information is required. Certain tools such as reporting should only be used if the legal act has been implemented long enough to allow drawing conclusions.

In addition, public access to certain compliance promoting tools, would ultimately contribute to better implementation of EU law. The publication of compliance checking studies, TIPS and agenda for package meetings in user friendly registries or data bases should be encouraged.
4. PRE-INFRINGEMENT TOOLS AND INFRINGEMENT PROCEEDINGS

This Section discusses the effectiveness, transparency and efficiency of two pre-infringement tools, i.e. CHAP and EU Pilot and the correlation between the transposition trends for the selected Member States identified in Section 2.1.3 and the initiation of infringement proceedings by the Commission. It also provides a detailed analysis of the CHAP and EU Pilot on the basis of the results collected during the interviews with Commission and national officials. Furthermore, an analysis is provided in relation to the infringement proceedings initiated by the Commission on the cases of delayed transposition and non-communication with regard to the selected EU legal instruments and the selected Member States.

The Secretariat General of the Commission has the responsibility of the management of EU Pilot and CHAP. On this role two representatives from Secretariat General participated in the interviews on EU Pilot and CHAP but prevented other services in the Commission from being interviewed on the effectiveness of these tools. Therefore the communication concerning this issue was limited to representatives of the Secretariat-General of the Commission and Member States officials.

4.1. Pre-infringement tools

4.1.1. Introduction

CHAP and EU Pilot are newly created tools set up with the aim to promote compliance with EU law prior to initiating an infringement procedure. They are also two specific IT tools. CHAP is a data base which enables the Commission to register complaints and enquiries, transfer data related to these and, finally, store them in electronic archives in a structured way. EU Pilot is linked to a data base and communication tool for pre-infringement cases. They are complementary to other Commission databases such as NIF (specific for infringement procedures) and ARES (registration of all documents created, received and held by the Commission).

1. The CHAP

CHAP is an IT tool exclusively created for and used by the Commission which supports the EU Pilot and is complementary to it. Contrary to EU Pilot, Member States do not have access to CHAP, and, as it is the case with EU Pilot, the public does not have access to it or its content, such as for example, to the list of existing registered complaints. It is a database which has two applications: an external one, where complainants send their complaints or enquiries, and an internal one, which the Commission staff can access in order to handle the files.

CHAP was created in 2009 with the aim of registering any complaints filed with the Commission by anyone (citizens, businesses, representatives of civil society) ‘free of charge against a Member State about any measure (law, regulation or administrative action), absence of measure or practice by a Member State which they consider incompatible with
Union law”. Any complaint addressed to the Commission is registered by the Secretariat-General of the Commission in this application unless it fails to satisfy certain minimum requirements set out in point 3 of the Communication on “Updating the handling of relations with the complainant in respect of the application of Union law”. A receipt of acknowledgement indicating that the correspondence has been registered as a complaint is sent within fifteen working days from receipt. This latter point represents an innovation, since previously only correspondence whose content had been assessed by Commission services was registered.

CHAP as a ‘registry of complaints and enquiries’ is not completely new. It partly replaced NIF, an ‘infringement database’ which ‘contained all types of cases regardless of their origin and the stage in the procedure’ including the previous and cumbersome ‘pre-258 letter procedure’ through the Permanent Representations of Member States. Both CHAP and the EU Pilot databases partially replace NIF as they contain all the information related to pre-infringement procedures. Therefore NIF database now contains “cases where the Commission has taken formal steps starting with the letter of formal notice addressed to the Member State under Article 258 TFEU”.

2. The EU Pilot system

What it is

The EU Pilot is a pre-infringement tool which, according to the Commission Communication “A Europe of Results – Applying Community Law”, aims at correcting problems related to Member State compliance with EU law at an early stage by finding out-of-court settlements through the establishment of a partnership relationship between the European Commission and Member States. It is also meant to reduce the number of infringement procedures, to provide more rapid answers to citizens and businesses and to tighten the handling and management of complaints. This objective has been confirmed in the subsequent annual reports produced by the Commission assessing the EU Pilot, where it is considered as a tool providing quicker and better answers to questions and solutions to problems for citizens and businesses.

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102 Communication from the Commission to the Council and the European Parliament “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final, 2.4.2012, p. 4, pt. 2.

103 According to the Commission Communication “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final, any correspondence shall not be investigable as a complaint by the Commission if it is anonymous, fails to show the address of the sender or shows an incomplete address; it fails to refer, explicitly or implicitly, to a Member State to which the measures or practice contrary to Union law may be attributed; it denounces the acts or omissions of a private person or body, unless the measure or complaint reveals the involvement of public authorities or alleges their failure to act in response to those acts or omissions. In all cases, the Commission shall verify whether the correspondence discloses behaviour that is contrary to the competition rules (Articles 101 and 102 TFEU); it fails to set out a grievance; it sets out a grievance with regard to which the Commission has adopted a clear, public and consistent position, which shall be communicated to the complainant; it sets out a grievance which clearly falls outside the scope of Union law.


105 Communication from the Commission to the Council and the European Parliament “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final, 2.4.2012, p. 2.


As a ‘tool for dialogue and problem-solving with the Member States’,\textsuperscript{111} it constitutes a prior phase to a possible infringement procedure, allowing a systematic, flexible and informal cooperation between the Commission and Member States through bilateral discussions whenever shortcomings in the transposition and/or application of EU law by Member State authorities are detected.

The idea is not completely new. Indeed, this non-litigation procedure has come to replace the former ‘pre-infringement’ letter of former Article 226 TEC\textsuperscript{112} (and ex-‘pre-258 letter procedure’) through the Permanent Representations of the Member States. The EU Pilot Project was mentioned for the first time in the Commission Communication about “A Europe of Results – Applying Community Law”\textsuperscript{113} as a new mechanism aimed at dealing with ‘enquiries and complaints raising a question of the correct application of Community law’. Its main purpose consists in ensuring the effective application of EU law by Member States\textsuperscript{114}.

By granting anyone the right to send a complaint or enquiry to the Commission through the webmail of the ‘Europa’ website or by e-mail or regular post, the EU implements the requirements of participatory democracy stated in the Treaty of Lisbon, according to which ‘[e]very citizen shall have the right to participate in the democratic life of the Union’\textsuperscript{115}. Putting these requirements into practice is even more relevant in light of the fact that, as the European Parliament noted, ‘[i]ndividual complaints by businesses and members of the public remain the main source for the detection of breaches of European Union law’\textsuperscript{116}.

Operating since April 2008 on a voluntary basis, the EU Pilot initiative originally included 15 Member States. Six out of the seven Member States analysed in this study participated in the Pilot from the very beginning on: Germany, Hungary, Italy, Spain, Sweden, the United Kingdom\textsuperscript{117}. Latvia joined the EU Pilot in a second phase in January 2011 together with Belgium and Poland, and was followed the same year by Cyprus, France and Greece, bringing the number of participating Member States to 25; Malta and Luxembourg joined the system in 2012\textsuperscript{118}.

The EU Pilot is a non-judicial tool searching for solutions before the Commission would start a non-judicial infringement procedure led and managed by the Commission as Guardian of the Treaties, which adds to existing national and European procedures, to which it is subsidiary and/or complementary.

Further to national procedures, it should not be forgotten that there are other instruments (outside the scope of this study) which are not the Commission responsibility as Guardian of the Treaties to which legal or natural persons may turn to find a solution to problems related to the application or implementation of EU law. These include the possibility to file a

\textsuperscript{112} A flow chart on the main steps of EU Pilot is provided in Annex 7 of the study.
\textsuperscript{113} Communication from the Commission “A Europe of Results – Applying Community Law”, COM (2007) 502 final, p. 11.
\textsuperscript{115} Article 10 (3) TEU.
\textsuperscript{116} European Parliament Report on the 28th annual report on monitoring the application of EU law (2010) (A7-0330/2012), p. 8, pt. 30. This is not a surprise as the Commission Communication “Relations with the complainant in respect of infringements of Community Law”, COM (2002) 141 final, pt. 5 that it ‘has regularly acknowledged the vital role played by the complainant in detecting infringements of Community law’.
petition with the European Parliament, which leads to an opinion by the Petitions Committee and has a moral value but is not necessarily linked to action by the Commission as the Guardian of the Treaties. The use of SOLVIT, or SOLVIT+ for internal market issues is another tool where citizens are more directly involved and enter into a dialogue with the national authorities through an IT system and where the Commission does not have a role apart from managing the platform. Furthermore, citizens may address a request to the European Data Protection Supervisor in cases where a breach of data protection rules is alleged. Finally, a complaint may be filed with the European Ombudsman when legal or natural persons suspect a case of maladministration by any EU institution.

The legal basis

There are no legal bases in the Treaty for any pre-infringement procedure and, therefore for the EU Pilot. However, the Commission is, indeed, granted with the competence to follow an (infringement) procedure prior to taking the Member State to the Court. Under Article 258, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, within the respect of its discretionary power it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. The opportunity to submit observations is already granted by the first step of the infringement procedure, the Letter of Formal Notice asking for Member States views prior to the reasoned opinion mentioned in Article 258 TFEU. If the State concerned does not comply with the EU law within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

How the Commission and the Member States communicate within the EU Pilot

To ensure a speedy resolution of problems (given that cases should in principle be dealt with in a timeframe of 20 weeks), every Member State has to designate a national competent authority called “The EU Pilot Central Contact Point”. The EU Pilot IT system channels the communication between the Commission Secretariat-General and/or Commission services and the contact point of Member State authorities.

Out of the seven selected Member States for this study, it is worth noting that the contact point function is carried out by different bodies; for example in Hungary, Spain and Sweden the function of national contact point is carried out by the Ministry of Foreign Affairs. In Germany, the contact point belongs to the Federal Ministry of Economics and Technology. In Italy, the contact point has been set up in the EU Policy Department within the Italian Prime Minister’s Office. This is similar to the UK, where the contact point is part of the EU Section of the Cabinet Office which coordinates at the same time the work on EU Pilot and infringement cases. In Latvia, the contact point belongs to the Ministry of Justice, which is also responsible for the coordination of infringement cases and representation of Latvia before the Court of Justice of the EU. Although the Central Contact Point is reported as competent for ensuring coordination, channelling messages to the Commission and providing legal advice, the technical and political responsibility for each case remains with the line ministry or region according to the thematic competence required by each case.

At EU level, a specific EU Pilot Expert Group, composed of all central national contact points and the European Commission has been set up and is centrally managed by the Commission’s Secretariat-General\(^\text{121}\). In particularly complex cases, exchanges through EU Pilot could be complemented through expert meetings\(^\text{122}\). However no experience of these meetings has been reported yet.

### 3. The functioning of the EU Pilot

Under the EU Pilot system, any natural or legal person\(^\text{123}\) may lodge a complaint with the Commission against a Member State for any measure or practice that might not be compatible with a provision or principle of EU law\(^\text{124}\). As long as the complaint is submitted in writing (by letter, fax, e-mail) in one of the official languages of the Union and satisfies the requirements set out in point 3 of the Communication on “Updating the handling of relations with the complainant in respect of the application of Union law”\(^\text{125}\), there are no further requirements which must be satisfied\(^\text{126}\). There is no need for the complainant to prove having a formal interest in bringing proceedings or being individually and directly concerned by the alleged breach of EU law\(^\text{127}\), as it is required for legal standing before the Court according to Article 263 TFEU.

There are two possibilities to start pre-infringement procedures: either through a complaint or an enquiry by a natural or a legal person (NGO, business) or upon the Commission’s own initiative. From the moment of receipt of a complaint, the Commission has two weeks’ to register it in CHAP. Whenever the Commission decides not to register the correspondence as a complaint in CHAP, ‘it shall notify the author to that effect by ordinary letter setting out [...] the reasons...’\(^\text{128}\), and shall inform the complainant about possible alternative forms of redress (on national, European or international level)\(^\text{129}\). In cases where the Commission decides to register the correspondence in CHAP, it must examine within a month whether to classify it as a complaint which will be transferred to the EU Pilot database\(^\text{130}\), or to initiate an infringement procedure.

Following the registry of the complaint, or the start of the EU Pilot on the Commission’s own initiative, the Commission addresses a question to the Member State concerned which would have ten weeks to report back to the Commission. Ideally, within this time frame, the Member State would make its national law comply with the requirements of EU law or present explanatory observations to the Commission about its compliance. The Commission

\(^{123}\) Communication from the Commission to the Council and the European Parliament “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final, p. 4, pt. 1.
\(^{125}\) Communication from the Commission to the Council and the European Parliament “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final, p. 4-5.
\(^{126}\) Even though the Commission recommends complainants to use the standard complaint form as published in the Official Journal of the European Union and available at the following address: [http://ec.europa.eu/eu_law/your_rights/your_rights_forms_en.htm](http://ec.europa.eu/eu_law/your_rights/your_rights_forms_en.htm), accessed on 25 January 2013.
\(^{128}\) The reasons are those set out in Communication from the Commission to the Council and the European Parliament “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final, p. 5, pt. 3, paragraph 2.
\(^{129}\) Communication from the Commission to the Council and the European Parliament “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final, p. 5, pt. 4.
\(^{130}\) In 2010, the examination of cases registered in CHAP continued for 17 % of the cases via EU Pilot: Report from the Commission, 28th Annual Report on Monitoring the Application of EU Law (2010), COM (2011) 588 final, p. 8.
then would have equally ten weeks to check whether the Member State has in the meantime remedied the situation, and is henceforth fully compliant with the EU legislation in question. If this assessment is positive, then the EU Pilot mechanism has achieved its aim of solving breaches of EU law within a relatively short period of time. The file is subsequently closed. Whenever the Commission decides to close a case, the non-legal binding rules require the Commission to ‘give the complainant prior notice in a letter setting out the grounds on which it is proposing the case to be closed and inviting the complainant to submit any comments within a period of four weeks.” If new information is sent by the complainant, the EU Pilot could continue and even be re-started once the case is closed.

If, on the contrary, the Commission is not satisfied with a Member State’s efforts to comply, then the file may continue but no more as an EU Pilot. In this case, infringement proceedings under Articles 258 and 260 may be started. In exceptional circumstances only, the pre-infringement phase might be skipped to lodge immediately a case before the CJEU. This is the case for non-communication infringements, urgent matters or the requirements of other overriding interests.

The Commission has discretion to decide which way to go (e.g. rejecting the case, starting the EU Pilot, closing it or starting an infringement directly without the pre-infringement phase). The decisions concerning the steps involved in the pre-infringement phase are taken by the Commission services, at the relevant operational unit of the responsible Directorate General, with the ultimate responsibility resting with the Head of Unit. These decisions are not made public and there is no internal control system reviewing them as they are not considered legally binding administrative acts. However, the complainant can always react when informed of the closure of the case, or send new facts. On the contrary, decisions regarding the steps in the infringement procedure, starting by the letter of formal notice, are taken formally by the Commission at College level, ensuring their publicity.

The Commission also enjoys a discretionary power, “[i]n deciding whether or not and when to commence infringement proceedings”, which ‘excludes the right for individuals to require it to adopt a specific position”. Similarly to the EU Pilot cases, when the Commission decides to close an infringement procedure launched on the basis of a complaint, the Commission will inform the complainant in writing of each procedural step. No information submitted by the complainants or related to the complainants’ identities may be disclosed, unless the latter have given their express consent to do so, in accordance with Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.
4. CHAP and EU Pilot in context

CHAP and the EU Pilot were set up as part of a political initiative to improve governance. They were not formally requirements of the Treaties.

A rethink of governance

The White Paper on European Governance (2001) aimed at renewing Community policies on the basis of five principles: openness, participation, accountability, effectiveness and coherence. Furthermore the Lisbon Treaty confirms this objective stating in its Article 1 TEU that “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen” However the meagre role recognised to the complainant in the EU Pilot and infringement procedures do not seem to be in line with these objectives. Furthermore several petitions submitted at the European Parliament referring to citizens’ difficulties to access Commission or Council documents show the difficulties that the EU experiences in translating these objectives and values into reality.

Face to these questions, the Commission insists on the usefulness of informal problem-solving mechanisms (such as SOLVIT and EU Pilot) in continuing to deliver fast and pragmatic solutions to citizens on problems of implementation of EU law. It is undisputable that the EU Pilot constitutes an eloquent illustration of the choice of the Commission to promote to the greatest extent the cooperation with the national competent authorities.

The principle of sound administration

This is a framework principle, enshrined in Article 41 Charter of Fundamental Rights of the European Union\textsuperscript{140}, from which derive a bundle of obligations for institutions, such as the duty to treat enquiries impartially and fairly and the principle of transparency. The Lisbon Treaty emphasises more clearly that transparency is a path to promote good governance and to strengthen civil society’s participation. The principle is currently contained in both the TEU (Art. 11) and the TFEU (Art. 15).

However, as discussed below, the right to a sound administration is constantly balanced with the requirements of an efficient administration. The decrease in costs and in administrative burdens is also one of the objectives of the strategy initiated by the Commission\textsuperscript{141}.

The principle of sound administration requires that ‘EU legislation must be implemented properly if it is to achieve its goals’\textsuperscript{142}. In this perspective, the Commission stresses the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8.

\textsuperscript{141}The Commission estimates it would be feasible to reduce administrative costs by as much as 25% by 2012. This would have a significant economic impact on EU economy - an increase in the level of GDP of about 1.5% or around € 150 billion - \url{http://ec.europa.eu/governance/better_regulation/admin_costs_en.htm}, accessed on 12 April 2013.
\textsuperscript{142}Communication from the Commission to the European Parliament, the Council, the European Economic and
necessity to ‘continue to improve the efficiency of the EU Pilot which aims to provide quick and full answers to citizens’ and businesses’ questions on EU law, and encourage more Member States to participate in it’\textsuperscript{143}. The Code of Good Administrative Behaviour, adopted by the Commission on 13 September 2000 ensures that the principles of good administration are put into practice by Commission staff in their dealings with the public\textsuperscript{144}.

