

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**IMPLEMENTATION AND
ENFORCEMENT OF EU
ENVIRONMENTAL LAW**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Implementation and Enforcement of EU Environmental Law

NOTE

Abstract

The measures adopted by the Commission in the last 5 years defining the EU implementation and enforcement policy aim at improving the implementation rather than enforcement of EU law by enhancing Member States' role and capacity, including by delegating actions to the national level. The present note argues the need to strengthen the enforcement role of the Commission as the Guardian of the Treaties and proposes specific actions to be taken at EU level for the development of a strong policy for implementation and enforcement of EU environmental law.

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LIST OF ABBREVIATIONS

CJEU Court of Justice of the European Union

EU European Union

TEU Treaty of the European Union

TFEU Treaty on the Functioning of the European Union

1. LATEST COMMISSION ACTS ON IMPLEMENTATION AND ENFORCEMENT OF EU ENVIRONMENTAL LAW

Member States and the European Commission have a shared responsibility in implementing and enforcing European Environmental Law, as recognized by the CJEU in its jurisprudence (i.e. Case C-365/97 *Commission v Italy* para 58-60). The former must implement Treaty obligations and those arising from secondary legislation, according to Article 4.3 Treaty of the European Union (TEU), whereas the Commission, as Guardian of the Treaties, must ensure the correct application of those obligations (Article 17.1 TEU). In the light of these legal bases, the Commission plays the role of supporting and controlling Member States' implementation in two ways: monitoring implementation by Member States and enforcement of EU law once a breach has been identified.

The Treaty stipulates no specific means to develop these obligations, and therefore the Commission has discretion to decide on the means used, including the adoption of new measures to improve the application of EU Law.

In this respect, the Commission adopted in 2002 a general policy towards "*Better monitoring of the application of Community Law*"¹, further developed in a Communication of 2007: "*A Europe of results*"². According to these documents, this policy aims at making all necessary efforts to solve implementation problems at an early stage focusing thus on preventive actions, promoting implementation and reducing the need for recourse to infringement procedures (enforcement).

One of the instruments created with this policy objective in mind is the EU Pilot, a new system to deal with complaints which, following the Communication, aims at reducing the number of infringement procedures by correcting problems at an early stage as well as at providing more rapid answers to citizens and tightening up the handling and management of existing procedures. The system is based on bilateral contacts between the Commission and Member States (with the appointment of a specific focal point in the country) through an internal IT database where questions and answers are introduced. The system replaces the cumbersome "pre-258 letter procedure" through the Permanent Representations of Member States. It started in April 2008 in a few Member States and, since then, it has contributed to reducing the number of infringement cases, even if the Commission reports do not include information on whether and how it has contributed towards solving problems of compliance, for instance in the field of EU environmental legislation. According to the Commission report adopted in December 2011³, during the period April 2008 to September 2011 a total of 2,121 files were submitted to EU Pilot, out of which 33% concerned environmental issues. The report evaluates the "*success rate*" concerning the 1,410 files which have completed their process in the EU Pilot system by stating that "...nearly 80% (1,107 files) of the responses provided by the Member States had been assessed as acceptable (in line with EU law) allowing the file to be closed without the need to launch an infringement procedure under Article 258 TFEU"⁴.

¹ Commission Communication "*Better monitoring the application of Community Law*", COM (2002) 725 final. This Communication derives from the discussion on the White Paper on European Governance COM (2001) 428 final, which focused on improving the quality and monitoring of legislation.

² Commission Communication "*A Europe of results*", COM (2007) 502 final.

³ Commission. Second Evaluation Report on EU Pilot, SEC(2011)1629/2, 21.12.2011

⁴ Report from the Commission. Second Evaluation Report on EU Pilot, SEC(2011) 1629/2, 21.12.2011, p.6.

In 18 November 2008, the European Commission issued the Communication (2008) 773 on Implementing European Environmental Law⁵, where general challenges for implementation and enforcement at national and EU level were identified and several measures at EU level were proposed including improving preventing measures such as building capacity at Member States level with particular interest in national judges. This Communication aimed at setting priority cases for its enforcement policy as follows:

- non communication of transposition measures,
- failure to comply with CJEU judgements,
- breaches of EU law raising issues of principle or having particularly far reaching negative impact for citizens in 4 categories: non conformity of transposition measures; systemic or large scale breaches; lack of compliance with key obligations or EU environmental legislation; breaches concerning big infrastructure projects or interventions involving EU funding or significant adverse impacts.

In March 2012, the Commission published a new Communication⁶ building up on the experience gained by the previous one, and aiming to improve knowledge and responsiveness in relation to EU environmental measures at national level. The Commission proposals focus on actions required to enhance Member States' implementation by improving information systems about how EU law is being implemented, including data on compliance and enforcement approaches. The Commission will consider the need for amending the Access to information Directive. Similarly, measures proposed to improve access to justice address only the national level.