### 4.1.2. Methodology

The assessment of the effectiveness, transparency and efficiency or reliability of the CHAP and EU Pilot is based on interviews with Commission and Member States officials as well as stakeholders at the national level in all four selected policy areas, on the basis of a questionnaire approved by the Parliament. The questionnaire is in Annex 6 of the study.

The table below gives an overview of the responses received, divided by level (i.e. EU and Member State level) and by policy area.

| Table 19: Breakdown of a number of received responses concerning EU Pilot |
|-----------------------------|-----------------|-----------------|-----------------|--------------|-----------------|
|                              | Total | EU \textsuperscript{145} | Member States\textsuperscript{146} | Policy Area |
| Internal Market | Judicial Cooperation | Environment | Citizenship and Fundamental Rights | General\textsuperscript{147} |
| Interviews conducted | 47 | 1 \textsuperscript{148} | 46 | 13 | 4 | 18 | 8 | 4 |

### 4.1.3. Results

#### 1. The effectiveness of EU Pilot

The assessment of the efficiency EU Pilot shows a dichotomy between EU and Member States’ officials on one side and the stakeholders (citizens, economic operators or NGOs) interviewed on the other side regarding the understanding of the purpose of EU Pilot and the ways to achieve its objectives. While a general perception of the interviewees coincide on certain positive aspects of the EU Pilot, they do not coincide on the objectives against which effectiveness should be measured or the legitimacy and legal justification for this tool. The objectives mentioned are:


\textsuperscript{143} http://ec.europa.eu/transparency/civil_society/code/index_en.htm

\textsuperscript{144} Face-to-face interviews

\textsuperscript{145} Phone and face-to-face interviews

\textsuperscript{146} ‘General’ in this table means that a person interviewed did not represent a certain analysed policy area per se. For example, representatives of the Secretariat-General of the Commission were included in this category.

\textsuperscript{147} The responsibility for the management of EU Pilot lies in Secretariat General of the Commission. Within this role, two representatives from Secretariat General agreed to participate in the interviews for this study providing one opinion but instructed the Commission services not to discuss the effectiveness of EU Pilot and CHAP with the research team for this study. The communication concerning this issue was limited to the Secretariat-General of the Commission.
A tool to address implementation problems and find solutions

National officials interviewed see the EU Pilot as an effective tool to achieve this objective. They consider it a welcome improvement on previous pre-infringement procedures and a useful method to examine and resolve issues. It is considered a tool which enables interaction with the Commission and addresses some EU law implementation problems at an early stage. For many of the interviewees, the EU Pilot is seen as a way to address problems, which for various reasons, they did not tackle during transposition or implementation; and a way of doing their best to avoid infringement procedures. In fact, the national officials’ major concern seems to be to satisfy the Commission’s requirements and thereby to avoid infringement.

Concerning the stakeholders interviewed (See Annex 3 Part II), they seemed less concerned about the EU Pilot itself, but rather expect EU Pilot to effectively provide solutions to problems and increase their involvement in the process. They cared less about the technicalities or tools the Commission used. As explained further down in this section of the study, the EU Pilot is considered yet just another, and not a very successful, attempt by the Commission to improve its handling and prompt management of complaints by reducing resources in the Commission to deal with this issue and delegating in Member States. In their views the EU Pilot should be more about solutions than process which is what they are now. Stakeholders expect the EU Pilot to find answers to the implementation issues raised in their complaints. They considered that an increased involvement of complainants in the EU Pilot procedure and higher access to arguments would increase the effectiveness of EU Pilot in finding solutions.

"Swift” problem-solving

One of the welcomed improvements associated with the EU Pilot, revealed by the interviews with Commission and Member State officials, is setting deadlines for both the Commission and the Member States to limit the time frame for the pre-infringement procedure. Here the officials of the Commission’s Secretariat-General stated that in 2012, i.e. after the implementation of EU Pilot in all 27 Member States, the number of days used in average under EU Pilot procedure decreased to 132 from the 169 calendar days needed in average in 2007. According to the Commission’s officials, this reduction of days is a considerable achievement. Indeed, this was confirmed in the 29th Annual Report on the Application of EU Law (2011) that stated, ‘The problem solving discussions under EU Pilot allowed for timely resolution of nearly two thirds of potential infringements’149.

Member State officials also expressed strong satisfaction with this procedure. It speeds up communication with the Commission services, while offering Member States the opportunity to solve (sometimes sensitive) problems of transposition or application. From their perspective, the Pilot’s timeframes seem reasonable. Ten weeks for drafting a response to the Commission and, more generally, the whole time frame of five months, appear manageable. Officials confirm generally that the EU Pilot’s rules are clear and predictable. In some cases it can even happen that answers are sent to the Commission before the required time limit. It should however be noted that cases vary according to subject-matter and complexity. In some cases the deadlines appear to be too short (especially in the environmental policy area). German officials highlighted that the reasonableness of this average timeframe of five months needs to be assessed regarding three factors: the barriers of language, federalism and the complexity of cases.

Stakeholders, have not experienced an improvement in the timeframe of the process yet. However, in addition to stressing the importance of “swift” problem-solving due to the risk of damages that could arise from the Member State’s delay to comply with EU law, they also stress the need for EU Pilot to provide actual outcomes and solutions. They perceive the EU Pilot as being a non-judicial procedure enabling them to file a complaint and therefore contributing to the role of the Commission as the guardian of the Treaties. Their approach is pragmatic.

Furthermore, some cases need to be solved fairly quickly if the negative impacts of non-compliance are to be avoided. In this sense, stakeholders consider that the system would be more efficient if, in cases where the infringement of EU law is clear and serious, the pre-infringement phase were skipped and the infringement procedure under Art. 258 TFEU started immediately.

**A partnership approach built on trust**

The Commission has stated that the EU Pilot ‘[p]rovides a framework for the Commission Departments and Member State authorities to work more closely together in the spirit of sincere cooperation to ensure the correct application of European Union law – the ‘partnership approach’:[150] The interviews with officials clearly show that the EU Pilot is seen by Member States as a way to form a constructive, collaborative and problem-solving dialogue with the Commission, in a confidential bilateral relationship excluding complainants and/or additional stakeholders. As mentioned above, Member State officials are primarily focussed on avoiding long drawn out infringement procedures or litigation with a potential hefty financial penalty at the end rather than on eliminating the problems caused by the lack of compliance (for example potential environmental damage in case of breach of EU environmental legislation). Some Member State officials consider that the EU Pilot is an incentive to handle cases effectively and to bring them to a close.

**Stakeholders**, however, think involving complainants at specific moments in the process would strengthen the Pilot’s effectiveness. Furthermore, the relationship of trust between citizens and national/EU bodies should also be nurtured. Some Member States consider that any dialogue with stakeholders should be the responsibility of the Commission, as in its role as guardian of the Treaties, manages the complaint-handling.

It may be argued that the idea of establishing cooperation between the Member State accused of an alleged breach of EU law and the Commission is not an innovation as such, as it replaces the system of pre-infringement letters (pre-258 letter procedure). However, it is generally appreciated by interviewed officials that the EU Pilot procedure is a more structured and systematic approach than previous methods while at the same time it is less threatening since the lines of communication between Member State authorities and the Commission has become clearer, creating a cooperation/partnership between the Commission departments and Member States. At this pre-infringement stage, the Commission highlights the legal requirements[151] and discusses the way to achieve them.

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[150] European Commission, EU Pilot: Guidelines for Member States, October 2012, p. 3.
[151] National officials indeed stated their concern to ‘satisfy the Commission’ in the pre-infringement stage (Latvia, UK, Germany). According to D. Hadroušek, ‘The rumor is that there are people inside the European Commission who, privately, if not officially, resent the EU Pilot, an invention of the European Commission Secretariat-General. Why should we go through the EU Pilot when we know there is an infringement and the Member State concerned is not likely to do anything about it? And indeed, can anything stop the Commission from launching an infringement procedure right away?’. Hadroušek, Speeding up infringement procedures: recent developments designed to make infringement procedures more effective, Journal for European Environmental and Planning Law
with the Member States on an equal footing. Predictable deadlines apply in a uniform manner and information is processed using a common IT tool. In Germany, where statistically 85% of all cases are solved through the EU Pilot, officials strongly insisted on the added value of this tool compared to the classical pre-infringement procedure. Latvian, Spanish and UK officials expressed similar views. The stakeholders’ involvement is sometimes seen as a threat to that cooperation but several national officials mentioned examples of successful collaboration with complainants. (See section on transparency below)

**Measure of Success: Decrease in number of infringement cases due to launching of EU Pilot**

The first two reports on the EU Pilot measured its success by the number of cases closed and the consequent decrease in infringement cases\(^\text{152}\). While this criterion fulfils management objectives both in the Commission and in the Member States, it is broadly questioned by stakeholders claiming solutions to implementation problems, improved monitoring or investigation of EU law implementation by Commission services and a stronger role for complainants.

Officials interviewed recognised that the number of infringements has decreased since the introduction of EU Pilot. Interviewees at **Secretariat-General of the Commission** welcomed the fact that, while the number of complaints has remained stable after the introduction of the EU Pilot, the number of formal infringements has gone down. They acknowledged several reasons causing the number of complaints to remain stable while there is more legislation, such as legislation becoming more and more technical which leads to monitoring difficulties faced by citizens or the improved public access to national enforcement mechanisms. The question of whether the NGOs would be disappointed with the system and discouraged to submit information to the Commission was dismissed.

Interviewees from **national authorities** strongly agreed that there is a significant link between the introduction of complaint handling mechanisms such as the EU Pilot, and the decreasing number of infringement proceedings. For example, the German and Italian officials observed that, especially in environmental matters, the number of complaints has dropped significantly since the introduction of the EU Pilot, and attributed this to the improvement of the system. In Hungary, the national authorities’ experience also confirmed the correlation between the introduction of pre-infringement mechanisms and the decrease in the number of infringement procedures.

In Latvia however, officials did not see a direct link between the decrease in infringement cases and the launching of the EU Pilot, even though they unanimously saw it is a very efficient way to improve compliance with EU law. Similarly, Spanish officials confirmed that the decrease in infringement might be linked to better implementation practices and more experience of EU law transposition and implementation. They noted that, on environmental matters, the number of complaints has remained broadly constant in the recent past due to an active NGO community with an enormous trust in the EU and the fact that biodiversity or infrastructure cases can be more easily monitored by citizens.

Decreasing the number of infringement cases, as an end in itself, is a concern for **stakeholders**. Stakeholders (e.g. in Germany) confirmed that the EU Pilot has lead to less infringement proceedings and acknowledged that the increase of cases closed and lack of

proper reasons for it is causing a discouraged attitude and loss of confidence in the system. Unanimously, stakeholders in all selected Member States see that the EU Pilot objective to decrease the number of infringements is leading to a weakening of the search for the best solutions to cases and a handling of cases targeted to close them sometimes on formalistic reasons or without motivation being conveyed. Stakeholders do not have a proper role in EU Pilot and lack access to the procedure and to the arguments in the discussions between Commission and national officials which together with the increase number of cases being closed is generating loss of confidence in the system as an effective resolution mechanism. The measures of success of the EU Pilot do not seem appropriate to them and request the Commission to make an effort to ensure that implementation problems are solved in the most appropriate way according to the objectives of the EU legislation and not the national interests. The communication to the public of the results of EU Pilot should focus on those aspects rather than on an administrative argument related to the number of closed cases. More involvement of complainant in the procedure would increase the effectiveness of the system in finding solutions

In brief, it can be concluded that the reduction of a number of formal infringement cases is welcoming if it represents an improvement in implementation of EU law. When evaluating the success of the EU Pilot, one must also take other measures of success such as the duration of the process and quality of achieved solutions. The decrease in the duration of the pre-infringement procedure could already be considered a success of the EU Pilot. Evaluating the level of implementation and quality of achieved solutions represents a more demanding task that needs proper criteria and indicators.

2. The transparency of the EU Pilot

Lack of transparency

The interview results show that general knowledge about the EU Pilot is lacking at national level, and its functioning is not always completely understood. Latvian officials regretted that their knowledge is limited to the stage in which they are involved, and does not extend to the whole mechanism. Latvian and Spanish officials claim for more transparency in the Commission reasoning as to whether Member States’ answers are satisfactory (or not).

Transparency issues are linked to discussions on the role of the complainants, NGOs and the general public in the EU Pilot. Stakeholders in Latvia regretted that complainants do not have access to any information on the case file or the status of the case, apart from some formal answers and letters from the Commission. Such answers include information to the complainants about the case being processed in the EU Pilot; asking permission to disclose their identity to the ministry; informing them about possibilities to seek remedies from relevant Member State authorities/courts; and/or informing them that the case will be closed inviting the complainant to submit any further comments within four weeks.

Stakeholders in Germany argue that, complainants notifying the Commission should be considered a party to the pre-infringement procedure and should be granted the same procedural rights (e.g. access to information or to respond to other parties’ views) as the national authority. This only reflects the situation under national law which cannot be disconnected from the recognition under some national Constitutions of the transparency requirement. Indeed, the strong protection of the transparency principle in Swedish law offers complainants a privileged participation in the dialogue between the Commission and Member State authorities, and thus a better integration of their expectations and points of view which is not the case in other Member States. This higher involvement of stakeholders
has not undermined the system but rather made it more efficient in finding the right solutions. As a practical example, thanks to the principle of public access to official records, it was possible for a stakeholder to follow up on correspondence between the Commission and the government in an ongoing case and to participate by drafting its own response to government documents.

Interviewees also regretted the lack of access to databases (at national and/or EU level) providing information on EU Pilot cases. Indeed, they believe that it would be beneficial to have access to ‘the motivation to close’ cases and the legal arguments and final decisions concerning cases in different Member States, in order to understand the pattern which the Commission applies when dealing with complaints and thus ensure transparency of the pre-infringement procedures. In Italy and in Hungary, national databases have been created\textsuperscript{153}, but they are only partly accessible by the public and not well-known.

This perceived lack of transparency bleeds trust from the system, according to stakeholders. The Commission and the Member States appear to present a complicit bureaucratic front towards the complainant. Stakeholders feel they, and the process in general, would benefit from the greater involvement of the complainant, as is shown by examples such as the Clean Air London (CAL) Case. The CAL (NGO) submitted a complaint to the Commission which was registered in CHAP and then handled by DG ENV through the EU Pilot. CAL was informed of this, but did not see the letter from DG ENV to the Department for the Environment, Food and Rural Affairs (DEFRA). It did see, however, the response from DEFRA, sent directly to CAL with a copy to the Commission. The NGO believes that DEFRA officials focussed more on providing a detailed response when the Commission was behind the request than when CAL asked them prior to the complaint. The possibility for the stakeholder to interact with the Commission during the process was perceived as extremely beneficial. Thus, associating stakeholders in the privileged dialogue between the Commission and Member States improved the efficiency of the EU Pilot in finding solutions. Furthermore it improved participatory democracy in accordance with the newly introduced provisions in the Lisbon Treaty (Art. 1(2) and 10(3) TEU). In other words, while the ‘civic’ character of this tool is appreciated by the stakeholders, not informing citizens comprehensively would deter them from using the EU Pilot, and eventually reduce the latter’s efficiency.

Differing understandings of the purpose of the Pilot explain differing views on its transparency. Both national and EU officials consider that at the pre-infringement stage the case should remain confidential. Matters should be dealt with exclusively between the Commission and the Member States. Member State and European officials think no third-party access to the database should be granted. Their key argument: the purpose of this dialogue is to solve possible problems prior to court. The dialogue should be protected. It is a privileged relationship based on mutual trust and confidentiality. It is considered that opening access of the EU Pilot database to the public or other European institutions would result in changing the role, the procedure and the meaning of this tool, in a way that would jeopardize the initial objective of the EU Pilot.

It was also indicated that an enhanced participation of complainants in the pre-infringement procedure would lead to weakening the Commission’s main role, which is to

\textsuperscript{153} The EU Policies Department within the Italian Prime Minister’s Office has created the database ‘Eurlinfra’ which includes a public area where it is possible to find the main data relating to infringement procedures: i.e. subject matter, status of the procedure, competent authority and allegedly violation. The infringement procedures become public only after the formal procedure is initiated. A database enabling monitoring of Member State’s obligations related to the implementation of directives also exists in Hungary (deadlines, legal acts to be modified, responsible Ministry: \texttt{http://jogharmonizacio.gov.hu/}, accessed on 30 January 2013.
engage in a constructive dialogue with the Member States in order to find solutions to problems related to the implementation of EU law. Some consider that associating complainants in providing evidence would go beyond the Commission’s mission as Guardian of the Treaties. Furthermore it is considered that the Commission discretionary power in the decisions regarding the opening and closure of pre-infringement and infringement procedures could be affected.

However, when examples of transparent practices in some Member States are presented, showing that involvement of complainants in the EU Pilot would enhance its effectiveness and would not jeopardise the achievement of its purpose, no concrete experiences of negative impact of complainants’ participation is provided to justify their rejection by the Commission or the Member States.

In conclusion, the lack of transparency of the EU Pilot procedure is acknowledged by all parties. While stakeholders consider it one of its main shortcomings, officials at national or EU level justify it on the basis of arguments related to the purpose of the tool.

Current EU law rules on access to information

Stakeholders enjoy a limited right to access the public documents of the EU. Proposals to increase the transparency of the EU Pilot cannot be separated from a more general discussion concerning access to information in the EU legal system.

The starting point is Regulation No 1049/2001, which governs and delimits the right of access to documents held by the European institutions. According to this instrument, this right is not absolute. Disclosure of information may be restricted under Article 4(2) if it would undermine the protection of, inter alia, commercial interests, court proceedings and legal advice, the purpose of inspections or investigations and audits unless there is an overriding public interest in disclosure.

The case law interpreting these conditions, when it comes to infringement procedures is rather restrictive. For example, in the Petrie case, the Court of First Instance has considered that it is vital that the Commission is ‘able to conduct investigations into issues in which it has a direct interest as guardian of the Treaties, while at the same time respecting the intrinsic nature of such proceedings. Infringement investigations call for genuine cooperation and an atmosphere of mutual trust between the Commission and the Member State concerned so as to enable those two parties to open discussions with a view to a rapid resolution of the dispute’. It also added that ‘disclosure of those documents, which concern proceedings that are pending (Infringement Procedure No 96/2208 against Italy), could have an adverse effect on another public interest referred to in the Code of Conduct, namely the proper conduct of court proceedings ...’.

However, EU Pilot is not an infringement procedure and the Commission should be able to obtain all possible available information by providing access to the information during the pre-infringement procedure. Currently if the complainant requests a document in

156 Ibid.
the EU Pilot, s/he may see the request refused with the justification that it concerns a phase leading to an infringement procedure, and that the document’s disclosure would undermine the protected interest under Article 4 (2) of Regulation No 1049/2001.\footnote{Regulation No. 1049/2001 is currently being revised. On 30 January 2013, the Council’s 1st reading position was awaited: \url{http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2008/0090(COD)&l=EN#basicInformation}.}

However, recent CJEU case law shows a \textbf{less restrictive approach}\footnote{Judgement of the Court (Grand Chamber), 29 June 2010, \textit{European Commission v. TechnischeGlaswerkeIlmenau GmbH}, C-139/07}. The Court recalled that, while Regulation No 1049/2001 aims at conferring the public the widest possible right to access to documents of EU institutions, this right is, however, subject to limitations justified by reasons of public or private interest. Concerned about striking a balance between the right to information of citizens and the preservation of the other interest at stake, the Court considered that 'in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to fall within an activity mentioned in Article 4(2) of Regulation No 1049/2001. The institution concerned must also supply explanations as to how access to that document could specifically and effectively undermine the interest protected by an exception laid down in that article'.\footnote{Joined cases C-39/05/P and C-52/05 P \textit{Sweden and Turco v Council} [2008] ECR I-4723, paragraph 49.} The mere fact that a document concerns an interest protected by an exception under this Article is not sufficient to justify application of that exception. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical.\footnote{Joined cases C-39/05 P and C-52/05 P \textit{Sweden and Turco v Council} [2008] ECR I-4723, para 35.}

Furthermore, in 2012, the Court has confirmed that the Commission is obliged to disclose documents linked to an infringement procedure once the latter is closed.\footnote{Case T-59/09 \textit{Germany v. Commission}, judgment of 14 February 2012.} Whenever proceedings are closed, access to Commission documents should be granted. Thus, if the file is closed at the end of the EU Pilot procedure without an infringement proceeding being launched, the situation is similar to the situation of a closed infringement proceeding. Furthermore, Member States are consulted on disclosure of their documents, pursuant to Article 4(5) of Regulation No. 1049/2001.\footnote{When Member States refuse disclosure of documents originating from them, they must state reasons for refusal matching with the exceptions listed in Article 4 of the Regulation, Case C-64/05 P, \textit{Kingdom of Sweden v. Commission of the European Communities and Others} [2007] ECR I-11389.} The general rule is that, as long as the infringements file remains open, access to the Member State’s documents is denied without the Member State being consulted unless, given specific circumstances, documents could be disclosed.


\textbf{Absence of clear procedural rules}

The Commission adopted a Communication in 2002, updated in 2012, concerning the handling of relations with the complainant in respect of the application of Union law.\footnote{Commission Communication to the European Parliament and the European Ombudsman on "Relations with the complainant in respect of infringements of Community law", COM (2002) 141 final, p. 8; Communication from the Commission to the Council and the European Parliament "Updating the handling of relations with the complainant in respect of infringements of Community law", COM (2003) 76 final, p. 8.}
Some interviewees referred also to the Commission’s ‘Code of good administrative behaviour’\(^\text{165}\). However, these rules are not legally binding, and thus not always respected; moreover, they are not well known to stakeholders. This leads to uncertainty about the procedure.

Indeed, stakeholders deplored the absence of clear procedural rules for the pre-infringement process (and infringement procedure) on issues including the form of the complaint, content, evidence needed, registration, time limit for the Commission decisions and motivation. Some stakeholders denounce the lack of transparency with regard to the ‘extra time’ sometimes granted to Member States in an EU Pilot case; or the fact of not being informed about the reasons for a ‘positive’ decision, when the Commission accepts as sufficient the response of the Member State and closes the case.

Complainants regret remaining often without information from the Commission on the status of the case for periods that can be as long as a full year, even concerning the acknowledgement of receipt of their complaint. They attest that no access to the legal arguments used by the Commission or the Member States is granted to them and no access is possible to the case file revealing a Member State’s response to the Commission. In this respect, they regret not having the chance to rebut or comment upon the answers given by the Member State.

In general, they perceived the ‘rules of the game’ as being unclear, since cases are built on taking into account Member States’ views but not those of complainants.

*How to enhance transparency?*

Public and private stakeholders concentrate most of their criticism on lack of transparency of the EU Pilot. However, such criticism is not even mentioned by the Commission in the second evaluation report of EU Pilot\(^\text{166}\) or in the accompanying appendices\(^\text{167}\).

None of the arguments used to justify the lack of transparency show how access to information could jeopardise the EU Pilot effectiveness. It is not clear how allowing access to the legal arguments in the documents developed by the Commission or the Member States or the participation of complainants in the discussion prior to infringement procedure could undermine the effectiveness of the EU Pilot in finding solutions or affect the Commission’s decision-making power.

The Commission enjoys a discretionary power (further strengthened by Art. 260 TFEU) in the decisions regarding the opening and closure of pre-infringement and infringement procedures\(^\text{168}\) that needs to be preserved and the exercise of which does not seem incompatible with a clear and legally binding regulatory framework.

Various proposals have been put forward as to how transparency could be enhanced. When assessing any of these proposals, what needs to be borne in mind is that the imperative of

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transparency should be balanced against the need to preserve a certain degree of efficiency in the Commission’s working.

- **Suggestions by national officials**

The research carried out for this study concludes in general that the Commission and the Member States do not favour opening their privileged dialogue to the complainants. Germany, Hungary, Latvia, Spain and the United Kingdom are concerned that greater public involvement would change the role, the procedure and the meaning of EU Pilot and would jeopardize its initial objective.

Nevertheless, and without any major concern as to coherence, the same authorities call for an enhanced involvement of complainants for the benefit of the pre-infringement procedure through a dialogue engaged by the Commission with the complainants and limited to these two parties. The Member State officials, even though favourable to the provision of more information on the progress of pre-infringement cases, are opposed to transforming the confidential relationship that they have with the Commission into a three-party-process.

Sweden and Italy have designed systems which involve the complainant, considering such a dialogue valuable to clarify the information presented, and if the complainant has no objection as to the confidentiality of its participation. An enhanced accessibility of all the documents related to the pending files and greater transparency of the procedures was also welcomed by the officials interviewed (e.g. by circulating relevant documents, making Member States’ responses and the decisions by the Commission available along the whole procedure). Furthermore, granting complainants access to databases providing information on the EU Pilot cases is considered by these national officials a necessity.

The Commission is, upon this basis, also invited to provide more precise and detailed information than those contained in the currently publicly available databases on the cases under infringement procedure. Also the proposal has been put forward to improve the information sheets for each infringement case included in the database publicly available. Finally, it has been proposed that the Commission, whenever an infringement procedure is opened, provide to the Member State concerned appropriate, exhaustive and clear motivations; the latter should be attached to the main file as a distinct document.

- **Stakeholders expectations and resolutions by the EP**

Stakeholders generally regret that the EU Pilot procedure resembles more a dialogue between national public authorities and Commission services. They call for a better inclusion of complainants (who, it is important to recall, make up 49% of the originators of the files submitted) in that relationship. The analysis of the interviews shows a certain coherence of the positions by the stakeholders, regardless of their nationality.

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169 This is confirmed by the response of German officials who consider that the elements of information the complainant gets from the Commission are sufficient and there are no reasons to facilitate access by the public to the status of a file which is being handled within EU Pilot.

170 It follows from the interviews with Spanish officials that in this Member State there is no 'legal basis enabling the involvement of citizens or complainants in a dialogue related to cases on the implementation of EU law. Law n. 30 of 26 November 1992, on the Legal Regime of Public Administrations and the Common Administrative Procedure, regulates the relationship between the public administration and citizens and is limited to administrative legal proceedings. Relationships with complainants outside the relevant provisions of this Law do not have a legal basis in the Spanish system. There is no complaint system in Spain available for citizens aiming to inform public authorities of a breach of EU law, but not willing to start a judicial procedure for it'.

Stakeholders insist on the need to build trust with the Commission, without which it is impossible to ensure an efficient and sustainable EU Pilot (Latvia). The risk of seeing private users turn away from this instrument is not to be minimised (Germany). Several interviewees consider complainants should be placed in the same position as Member State authorities in the procedure and should have access to information of the file (Germany, Latvia), including access to the database where they can see the progress of the case and ideally should have access to the case file, so they can get acquainted with the answers from the Member State and have a chance to rebut them. According to the stakeholders interviewed, it would be beneficial for the public to have access to the final decisions for all cases as this would allow an overview of the implementation of a specific legal instrument in all Member States.

In this perspective, it is interesting to notice that stakeholders claim a formalization of the procedure through a legally binding instrument clarifying the role of all parties, including the Commission’s obligation to inform the complainants on the motivations of its decision to close a file. A mere Code of Good Conduct is not enough in order to ensure the respect of transparency and legal certainty.

Furthermore, stakeholders have argued that the high number of files closed subsequently to a Member State response under EU Pilot is welcome if problems are solved, but the reasons on which the Commission grounds its decision to put an end to (or pursue) a procedure should be laid out precisely and made public.

This position is confirmed by the European Parliament, which has insisted on the fact that the adoption of binding rules in this field would not violate the core of the Commission’s prerogatives, but would merely make it possible to ensure that the Commission, when exercising its powers, respects the principles of an ‘open, efficient and independent European administration’ as referred to in Article 298 TFEU and in Article 41 of the Charter of Fundamental Rights.

As the complaints registered by citizens and businesses constitute the main tools enabling the Commission to detect breaches of EU law and thus to launch pre-infringement and infringement procedures, the Parliament has highlighted the necessity of adopting more effective and legally binding administrative provisions which define in a clear and reliable manner the procedural relationship between the Commission and complainants before, during and after the infringement proceedings in order, above all, to strengthen the position of the individual complainant. In this respect, the Commission was invited again (as in 2010) to adopt a proposal for a regulation, on the basis of Article 298 TFEU, ‘setting out the various aspects of the infringement procedure and the pre-infringement procedure, including notifications, binding time limits, the right to be heard, the obligation to state reasons, and the right for every person to have access to her or his file, in order to reinforce citizens’ rights and guarantee transparency’.

Access to this data was also denied to this Project Team which had to limit its source of information on infringement to the use of the database containing information on the status of infringements hosted in the Commission website. However, the results of this project show that the use of this database is time-consuming and complex, due to the limited

features of the research tools. Indeed, no search via the name or number of the directives or via the number of the procedure or Member State concerned is possible. The data provided is often incomplete, inconsistent and does not give a comprehensive picture of infringement cases. Indeed, the Commission provides an account of decisions taken on infringement proceedings by chronological order against Member States. There is no systematic reference to the legislation it refers to. There is no access to responses from Member States or actions taken by Member States in relation to the Commission’s letter of formal notice or reasoned opinion. Reasons are invariably not given as to why the proceedings were commenced, or why they are closed.

3. The efficiency of EU Pilot

A positive perception by the Commission and national officials

The Commission considers that, as of today, the EU Pilot satisfies the needs for which it was created and refers it to as, ‘[a] well-established working method that delivers results for the Commission, the participating Member States and citizens’175. The structured, systematic and relatively ‘informal’ approach of the EU Pilot is considered a guarantee for efficiency, measurable through statistics which are used by the Commission to evaluate annually this working method with the intention of enhancing its efficiency176.

This globally positive appreciation is backed by several arguments linked to three main criteria, namely quality, cooperation and support. The Commission considered that ‘when dealing with a file, Member States are broadly satisfied with the quality of the EU Pilot files submitted by the Commission, particularly concerning the clarity of the questions raised and the identification of the issues at stake. Both Commission and Member States are also satisfied with the level of cooperation and support underlying the project’177.

Finally, the satisfaction declared by the Commission is backed by telling statistics provided in the Commission Reports on EU Pilot. Concerning the volume of the files, the Commission notes that ‘during the period April 2008 – September 2011 a total of 2,121 files were submitted to EU Pilot and. Of these, 1,410 files completed the process in EU Pilot178 and nearly 80% (1,107 files) of the responses provided by the Member States were assessed as acceptable enabling the file to be closed without the need to launch an infringement procedure under Article 258 TFEU. Furthermore, it detailed that the percentage of files refused by Member States is minimal (2% of all files registered with the EU Pilot) and stressed that these rejections are generally due to the fact that the complainant submitted an incomplete file. The remaining 20% of the files (303) in which no acceptable solution in line with EU law could be found went on to the infringement phase following the processing of the file in EU Pilot.

The success rate for the first evaluation report on EU Pilot was 85%179. Also, the College has observed since 2010 ‘a reduction in the volume of new infringement proceedings for the first 15 volunteer EU Pilot Member States. For the remaining 12 Member States, which joined EU Pilot after March 2010, a decrease is also observed, although to a lesser

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extent. As a main characteristic of its success, the Commission highlighted that ‘49% of these 2,121 files originated from complaints, while 7% were enquiries by citizens or businesses, and around a further 44% were files created by the Commission on its own initiative’. This ratio can be interpreted as an indicator of the take-up of the EU Pilot by private operators.

Some national officials shared the impression that the EU Pilot cases serve as an incentive for the Member States to improve internal efficiency. For instance, in Member States with decentralized organisation such as Spain, better coordination of answers to the Commission is required. This phenomenon illustrates a spill-over of the EU Pilot’s efficiency to the national level, as significant (and detectable) transformations of the national administrative systems have been observed with regard to EU law compliance since the Pilot’s introduction.

A hampered efficiency of the procedures

The efficiency of the EU Pilot procedure is, however, being hampered by several factors.

- Language factor

Member States have the right to draft their response to the Commission in any of the official languages of the EU, which might lead to the slowdown of the process to allow enough for translations before the Commission can start its analysis. Germany, Hungary, Italy, together with Latvia and Spain, have indicated to the Commission that they will not follow up on EU Pilot files without full translations available. Among the seven selected Member States, only the United Kingdom and Sweden have opted for a communication in English language between the Commission and their national contact points.

Translations take a lot of time, and lack of clarity has been reported by Latvian officials who stated that incoming questions are sometimes difficult to read and their meaning is ambiguous. Stakeholders also mentioned the example of having filed two volumes of supporting evidence in Latvian, which took a lot of time for the Commission to translate (they were allowed to provide a version translated by themselves).

- Constitutional constraints

Another reason for occasionally occurring additional delays is the federal structure of the State concerned. For example, there may be delays in Germany, when the participation of the sixteen Federal States is required or in Spain where municipalities are often involved in implementing EU law. Also, the timeline might be short in complex cases (such as in the area of environment), where expertise is needed for ensuring compliance with EU law. Spanish interviews highlighted the importance of flexibility for deadlines. Requests for exceptional deadline extensions by public authorities due to the serious and complex character of files were also reported in the UK, stressing that the facility to extend them was not abused.

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- Lack of accessibility of information

Between April 2008 and September 2011, a total of 2121 complaints were submitted to the EU Pilot. In 2011 alone, 3115 new complaints were lodged by stakeholders. Compared to the number of legislative acts and the 500 million citizens of the EU, this low figure seems ridiculous. It follows from desk search that only a few documents, which refer explicitly to the stages of procedure within this pre-infringement tool, are easily and freely accessible.

From interviews with officials and stakeholders, it appears that the EU Pilot tool is subject to narrow access even by national authorities, due to the channelling of communication between the EU and Member State authorities. Indeed, only a small number of national officials may access the full content of this database. Therefore, knowledge about the EU Pilot among the ministry officials is mostly restricted to a general idea of its purpose to contribute to the faster resolution of complainants’ problems.

The examination of the interview results has shown that general knowledge about the EU Pilot and how it functions is not comprehensive among stakeholders either. Representatives of major organizations regretted that they had only found out by pure coincident about the procedure. Others were either not aware of the existence of the EU pilot or were only aware of the existence of SOLVIT and the Market Access Database. In other words, it is important to highlight that despite the existence of the EU Pilot since 2008, even stakeholders familiar with EU procedures are hardly informed about its existence. It clearly results from the interviews that stakeholders would welcome any action to make the EU Pilot more accessible/known to the public.

This lack of information prevents citizens from playing their vital role in ensuring the effectiveness of EU law while the citizens’ role has been strengthened – following the entry into force of the Lisbon Treaty - by Articles 1(2) and 10(3) TEU on participatory democracy, as well as articles 41 and 42 of the CFREU on the rights to good administration and of access to documents. Not providing enough information about the EU Pilot to citizens and stakeholders is contrary to the principles of good governance which the EU has been promoting actively since the Commission White Paper of 2001; contrary to openness, participation, accountability, effectiveness and coherence. It is also contrary to the Smart Regulation Strategy and the objectives laid out in the Commission communication of 2007 on ”A Europe of results – Applying Community Law”.

- Lack of resources

As partners collaborating directly with the Commission on EU Pilot cases, it can be assumed that Member State officials are better placed than stakeholders for bemoaning the lack of Commission resources for optimal processing.

Latvian ministry officials argued that resources dedicated by the Commission to deal with complaints and EU Pilot or enforcement measures are either insufficient or inappropriate. Sometimes the Commission’s case handlers lack awareness of the background of the problem in the Member State involved. The frequent turnover of Commission staff and the language barrier are further quoted as problems addition to the lack of resources.

Indeed, whereas the average time taken by Member States for proposing responses to cases is 67 days, which is in line with the ten week (70 days) benchmark, since March 2010, 'the average time taken by the Commission services to assess the replies proposed by Member States' authorities and to decide on a follow-up of the file is 102 days, which exceeds the general benchmark'. Ministry officials referred to several on-going cases on which they are waiting for the Commission to act. Extreme overshooting of deadlines concerns two environmental cases, where the processing of the files was respectively 473 and 664 days late at the time of the interview. Officials in the UK said that it was common knowledge that the Commission was less stringent in keeping to the timetable than Member States.