No major proposals are included for improving the Commission enforcement role as Guardian of the Treaty. The Commission Communication proposes to assess options for inspection actions at EU level, including the development of EU level inspection and surveillance capacity and the use of independent expert input. It also includes proposals to involve Member States in the handling of complaints regarding breaches of EU environmental law and refers to the establishment of independent national administrative review bodies to deal with claims of administrative inaction or inadequacy of action. While delegating this role to the national level, the Commission will aim at improving its rules by the review and update of Communication (2002) 141 on relations with the complainant in respect of infringements of Community Law⁷ as announced in its 27th Annual Report on monitoring the application of European Union Law⁸

As a conclusion, the nature of the measures developed by the Commission in the last 5 years to improve implementation and enforcement of EU law aim at enhancing Member States' role and capacity, delegating actions from the EU to the national level. This note rather argues the need to strengthen the enforcement role of the Commission as the Guardian of the Treaties and proposes specific actions to be taken at EU level for the development of a strong policy for implementation and enforcement of EU Law, and more particularly environmental law.

⁵ Commission Communication on implementing European Environmental Community Law, COM(2008) 773/4.

⁶ Communication from the Commission "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness" COM(1012) 95 final, 7.3.2012.

⁷ *Commission Communication (2002) 141 on relations with the complainant in respect of infringements of Community Law*, COM (2002) 141 final.

⁸ 27th Annual report on *monitoring the application of Community law* (2009), COM(2010) 538 final.

2. MEASURES AT EU LEVEL TO IMPROVE ENFORCEMENT OF EU ENVIRONMENTAL LAW

2.1. Implementation and Enforcement

Actions proposed by the European Commission during the last 5 years give priority to improving the implementation of EU environmental law by Member States, neglecting enforcement actions at EU level and delegating them to Member States. There is a need for a strengthened enforcement policy at EU level, which has the capacity to maximize deterrence. Applying uniform and deterrent enforcement actions is as important as monitoring implementation of European Environmental law. Focusing exclusively on one of the two will not achieve by itself a uniform application of European Environmental law. Therefore, enforcement has to be strengthened. So far, the Commission has chosen a "soft" approach towards Member States, based on mutual cooperation and monitoring implementation. However, Member States are not cooperative at all times nor do they always provide accurate and timely information. In addition, the Commission interprets the cooperation principle as limiting its discretionary power to put into question Member States' information, including assumptions and conclusions.

The Commission should develop a stronger enforcement policy with a stronger Commission enforcement role on the basis of the Treaty and respecting its discretionary power. **ClientEarth** proposes the following mechanisms to strengthen enforcement action at EU level:

- The cooperation principle should not prevent the Commission from assessing the information sent by Member States and putting into question conclusions that are not properly based on the information submitted. Several examples show that the Commission defers any action on cases regarding the implementation of legislation, such as the Quality of Air Directive, on the basis that the national plan states that the emission levels will be respected, even if an analysis of the information provided in the plan demonstrates that the measures proposed do not guarantee compliance. The Commission should undertake an assessment of the information provided by Member States and even question its solidity or acting accordingly to avoid breaches of implementation of EU law.
- The Commission should assess whether Member States proposed plans or programmes required under EU Environmental law for meeting specific objectives, emission limit values or targets and ensure Member States' compliance with them. If the assessment of the measures is negative or if there are deviations from indicative trajectories, the Commission should initiate infringement procedures right away, before the deadline for complying with the objective, emission limit or target expires, in order to avoid future and certain damages to the environment. More particularly, deviations from the measures proposed in mandatory programmes or from indicative national trajectories should be used as the indication of a breach of the mandatory target at a later stage, justifying enforcement action by the Commission.