Stakeholders found sometimes that the Commission relies too much on unilateral information from the Member States without investigating further, due to lack of resources. The latest decision of DG Environment to dismantle the legal units reduces even more the dedicated resources and would negatively affect the level of monitoring and enforcement of EU environmental law. However, information from certain stakeholders points out that it is often Member States who ask for more time to reply to the requests, and this has a direct impact on the duration of the procedure.

- Technical difficulties

Commission officials regret that the efficiency of CHAP is diminished by technical shortcomings. However, it is rather the human factor, such as the failure to use CHAP in the appropriate manner by Commission’s officials, which seems to be CHAP’s biggest shortcoming.

The EU Pilot application seems not to be very user friendly and too complicated due to technical details, such as restricted access rights and several codes being attributed to proceedings within one single complaint.

*How to improve efficiency?*

First of all, there is no doubt about the language barriers. Thus, it would be useful if Commission officials working with each case were familiar with the language and background of the relevant Member State, even if that means additional resources. Some Member States’ officials interviewed call the Commission to prepare cases better before addressing the Member State authorities.

Moreover, it follows from several interviews that additional resources at the Commission are needed to overcome the Commission’s incapacity to absorb the growing flow of cases, inherent in the fact that the EU Pilot is now being fully used by 27 Member States and respond in a timely manner without long delays in the procedure which cause distortion.

Stakeholders (i.e. from Italy and Germany) consider that efficiency could be improved if in clear-cut cases, when the infringement is clear and it is obvious from the beginning that cooperation between a Member State and the Commission within the EU Pilot will not solve the problem, the Letter of Formal Notice starting the infringement procedure would be sent without engaging the formal pre-infringement.

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One solution put forward by interviewees to improve the efficiency of this tool suggests introducing a threshold, beyond which, for particularly serious breaches, the Pilot is skipped and an infringement procedure launched. This might require establishing criteria related to the complexity of cases (e.g. environmental) and the seriousness of the breach of EU law (e.g. with menace of immediate harm in the areas of environment or health protection) for the use of EU Pilot.

This proposal may find some legal basis. The EU Pilot Guidelines for Member States (even though not available via the public EUR-LEX database) already recognize an exception for not introducing an EU Pilot where 'files for which urgency or another overriding interest requires the immediate launching of an infringement procedure'\(^{185}\).

The lack of visibility of the EU Pilot calls undoubtedly for action from the Commission in favour of widening public access to information about EU Pilot and the complaint system. It may require large education campaigns, ranging from making available information sheets to the wide public via websites hosted by the EU\(^{186}\), to publishing the closure of EU Pilot cases through press releases, but also mentioning them in technical or legal journals and newspaper articles. Additional methods include making information available through brochures, advertisement on media (e.g. television), creating incentives for doing research and teaching about this pre-infringement tool at law schools.

4.2. Analysis of infringement proceedings for non-transposition

Section 4.2 provides an examination of the correlation between the delayed and non-transposition instances identified and the initiation of infringement proceedings by the Commission. The scope of this research is limited to the 16 EU legal instruments and the seven selected Member States. The results of the analysis are presented after an introduction to the purpose and functioning of the infringement proceedings.

4.2.1. Introduction

The formal infringement procedure is one of the cornerstones of the mechanism which enables the Union to guarantee that the common rules set by EU law are respected by the Member States. In this respect, it indeed reflects the specificity of the Union’s legal system\(^{187}\) enabling the Union interests enshrined in the Treaty to prevail over the inertia and resistance of Member States\(^{188}\), and ensure that obligations of States are fulfilled\(^{189}\). This procedure leads to the judicial review of Member State infringements in order to obtain the effective termination of them. The primary goal of the infringement proceedings is not to reach the Court or sanction the State, but rather to ‘give the Member State concerned an opportunity either to justify its position or, if it so wishes, to comply of its own accord with the requirements of the Treaty’\(^{190}\).

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\(^{185}\) European Commission, EU Pilot: Guidelines for Member States, October 2012, p. 2.


\(^{187}\) Case C-304/02, Commission of the European Communities v French Republic, [2005] ECR I-06263.

\(^{188}\) Case C-25/59, Kingdom of the Netherlands v High Authority of the European Coal and Steel Community, [1959] ECR 355.

\(^{189}\) Case C-20/59, Government of the Italian Republic v High Authority of the European Coal and Steel Community, [1960] ECR 325.

The legal basis for any infringement procedure brought by the Commission against a Member State lies in Article 258 of the TFEU. This provision recognises the Commission’s power to deliver a reasoned opinion if it considers that a Member State has failed to fulfil an obligation under the Treaties, and after giving the State concerned the opportunity to submit its observations. This article has translated into the two main phases of the infringement procedure: the letter of formal notice, where the Commission requests the Member State to submit its observations in relation to certain facts and legal arguments regarding a presumed breach of EU law, and the reasoned opinion, where the Commission argues that the Member State has failed to comply with EU law and requests it to correct the situation. Prior to the letter of formal notice, a pre-infringement phase takes place through the EU Pilot tool, where a dialogue and solution is sought.

The letter of formal notice represents the first official stage of the pre-litigation phase. As it aims at establishing the content of the proceedings, it necessarily describes the national measures which allegedly violate EU law and sets out - at least in a brief summary - the legal grounds of the complaint. This formal requirement is substantial and conditions the regularity of the procedure, as it guarantees the concerned Member State the possibility to present its observations and thus prepare its defence. Its omission triggers the irregularity of the reasoned opinion and the inadmissibility of the request to the Court. Furthermore, the letter of formal notice fixes the terms of the case and the Commission will not be able to add new legal grounds at a later stage of the procedure.

Once the Member State has responded, the Commission may decide on a case-by-case basis to close the case, if it is convinced by the arguments presented or by the measures taken by the concerned Member State to re-establish legality.

Whenever the Commission considers that the arguments put forward by the State do not allow the case to be closed, it may send a reasoned opinion, the second step of the pre-litigation phase, giving the Member State the possibility to convey its observations. Being more detailed than the letter of formal notice, the reasoned opinion must contain a coherent statement of the reasons which led the Commission to consider that the Member State has failed to fulfil an obligation under the Treaty or under secondary legislation. The reasoned opinion may furthermore prescribe the measures which are appropriate for putting an end to the Member State failure within a specific deadline. Given the silence of the Treaty, the CJEU has stated that this deadline must be reasonable and correspond to a time period which is not too short and which takes into account, to the extent possible, the procedural constraints which fall on the national authorities during the process of termination of the infringement. The procedure is interrupted whenever the Member State’s failure disappears during the fixed timeline.

If the State concerned does not comply with the opinion within the period laid down, the Commission may refer the matter before the CJEU seeking to declare the infringement and impose, if required, financial sanctions.

Decisions during the infringement phase are taken collectively by the college of Commissioners, while decisions on the pre-infringement phase are taken by the services.

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An infringement materializes when a Member State does not comply with EU law, be it intentionally or not, and without regard to the intensity of the alleged violation. Once the matter is brought before the CJEU, the Court has jurisdiction to hear and determine proceedings on all possible forms of infringements, including omissions to act (Articles 260 of the TFEU)\(^{197}\).

**Transparency vs. confidentiality**

Unlike the pre-infringement phase, all steps in the infringement phase are subject to a decision by the Commission acting as a College (according to Article 250 TFEU) and are published through press releases. Information about these decisions is to be found in the Commission database on infringement\(^{198}\). However, this information is not systematically updated and it is very difficult to access due to design of the data base. Furthermore, the Commission does not publish in the data base decisions to close a case nor does it publish the content of the decision related to Letters of Formal Notice or Reasoned Opinions. Furthermore, the legal arguments justifying the decisions are not included. A renewed commitment in 2012\(^{199}\) could be used to change this situation with a more comprehensive and user-friendly database and the adoption of legally binding rules ensuring more transparency in this type of Commission decisions.

The Commission’s discretionary power for initiating the infringement procedure and the litigation phase is a cornerstone of procedural efficiency. In accordance with the established case-law of the CJEU, the Commission is free to decide whether or not, and when, to start infringement proceedings, as well as to refer or not the case to the Court. The discretionary power enjoyed by the Commission, even though not unlimited, is exempt from judicial control\(^{200}\). Consequently, the Court does not have jurisdiction for adjudicating over the legality of the Commission’s failure\(^{201}\) or refusal to act\(^{202}\). The Commission’s freedom of action, thus, excludes any right of individuals to require the adoption of a specific position\(^{203}\).

However, while the discretionary power of the Commission to decide on the opening and closure of pre-infringement and infringement procedures\(^{204}\) needs to be preserved, the exercise of it does not seem incompatible with an improved access to the database on infringements and a legally binding regulatory framework for handling complaints, nor with an increased involvement of complainants in infringement procedure providing and their access to information on the arguments concerning the case and motivation of decisions.

Following the CJEU jurisprudence (section 4 of this report), the proceedings are governed by total confidentiality regarding documents, arguments and decisions including the motivations of the Commission’s decisions except for the complainant, to whom motivation of decisions may be communicated. It is thus difficult to get to know precisely the reasons for which the cases are closed or, on the contrary, why proceedings continue. However,

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\(^{197}\) Case C-31/69, Commission v. Italian Republic, [1970], 33.


\(^{199}\) Communication from the Commission to the Council and the European Parliament “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final, para. 11.


\(^{203}\) Communication from the Commission to the Council and the European Parliament “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final.

\(^{204}\) Communication from the Commission to the Council and the European Parliament “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final, p. 8.
recent CJEU case law shows a less restrictive approach\textsuperscript{205} and require motivated arguments to justify refusal for access to documents (including those of infringement procedures) under Article 4(2) of Regulation 1049/2001/EC (See section 4). The institution concerned must also supply explanations as to how access to that document could specifically and effectively undermine the interest protected by an exception laid down in that article\textsuperscript{206}. The mere fact that a document concerns an interest protected by an exception under this Article is not sufficient to justify application of that exception. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical\textsuperscript{207}.

As shown in section 4 on pre-infringement tools, despite calls for greater transparency, the Commission and Member States consider the confidentiality of their relationship in the infringement procedure to be necessary for success in finding solutions. The lack of public involvement in the procedure provides them with a margin of manoeuvre that leaves room for other considerations than purely legal ones, including political factors. These elements illustrate why some authors have expressed concerns that, trying to avoid interference from third parties and aiming to ensure ‘consistent and effective enforcement of Community law [...], the Commission could fail to resist political interference’\textsuperscript{208}.

An effective and deterrent system

The Commission policy of targeting particular types of infringements is clear-cut, especially compared to the Commission’s policy in the late 1970s, when it pursued failures to implement directives systematically, leading ‘to an increase in the number of rulings given by the Court and a concomitant rise in the number which were not complied with in the absence of further action by the Commission’\textsuperscript{209}. Nowadays, the approach is a more collaborative one, in order to find solutions in the course of the pre-litigation stage, thus trying to avoid the referral of the said cases to the Court. However, the Commission does not hesitate to make use of its discretionary power to launch an infringement procedure when it appears that the issue at stake is a question of principle or politically important\textsuperscript{210}.

The Commission notes that in 2011 ‘[t]he number of formal infringement procedures launched continued to decrease as did the number of cases referred to the ECJ\textsuperscript{211}. These results show that, on the one hand, pre-infringement procedures such as the EU Pilot\textsuperscript{212} are producing their desired effects\textsuperscript{213}. On the other hand, the Commission observes that once a

\textsuperscript{205} Judgement of the Court (Grand Chamber), 29 June 2010, European Commission v. TechnischeGlaswerkeIlmenau GmbH, C-139/07

\textsuperscript{206} Joined cases C-39/05P and C-52/05 P Sweden and Turco v Council [2008] ECR I-4723, paragraph 49

\textsuperscript{207} Joined cases C-39/05 P and C-52/05 P Sweden and Turco v Council [2008] ECR I-4723, para 35.


\textsuperscript{210} In this sense, the Commission has launched a procedure concerning the Mutual Recognition of Professional Qualifications Directive (2005/36/EC) in six cases against four Member States. This ratio witnesses of the will of the Commission to avoid generalized infringements.


\textsuperscript{212} EU Pilot automatically alerts on deadlines enabling Member States to avoid infringements.

\textsuperscript{213} ‘Since 2010, the Commission observes a reduction in the volume of new infringement proceedings for the first 15 volunteer EU Pilot Member States. For the remaining 12 Member States, which joined EU Pilot after March 2010, a decrease is also observed, although to a lesser extent. Although it is not possible to identify all the reasons for this tendency, one explanation is the setting up of EU Pilot, [...] putting an end to problems without the need for recourse to infringement proceedings…’: European Commission, Second Evaluation Report on EU Pilot, COM (2011) 930 final, p. 6.
Formal infringement procedure is launched, the Member States make ‘serious efforts to bring their laws or practices in line with EU law’. However, the Lisbon Treaty has introduced two main changes concerning infringement proceedings, in order to improve the deterrent effect of infringement and Court procedures. Firstly, it speeded up the procedure for non-implementation of Court rulings by removing the need to send a letter of formal notice to the Member State concerned and enabling the Commission to send the reasoned opinion directly. When a Member State does not correctly apply a Court decision, the Commission may send a reasoned opinion to the Member State concerned with the invitation to submit its observations. If it is not satisfied with the observations of the concerned Member State or if the latter does not respond, the Commission has the power to refer directly to the CJEU according to Article 260(2) TFEU. On this basis, the duration of the procedure should be reduced to a time-span between 8 to 18 months instead of 12 to 24 months.

Secondly, in infringement cases for failure to communicate transposition measures of a directive adopted through legislative procedure, Article 260(3), TFEU establishes an entirely unprecedented instrument enabling the CJEU to impose financial penalties directly without the need for a prior court ruling. Indeed, the Commission is from now on invested with the power to suggest to the Court a penalty and/or a lump sum payment from the start of the procedure. For example, the Commission has launched an action against Hungary before the Court, inviting it to impose a lump sum payment of EUR 27,316.80 per day from the date of judgment concerning the non-implementation of Directive 2008/98/EC on waste. It is worth noting that when fixing the amounts, the Commission and the Court can take into account the Member State’s ability to pay, as in a recent Court ruling concerning the Republic of Ireland in the context of the economic crisis.

According to the Commission, these provisions aim at creating incentives for Member States to better comply with EU law from an early stage. Furthermore, they provide the Commission with the legal justification for a more active enforcement role. Indeed, monitoring transposition of EU law (delayed and non-communication) have been identified as a priority for the Commission since 2007. Statistics show that, while the number of open infringement cases in general has been falling since 2009 (from 2900 in 2009 to 2100 in 2010 to 1775 in 2011), the number of cases related to late transposition have increased in 2011 compared to previous years. The Commission launched 1185 late transposition infringements in 2011 compared to 855 in 2010 and 531 in 2009. Compared to the end of 2010, 763 late transposition cases were open at the end of 2011, representing a 60% increase.

However, the effectiveness of the infringement procedure would increase with higher involvement of complainants in the procedure defined in clear and legally binding rules for handling complaints and infringement procedure providing access to information on the
arguments under discussion by the Commission and the Member States and motivation of decisions.

4.2.2. Methodology

The analysis for this section has been carried out by drawing data from the desk study concerning the Transposition Trends presented in Section 2 of this study.

The findings concerning delayed transposition and non-communication of legislation set the scope of the EU legal instruments in which further analysis on infringement proceedings was carried out. The key source of information was the Commission database dedicated to infringement proceedings, the website of the Commission’s Secretariat-General dedicated to Application of EU law, the official websites of the European Union and the CJEU, but also databases of national authorities (where available, e.g. in Italy and in Hungary). Furthermore, information on infringement proceedings was obtained through the annual reports on monitoring the application of EU law issued by the Commission, Commission press releases, national reports on implementation of EU law (e.g. in Sweden), but also exchanges with relevant ministry officials (Latvian and Swedish experts) or the EU information centre (Sweden).

However, the results of this project show that the use of the Commission database is time-consuming and complex due to the limited features of the research tools. Indeed, no search via the name or number of the directives or via the number of the procedure or Member State concerned is possible. The data provided is often incomplete, inconsistent and does not allow for a comprehensive picture of infringement cases. Indeed, the Commission provides an account of decisions taken on infringement proceedings by chronological order against Member States. There is no systematic reference to the legislation it refers to. There is no access to responses from Member States or actions taken by Member States in relation to the Commission’s letter of formal notice or reasoned opinion. Reasons are invariably not given as to why the proceedings were commenced, or why they are closed.

Any identified divergence between the findings of Transposition Trends section (based on the public information in the Commission data base) and the research on the infringement proceedings is noted in the Divergence Table contained in the Annex 8 of this Report.

The data is presented here according to the following structure:

- General analysis - containing collated information for all four selected policy areas and all seven selected Member States;
- Analysis per policy area; and
- Analysis per Member State.

For each item, information assessed includes: how often the Commission took action when there was infringement; the type of action taken (LON, RO or referral to the Court); time needed for action to be taken; and re-action by the Member State.

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Since the Council Framework Decision on European Arrest Warrant (2002/584/JHA) does not fall yet within the jurisdiction of the CJEU, it was not included in the tables.

### 4.2.3. Results

#### 1. General analysis: infringements for late transposition

From the survey carried out it can be concluded that, when the Commission was aware of cases of late transposition or non-communication of national legislation, in the majority of the cases Commission has taken action to bring Member States into compliance. However, in a large number of cases there is no information available about whether any action has been taken by the Commission. The database on infringements used as main source of information is not user-friendly and data is incomplete (sometimes non-existing) and outdated or filled in too late. The European Parliament request to the Commission to make information on infringement cases available should be revisited and a formal request for full and up-to-date information should be put forward.

The numbers that could be obtained show that in approximately 57% of the cases, the Commission has reacted to the identified cases of delayed transposition and non-communication. In approximately only 3% of cases, the Commission has not taken any action. No information could be found on the remaining 40% of the cases.

The analysis undertaken within this project shows that the average time needed for the issuance of a letter of formal notice is approximately 9 months from the moment of infringement (deadline for transposition in the EU legislation). Furthermore, it took an average of 7.5 months for the Commission to issue reasoned opinions and 9 months to decide on referring the case to the Court.

These numbers mean that it takes on average over two years before a case of late transposition or non-communication is submitted to the CJEU. While according to literature, infringement proceeding in 2006 and 2007 took approximately 47 months\(^2\), the two year period for late transposition cases is unnecessary long. Such a lengthy period for the issuance of a letter of formal notice in cases of late or non-transposition is not needed, as the data of those cases does not need to be checked: if there is no transposing legislation communicated, action can immediately be taken. No EU Pilot is needed in those cases as, already the Letter of Formal Notice enables Member States to react and/or send observations or justifications.

The European Parliament might want to consider asking the Commission to take measures to improve this situation.

Finally, the survey, based on the available information, has shown that in approximately 59% of cases, the Member States have taken actions to transpose the EU legal instruments and/or to communicate transposing measures before the case reaches the Court, while this was not done only in approximately 8% of the cases. Nevertheless, there is lack of information about Member States’ actions. The fact that in approximately 33% of

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the cases, no information has been obtained reiterates the problem of public access to information on infringement procedures concerning implementation of EU law.

1. Analysis per policy area

The following analysis and conclusions are based on data from the survey that is presented below.

According to the survey, it seems that the Commission takes stronger action to ensure environmental protection and that the information on the Commission’s actions regarding this policy area is better disseminated. In the majority of cases of delayed transposition and non-communication of environmental legislation, the information available on the action taken by the Commission is significantly higher (approx. 69%) than the average amount of information for all policy areas (approx. 60%). Furthermore the Commission took action on infringements related to EU environmental law more systematically in this policy area (66% average) than the average in all areas (approx. 57%).

In the environmental field, Member States take longer to act when infringement procedures start. National measures to adopt and/or to communicate the necessary transposing legislation do not seem to be taken when the Letter of Formal Notice is received but rather after the Reasoned Opinion. On the opposite site, in the Citizenship and Fundamental Right policy, Member States tend to adopt or communicate the transposing legislation after the letter of formal notice, and thus, the number of reasoned opinions is lower.

In the environment policy area it takes the Commission about 6 months to issue a Letter of formal notice and again 6 months to send a Reasoned opinion while, in the internal market policy area, a Letter of Formal Notice takes in average 2 months but 7.5 months to issue a Reasoned Opinion. The whole procedure looks very different in the Citizenship and Fundamental Rights policy area where it takes an average of 17 months to issue a Letter of Formal Notice in Fundamental Rights and 9 months to send a Reasoned Opinion in the same policy. However, it took the Commission an average of 12 months from the date the Reasoned Opinion was sent to decide taking a Member State to Court on the cases of non transposition of environmental legislation while it took 7 months in internal market and 2 in Citizenship and Fundamental rights.

It is worth pointing out a particularly extreme case, where it took the Commission 86 months to send a letter of Formal notice to Sweden for late transposition of the Water Framework Directive (environment policy). Furthermore in the Citizenship and Fundamental Rights area the Commission took 59 months after the expiry of the transposition deadline to issue the Letter of Formal Notice against Spain for late transposition of the Citizenship Directive.
Table 20: Analysis of infringement proceedings – Environment

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<th>Environment</th>
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**Chart 1 - Overview of number of action taken by the Commission**

*Information is provided per number of actions taken by the Commission*

**Chart 2 - Time taken for action by the Commission**

*Information is provided in months; the time period indicated represents the approximate average time period between two actions taken by the Commission.*
Table 21: Infringement proceedings – Internal Market

Internal Market

Chart 1 - Overview of number of actions taken by the Commission

* Information is provided per number of actions taken by the Commission

Chart 2 - Time taken for action by the Commission

* Information is provided in months; the time period indicated represents the approximate average time period between two actions taken by the Commission.
Table 22: Infringement proceedings – Citizenship and Fundamental Rights

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<th>Citizenship and Fundamental Rights</th>
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Chart 1- Overview of number of actions taken by the Commission

* Information is provided per number of actions taken by the Commission

<table>
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<th>Actions taken by the Commission</th>
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<tr>
<td>Letter of Formal Notice</td>
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<td>Reasoned Opinion</td>
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<td>Proceedings before CJEU</td>
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<tr>
<td>Penalty Proceedings</td>
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</table>

Chart 2- Time taken for action by the Commission

* Information is provided in months; the time period indicated represents the approximate average time period between two actions taken by the Commission.

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<th>Time taken for action by the Commission</th>
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<td>Proceedings before CJEU</td>
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<tr>
<td>Penalty Proceedings</td>
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</tbody>
</table>
3. Analysis per Member State

Member States have a very high percentage of cases where information is non-available regarding actions taken by the Commission. This reinforces the problem of lack of data in relation to the Letters of Formal Notice or the Reasoned Opinions and referrals to the CJEU encountered in Commission databases. The highest percentage of available information on actions taken by the Commission was observed in the case of Sweden (100%) where there is ‘an open society approach to administrative secrecy’\(^\text{232}\). Furthermore, it seems that ‘new’ Member States have more information available than some ‘old’ Member States with the percentage of cases where information is not available climbing up to 58% in the case of Spain or 54% in Italy.

The Commission states that once a formal infringement procedure is launched, the **Member States react** and make ‘serious efforts to bring their laws or practices in line with EU law’\(^\text{233}\). The survey shows a rather high percentage of compliance by Member States once the Commission has undertaken action. In the case of Sweden, Latvia, the UK and Hungary the number of Letters of Formal Notice sent by the Commission is substantially higher than the number of Reasoned Opinions. This means that the Member State reacted promptly to the requests by the Commission. On the other side, the information shows that Spain, while having a lower number of cases of late transposition, takes longer to react to Commission action and the Reasoned Opinion is often needed before compliance and Germany is the Member State with the lowest degree of reaction to comply and the highest number of cases referred to the Court.

The issue of lack of information is again dominant in relation to cases of (re)action by Member States. Spain has made the largest improvement concerning the accessibility of information with 100% of information available on its (re)action and documents as opposed to 42% of cases concerning Commission’s action and documents. Italy is however the Member States of the 7 assessed with the highest number of cases of no information on the Member State re-action to Commission action (54% of no information concerning the cases analysed). In Germany, a high percentage of cases of no (re)action has been observed, which could be due to its federal structure.


5. CONCLUSIONS AND RECOMMENDATIONS

Drawing upon the analysis carried out in Sections 2, 3 and 4 of the study this section presents the conclusions and a series of recommendations for both EU and Member States.

5.1. Transposition trends and hurdles to timely transposition

5.1.1. Conclusions

The analysis of the selected 16 EU legal instruments shows that there is a general continuous trend of late transposition in Member States. The data also suggest that the improvements recently introduced by the Lisbon Treaty, speeding up the enforcement procedure for transposition cases (Article 260(3) of TFEU), have already started yielding results. On-time transposition rates are increasing. The results of the survey show that the late transposition trend occurred more often with environment Directives than with the other policy areas. Regarding the five analysed EU Directives in Environment, 91% were delayed. In the Internal Market, of the six instruments analysed, 73% delayed; in the four analysed for the Citizenship and Fundamental Rights area, 73% delayed similarly.

The assessment of the effectiveness of the three compliance-promoting tools relevant for timely transposition (correlation tables, scoreboards and committees) show that while these instruments are considered useful by the officials interviewed, the Committees do not seem to improve transposition of EU law. Directives where correlation tables are referred to in the recitals or where scoreboards are used, the rate of timely transposition is higher while this is not the case in Directives where Committees are set up. One explanation may be that Committees are established for implementation rather than transposition. Furthermore, Member States officials may form coalitions in the Committees to advance national interests, thus lowering the quality and speed of compliance.

A major block to transposition is the vagueness of the Directives. About 80% of officials interviewed, both at EU and Member State level, considered that the provisions of EU law are not clear. They lack clarity due to the compromises of the decision making procedure and their complex, technical, subject matter. Member States’ officials justified delayed transposition by referring to the legislative procedure to be followed (i.e. the extent of changes required and the speed of national legislative process). Another key reason for delay is the differences in the interpretation and understanding of EU law provisions between national authorities and the EU institutions. It can therefore be concluded that, while the Member States’ administrative structure or legislative procedures should be taken into consideration when setting up transposition deadlines, during the negotiation phase, the EU must improve the clarity of Directives and the Commission should develop TIPs to guide Member States.

While some Member States feel that longer transposition deadlines would contribute to a more accurate transposition of EU legal instruments, EU level officials believe that there are no tradeoffs between timely and accurate transposition. Member States’ competent authorities have enough time to transpose timely and accurately EU legal instruments. Additionally, they argue Member States have an opportunity to agree on longer transposition deadlines during the negotiation phase.
5.1.2. Recommendations

1. Link between the European Parliament and national parliaments

The European Parliament (EP) should contribute to the timely and accurate transposition of EU legislation by sharing the expertise gained in the legislative decision making process through pre-established links with national Parliaments.

2. Member States’ preparation for the adoption of EU legal instruments

Prior to the adoption of new EU legal instruments and during the legislative decision making procedure, Member States should take preparatory steps and ensure internal coordination to determine appropriate transposition deadlines, taking into account their administrative structures and the legislative procedures the proposal might entail. The improved preparation at national level would enable a transposition of the relevant EU obligations without undue delays. This would require specifically that:

- Member States should set up structural coordination and communication channels between the staff in charge of negotiation and those responsible for transposition and implementation of the new EU legislative act. This would require an active role of the negotiator, as the final wording of the legislative text is only made available once the procedure is finalised;
- In cases where the triilogue or conciliation procedures are applied, transparency should improve if the negotiated modifications were made immediately available.

<table>
<thead>
<tr>
<th>Examples of best practices</th>
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<tbody>
<tr>
<td>In Sweden, lawyers are systematically included in the process of negotiation of EU legal instrument in order to grasp the legal implication of the negotiated measures at the national level.</td>
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<tr>
<td>In Latvia, the competent authorities clarify uncertainties with the Commission officials with regard to transposition before starting the transposition process.</td>
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</tbody>
</table>

3. Internal domestic mechanisms to ensure timely transposition

Once the EU instrument is adopted, adequate mechanisms and structures should be set at Member State level to ensure timely transposition. Those structures should ensure the appointment of responsible bodies (e.g. Ministry) and make them accountable to a higher governmental structure (e.g. Council of Ministers) for any transposition delays. When regional entities are responsible for transposition, appropriate structures should also be set up. The Central Government should ensure their establishment as, under EU law, Member States are the ones responsible for infringements before the Court. Furthermore, Member States would benefit from developing a general tool kit to guide consistent transposition and application of EU legal instruments.

<table>
<thead>
<tr>
<th>National best practices</th>
</tr>
</thead>
<tbody>
<tr>
<td>In Italy, the central government may act instead of a Regional government in cases when the latter does not fulfil the obligations under EU legislation.</td>
</tr>
<tr>
<td>In Spain, Secretaries of State in each Ministry’s weekly meetings (prior to the Council of Ministers meetings) have timely transposition as a first point of the agenda. The Ministries responsible are made accountable, creating a high level, effective, policy control mechanism.</td>
</tr>
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</table>
4. The use of Regulations for immediate effect

In policy areas issues where timely transposition is crucial because the effectiveness of the legal instrument requires an immediate effect (e.g. Internal Market or environment) the adoption of Regulations should be considered. In those cases, the implementation of the Regulations should be enforced at EU level by the Commission, including the conformity of national laws.

5. Improved enforcement of Regulations

The Commission, at least in some areas, seems to have decided not to monitor transposition and implementation of Regulations; or at least not in the same way as Directives. This does not have any legal basis in the Treaty. Regulations are generally implemented through national legislation and therefore Member States should also submit it to the Commission for control of compliance.

The EP should ensure that the Commission carries out its role of Guardian of the Treaties for Regulations as well as for Directives, by requesting information in the Commission report on the monitoring of the application of EU law and by holding specific hearings.

6. TIPs and meetings on transposition and implementation risks

After the publication of the EU legal instrument, the Commission should adopt Transposition and Implementation Plans (TIPs) highlighting the provisions where it could be potential risks in transposition or implementation and providing guidance on the understanding of the Directive.

Further, the Commission should hold meetings with Member States to discuss transposition and implementation risks and potential problems. The European Parliament should be invited to participate in those meetings.

Member States should consider the use of systems similar to the Commission Transposition and Implementation Plans (TIP) or impact assessments, once the measure is adopted. These are foresight procedures, helping define what legal instruments may need to be reviewed or created.

The Services Directive

The experience of the Services Directive (2006/123/EC) can be regarded as good practice. While the complexity of the matter regulated by this Directive was recognised early on, the willingness of the Member States to transpose and implement this legal instrument counterbalanced it. The potential transposition and application risks were discussed in Working groups’ meetings.

7. Systematic fast-track procedure for timely transposition

The improvements recently introduced by the Lisbon Treaty speeding up the enforcement procedure for transposition cases (Article 260(3) of TFEU) are already showing results. The number of timely transposition cases of the 16 EU legal instruments selected for this study has increased (from 10% to 24%) after the entry into force of the Lisbon Treaty.

This fast-track system under Article 260(3) should be strengthened. The European Parliament should ensure that the Commission has enough resources to systematically
apply and follow up those cases. The European Parliament should ensure that the recent decision by DG Environment to dismantle the legal units does not affect the enforcement of the transposition and application of EU law.

5.2. Compliance-promoting tools

5.2.1. Conclusions

The problems of implementation and enforcement of EU law have been longstanding. The Commission has developed an EU policy on implementation and enforcement of EU law which includes measures to promote compliance before initiating infringement procedures. The assessment of the effectiveness of selected EU level compliance-promoting tools, based on the interviews with EU and Member State officials in the four selected policy areas is generally very positive. However, they were perceived more positively by the EU officials than by Member States officials. A high number of officials were not familiar with fitness checks and Commission transposition and implementation plans (TIPs), due to their relatively recent introduction.

While fitness checks were considered to be the least effective of compliance promoting tools, package meetings were considered to be the most effective one. This is at the same time the only compliance-promoting tool where interviewed Member States officials gave higher effectiveness ratings than their EU counterparts.

The selected compliance promoting tools could be improved by applying certain recommendations listed below.

5.2.2. Recommendations

1. Strategic approach

The use of compliance-promoting tools should be defined on the basis of a strategic approach taking the characteristics of each EU instrument into account, on a case by case basis. Criteria for the strategic approach would include the social and political relevance, economic impact or technical difficulty of each EU instrument. The European Commission should annually report on the strategic use and the management of all the compliance promoting tools to the European Parliament.

2. Compulsory nature of correlation tables

Correlation tables are a tool for verifying and ensuring transposition. Given the effectiveness in achieving this objective, Commission and the EP have agreed in the 2010 Inter-Institutional Agreement to endeavour to include compulsory correlation tables in new legislative acts in order to ensure better monitoring of the transposition and application of EU law. In those cases where Member States communicate the transposing legislation without correlation tables, the Commission should draft them within a certain period of time and make them public in the Commission web site for correction by stakeholders or Member States. Correlation tables submitted by Member States to the Commission should also be made public.
The European Parliament should ensure that the Commission has sufficient resources to ensure that correlation tables are carried out for all EU legal instruments and are made public.

3. Improved national inspections and EU level inspections of Environmental infringement cases

National inspections are required by law in relation to the compliance with standards or limit values in permits or licenses derived from law. They should be promoted given their deterrent effect.

The EU level inspections should be a tool to monitor implementation of EU law and to complement the EU Pilot and infringement procedures, ensuring the Commission obtains the necessary data to decide on open cases and to provide evidence in cases before the CJEU.

The European Parliament should continue to work towards the adoption of an EU legislative act enabling EU inspections on environmental legislation and revisit its 1990 call for the EEA to support the Commission in carrying out this inspection role234.

4. Systematic use of specific compliance promoting tools

In general, the survey concludes that several of the compliance promoting tools should be used more broadly. Specifically it suggests:

Conformity checking studies
Conformity checking exercises are tools specific for promoting correct transposition and therefore should be carried out systematically. They should assess the effectiveness of transposition and, as a rule, be disclosed to the public.

Implementation guidelines discussed with stakeholders and EP
The use of guidelines in technically complex areas should be encouraged. The Commission guidelines provide for the interpretation of a directive’s provisions and ensure a harmonised implementation. Currently, the Guidelines are discussed only with Member States. They should also be discussed with stakeholders and the EP.

Commission Transposition and Implementation Plans (TIPs)
The European Commission should systematically produce TIPs for newly adopted EU legislation, highlighting the possible risks to timely and accurate transposition and potential barriers to application, in order to give an early warning to Member States. TIPs should be made public through the Commission website and be officially sent to national parliaments.

Package meetings
Package meetings between the Commission and the Member States should be encouraged and made more systematic. To increase transparency, the agenda of the meetings (of parts thereof) should be made public. Furthermore, the European Parliament should be invited to the meetings or, at least, notified of their occurrence. Meetings between the Commission and the relevant complainants or NGOs should be held before and after package meetings, to share relevant information on existing cases.

234 Art. 20 of the Regulation 1210/90 on the establishment of the EEA
5. Compliance promoting tools to be used only if specific circumstances are met.

Scoreboards
Currently the use of scoreboards, in relation to the selected EU legal instruments, is limited to Internal Market and to a few legal instruments in the area of Environment. The use of scoreboards should be replicated in EU legislative acts or policy areas whenever implementation problems require the political pressure that the use of such a tool generates. Scoreboard on specific policy areas where implementation is perceived as problematic or challenging should publicly disclose the list of EU legal instruments being assessed.

The effectiveness of this tool should be enhanced by providing adequate press and communication support to this tool, linking scoreboards with communication campaigns.