- Priorities should be set up to guide the Commission action towards the areas where stronger enforcement and deterrence action are needed. Examples show that complaints not falling within the scope of the Commission priorities are closed and the complainant referred to the national level. We argue that Commission's actions should ensure treatment of all complaints related to breaches of EU environmental law by initiating infringement cases if no solution to the environmental law breach is provided by the Member State (e.g. after the case being dealt with through the EU Pilot scheme) and therefore if the negative impacts on the environment have not been halted.
- Furthermore, the Commission should apply timely enforcement measures when deadlines of priority cases obligations are not respected. ClientEarth submitted a complaint to the Commission regarding the transposition of the ETS Directive 2003/87/EC as amended in 2009 by Poland, which affects its implementation of Article 10c. This is a case falling within the Commission priorities, and therefore subject to stronger enforcement measures. However, the Commission has acted negligently by acknowledging reception only 2 months after the complaint was sent, and has not provided any information at all to the complainants regarding whether the case is in EU Pilot or how it is being dealt with.
- The Commission policy for enforcement lacks internal systems to control and review Commission's decisions on whether to start infringement cases or not. This lack of review mechanism is even more important in cases falling within the priorities but where the Commission might not initiate infringement procedures.
- Currently, the Commission depends on the information from Member States and complainants to develop proper enforcement actions. The Commission should be enabled to carry out inspections or independent investigations either with its own staff or/and with independent experts to gather information on potential infringements of EU Environmental law. Arguments justifying the need for inspections at EU level are:
 - 1) Information from citizens or NGOs is limited to visible infringement as they do not have enough resources to detect infringements of technical environmental legislation, such as emissions or discharges above permit limits, or implementation of best available pollution control techniques;
 - 2) The Commission cannot rely solely on national inspections to detect infringements of Community environmental law since the system is not working; In November 2007 the Commission issued a Communication on the implementation of the Recommendation 2001/331/EC of the European Parliament and the Council on minimum criteria for Environmental Inspections (RMCEI) where it noted that many Member States had not fully implemented it.⁹ Legally binding rules on minimum national inspection requirements should be adopted, as requested by the European Parliament Resolution adopted on 20 November 2008.

⁹ Commission Communication on *the review of Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States*, COM (2007) 707 final. The Communication concludes that despite the positive effects of the Recommendation in the inspection systems in most countries, few of them appear to fully implement it.

3) For enforcement, the Commission needs to be able to gather information to support its arguments related to the infringement cases submitted to the Court of Justice of the European Union. In several occasions the Commission has been told by the Court of Justice that it has not proven its case¹⁰.

A decision recognising the Commission inspections/investigations powers would be required. The legal basis would not be a problem, as it is not a matter of competence: there are areas of shared competence where Commission inspection powers have been recognized under EU law.

Along with the inspection powers recognised to the Commission for the development of competition policy under the Treaty, such powers are also being awarded by secondary legislation. More particularly, Regulation EC No 725/2004 on enhancing ship and port facility security¹¹ establishes that the Commission shall carry out a series of inspections, in cooperation with the Member State focal point, to monitor the application of the Regulation. EMSA facilitates technical assistance to the Commission for these inspections¹².

The European Aviation Safety Agency (EASA)¹³ 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.

The Food and Veterinary Office (FVO) has inspection powers to check on compliance with the requirements of EU food safety and quality, animal health and welfare and plant health legislation

An effective enforcement policy of EU environmental legislation requires the development of investigation actions at EU level in addition to those carried out at a national level. The European Commission could use current resources to undertake this task.

- The proposal for a Directive on access to justice should be de-blocked to ensure compliance with the obligations embodied in the Aarhus Convention and empower citizens to act instead of keeping enforcement actions as the monopoly of the European Commission.
- ClientEarth is of the opinion that neither the European Union nor the vast majority of EU Member States have, until now, fully complied with the requirements of Article 9(3) and (4) of the Aarhus Convention which deal with questions of access to justice in environmental matters. The present state of affairs is marked by the provision of Article 263(4) TFEU, according to which a person must be directly and individually concerned by an environmental decision (other than a decision directed at that person), in order to

¹⁰ Case C-308/08, *Commission v Spain*, 20 May 2010.

¹¹ Regulation no 725/2004 of the European Parliament and of the Council of 31 March 2004 on *enhancing ship and port facility security*, OJ L 129, 29.04.20074, P. 0006, Article 9.4.

¹² Article 2.1.b.iv, Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a *European Maritime Safety Agency*.

¹³ Regulation (EC) no 1592/2002 of the European Parliament and of the Council of 15 July 2002 on *common rules in the field of civil aviation and establishing a European Aviation Safety Agency*, OJ L 240, 7.09.2002. p. 0001-21.

have standing before the EU courts. The situation does not seem to have changed with the Lisbon Treaty. The General Court in a recent order (adopted on 6 September 2011 regarding case T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council*) confirms that a natural or legal person may institute proceedings against a legislative or regulatory act of general application which is of direct and individual concern to them and against certain acts of general application, namely regulatory acts which are of direct concern to them and do not entail implementing measures. As the environment is a public *general* interest, a citizen or an NGO cannot, according to the EU Courts, be *individually* concerned by an environmental decision.

2.2. Relations with complainants

The Commission acknowledges the importance of complainants in raising awareness about eventual problems in the implementation of EU environmental law, since citizens are the ones who become aware first of breaches of environmental law, such as construction projects without previous EIA, or pollution discharges. Moreover, the nature of environmental legislation is subject to certain challenges that are different to the ones encountered in other areas of law. The environment has no owner and there are no financial private interests claiming for the implementation of the legal obligations aiming at its protection.