The Citizenship Directive
In the area of Citizenship and Fundamental Rights, the Commission drafted a report on the application of the Citizenship Directive (2004/38/EC) which was similar to a scoreboard. This Report was used for analysis of compliance. Findings of the Report were further used to start a dialogue with Member States (in a pre-infringement phase).

Targeted networks
The use of networks, both in the transposition and in the application phase, should be encouraged on targeted issues, where exchange of information is required for the successful implementation of key legal instrument. The EP should be asked to nominate at least one representative to participate in the network and access updated information on the implementation of key EU legal instruments. Documents shared in the networks should be made available to the public through the Commission or EP website.

Examples of best practices
Existing networks are a useful way for the Commission to obtain information on problems in transposition and application of EU legislation while they are a platform for dialogue between national authorities. For example, the National Equality Bodies in the area of Citizenship and Fundamental Rights or the Internal Market Network under the Services Directive (2006/123/EC) to facilitate the exchange of enquiries, answers and opinions among Member States. The European Migration Network also includes EP representatives as observers.

Ex post evaluation exercises
Ex post evaluations are sometimes foreseen in provisions of a legal instrument or are carried out on the own initiative of the Commission. They should only be conducted when the EU legal instrument reaches an implementation phase where lessons can be learnt and where improvements in the Directive’s objectives can be achieved. These evaluations should be made public and subject to consultation when relevant.

Reporting obligations
Reporting obligations should be strategically defined to promote achievement of specific objectives. They should not be limited to presenting measures taken to implement EU law, but also be extended to presenting the results achieved in relation to the objectives of the legislation. Member States should systematically receive feedback from the Commission on the information provided. The European Parliament should monitor the Commission’s reporting deadlines.
6. Additional compliance promoting tools

Press releases to increase pressure

The use of ‘compliance-promoting’ tools such as Scoreboards should, wherever possible, be combined with press releases to facilitate the political pressure and comparison between Member States. Press releases should not just concern the opening of infringement proceedings, but also other issues of non-compliance such as package meetings and meetings with civil society, if the confidentiality principle is respected.

5.3. The EU Pilot and the Infringement procedure

5.3.1. Conclusions

CHAP and the EU Pilot are pre-infringement tools designed for enhancing the existing enforcement system of transposition and application of EU rules. CHAP is understood as an internal Commission data base with no external impact and is, therefore, not subject to the assessment.

Most cases are solved before an infringement procedure is initiated under Article 258 TFEU. The EU Pilot aims at reducing the number of infringement procedures by correcting problems at an early stage. It is also meant to provide more rapid answers to citizens and tighten the handling and management of complaints. It is accompanied by an IT platform which enables exchange of information and documents. It replaces the cumbersome ‘pre-258 letter procedure’ through the Permanent Representations of Member States with a more structured and clear system. However, the assessment of this tool shows flaws in terms of the effectiveness to achieve its objectives, its transparency and its efficiency. Furthermore, its legitimacy and legal basis are questioned.

The infringement procedure is the only tool recognised by the Treaties allowing the Commission to carry out its role of Guardian of the Treaties. The effectiveness of the infringement procedure, in its deterrent effect and capacity as an enforcement tool promoting compliance with EU law, is broadly recognised. However, key problems identified include too long periods for taking decisions on the different steps, lack of legally binding rules governing the procedure (roles and timeframes) and the general lack of information on the status of the cases, arguments and reasons behind decisions.

Effectiveness

The assessment of the EU Pilot’s effectiveness shows a dichotomy in the understanding of its purpose and the ways to achieve it. The views of the EU and Member State officials and those of the stakeholders interviewed differ.

In general, the EU Pilot is considered by EU and Member States officials an efficient instrument for the purpose of strengthening the relations between the EU and the Member States and reducing the number of infringement procedures. Its effectiveness is seen as being part of a partnership approach, built on the pillars of mutual trust and confidentiality in the discussions between the Commission and national authorities. The first two reports of EU Pilot measure its success on the number of cases closed and the consequent decrease of the infringement cases\(^\text{235}\). Commission officials stressed that, while the number of

complaints has remained stable since the introduction of the Pilot, the number of infringements has decreased.

This positive attitude vis-à-vis the pre-infringement tools is mirrored in the latest Report on monitoring the application of EU law, where it is stated that ‘EU Pilot dialogue facilitates speedy resolutions of problems’ and that ‘Commission works in partnership with the Member States to try to solve in an efficient and satisfactory manner, problems and complaints from citizens, business, NGOs and other stakeholders, concerning the application of EU law before starting formal infringement procedures’.

However, stakeholders interviewed expressed their expectations that this tool provides solutions to the problems caused by breaches of EU law. The EU Pilot is not considered an effective tool in this regard. The need for a close dialogue between Commission and Member States is questioned and the adoption of clear legally binding rules governing the procedure including a clear definition of the role of all parties including the complainant is requested; the number of cases closed as a measure of success, is criticized. Moreover, access to the EU Pilot data base is expected to enable complainants to participate in a more effective, efficient and transparent system.

The deterrent effect of the infringement procedure is beyond any doubt. However, improvement of its effectiveness requires increased involvement of complainants in the procedure defined through clear and legally binding rules providing access to information on the arguments under discussion by the Commission and the Member States and motivation of decisions.

**Transparency and access to information**

The lack of complainants’ involvement in the EU Pilot and of public access to the documents stored/exchanged within EU Pilot is seen as a main shortcoming of this tool. There is an apparent contradiction between the sophisticated character of the tool and the opacity of its information.

The lack of transparency of the EU Pilot was raised by Member State officials regarding the Commission’s reasons when considering Member State’s answers as satisfactory or not.

Transparency issues are linked to discussions on the role of the complainants in the EU Pilot. In general, the complainants are not involved during the EU Pilot and do not receive information on the exchange of letters between the Commission and the Member States. They do not have access to the information in the EU Pilot database or to the case file. There is no public access to the information on the status of the case or to documents of the case apart from some formal answers and letters from the Commission informing complainants about the case being processed in the EU Pilot, asking permission to disclose his or her identity or about the closure of the case. Under the transparency principle, complainants should be involved in the pre-infringement procedure with similar information rights as the national authority. Some Member States provide access to information in the EU Pilot by involving complainants in the procedure.

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Examples of best practices

Swedish law offers complainants a privileged participation in the dialogue between the Commission and Member State authorities and thus a better integration of their points of view. Stakeholders follow up the correspondence between the Commission and the government in ongoing cases and draft its own response.

In Italy and in Hungary, national databases have been created\textsuperscript{238} and are partly accessible by the public.

In the UK, the Clean Air London (CAL) organisation, which submitted a complaint to the Commission in January 2012 received the response directly from DEFRA with a copy to the Commission. The possibility for the stakeholder to interact with the Commission and the Member State during the process was perceived as extremely satisfactory and strengthening the effectiveness of the tool.

The conceptual understanding of the purpose of the EU Pilot is behind the different positions on the transparency of this tool.

Public authorities argue that allowing complainants or other European institutions access to the EU Pilot database would result in changing the purpose of the tool in a way that would jeopardize its objective of reaching solutions to the breaches of EU law. Furthermore, some officials consider that enhanced participation of complainants in the pre-infringement procedure would weaken the Commission’s main role in EU Pilot, which is considered to be engaging in a constructive dialogue with Member States in order to find solutions to problems related to the implementation of EU law. The importance of preserving the Commission’s discretionary power in deciding actions during the infringement procedures is argued to justify the maintenance of the EU Pilot as it is, without complainants’ access to documents. It enables the parties to negotiate compromise solutions which are politically and legally acceptable.

However, no argument has been made proving that participation of complainants would weaken the possibility for finding solutions to breaches of EU law. On the contrary, the examples of participation of NGOs in the process show that the complainant’s involvement strengthened the effectiveness of the EU Pilot. The dialogue-based and preliminary nature of the EU Pilot, prior to the infringement procedure, makes very exceptional any situation where the complainants’ participation could affect the litigation phase or the Commission’s decision-making power prior to potential Court proceedings.

Access to the EU Pilot data base was also denied to this Project Team which had to limit its source of information on infringement to the use of the database with information on the status of infringements\textsuperscript{239} hosted in the Commission website. However, the results of this project show that the use of this database is time-consuming and complex due to the limited features of the research tools. Furthermore, the information is incomplete and outdated. The European Parliament request to the Commission to make information on infringement cases available should be revisited and a formal request for full and up-to-date information should be put forward.

\textsuperscript{238} The EU Policies Department within the Italian Prime Minister’s Office has created the database ‘EurlInfra’ with a public area where it is possible to find the main data relating to infringement procedures. In Hungary, there exists also a database which allows to follow this Member State’s obligations related to the implementation of directives (deadlines, legal acts to be modified, responsible Ministry: \url{http://jogharamonizalo.gov.hu/}

\textsuperscript{239} \url{http://ec.europa.eu/eu_law/infringements/infringements_decisions_en.htm}, accessed on 14 March 2013.
While the discretionary power of the Commission to decide on the opening and closure of pre-infringement and infringement procedures\textsuperscript{240} needs to be preserved, the exercise of it does not seem incompatible with an improved access to the data base on infringements and a legally binding regulatory framework for handling complaints and infringement procedure providing increased involvement of the complainants and access to information on the arguments concerning the case and motivation of decisions. Greater transparency of the infringement procedure can be regulated in respect of the CJEU jurisprudence, taking into account the less restrictive approach requiring motivated arguments to justify refusal for access to documents (including those of infringement procedures) under Article 4 of Regulation 1049/2001/EC (See page 69, section 4)\textsuperscript{241}.

Calls for greater transparency of the infringement procedure are also based on some authors’ concerns that the confidentiality of the information would lead to situations where ‘[…] the Commission could fail to resist political interference’\textsuperscript{242}. Whenever infringement proceedings are closed, access to Commission documents should be granted. Thus, if the file is closed at the end of the EU Pilot procedure without an infringement proceeding being launched, the situation is similar to the situation of a closed infringement proceeding and the access to Commission documents in this case should be granted.

**Efficiency**

The Commission considers that, as of today, the EU Pilot satisfies the needs for which it has been created. It refers to it as ‘a well-established working method that delivers results for the Commission, the participating Member States and citizens’\textsuperscript{243}. Besides, the Commission endeavours to evaluate this working method annually with the assumed intention of enhancing its efficiency\textsuperscript{244}.

However, the officials and stakeholders interviewed consider that the efficiency of the procedure is being hampered by several factors. These include language barriers that jeopardise an efficient reaction by the Commission and a general lack of resources at the Commission\textsuperscript{245} for processing the files and preparing the cases in an optimum way. The latest Commission decision to eliminate legal units in DG ENV increases the problem. Furthermore, the federal structure of Member States is seen as a barrier which sometimes requires the participation of several authorities causing delays.

Regarding the infringement procedures for cases of non or late transposition assessed in this project shows that the period for the issuance of a letter of formal notice is unnecessarily too long as the data and information of those cases is clear and action can immediately be taken. No EU Pilot is needed in those cases, as already the Letter of Formal Notice enables Member States to react and/or send observations or justifications. The European Parliament might want to consider asking the Commission to take measures to improve this situation.

\textsuperscript{240} Communication from the Commission to the Council and the European Parliament “Updating the handling of relations with the complainant in respect of the application of Union law”, COM (2012) 154 final, p. 8.
\textsuperscript{241} Joined cases C-39/05 P and C-52/05 P Sweden and Turco v Council [2008] ECR I-4723
\textsuperscript{245} Even though this lack of resources is not a coincidence but Member States contribute to this situation as they refuse to allocate more human and financial resources indispensable for its smooth functioning: R. Mehdi, Institutions européennes, Hachette Supérieur, Paris, 2007, p. 110.
5.3.2. Recommendations

Horizontal issues

1. Legal basis and legitimacy of EU Pilot

The Commission should ensure legitimacy and legality of the pre-infringement procedure. There are no legal bases in the Treaty for a pre-infringement procedure and, therefore, for the EU Pilot. Article 258 of the TFEU provides the Commission with the competence to follow an infringement procedure prior to taking the Member State to the Court and refers to the reasoned opinion in order to give the State concerned the opportunity to submit its observations. The letter of formal notice prior to the reasoned opinion was already generated in order to provide the opportunity for the Commission and the Member State to dialogue and find solutions prior to the start of the infringement procedure. The current pre-infringement phase, the EU Pilot, is another layer with the same objective.

Recognising the value of the political agreement to develop a pre-infringement phase, the Commission should adopt all the necessary measures to ensure the legitimacy and legality of this tool. Legitimacy can only be ensured by enabling transparency, participation of complainants and EP (see proposals below) in the EU Pilot. Legality can be ensured through the adoption of a legally binding act containing the rules governing the whole pre-infringement and infringement procedure (see proposals below).

2. The role of the EP in the complaint-handling procedure

The EP should be involved in the complaint-handling procedure and receive systematically a copy of all the letters and complaints that will be the basis of EU Pilot or infringement procedures. This early access to the relevant information should enable the EP to be an active partner in the EU Pilot procedure and database and monitor the implementation and enforcement of EU legislation in a more transparent way. The involvement of the EP will improve the effectiveness, transparency and efficiency of the EU Pilot.

Effectiveness

3. Clarification of the purpose of EU Pilot

The purpose of the EU Pilot should be clarified and legally defined through a participatory process that would enable taking into account the views of all parties, including stakeholders and complainants. There is a dichotomy in the understanding of the EU Pilot’s purpose which affects the assessment of its effectiveness and the arguments to justify the procedure and its shortcomings for achieving its objectives.

4. Participation of complainants in the EU Pilot

The involvement of complainants in the EU Pilot case with access to the exchange of information between the Commission and the Member State and the possibility to contribute to it would strengthen the EU Pilot’s effectiveness for finding solutions.

No examples have been provided by interviewers to justify the general exclusion of complainants from the pre-infringement EU Pilot procedure on the basis of the consideration of the EU Pilot as a ‘privileged’ dialogue between the Commission and Member States or the discretionary power of the Commission which is recognised by the
CJEU for access to information to the documents during the infringement procedure in preparation of a potential judicial phase.

5. **Timing of decisions**

The effectiveness of the EU Pilot and the infringement procedure depends on the timing of the decisions to start each phase. If there is no clear message that an action against potential infringements would be taken, the risk of lengthy procedures would affect the effectiveness of the EU Pilot for solving cases.

Once the complaint is registered, the decision of the start of the EU Pilot should be immediate and not subject to prior informal communications between Commission and Member States.

Decisions for sending a Letter of formal notice should be taken immediately after closure of the EU Pilot, not later than six months of the start of the pre-infringement procedure. It continues providing an opportunity to the Member State to make observations to the Commission.

6. **Internal review of decisions within EU Pilot**

The effectiveness of the EU Pilot requires an internal decision making process that enables review of services’ decisions not subject to publicity. While the discretionary power by the Commission on the steps to be undertaken in the pre-infringement procedure (as well as in the infringement procedure) needs to be respected, the decision-making process prior to infringement procedure, which is carried out at unit level, should be subject to publicity and to internal review (ie. at Director General level).

7. **Measures to evaluate the success of EU Pilot**

The evaluation of the success of the EU Pilot should be based on the problems solved and the undesirable impacts avoided. The criterion that the Commission is currently using to evaluate the success of EU Pilot is the number of cases closed before going to infringement procedure. The communication to the public of the results of EU Pilot should not focus on an administrative argument related to the number of closed cases. A good example seems to be SOLVIT, where the content of every case is described in the data base and citizens, national authorities and the Commission have access to it.

8. **Strategic use of the EU Pilot**

The EU Pilot should not be used in unnecessary cases when it is obvious that cooperation between a Member State and the Commission within the EU Pilot will not remedy the problem. In those cases, the letter of formal notice should be sent directly, without engaging the formal pre-infringement procedure. Establishing criteria according to the complexity of cases on the one hand, and the seriousness of the breach of EU law (e.g. with threat of immediate harm in the areas of Environment or Health) on the other, would improve effectiveness of EU Pilot and infringement procedure in finding solutions.
Transparency

9. Transparency through the Commission or the EP website

The European Parliament should provide access to the information related to the EU Pilot cases they have access to (according to recommendation 2) by publishing in the website the relevant information concerning the case such as the EU legislation and provisions concerned and legal arguments used by all parties.

10. Access to databases and information on EU Pilot and infringement cases

Complainants should have access to the EU Pilot data base.

The European Parliament’s call for the Commission to provide public access to information on infringement cases through a database should be renewed to ensure that the database is user-friendly, providing comprehensive information on the infringements related to specific EU legislative acts or to a Member State. The Commission should provide more precise and detailed information than those contained in the currently publicly available databases on infringement cases. The information sheets within the current IT system\(^{246}\) should be improved and provide more information on the cases.

11. Access to legal and factual arguments

Access to the legal and factual arguments considered in the EU Pilot should systematically be provided to complainants, enabling them to comment on the arguments provided by the Member State.

The Commission, whenever an EU Pilot or an infringement procedure is opened, should provide the Member State concerned with exhaustive and clear motivations in relation to the acceptance or not of their responses on the compliance with EU law.

12. Mandatory rules on participation of complaints

Clear rules on the participation of complainants in the EU Pilot should be adopted through legally binding measures (see below).

Efficiency

13. Sufficient resources

Sufficient resources should be made available to the Commission to enable proper management of complaints, EU Pilot (including preparation of cases and assessments before sending them to Member States) and infringement procedures.

The European Parliament as budgetary authority should ensure that the Commission has the necessary resources to ensure the enforcement and monitoring of EU law. The latest Commission decision to eliminate the legal unit in DG ENV should be challenged.

\(^{246}\) These sheets summarize the main content of the complaints and the Commission’s requests for information.
14. Information on EU Pilot and infringement procedure

The European Parliament should lead and promote raising awareness campaigns on the complaints system, EU Pilot and infringement procedures enhancing a broader use. The number of complaints submitted to the Commission is very low compared to the number of EU laws and population rates in the EU\textsuperscript{247}. This is due to a systemic lack of information on the EU Pilot and infringement procedures, which hinders citizens from playing their vital role in ensuring the effectiveness of EU law. The citizens’ role has been strengthened following the entry into force of the Lisbon Treaty\textsuperscript{248}.