As a consequence, enforcement actions fall almost exclusively in the sphere of public authorities, and very often, are left to the initiative of private citizens and environmental NGOs. However, the Commission does not involve properly complainants when dealing with complaints and infringement cases.

The EU Pilot system seems to have weakened the position of complainants. The latest Commission report on EU Pilot adopted in December 2011 does not assess its success rate in relation to the objective of providing quicker answers to complainants. The public is being discouraged to send complaints to the Commission. The numbers are clear: During the period April 2008 to September 2011, 700 complaints on environmental matters were registered for the 27 EU Member States, in comparison with 697 cases registered only in 2002 for 15 EU Member States. The EU Pilot scheme takes at least 5 months for the responses from the Commission and Member States to be issued from the date of registration of the complaint in the registry system (CHAP). During this period the complainant does not receive any information. These 20 weeks might be expanded to the request of the Commission or the Member State concerned.

The role of complainants should be respected and enhanced as follows:

- Promoting dialogue with complainants from the moment the complaint is registered, including during the EU Pilot phase. Information regarding progress and status of the case, decisions to close it, arguments used and discussions between the Commission and the Member States should be shared with complainants.
- Legally binding rules on the procedures for dealing with complaints and infringement cases are critical. The current Commission Communication from 2002 is not enough. The EU should adopt a regulation on the procedures under Article 258 and 260 TFEU for environmental matters. At present, the procedure under these two provisions is at the complete discretion of the Commission and the handling of complaints or the process for initiating infringement proceedings is

unclear and follows different paths in different cases. In competition matters, the EU adopted Regulation (EC) 773/2004 which regulates the details of the procedure, including the initiation of proceedings, the investigation by the Commission, the handling of complaints, access to the file and the treatment of confidential information. All these aspects should well form part of a Regulation on procedures under Article 258 and 260 TFEU for environmental matters, where the discretionary power of the Commission would be respected while providing for clear procedural rules in this decision making process.

- The Commission generally contacts the complainants before closing a case in order to give them the opportunity to provide additional information that could lead to a modification of the Commission decision. However, the complainant cannot request the Commission to reconsider the decision. Regulation on complaints and infringement procedures under Article 258 and 260 for environmental matters should ensure that citizens having submitted a complaint to the Commission have the option to request a review of the decision taken by the services.
- It is important to ensure that all complaints are properly handled with a view to finding a proper solution to the breach of EU environmental law and the negative impact to the environment. Proper handling of complaints would also foster the link between EU Institutions and the public, bringing the EU closer to the citizens.

2.3. Transparency

More **transparency** is needed in order to achieve efficiency of the EU enforcement policy and regain citizens' confidence in the system. Measures improving transparency should include the following:

- The Commission should provide regular updates about complaints and infringement cases including information on their status, the substance of the case including legal arguments, any EU funding involved, the status of project funding, chronology and latest developments. The Commission Communication adopted on 7 March 2012 proposes to improve some of these aspects.
- The Commission should systematically publish letters of formal notice and reasoned opinions in environmental matters which it issues under Articles 258 and 260 TFEU. Citizens in the Union are entitled to know, whether their own State – as well as other Member States – comply with their obligations under EU law, and whether the European Commission complies with its obligations to ensure that EU environmental law is effectively applied as well as the arguments of EU law that the Commission has developed in carrying out this role. Letters of formal notice and reasoned opinions should not be treated as confidential information, since they are documents where the Commission analyses a specific situation or case in relation to the relevant provisions of EU law.
- Transparency in the reasons behind decisions taken on cases during the EU Pilot phase and those regarding the closure of files prior to the letter of formal notice should be ensured. Those decisions may involve certain non-law enforcement considerations. But this should not exclude the provision of information about the arguments behind decisions, coupled with the establishment of systems requests for internal review of decisions regarding complaints.

- Similarly, publication of the elements considered when deciding the status of a case after the letter of formal notice is also needed. Decisions about infringement cases after the letter of formal notice are taken by the Commission as a college. The Commission's discretionary power regarding infringement procedures would still be respected and would not be jeopardised if information on the motivation and arguments behind these decisions is provided.
- The EU institutions, bodies and agencies should actively disseminate environmental information on the internet in accordance with Article 4 of Regulation 1367/2006, in order to keep European citizens informed. This should include:
 - Correlation tables on the transposition of EU environmental legislation based on the Member States obligation to submit them.
 - Reports submitted by Member States in the framework of their obligations under specific legislation.
 - Environmental studies made by the institutions, including conformity studies.
 - Reports by Member States on the implementation and application of EU environmental legislation.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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