15. Clear legally binding procedural rules

The Commission should propose a Regulation governing the rules of the pre-infringement and the infringement procedures. The development of these rules should go through a consultation process prior to the legislative decision making procedure. The legitimacy and legality of the EU Pilot should be ensured by adopting a legally binding Regulation setting out the rules of the pre-infringement and infringement procedure.

Furthermore the current rules set up in the Commission Communication in 2002, updated in 2012, concerning the handling of relations with the complainant in respect of the application of Union law\textsuperscript{249} are not always respected and are not well known by stakeholders. This leads to legal uncertainty of the procedure.

These rules should define the purpose of the EU Pilot and should address the form of the complaint, desirable content and evidences needed to ensure effectiveness and efficient use of resources. The rules should clearly define the role of each of the parties including the Commission, Member States’ authorities and the complainants who should be involved in the procedure alongside the European Parliament as described above. The Regulation should establish clear time limits defining the moment of the start of EU Pilot procedure, short and precise periods for each procedural phase and for the registration, notifications and adoption of the relevant decisions (e.g. closure of the case). The obligation for the administration to state reasons and motivation of decision and the right for every person to have access to her or his file, should also be dealt with. These rules should prevent informal discussions between Member States and Commission officials prior to the start of the EU Pilot, which would prolong the start of the infringement procedure even more.

\textsuperscript{247} From April 2008 – September 2011 a total of 2,121 files were submitted to EU Pilot. Of these, 1,410 files completed the process in EU Pilot\textsuperscript{Report from the Commission, EU Pilot Evaluation Report, COM(2010) 70 final, p. 6; Report from the Commission, Second Evaluation Report on EU Pilot, COM(2011) 930 final, p. 5.}

\textsuperscript{248} Articles 1(2) and 10(3) TEU on participatory democracy; Articles 41 and 42 of the Charter of Fundamental Rights of the EU (CFREU) on the rights to good administration and of access to documents

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ANNEX 1 – OVERVIEW OF THE STRUCTURE OF THE STUDY

Introduction

Transposition

- Transposition trends
  - Analysis per timing of transposition
  - Analysis per policy area
  - Analysis per Member State
  - Analysis per presence of some compliance promoting tools
  - Reasons for delayed transposition
  - Trade-offs between timely and accurate transposition

- Hurdles to timely transposition
  - Key trends

Compliance promoting tools

- General information
- Specific tools

Pre-infringement tools

- Pre-infringement tools and infringement proceedings
  - CHAP
  - EU Pilot
  - General analysis
  - Analysis per policy area
  - Analysis per Member State
  - Effectiveness, transparency, efficiency

Infringement proceedings

Conclusions and recommendations

- Transposition trends and hurdles to timely transposition
- Compliance promoting tools
- EU Pilot and infringement procedure
## ANNEX 2 – SELECTION OF DIRECTIVES

<table>
<thead>
<tr>
<th>Environment</th>
<th>Deadline for transposition</th>
<th>Degree of sensitivity of the content</th>
<th>Degree of technicality (1. difficult transposition and application; easy transposition and difficult application; easy transposition and difficult application; 2. comment)</th>
<th>Expert judgment on the degree of difficulty connected to the selected Directives’ transposition and application (1. yes, no, no information; 2. comment)</th>
<th>Presence of ‘compliance-promoting’ tools</th>
</tr>
</thead>
<tbody>
<tr>
<td>Air Quality Directive 2008/50/EC</td>
<td>1. post-Lisbon Treaty; 2. 10/06/2010</td>
<td>1. Medium to high; 2. Some limit values are exceeded in Belgium and no derogation was granted; 3. Since a number of years, Member States do not manage to keep air pollution below thresholds</td>
<td>1. Difficult transposition and application; 2. Need to draw plans to improve air quality, implement them, possible economic consequences etc., several practical measures (e.g. measuring stations, frequency, assessments etc.)</td>
<td>1. Yes; 2. Several application problems in most Member States. The Commission has not taken action against them and is rather considering reviewing the Directive</td>
<td>Correlation tables; implementation plans; guidelines; committees; reporting obligations; legal reviews.</td>
</tr>
<tr>
<td>Waste Framework Directive 2008/98/EC</td>
<td>1. post-Lisbon Treaty; 2. 12/12/2010</td>
<td>1. Medium; 2. Sovereignty problems linked with Swedish constitution; 3. The Directive</td>
<td>1. Easy transposition and difficult application; 2. In view of the low priority for</td>
<td>1. Yes; 2. Several application problems (e.g. landfills, incinerators, recycling installations</td>
<td>Correlation tables; guidelines; committees; implementation plans; inspections; reporting</td>
</tr>
<tr>
<td>Deadline for transposition (1. ‘earlier than EU10 enlargement in 2004’; EU10 enlargement till entry into force of the Lisbon Treaty in 2009’ and ‘post-Lisbon Treaty’; 2. dd/mm/yy)</td>
<td>Degree of sensitivity of the content (1. low; medium; high; 2. example; 3. comment)</td>
<td>Degree of technicality (1. difficult transposition and application; easy transposition and difficult application; easy transposition and application; 2. comment)</td>
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<tr>
<td>Public Participation Directive 2003/35/EC amending Directive 85/337/EEC and 96/61/EC</td>
<td>1. EU10 enlargement till entry into force of the Lisbon Treaty in 2009; 2. 25/06/2005 (BG and RO – 01/01/2007)</td>
<td>1. High; 2. ...; 3. Politically sensitive because of public participation and involvement of local and regional authorities, perceived as an obstacle to quick realisation of</td>
<td>1. Difficult transposition and application; 2. Smaller plans (e.g. town and country planning etc) are likely to be the subject matter of bargaining</td>
<td>1. Yes; 2. There is extensive litigation around it since NGOs and citizens are likely to challenge plans which did not follow the requirements of the Directive</td>
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</tr>
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<td></td>
<td>largely reproduces measures which had to be taken since 1991.</td>
<td>waste measures, application in practice is difficult and practices)</td>
<td>obligations; legal reviews.</td>
<td>Committees; inspections; legal reviews; reporting obligations.</td>
<td>Reporting obligations; legal reviews.</td>
</tr>
<tr>
<td><strong>Water framework Directive 2000/60/EC</strong></td>
<td>Deadline for transposition (1. ‘earlier than EU10 enlargement in 2004’, ‘EU10 enlargement till entry into force of the Lisbon Treaty in 2009’ and ‘post-Lisbon Treaty’; 2. dd/mm/yy)</td>
<td>Degree of sensitivity of the content (1. low, medium, high; 2. example; 3. comment)</td>
<td>Degree of technicality (1. difficult transposition and application; easy transposition and difficult application; easy transposition and application; 2. comment)</td>
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<tr>
<td>1. earlier than EU10 enlargement in 2004; 2. 22/12/2003 (CZ, EE, CY, LV, LT, HU, MT, PL, SI and SK – 01/05/2004) (BG and RO – 01/01/2007)</td>
<td>Medium; 2. ...; 3. Directive leaves water bodies a large margin of discretion</td>
<td>Difficult transposition and application; Several decisions on water stretches need to be taken, and plans and programmes need to be elaborated</td>
<td>Yes; 2. Compliance on many aspects of the Directive is only required by 2015, hence at present only one application problem (e.g. plans and programmes)</td>
<td>Implementation plans; committees; guidelines; fitness checks; legal reviews; reporting obligations.</td>
<td></td>
</tr>
</tbody>
</table>

<p>| <strong>Internal Market</strong> | <strong>Services Directive 2006/123/EC</strong> | Deadline for transposition (1. ‘earlier than EU10 enlargement in 2004’, ‘EU10 enlargement till entry into force of the Lisbon Treaty in 2009’ and ‘post-Lisbon Treaty’; 2. dd/mm/yy) | Degree of sensitivity of the content (1. low, medium, high; 2. example; 3. comment) | Degree of technicality (1. difficult transposition and application; easy transposition and difficult application; easy transposition and application; 2. comment) | Expert judgment on the degree of difficulty connected to the selected Directives’ transposition and application (1. yes, no information; 2. comment) | Presence of ‘compliance-promoting’ tools |
|---|---|---|---|---|---|
| 1. post-Lisbon Treaty; 2. 27/12/2009 | High; 2. ...; 3. Especially Article 16 and all developments related to the ‘new’ country of origin principle | Difficult transposition and application; The Directive contains a lot of exceptions regarding the scope of the Directive and the application of | Yes; 2. 1st time, Commission has developed tools to ensure correct transposition and application (e.g. mutual evaluation, performance checks, | Committees; correlation tables; implementation plans; inspections; legal reviews; reporting obligations. |</p>
<table>
<thead>
<tr>
<th>Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deadline for transposition (1. ‘earlier than EU10 enlargement in 2004’, ‘EU10 enlargement till entry into force of the Lisbon Treaty in 2009’ and ‘post-Lisbon Treaty’; 2. dd/mm/yy)</td>
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<tr>
<td>------------------------------------------------------------------------------------------------</td>
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<tr>
<td><strong>Directive 2008/6/EC amending Directive 97/67/EC on the full accomplishment of the internal market with regard to postal services</strong></td>
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<tr>
<td><strong>Deadline for transposition</strong> (1. ‘earlier than EU10 enlargement in 2004’, ‘EU10 enlargement till entry into force of the Lisbon Treaty in 2009’ and ‘post-Lisbon Treaty’; 2. dd/mm/yy)</td>
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<tr>
<td><strong>Internal market in electricity</strong></td>
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<tr>
<td><strong>Directive 2007/66/EC amending Directives 89/665/EEC and 92/13/EEC on review procedures in the award of public contracts</strong></td>
</tr>
<tr>
<td><strong>Mutual Recognition of Professional Qualifications Directive 2005/36/EC</strong></td>
</tr>
<tr>
<td>Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness</td>
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<tr>
<td><strong>Deadline for transposition</strong> <em>(1. ‘earlier than EU10 enlargement in 2004’, EU10 enlargement till entry into force of the Lisbon Treaty in 2009’ and ‘post-Lisbon Treaty’; 2. dd/mm/yy)</em></td>
</tr>
<tr>
<td><strong>Degree of sensitivity of the content</strong> <em>(1. low, medium, high; 2. example; 3. comment)</em></td>
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<tr>
<td><strong>Degree of technicality</strong> <em>(1. difficult transposition and application; easy transposition and difficult application; easy transposition and application; 2. comment)</em></td>
</tr>
<tr>
<td><strong>Expert judgment on the degree of difficulty connected to the selected Directives’ transposition and application</strong> <em>(1. yes, no; 2. comment)</em></td>
</tr>
<tr>
<td><strong>Presence of ‘compliance-promoting’ tools</strong></td>
</tr>
<tr>
<td><strong>Judicial Cooperation</strong></td>
</tr>
<tr>
<td>1. post-Lisbon Treaty; 2. 28/03/2011</td>
</tr>
<tr>
<td>1. High; 2. Ruling by the Belgian, German and Czech Constitutional Courts; 3. Topic close to the sovereignty of Member States</td>
</tr>
<tr>
<td>1. Easy transposition and difficult application; 2. ...</td>
</tr>
<tr>
<td>1. No information; 2. ...</td>
</tr>
<tr>
<td>Legal reviews; reporting obligations.</td>
</tr>
<tr>
<td><strong>Citizenship &amp; Fundamental Rights</strong></td>
</tr>
<tr>
<td><strong>Citizenship Directive 2004/38/EC</strong></td>
</tr>
<tr>
<td>1. EU10 enlargement till the entering into force of the Lisbon Treaty in 2009; 2. 30/04/2006 (BG and RO - 01/01/2007)</td>
</tr>
<tr>
<td>1. Medium; 2. ...; 3. ...; Political obstacles, difficult topic (immigration)</td>
</tr>
<tr>
<td>1. Easy transposition and application; 2. ...</td>
</tr>
<tr>
<td>1. Yes; 2. Vast amount of case law, especially linked to third country nationals and access to financial aid</td>
</tr>
<tr>
<td>Reporting obligations.</td>
</tr>
<tr>
<td><strong>Race Directive</strong></td>
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<tr>
<td>1. earlier than</td>
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<td>1. Easy</td>
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<tr>
<td>Reporting obligations.</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Policy Department</th>
<th>Deadline for transposition (1. ‘earlier than EU10 enlargement in 2004’, ‘EU10 enlargement till entry into force of the Lisbon Treaty in 2009’ and ‘post-Lisbon Treaty’; 2. dd/mm/yy)</th>
<th>Degree of sensitivity of the content (1. low, medium, high; 2. example; 3. comment)</th>
<th>Degree of technicality (1. difficult transposition and application; easy transposition and difficult application; easy transposition and application; 2. comment)</th>
<th>Expert judgment on the degree of difficulty connected to the selected Directives’ transposition and application (1. yes, no, no information; 2. comment)</th>
<th>Presence of ‘compliance-promoting’ tools</th>
</tr>
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<tbody>
<tr>
<td>2000/43/EC</td>
<td>EU10 enlargement in 2004; 2. 19/07/2003 (CZ, EE, CY, LV, LT, HU, MT, PL, SI and SK – 01/05/2004) (BG and RO – 01/01/2007)</td>
<td>transposition and difficult application; 2. Similar problems as the Equal Treatment Directive 2006/54/EC</td>
<td>problems with transposition, but more hurdles with application given the lack of awareness of powers and mechanisms for reporting of equality bodies</td>
<td></td>
<td>Correlation tables; reporting obligations.</td>
</tr>
<tr>
<td>96/71/EC Directive on posted workers</td>
<td>1. earlier than EU10 enlargement in 2004; 2. (BE, …; 3. …</td>
<td>1. Medium to high; 2. …; 3. …</td>
<td>1. Easy transposition and difficult application; 2. …</td>
<td>1. Yes; 2. Several rulings of the ECJ have had to clarify the concrete scope of</td>
<td>Legal reviews.</td>
</tr>
<tr>
<td>Deadline for transposition (1. 'earlier than EU10 enlargement in 2004', 'EU10 enlargement till entry into force of the Lisbon Treaty in 2009' and 'post-Lisbon Treaty'; 2. dd/mm/yy)</td>
<td>Degree of sensitivity of the content (1. low, medium, high; 2. example; 3. comment)</td>
<td>Degree of technicality (1. difficult transposition and application; easy transposition and difficult application; easy transposition and application; 2. comment)</td>
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<tr>
<td>DE, DK, GR, IE, IT, ES, FR, LU, NL, AT, PT, FI, SE and UK - 16/12/1999 (CZ and LT - 01/05/2004) (BG and RO - 01/07/2007) (EE and LV - 01/05/2009) (CY, HU, MT, PL, SI and SK - 01/05/2011)</td>
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<td>the Directive and the European Commission has adopted a proposal called 'implementation of Directive 96/71/EC' because of the difficulties linked to the practical application.</td>
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</table>
ANNEX 3 – LIST OF STAKEHOLDERS

Part I

The table below contains an overview of stakeholders whose officials were interviewed during the project with the aim of identifying hurdles to timely transposition and assessing the effectiveness of the selected compliance-promoting tools. In total, 39 (7 EU level + 32 Member State level) interviews were conducted. In certain cases, interviews were conducted with two different officials of the same stakeholder. Finally, in certain cases, on Member State level, some of the stakeholders indicated below coordinated the collection of information with other relevant government authorities (e.g. Germany - Federal Ministry of Economy and Technology) and may not necessarily be authors of the received responses.

<table>
<thead>
<tr>
<th>EU</th>
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<tbody>
<tr>
<td>Secretariat General</td>
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<tr>
<td>DG Environment - Unit</td>
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<tr>
<td>DG Markt - Unit A2</td>
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<tr>
<td>DG Markt - Unit B3</td>
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<tr>
<td>DG Markt - Unit B3</td>
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<tr>
<td>DG Justice - Unit A1</td>
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<tr>
<td>DG Justice - Unit C2</td>
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<td>DG Justice - Unit D1</td>
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<td>DG Justice - Unit D1</td>
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<table>
<thead>
<tr>
<th>Germany</th>
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<tbody>
<tr>
<td>Germany - Federal Ministry for the Environment, Nature Conservation and Nuclear Safety</td>
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<td>Germany - Federal Ministry for the Environment, Nature Conservation and Nuclear Safety</td>
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<td>Germany - Federal Ministry for the Environment, Nature Conservation and Nuclear Safety</td>
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<td>Germany - Federal Ministry of Economy and Technology</td>
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<td>Germany - Federal Ministry of Justice</td>
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<tr>
<td>Germany - Federal Ministry of Justice</td>
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<tr>
<td>Germany - Federal Ministry of Economy and Technology</td>
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<tr>
<td>Spain</td>
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<tr>
<td>Spain - Ministry of Foreign Affairs</td>
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<td>Spain - Spanish Permanent Representation in Brussels</td>
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<td>Spain - Spanish Permanent Representation in Brussels</td>
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<td>Hungary</td>
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<td>Hungary - Ministry of Rural Development</td>
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<td>Hungary - Ministry of Rural Development</td>
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<td>Hungary - Ministry for National Economy</td>
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<td>Hungary - Ministry of Foreign Affairs</td>
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<td>Hungary - Ministry of Public Administration and Justice</td>
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<td>Hungary - Ministry of Public Administration and Justice</td>
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<tr>
<td>Italy</td>
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<td>Italy - Ministry of Justice</td>
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<td>Italy - Presidency of the Council of Ministers</td>
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<td>Italy - Ministry of Foreign Affairs</td>
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</tbody>
</table>
### Latvia

- Latvia - Ministry of Environment
- Latvia - Ministry of Economics
- Latvia - Ministry of Transport
- Latvia - Ministry of Justice

### Sweden

- Sweden - Ministry of Environment
- Sweden - Ministry of Enterprise, Energy and Communications
- Sweden - Ministry of Justice
- Sweden - Ministry of Education and Research
- Sweden - Ministry of Employment
- Sweden - Ministry of Justice

### UK - Department of Business, Innovation and Skills

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**Part II**

The table below contains an overview of stakeholders whose officials were interviewed during the project in assessing the effectiveness, transparency and efficiency of the EU Pilot and CHAP. In total 47 (1 EU level + 46 Member State level) interviews were conducted. In certain cases, interviews were conducted with two or more different officials of the same stakeholder.

### EU

#### Germany

- Germany - The Federal Environment Agency
- Germany - Freiburg Regional Council
- Germany - Heidelberg Department of Environmental Protection
- Germany - Expert in Environmental Law
- Germany - Main Custom and Criminal Office
- Germany - Rhine-Neckar district department Economic Development and Europe
- Germany - Expert in Consumer Protection
- Germany - Rhine-Neckar District
- Germany - Prosecutor

#### Spain

- Spain - Secretary of the State for European Union
- Spain - Spanish Permanent Representation in Brussels
<table>
<thead>
<tr>
<th>Country</th>
<th>Organization</th>
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<tbody>
<tr>
<td>Hungary</td>
<td>Ministry of Foreign Affairs</td>
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<td>University of Debrecen</td>
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<td>Ministry of National Development</td>
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<td>Hungarian Energy Company</td>
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<td>Ministry of Public Administration and Justice</td>
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<td>Fundamental Rights Expert</td>
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<td>Ministry of Attorney at law</td>
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<th>Italy</th>
<th>Organization</th>
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<td>Presidency of the Council of Ministers</td>
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<td>Italian Post</td>
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<td>Amnesty International</td>
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<tr>
<th>Latvia</th>
<th>Organization</th>
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<tr>
<td>Latvia</td>
<td>Ministry of Environmental Protection and Regional Development</td>
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<td>Latvian Environmental NGO</td>
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<td>Ministry of Economics</td>
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<td>Attorney at law</td>
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<td>Ministry of Welfare</td>
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<td>Ministry of Justice</td>
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<tr>
<th>Sweden</th>
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<tr>
<td>Sweden</td>
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<td>Ministry of Environment</td>
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<td>WWF</td>
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<td>Ministry of Finance</td>
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<td>Enterprise, Energy and Communications</td>
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<td>Swedish Red Cross</td>
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<td>Confederation for Professional Employees</td>
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<tr>
<th>United Kingdom</th>
<th>Organization</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>Department for the Environment, Food and Rural Affairs</td>
</tr>
<tr>
<td>UK</td>
<td>Environmental NGO</td>
</tr>
<tr>
<td>UK</td>
<td>UK Cabinet Office</td>
</tr>
</tbody>
</table>
ANNEX 4 – TEMPLATE FOR INTERVIEWS ON HURDLES AND BEST PRACTICES OF TRANSPOSITION

What are the main hurdles and reasons for failure of (timely) transposition in your country/in the EU (if question addressed to EU official)?

Do you agree with the problems listed below? Which ones are particularly important for your country/for the EU (if question addressed to EU official)? Can you think of any other? Can you give examples for each? What solutions do you see?

EU law itself:
- Provisions of the EU law are vague or lack clarity;
- The subject matter is complex and technically challenging.

National level
Political:
- There is a misalignment in policy priorities; the subject matter is perceived as unimportant/low in the political agenda;
- The directive is subject to domestic political sensitivity, reflecting political/electoral division;
- National economic interests are involved;
- There are problems specific to a particular policy area: please comment regarding areas of environment (including climate and energy legislation); internal market; judicial cooperation; citizenship and fundamental rights.

Institutional and administrative:
- There are shortcomings in knowledge and capacities (financial, human) in the different levels (please specify which ones) of the administration;
- There is confusion regarding the choice of policy/legal options in the Directive;
- There are problems in aligning the respective legal act with existing legislation;
- There is institutional competition/the competences are unclear
  Horizontally (e.g. among different ministries)
  Vertically (e.g. among different levels of governance, such as between Federal and Regional/Provincial level).
- There is need for cooperation between authorities of different levels (e.g. national, regional, local)

Procedural and legal:
- Conviction that the legal system already complies with the Directive’s provisions;
- Extent of changes required in national law;
- Differences of interpretation: the understanding or interpretation of a provision of EU law by the national authorities does not comply with the general or EU institutions understanding of what the EU measure in question means;
- Speed of national legislative processes;
- Attempts to match transposition with other legislative provisions or policies;
- Insufficient attention to deadlines.

What are the **tools the Commission can employ to improve the timeliness or quality of transposition**? Please rate the effectiveness of each of these tools with 1 – not effective, 2 - somewhat effective or 3 - very effective:

- Correlation tables;
- Scoreboards and barometers;
- Conformity checking;
- Guidelines;
- Networks;
- (Quicker) infringement procedures;
- Package meetings;
- Other: please explain.

Further to your answers to question 3, can you think of ways to improve those you considered ineffective and (legal, procedural, institutional) **tools that would be more effective** than the ones mentioned above to improve the timeliness or quality of transposition?

Please describe examples of **best practices** (cases in which challenges were successfully addressed) in transposition? Can you think of examples in the areas of

- Environment (climate and energy legislation);
- Internal market;
- Judicial cooperation;
- Citizenship and fundamental rights.

Do you think that, in cases where transposition time is considered short by the Member States, there is a risk of **trade-off between timely and accurate transposition** of EU law? If so, do you think this problem needs to be addressed at EU level? Do you have any suggestions how this could be done?

**Examples:**

- Cases when transposition is timely, but literal;
- French example, where transposition is slow, but implementation is much better than in some other Member States where transposition is timely.

Do you see any **key trends or lessons learned regarding the quality or timeliness in transposition** of EU law in your country?
ANNEX 5 – TEMPLATE FOR INTERVIEWS ON ‘COMPLIANCE-PROMOTING’ TOOLS

The interviewees were asked to provide answers to the questions indicated below for each identified compliance promoting tool. Furthermore, the interviewees were provided with a brief description and examples of use for each identified compliance promoting tool. Compliance promoting tools’ brief description and example of use are provided in Section 3 of this Report and are not contained in this Annex with the aim of avoiding repetition.

Questions for each ‘compliance-promoting’ tool

For each of the tools listed below, please comment on the following questions.

- How familiar are you with this tool?
- In your experience, when and how is this tool used?
- How effective is this tool in promoting compliance?

Is the tool more useful in some policy areas than others (environment, internal market, judicial cooperation, and fundamental rights and citizenship)?

- What are the strengths and weaknesses of this tool?
- How could the tool be improved?

Please also rate the criteria of effectiveness (question 3) with
1 - not useful or effective;
2 - somewhat useful/effective, or
3 - very useful/effective,
while giving examples motivating your answer.
ANNEX 6 - TEMPLATE FOR INTERVIEWS ON PRE-INFRINGEMENT TOOLS

The interviewees were asked to present their views on the effectiveness and efficiency of the system in enhancing compliance with EU law. They were specifically asked to address whether the tools promote transparency and improve citizens’ involvement in the enforcement of EU law. The questions below were intended to provide guidance with the possibility of their adaptation during the course of interviews to enable coverage of additional issues relating to the effectiveness, transparency and reliability of the tools.

1. Questions relating to CHAP (questions to EU officials)

What is the purpose of CHAP?

- Ensuring registration of complaints and letters for internal management purposes;
- Ensuring complainants receive responses in due time;
- Ensuring (suitable?) complaints are handled by the EU Pilot;
- Other.

Is CHAP a database/registration tool? Do you see the possibility to make it available to the public and/or to other European institutions?

Who, within the Commission, has access to CHAP registration? How and by whom are decisions made regarding the registration of a complaint or a case?

Are all cases registered or are there exceptions?

How and by whom are decisions made on the next steps after registration of the complaint/case (e.g. whether the case is transferred to the EU Pilot or to the Commission’s relevant service)?

If the complaint or case goes to the Commission’s relevant service, is there any step prior to the decision to start an infringement procedure through the letter of formal notice? Who makes this decision?

Is there any control system to check whether the reasoning on which the above decisions are based is correct (i.e. not sending it to EU Pilot, closing a file after the EU Pilot process, or instead starting an infringement procedure)? Is there a (formal or informal) internal review mechanism of the decisions?

In your view, is CHAP an effective and reliable registration tool? Please explain.

Do you consider that the Lisbon Treaty and its provisions on transparency (e.g. Articles 1 and 11 TEU and Article 15 TFEU) have brought about improvements to CHAP?

Is CHAP a transparent pre-infringement tool? Please elaborate.

What are the strengths and weaknesses of CHAP?
What can be done to improve CHAP?

2. Questions relating to the EU Pilot

What is the purpose of the EU Pilot? Is it applied to all Member States?

Effectiveness

In your view, is the EU Pilot an effective pre-infringement tool? Please explain.

Do you think that the EU Pilot system serves its purpose to provide quicker responses to citizens and NGOs submitting information to the Commission?

It takes an average of five months to issue a response under the EU Pilot. In your view, is that a reasonable amount of time in relation to the EU Pilot objectives? If not, what could be done to speed up the process?

Do you think that the EU Pilot has improved proper citizen involvement? Do you think that citizens could feel discouraged when complaints are sent to EU Pilot and then closed without disclosure of the motivation for doing so or evidence of the (environmental) problem being solved?

The European Parliament as well as the first Commission report on EU Pilot called for the involvement of the complainant in the dialogue between Commission and the national authorities. Is this being done? If so, how? Do you think that EU Pilot should include such a dialogue with complainants? If so, what can be done to facilitate this dialogue? The number of submitted complaints on environmental matters has dropped significantly since the introduction of the EU Pilot. In your view, to what extent could this be due to a loss of confidence in the system or to an improvement of implementation by Member?

Do you consider the criteria to assess the success of the EU Pilot adequate and transparent?

In your view, is there a link between the introduction of complaint handling mechanisms such as CHAP and the EU Pilot on the one hand, and the decreasing number of infringement proceedings on the other hand? If not, what factors other than CHAP/EU Pilot could explain the decreasing number of infringement proceedings?

Is there any mechanism to guarantee that decisions on cases are taken in an objective way?

Transparency

Is the EU Pilot a transparent pre-infringement tool?

How have relevant stakeholders in the Member States been informed of the use EU Pilot system?

Is there a database providing information about the status of cases handled by EU Pilot? If so, does the public have access to this database? If not, why is this information not available to the public?

Which reasons listed in Article 4 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents serve as grounds for
denying public access to information on the status of the cases in EU Pilot? Please elaborate.

The EU Pilot has been criticised by the Parliament for not providing information regarding the progress and status of a case? Do you think that providing information to the public/complainant would affect the Commission’s margin of appreciation? How could the provision of such information be facilitated?

Does the EU Pilot foresee the involvement of experts in particularly complex cases? If so, is transparency of the rules relating to the designation of experts, as well as their status and mission being guaranteed?

In your view, should the reasons behind decisions and the closure of files handled by the EU Pilot be made available to the complainants and/or the public?

Do you think that the question of whether a Member State has complied with its obligations under EU law should be dealt with in confidential procedure also when the original complaint was introduced by a citizen or member of the public?

Do you consider that the Lisbon Treaty and its provisions on transparency have brought about improvements to the EU Pilot?

Efficiency

Are the EU Pilot technical requirements and resources used sufficiently/ to full capacity? Do you have any suggestions for technical measures to improve the EU Pilot’s performance?

In your opinion, is the delimitation of scope between SOLVIT and SOLVIT+, and EU Pilot sufficiently clear? Is there sufficient communication between both systems to correct any mistakes which may have happened in the initial allocation of complaints?

General evaluation

When a Member State commits itself during the EU Pilot to take this or take measure, is there any mechanism to check whether it has complied with its commitment?

What are the strengths of the EU Pilot? What is its added value compared to the classical pre-infringement procedure? What are the weaknesses of the EU Pilot? What are the difficulties encountered with extending the EU Pilot as an instrument of problem-solving and prevention to all Member States?

- What can be done to improve the EU Pilot?
- Is there a standard method for handling complaints or can we observe differences in processing files according to their content? If the latter is the case, could you explain why?
- In your opinion, are the procedural guarantees for complainants in line with the EU Data protection rules? Do the legal and judicial limits to transparency seem sufficiently clear in the Commission’s infringement policy? Is there any need/room for increasing transparency?
ANNEX 7 – FLOW CHART ON THE MAIN STEPS IN EU PILOT

## ANNEX 8 – DIVERGENCE TABLE

During the additional research regarding seven selected seven Member States, national experts, engaged on the project, identified several cases where the data contained in the “Table on timely transposition” and the data that they had differs. The table below shows an overview of identified cases of divergence between the data contained in the “Table on timely transposition”, i.e. EURLex database and the information available to the experts together with provided explanation, in case such explanation was provided.

<table>
<thead>
<tr>
<th>EU legal instrument</th>
<th>Explanation</th>
</tr>
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<tbody>
<tr>
<td><strong>Environment</strong></td>
<td></td>
</tr>
<tr>
<td>Water Framework Directive (2000/60/EC)</td>
<td>LV - In accordance with “Table on timely transposition”, transposition in this case has been delayed. According to the national expert, there is no evidence that the transposition was delayed. No information was accessed on Commission’s accession regarding possible delayed transposition.</td>
</tr>
<tr>
<td>Directive on Public Participation (2003/35/EC)</td>
<td>SE - In accordance with “Table on timely transposition”, transposition in this case has been timely. According to the national expert, who obtained his/her information from the relevant Swedish Ministry, in this very case, Sweden received a Letter of formal notice for “late implementation”.</td>
</tr>
<tr>
<td><strong>Internal Market</strong></td>
<td></td>
</tr>
<tr>
<td>Services Directive (2006/123/EC)</td>
<td>UK - In accordance with “Table on timely transposition”, transposition in this case has been delayed. According to the national expert, the transposition was timely.</td>
</tr>
<tr>
<td>Transparency Directive (2004/109/EC)</td>
<td>UK - In accordance with “Table on timely transposition”, transposition in this case has been delayed. According to the national expert, the transposition was timely. The Directive is transposed through Transparency Rules made by Financial Services Authority under new provisions conferred by the Companies Act 2006.5. The Companies Act provides a single company law regime that applies to the whole of the United Kingdom.</td>
</tr>
<tr>
<td>Directive on Internal Market in Electricity (2009/72/EC)</td>
<td>DE - In accordance with “Table on timely transposition”, transposition in this case has been delayed. According to the national expert, the transposition in this case was</td>
</tr>
<tr>
<td>EU legal instrument</td>
<td>Explanation</td>
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<tr>
<td>Timely. HU - In accordance with “Table on timely transposition”, transposition in this case has been delayed. According to the national expert, the transposition in this case was timely. In case of this Directive, the Commission sent an informal request, but the Directive itself was timely transposed according to the Hungarian Ministry of Justice and information accessible through various databases 250.</td>
<td></td>
</tr>
</tbody>
</table>

| Directive on Postal Service (2008/6/EC) | CZ, EL, LV, LT, LU, HU, MT, PL, RO and SK - In accordance with “Table on timely transposition”, transposing legislation in this case has not been communicated. However, on 11 April 2013, it was observed that CZ, EL, LV, LT, LU, HU, MT, PL, RO and SK communicated their national transposing measures to the Commission. Cases of delayed transposition were observed in regards to LT and RO. From the information contained in the EURLex database, CZ, EL, LV, LU, HU, MT, PL and SK transposed this Directive on time. Possible explanation for this could be that since the “Table on timely transposition” was drafted in January 2013, and having in mind the fact that transposition deadline for this Directive in case of these Member States was 31 December 2012, it is plausible that the legislation was not communicated at the moment of drafting of the “Table on timely transposition”. |

| Directive on Posted Workers (96/71/EC) | DE - In accordance with “Table on timely transposition”, transposing legislation in this case has not been communicated. According to the national expert, the transposition in this case was timely. |

| Judicial Cooperation |

| Framework Decision on Arrest Warrant (2002/584/JHA) | BE, DK, ES, IE, CY, LT, HU, PL, PT, SI, FI, SE, UK - In accordance with “Table on timely transposition”, not a single Member State communicated transposing legislation |

250 These include the following: [http://ec.europa.eu/eu_law/infringements/infringements_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_en.htm), [http://jogaharmonizacio.gov.hu/](http://jogaharmonizacio.gov.hu/) and 3/B - The internal database which is not accessible to the public. This database contains more detailed information concerning the relevant procedures.
<table>
<thead>
<tr>
<th><strong>EU legal instrument</strong></th>
<th><strong>Explanation</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>to the Commission. However, a Report from the Commission(^251), states that the above listed Member States have “complied with the time limit laid down” by the Decision.</td>
</tr>
</tbody>
</table>

### Citizenship and Fundamental Rights

**Citizenship Directive (2004/38/EC)**

- **HU** - In accordance with “Table on timely transposition”, transposition in this case has been delayed. According to the national expert, the transposition in this case was timely. In case of this Directive, the Commission sent an informal request, but the Directive itself was timely transposed according to the Hungarian Ministry of Justice and information accessible through various databases\(^252\).


- **HU** - In accordance with “Table on timely transposition”, transposition in this case has been delayed. According to the national expert, the transposition in this case was timely. In case of this Directive, the Commission sent an informal request, but the Directive itself was timely transposed according to the Hungarian Ministry of Justice and information accessible through various databases\(^253\).

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\(^{252}\) These include the following: [http://ec.europa.eu/eu_law/infringements/infringements_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_en.htm), [http://isoharmonizacio.gov.hu/](http://isoharmonizacio.gov.hu/) and 3/B - The internal database which is not accessible to the public. This database contains more detailed information concerning the relevant procedures.

\(^{253}\) These include the following: [http://ec.europa.eu/eu_law/infringements/infringements_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_en.htm), [http://isoharmonizacio.gov.hu/](http://isoharmonizacio.gov.hu/) and 3/B - The internal database which is not accessible to the public. This database contains more detailed information concerning the relevant procedures.
POLICY DEPARTMENT
CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS

Role
Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas
- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents