

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

# POLICY DEPARTMENT **C**

## CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



## Monitoring the implementation of EU law: tools and challenges

Study for the PETI Committee







**DIRECTORATE GENERAL FOR INTERNAL POLICIES**

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

**PETITIONS**

# **Monitoring the implementation of EU law: tools and challenges**

**STUDY**

## **Abstract**

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee. The paper presents the evolution of the EU enforcement policy as part of the principle of rule of law in the European Union. It provides information on the main actors responsible for the implementation and enforcement of EU law and trends related to the transposition and application of European legislative acts according to the latest information available. Finally, it browses through the different measures within the EU enforcement policy, including the recent developments regarding the use of EU Pilot tool.

## **ABOUT THE PUBLICATION**

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Policy departments provide independent expertise, both in-house and externally, to support European Parliament committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU external and internal policies.

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## LIST OF ABBREVIATIONS

- CJEU** Court of Justice of the European Union
- EP** European Parliament
- EU** European Union
- IMPEL** EU Network for the Implementation and Enforcement of Environmental Law
- MEP** Members of the European Parliament
- 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

## DEFINITIONS

This note 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.

<i>Transposition</i>	The legal or regulatory act(s) by which a piece of EU law is incorporated into the national legal order.
<i>Application</i>	The practical application of the national transposing provisions to a concrete situation or to a number of situations.
<i>Implementation</i>	The general term covering both transposition and application.
<i>Enforcement</i>	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.

## EXECUTIVE SUMMARY

### The EU implementation and enforcement policy

The European Union is founded on the rule of law which is one of the values stated under Article 2 of the Treaty of the European Union (TEU). It is a principle shared with all EU Member States and means that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights and under the control of independent and impartial courts.<sup>1</sup> The principles stemming from the rule of law include legality (which implies a transparent, accountable democratic and pluralistic process for enacting law) legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts and effective judicial review<sup>2</sup>. Ensuring implementation of EU law is at the heart of this principle.

The problems of implementation and enforcement of EU law have been longstanding. Recent studies on the evaluation of certain pieces of EU legislation evidence that while the objectives of the EU Directives are still relevant, their lack of effectiveness is linked to the lack of implementation<sup>3</sup>.

Proper implementation of EU law is essential to deliver the EU policy goals defined in the Treaties and secondary legislation and the potential benefits derived from the objectives stated in the provisions of the EU law. Further, non-implementation affects the efficiency of the internal market based on a level playing field<sup>4</sup> across all EU Member States which is distorted if rules are not complied with by one or few Member States. Finally, non-implementation and lack of enforcement affects the credibility of the Union<sup>5</sup>. The legislative competence conferred by the Treaties, entails the responsibility to ensure its implementation and enforcement.

### Who is responsible for ensuring implementation and enforcement of EU law?

Implementation and enforcement is based on the distribution of powers conferred by the Treaties. Member States and the European Commission have a shared responsibility in implementing and enforcing European law as recognised by EU law and settled case-law of the CJEU<sup>6</sup>. All EU Institutions have certain responsibility in ensuring implementation and enforcement of EU law. Under the recently signed Inter-institutional Agreement on Better Law-Making<sup>7</sup>, the European Parliament, the Council and the Commission recognise their joint responsibility.

**EU Member States** are responsible for correctly applying the entire body of EU legislation (the EU *acquis*) and for transposing the EU Directives into their national law on time and accurately. The European Parliament and the Council are co-legislators. Therefore, Member States responsibility to implement the EU law derives from prior discussions on and

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<sup>1</sup> Commission Communication on a new EU Framework to strengthen the Rule of Law COM(2014) 158 final/2

<sup>2</sup> Commission Communication on a new EU Framework to strengthen the rule of law, COM(2014) 158 final/2, p.4.

<sup>3</sup> REFIT EVALUATION of the Drinking Water Directive 98/83/EC, SWD(2016) 428 final, 1.12.2016 at [http://ec.europa.eu/environment/water/water-drink/pdf/SWD\\_2016\\_428\\_F1.pdf](http://ec.europa.eu/environment/water/water-drink/pdf/SWD_2016_428_F1.pdf) ; REFIT Evaluation of the Environmental Liability Directive, SWD(2016) 121 final, 14.4.2016 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0121&from=EN>; Fitness Check of the EU Nature Legislation (Birds and Habitats Directives), SWD(2016) 472 final, 16.12.2016, [http://ec.europa.eu/environment/nature/legislation/fitness\\_check/docs/nature\\_fitness\\_check.pdf](http://ec.europa.eu/environment/nature/legislation/fitness_check/docs/nature_fitness_check.pdf)

<sup>4</sup> Monitoring the application of European Union law. 2015 Annual Report, COM (2016) 463 final, 15.7.2016.

<sup>5</sup> Commission "White Paper on European Governance", COM (2001) 428 final.

<sup>6</sup> Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paras. 4-6 defining the responsibility of Member States and the Commission in ensuring full implementation and all along the infringement procedure.

<sup>7</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ L 123 of 12.5.2016)

agreement for the adoption of the EU legal acts. As announced in the 2016 annual report on Monitoring the application of EU law, '...it is essential that Member States live up to their responsibility to respect and enforce the rules they themselves have jointly put in place'<sup>8</sup>.

Significant shortcomings in the implementation and enforcement of EU legislation persist in Member States<sup>9</sup>. **In 2015**, the policy areas with the highest score of infringements by Member States were environment (20%), transport (18%), financial services (13%), internal market (9%) and migration (8%). Similarly, **in 2016** the highest number of existing infringement cases were on internal market (16%) and environment (16%), transport (14%), migration and home affairs (8%). The highest number of new Commission's enforcement actions through EU Pilots **in 2016** were related to the environmental acquis with 19% out of the 790 new files. However, only 10% of the 3783 complaints registered were related to environmental legislation. The countries with the highest number of infringement cases in **2015** were: Italy, Germany, Spain, Greece, France and Poland. Similarly, **in 2016** the highest number of open infringement cases were in Spain, Germany, Belgium, Greece, Portugal, France and Poland.

The number of infringement procedures in 2015 and 2016 confirms that ensuring the timely and correct implementation of EU legislation remains a challenge that there is a need for Member States to increase their efforts and priorities for the effective and timely transposition and implementation of EU law.

The role of the Commission, as guardian of the Treaties, is to promote the general interest and ensure the correct application of the Treaties and the measures adopted pursuant to them (Article 17(1) TEU). **The Commission's** role to strengthen its response to breaches of EU law is, therefore, critical. Improving implementation and enforcement of EU law has traditionally been a Commission priority and its enforcement policy has evolved progressively over the past 15 years. Monitoring and enhancing the application of EU law is a priority of the Juncker Commission<sup>10</sup> and a key part of the Better Regulation Policy, as stated in 2015<sup>11</sup> and confirmed in the recent Commission Communication 'EU law: Better results through better application'<sup>12</sup> setting out a more strategic approach to its infringement policy. It has announced that it will focus its enforcement action where it can make a real difference, and on policy priorities, pursuing cases which reveal systemic weakness in a Member State's legal system. It will launch infringement procedures without relying on the EU Pilot mechanism, unless recourse to EU Pilot is seen as useful in a given case.

**The European Parliament's** role of representing the 'Union's citizens' makes it the natural receptor of **petitions** and questions (Article 227 TFEU) which often trigger Commission's action such as EU Pilot investigations or infringement procedures against Member States which may eventually end up before the CJEU. **In 2016**, the Commission acted upon more than seven cases based on the European Parliament submissions regarding shortcomings in the way some Member States were implementing certain EU laws. However, the numbers remain low. The deficit of specific expertise required to deal with the complex issues that EU legislation regulates (e.g. environment)<sup>13</sup> and the long periods required to deal with petitions are some of the challenges hindering the use of this tool to raise implementation problems.

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<sup>8</sup> Commission report, Monitoring the application of European Union law. 2016 Annual Report, p.4.

<sup>9</sup> Monitoring the application of European Union law. 2015 Annual Report. Report from the Commission, COM(2016) 463 final, 15.7.2016 available at:

[http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm);

[http://ec.europa.eu/atwork/applying-eu-law/docs/annual\\_report\\_33/com\\_2016\\_463\\_en.pdf](http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_33/com_2016_463_en.pdf);

<sup>10</sup> Monitoring the application of European Union law. 2015 Annual Report, COM (2016) 463 final, 15.7.2016.

<sup>11</sup> Commission Communication, Better regulation for better results – An EU Agenda. COM(2015)215 final

<sup>12</sup> Commission Communication 'EU law: Better results through better application', C (2016) 8600, OJ C 18, 19.01 2017.

<sup>13</sup> *ibid*

The European Parliament is not involved in the EU Pilot or in the infringement procedures. However, its involvement at least in those cases triggered by petitions, would improve the transparency and legitimacy of the EU Pilot. In any case, the European Parliament should receive first-hand information of all the EU Pilots opened and the infringement procedures initiated<sup>14</sup>.

In addition to the Commission's own-initiative cases, citizens' complaints are the main source of information on the implementation of EU law, in particular in relation to environmental legislation.

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. **In 2015** the number of new complaints registered in the Commission reported 3450 potential breaches of EU law<sup>15</sup>. This represented a reduction in the number of complaints submitted which is lower than the 3505 complaints received in 2013 and the 3715 complaints received in 2014<sup>16</sup>. However, members of the members of the public, citizens, business, NGOs or other organisations became very active again in 2016 with a record figure of 3783 complaints registered in the Commission<sup>17</sup>. The Member States with a higher number of complaints in 2016 were Italy, Spain and France and Italy, Spain and Germany in 2015.

Complaints trigger the Commission action, as Guardian of the Treaties, either to initiate an EU Pilot dialogue with one or several Member State regarding a suspected infringement or to directly open an infringement procedure if urgency or other overriding interest require immediate action<sup>18</sup>. While the Commission confirms the important role of complaints in identifying wider problems of EU law implementation affecting the interests of citizens and businesses, it highlights the need for a proper understanding of the nature of the infringement process<sup>19</sup>. The Commission defines the purpose of the infringement procedure as a mechanism to raise issues of wider principle and announces that those cases that can be satisfactorily dealt with by other mechanisms at EU and national level, the Commission will generally direct complainants to the national level<sup>20</sup>. While it is clear that the Commission wants to reduce the number of complaints to strategic cases and not to all potential infringements of EU law, it is not clear how the concept of 'issues of wider principle' would be determined and how this objective fits with the Commission's role attributed by Article 17(1)TEU. The implications of such policy have not been fully developed but it might jeopardize the treatment of certain cases whose effective resolution might be better achieved at EU level due to the national circumstances or interests involved.

According to the Commission Communication updating the rule for handling complaints<sup>21</sup> complainants' involvement in the EU Pilot procedure or the pre-infringement and infringement procedure is currently limited to being the receptor of information from the Commission.

Decisions on the infringement procedural steps are taken by the College of Commissioners and the public is informed through the publication of press releases, even if not always systematically. However, decisions prior to the start of the infringement procedure including the EU Pilot, and their duration are taken by the services with no publicly available

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<sup>14</sup> European Parliament resolution of 26 October 2017 on monitoring the application of EU law 2015 (2017/2011(INI))

<sup>15</sup> European Commission Annual Report: 'Monitoring the application of European Union law. 2015 Annual Report'. COM(2016) 463 final

<sup>16</sup> Commission 2014 Annual Report on Monitoring the application of Union law, 2015.

<sup>17</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>18</sup> Commission 'Monitoring the application of European Union law. 2015 Annual Report'. COM(2016) 463 final

<sup>19</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>20</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final, p. 4.

<sup>21</sup> Commission Communication "Relations with the complainant in respect of infringements of Community Law", COM (2002) 141 final, pt. 5 states that it 'has regularly acknowledged the vital role played by the complainant in detecting infringements of Community law'.

information about them and no internal review procedure. The complainant will only be informed if the Commission official decides to do it. As certain authors have pointed out, '...the Commission's handling of potential infringements, its investigation of complaints, petitions and other practices are not controlled, it has a quasi-monopoly – unlimited discretion on whether and with what intensity it looks into cases of non-compliance by a Member State.'<sup>22</sup> For example, the Commission Report 2016 on implementation of EU law states that 3,783 new complaints registered by the Commission in 2016, triggered 270 EU Pilots, which together with the 520 due to own Commission initiative amount a total of 790 EU Pilots. The 348 complaints related to environmental legislation led to 151 EU Pilots. There is no information about what happened with the 3,000 complaints that did not trigger any level of action, including the 200 complaints on environmental legislation.

Some of the above-described problems would be solved or would improve with some of the actions suggested in the latest European Parliament resolution on monitoring the application of EU law. It calls on the Commission to involve petitioners in EU Pilot procedures initiated in relation to their petitions. It also proposes the adoption of a Regulation on an open, efficient and independent European Union administration. The regulation would aim at setting out various aspects of the administrative procedure – including the role of the citizen when sending complaints, citizens' access to the file of the case on which they sent a complaint, the notifications or binding time limits. Such a proposal for regulation would reinforce citizens' rights and transparency<sup>23</sup>.

## Transposition of EU law

Transposition into national legislation of EU directives is mandatory. The monitoring of the measures adopted to ensure the transposition of Directives and the application of Regulations fall within the competence of the Commission as Guardian of the Treaties. The 2009 Commission Communication on 'A Europe of results' highlighted that reducing late transposition was a priority for the Commission<sup>24</sup>. This objective has been reiterated systematically in the Commission Annual Reports since it is considered essential to ensure the effectiveness of European policies<sup>25</sup>.

**Trends:** The Commission 2012 Annual report highlighted a steady increase in the number of late transposition cases over several years - 2011 (1185), 2010 (855), 2009 (531)-. After few years of decreasing trend, the number of infringement procedures in 2016 rose again, evidencing that correct and timely transposition remains an issue of concern for the Commission. The 2016 Commission report on implementation of EU law announces the Commission intention to ensure swifter compliance by launching infringement procedures without relying on the EU Pilot mechanism, unless recourse to EU Pilot is seen as useful on a case by case basis<sup>26</sup>. The Commission has also announced its commitment to reinforce the sanctions with a request for daily penalties applicable under Article 260(3) TFEU for non-communication of transposing measures on time<sup>27</sup>.

While late transposition infringements remain a problem, the Commission has noted that once infringement procedures are opened, national measures are usually communicated

<sup>22</sup> Ludwig Krämer, *EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement*, 2016.

<sup>23</sup> European Parliament resolution on monitoring the application of EU law 2015, 26.10.2017 (2017/2011(INI))

<sup>24</sup> Commission Communication on 'A Europe of results – Applying Community Law', p 9.

<sup>25</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report COM(2017) 370 final p.28; Commission 'Monitoring the application of European Union law. 2015 Annual Report'. COM(2016) 463 final p. 27; 29<sup>th</sup> Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p.7. ; 30<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 7; Commission 'Monitoring the application of European Union law. 2015 Annual Report'. COM(2016) 463 final p. 27

<sup>26</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>27</sup> Ibid

swiftly<sup>28</sup>. The fear of fines improves compliance. This trend is still valid in 2016 when out of the 868 transposition cases open in 2016, 498 could be closed due to the action by Member States. The Commission continues to systematically apply this fast-track provision and reiterated in its 2016 Communication *EU law: Better results through better application*, that for late transposition infringement cases, it would systematically ask the Court to impose a lump sum as well as a periodic penalty payment. In addition, the Commission has announced<sup>29</sup> that while it will continue to systematically support Member States, it will also strengthen its response pursuing breaches of transposition of EU law through infringement procedures without relying on the EU Pilot mechanism and continuing to apply the reinforced sanctions regime under Article 260(3) TFEU.

**Conformity checking studies** are a specific tool for monitoring the correct transposition of EU law and therefore need to be carried out systematically. They assess the effectiveness of transposition. **Correlation tables** present in a systematic manner how each provision of a Directive is transposed into national law. Their existence is linked to the prerequisite that Member States communicate the transposing measures of each Directive to the Commission based on the principle of sincere cooperation under Article 4, TEU.

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 Parliament. The EU institutions and the Member States agreed in the Joint Political Declaration of 28 September 2011 that Member States, when notifying national transposition measures to the Commission, may also have to provide documents explaining how they have transposed directives into their law<sup>30</sup>. However, most Member States communicate the transposing legislation without correlation tables. In such cases, the Commission typically develops them within a certain time and use the results to initiate infringement procedures for non-communication or for non-compliance of national legislation with the EU law.

The studies and correlation tables are generally not publicly available since the Commission does not disclose them to the public because they are considered confidential information essential for the launch of infringement actions and whose disclosure could undermine the purpose of the investigations (Article 4 of Regulation 1049/2001). However, the correlation tables only reflect an analysis of publicly available legislation with no confidential information in it and each study contains a disclaimer stating that the Commission is not responsible for the content of the study. The Commission has discretion to accept the conclusions of a study or not and to act upon it by initiating an infringement procedure against a Member State under Article 258 TFEU. Studies on the transposition of an EU environmental directive are "environmental information", to which Regulation 1367/2006 provides a right of access<sup>31</sup>. As pointed out by certain authors, the conformity studies are not part of the procedure under Article 258 TFEU – such a procedure has not even begun when the study is made<sup>32</sup>. Therefore, nothing would prevent the Commission from systematically making this information directly accessible to the public, e.g. in electronic form or through a register under Article 12 of Regulation 1049/2001.

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<sup>28</sup> Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p.14.

<sup>29</sup> Communication *EU law: Better results through better application*, 19.01.2016 and the Annual Reports on implementation and enforcement of EU law such as 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final p.32

<sup>30</sup> Joint Political Declaration of 28 September 2011 between the Commission and the Member States (OJ 2011/C 369/02) and a Joint Political Declaration of 27 October 2011 between the European Parliament, the Council and the Commission (OJ 2011/C 369/03).

<sup>31</sup> Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on access to information, participation in decision-making and access to justice in environmental matters to Community institutions and bodies, OJ 2006, L 264 p.13.

<sup>32</sup> Ludwig Krämer, *EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement*, 2012

The 2017 Commission Communication 'EU law: Better results through better application'<sup>33</sup> announces that the Commission is developing such a Data analytics tool to speed up the assessment of the compliance of national measures with EU law, identify gaps and incorrect transposition, and possibly detect 'gold plating' measures.

The European Parliament has called the Commission to strengthen enforcement of EU law based on structured and systematic transposition and conformity checks of national legislation, in full compliance with the EU Treaties. It calls on the Commission to support Member States in the process of drawing up these explanatory documents and correlation tables<sup>34</sup>. On its turn, the European Parliament should ensure that the Commission has sufficient resources to carry out the correlation tables for all necessary EU legal instruments and request that correlation tables and conformity checking studies are published. While the Parliament requests the Commission to include information about the explanatory documents in the annual reports on the application of EU law, it should actively develop its role in strengthening the links with the national parliaments for the adoption of legislation correctly transposing the EU law<sup>35</sup>.

### Implementation/compliance promoting tools

The Commission Communication 'EU law: Better results through better application'<sup>36</sup> applies this strategic approach and announces those implementation and compliance promoting tools that the Commission intends to use in a more systematic way. They include: package meetings, implementation guidelines discussed with stakeholders and EP, Transposition and Implementation Plans (TIPs), committees and expert groups; capacity building actions in Member States.

Following this strategic approach, the Commission published on the 3<sup>rd</sup> of February 2017 the Environmental Implementation Review package including a Communication proposing specific actions to improve the situation and an annex suggesting priorities for action on better environmental implementation by each of the EU Member States. The annex summarises the suggested actions contained in the 28 EIR country reports focusing on those that should be considered a priority in each Member State<sup>37</sup>.

Further, on 2 May 2017, the Commission published the 'compliance package' including the following measures: the Single Digital Gateway, the Single Market Information Tool (SMIT) y SOLVIT.<sup>38</sup>

### EU Pilot and infringement procedure

The **EU Pilot** is the pre-infringement tool designed for enhancing the existing enforcement system of implementation of EU law. The EU Pilot is part of the administrative phase but prior to the infringement procedure. It is accompanied by an IT platform, which enables an exchange of information and documents between the Commission and the relevant Member State.

Most cases are solved before an infringement procedure is initiated under Article 258 TFEU. According to the latest Commission annual report on monitoring the application of EU law, **in**

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<sup>33</sup> 2017/C 18/02

<sup>34</sup> European Parliament resolution of 26 October 2017 on monitoring the application of EU law 2015 (2017/2011(INI))

<sup>35</sup> Ibid

<sup>36</sup> Commission Communication 'EU law: Better results through better application', C(2016) 8600, OJ C 18, 19.01 2017 (2017/C 18/02)

<sup>37</sup> Commission Communication 'The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results' COM(2017) 63 final. And

<sup>38</sup> [http://europa.eu/rapid/press-release\\_IP-17-1086\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1086_en.htm)

**2016**<sup>39</sup> the Commission initiated 790 new EU Pilot files with the highest number of cases related to environmental legislation (151). It follows a **decreasing trend** over the last years.

The assessment of this tool shows some flaws in terms of the effectiveness to achieve its objectives, its transparency and its efficiency. There are no legal bases in the Treaty for any pre-infringement procedure and, therefore for the EU Pilot. The EU Pilot tool takes place prior to the letter of formal notice, aiming to find a solution through a privileged dialogue. However, 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. Those problems have been recognised in the latest annual Commission report on implementation of EU law which states that 'the recourse to EU Pilot adds a lengthy step to the infringement process, which in itself is a means to enter into a problem-solving dialogue with a Member State. In line with the Communication "EU law: Better results through better application"<sup>40</sup>, the Commission will henceforth launch infringement procedures without relying on the EU Pilot mechanism unless recourse to EU Pilot is seen as useful in a given case.'<sup>41</sup> This statement implies an evolution of the EU enforcement policy whose objective do not seem to include the reduction of infringement cases in itself and therefore the EU Pilot would only be open when necessary or useful<sup>42</sup>.

On the transparency of the system, a recent CJEU ruling published in May 2017<sup>43</sup> has confirmed the interpretation that the documents within the EU Pilot should not be disclosed to the public if there is a risk that such disclosure would affect the purpose of the infringement procedure. It states:

'... so long as, during the pre-litigation stage of an inquiry carried out as part of an EU Pilot procedure, there is a risk of affecting the nature of the infringement procedure, altering its progress or undermining the objectives of that procedure, the application of the general presumption of confidentiality of the documents exchanged between the Commission and the Member State concerned is justified, ... That risk exists until the EU Pilot procedure is closed and there is a definitive decision not to open a formal infringement procedure against the Member State.'

On the other hand, the current regulatory framework for handling complaints and infringement procedures is not legally binding. Transparency of the EU Pilot and infringement procedure could be regulated while respecting the CJEU jurisprudence, requiring motivated arguments to justify refusal for access to documents (including those of infringement procedures) under Article 4 of Regulation 1049/2001/EC<sup>44</sup>.

Transparency of the **infringement procedure** has been achieved since the last report where the European Parliament called the Commission to improve the existing database on infringements<sup>45</sup>. The new database hosted by the Commission website provides access to an efficient and user-friendly tool, which enables to search through clear filters and obtain information on the status of infringements per policy area, thematic sector within the policy area and Member State<sup>46</sup>.

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<sup>39</sup> European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final p.32

<sup>40</sup> C(2016) 8600, OJ C 18, 19 January 2017

<sup>41</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>42</sup> Commission Communication EU law: Better results through better application (2017/C 18/02)

<sup>43</sup> Case C-562/14 P Kingdom of Sweden v European Commission; can be accessed at:

<http://curia.europa.eu/juris/documents.jsf?num=C-562/14>

<sup>44</sup> Joined cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723

<sup>45</sup> Ballesteros, M. Monitoring the implementation of EU law: tools and challenges. Briefing. European Parliament, Policy Department C: citizens' rights and constitutional affairs. Legal affairs. October 2014

<sup>46</sup> [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/?lang\\_code=en](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en) accessed on July 2017.

# 1. THE EU IMPLEMENTATION AND ENFORCEMENT POLICY

## 1.1. Introduction: the importance of the EU implementation and enforcement policy

The European Union is founded on the rule of law which is one of the values stated under Article 2 of the Treaty of the European Union (TEU). It is a principle shared with all EU Member States which explains why, under Article 49 TEU, respect for the rule of law is a precondition for EU membership. As described in the recent Commission Communication on a new EU Framework to strengthen the Rule of Law<sup>47</sup>, this principle means that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights and under the control of independent and impartial courts. The principles stemming from the rule of law include legality (which implies a transparent, accountable democratic and pluralistic process for enacting law) legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts and effective judicial review<sup>48</sup>. Ensuring implementation of EU law is at the heart of this principle.

The problems of implementation and enforcement of EU law have been longstanding. Recent studies on the evaluation of certain pieces of EU legislation evidence that while the EU Directives are fit for purpose, their lack of effectiveness is linked to the lack of implementation<sup>49</sup>. The late or incorrect transposition of directives into national law is a barrier to implementation. Bad application of EU law is often related to insufficient human or financial resources, deficient knowledge and understanding of the issues at stake and poor willingness by authorities or key players<sup>50</sup>.

### Why full and correct implementation of EU law matters?

Proper implementation of EU law is essential to deliver the EU policy goals defined in the Treaties and secondary legislation. Weak or non-implementation means depriving citizens and businesses of the potential benefits derived from the objectives stated in the provisions of the EU law and assessed through the impact analysis that new proposals for legislation go through before their adoption. In addition, breaches of EU law may have impacts and costs related to the specific objectives of the legislation (e.g. damages to the environment) but also impacts and costs that go beyond such as putting biodiversity at risk, harming citizens' health<sup>51</sup> or undermining the efforts to support business and job creation through the right regulatory framework<sup>52</sup>.

<sup>47</sup> COM(2014) 158 final/2

<sup>48</sup> Commission Communication on a new EU Framework to strengthen the rule of law, COM(2014) 158 final/2, p.4.

<sup>49</sup> REFIT EVALUATION of the Drinking Water Directive 98/83/EC, SWD(2016) 428 final, 1.12.2016 at [http://ec.europa.eu/environment/water/water-drink/pdf/SWD\\_2016\\_428\\_F1.pdf](http://ec.europa.eu/environment/water/water-drink/pdf/SWD_2016_428_F1.pdf) ; REFIT Evaluation of the Environmental Liability Directive, SWD(2016) 121 final, 14.4.2016 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0121&from=EN>; Fitness Check of the EU Nature Legislation (Birds and Habitats Directives), SWD(2016) 472 final, 16.12.2016, [http://ec.europa.eu/environment/nature/legislation/fitness\\_check/docs/nature\\_fitness\\_check.pdf](http://ec.europa.eu/environment/nature/legislation/fitness_check/docs/nature_fitness_check.pdf)

<sup>50</sup> *Study commissioned by Parliament, Policy Department C, 'Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness', Brussels, 2013.*

<sup>51</sup> Case C-45/91 Commission v Greece referred to the consequences of the failure to fulfil the obligation as endangering human life and harming the environment and Case C-365/97 Commission v Italy, paragraph 70 or Case C-297/08 Commission v Italy which state that '...the consequences of non-compliance ... are likely, given the very nature of that obligation, to endanger human health and harm the environment, even in a small part of the territory of a Member State'.

<sup>52</sup> Commission report, Monitoring the application of European Union law. 2016 Annual Report <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM%3A2017%3A370%3AFIN&from=EN>

Further, non-implementation affects the efficiency of the internal market based on a level playing field<sup>53</sup> across all EU Member States which is distorted if rules are not complied with by one or few Member States. A recent study to support the Fitness Check of the Nature Directives acknowledges that many stakeholders consulted considered that the introduction of EU level standards for designation and management of protected areas and for the assessment of the impact of projects likely to affect those sites, have created an enabling environment for business through the creation of a level playing field between Member States<sup>54</sup>.

Finally, non-implementation and lack of enforcement affects the credibility of the Union<sup>55</sup>. The legislative competence conferred by the Treaties, entails the responsibility to ensure its implementation and enforcement.

## **1.2. Who is responsible for ensuring implementation and enforcement of EU law?**

Implementation and enforcement is based on the distribution of powers conferred by the Treaties. Member States and the European Commission have a shared responsibility in implementing and enforcing European law as recognised by EU law and settled case-law of the CJEU<sup>56</sup>.

According to Article 4(3) (sub-paragraph 2) TEU, 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. This provision is confirmed by the TFEU, Article 291(1) which requires Member States to adopt all measures of national law necessary to implement legally binding Union acts while the second paragraph empowers the Commission to adopt implementing non-legislative acts. Specific articles of the TFEU reiterate Member States' obligation to implement different EU policies such as Article 192(4) in relation to EU environmental measures.

The role of the Commission, as guardian of the Treaties, is to promote the general interest and ensure the correct application of the Treaties and the measures adopted pursuant to them (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 light of these legal bases, the Commission plays its role in two ways: supporting Member States in their efforts to implement EU law and ensuring enforcement of EU law once a breach has been identified. Both require the Commission to monitoring the implementation of EU law.

Monitoring and enhancing the application of EU law is a priority of the Juncker Commission<sup>57</sup> and a key part of the Better Regulation Policy, as stated in 2015<sup>58</sup> and confirmed in the Commission Communication published in December 2016 setting out a more strategic approach to its infringement policy<sup>59</sup>.

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<sup>53</sup> Monitoring the application of European Union law. 2015 Annual Report, COM (2016) 463 final, 15.7.2016.

<sup>54</sup> Millieu, IEEP and ICF, Evaluation Study to support the Fitness Check of the Birds and Habitats Directives, March 2016 p. 483.

<sup>55</sup> Commission "White Paper on European Governance", COM (2001) 428 final.

<sup>56</sup> Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paras. 4-6 defining the responsibility of Member States and the Commission in ensuring full implementation and all along the infringement procedure.

<sup>57</sup> Monitoring the application of European Union law. 2015 Annual Report, COM (2016) 463 final, 15.7.2016.

<sup>58</sup> Commission Communication, Better regulation for better results – An EU Agenda. COM(2015)215 final

<sup>59</sup> Commission Communication 'EU law: Better results through better application', C 18/02, 19.1.2017.

All EU Institutions have certain responsibility in ensuring implementation and enforcement of EU law. Under the recently signed Inter-institutional Agreement on Better Law-Making<sup>60</sup>, the European Parliament, the Council and the Commission recognise their joint responsibility in delivering high-quality Union legislation and in the Joint Declaration on the EU's legislative priorities for 2017, the three institutions reiterate the commitment to promoting the proper implementation and enforcement of existing legislation.

### 1.2.1. Member States responsibility and implementation trends

EU Member States are responsible for correctly applying the entire body of EU legislation (the EU *acquis*) and for transposing the EU Directives into their national law on time and accurately.

According to Article 288 TFEU, the Union legal acts that need to be implemented by Member States are: regulations, directives, decisions, recommendations and opinions. The regulations are of general application, legally binding and directly applicable, which implies that Member States are not required to transpose them into national legislation. However, they might need to adopt national legislation to ensure their full application. The Directives are legally binding in relation to the results to be achieved but leave Member States to whom they are addressed the choice of form and methods to implement their objectives. On that basis they need to be transposed through legally binding national legislation. Decisions are legally binding on those to whom they are addressed to and do not need to be transposed. Recommendations and opinion do not have legally binding force.

While Member States have a margin of discretion in defining how to implement the Directives' objectives, a situation of non-conformity that persists and leads to negative impacts, such as the deterioration of the environment, without any action taken by the competent authorities is considered an indication that the Member States have exceeded such discretion<sup>61</sup>.

EU Legal acts are adopted through legislative procedures where all Member States are involved. Both, the ordinary legislative procedure defined under Article 294 TFEU and the special legislative procedure defined for specific cases, require the involvement of Member States through the Council of the European Union or the Members of the European Parliament grouped representing parties and nationalities. The European Parliament and the Council are co-legislators. Therefore, Member States responsibility to implement the EU law is based on prior discussions and agreement for adoption of each EU legal act. As announced in the 2016 annual report on Monitoring the application of EU law, '...it is essential that Member States live up to their responsibility to respect and enforce the rules they themselves have jointly put in place'<sup>62</sup>.

The non-implementation of EU law by Member States may either relate to a failure to notify on time the national measures transposing the directives, to the non-conformity/non-compliance of the national legislation transposing the directives and to the incorrect or bad application of EU law.

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<sup>60</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ L 123 of 12.5.2016)

<sup>61</sup> Case C-297/08 Commission v Italy para 96 and 97.

<sup>62</sup> Commission report, Monitoring the application of European Union law. 2016 Annual Report, p.4.

### What are the current trends on implementation?

The Commission has acknowledged repeatedly<sup>63</sup> that significant shortcomings in the implementation and enforcement of EU legislation persist in Member States. **In 2015**, the policy areas with the highest score of infringements by Member States were environment (20%), transport (18%), financial services (13%), internal market (9%) and migration (8%). Similarly, **in 2016** the highest number of existing infringement cases were on internal market (16%) and environment (16%), transport (14%), migration and home affairs (8%). The highest number of new EU Pilots **in 2016** were related to the environmental acquis with 19% of the 790 new files. However, only 10% of the 3783 registered complaints concerned environmental legislation, being Justice and consumers the policy with the highest number of complaints (24%) followed by employment (18%) and internal market (13%).

The countries with the highest number of infringement cases in **2015** were: Italy, Germany, Spain, Greece, France and Poland. Similarly, **in 2016** the highest number of open infringement cases were in Spain, Germany, Belgium, Greece, Portugal, France and Poland.

The **2016 report** states that enforcing the environmental acquis is one of the key priorities of the Commission towards contributing to a healthier environment and a stronger, more 'circular' economy which uses resources in a more sustainable way. It refers to waste management, waste water treatment infrastructure and compliance with air quality limit values as the main shortcomings on the implementation of environmental legislation<sup>64</sup>. In addition, the Commission focused its action on agriculture, maritime/fisheries and free movement legislation<sup>65</sup>.

In this section, we present a comparative analysis of the main issues regarding the implementation of environmental legislation in 2015 and 2016 given that in this period it is one of the most infringement-prone policy area and a policy priority for the Commission<sup>66</sup>. In addition, we have focus our analysis on the Member States where there are more problems of implementation over this period.

In **2015**, the highest number of **EU pilots** initiated by the Commission due to problems of implementation of environmental legislation were related to nature protection followed by water protection and management and air quality. In **2016**, EU pilot files opened on water protection & management were higher than those open on nature protection or chemicals.

However, **in 2015** most of EU pilot cases on nature were closed and only 8 translated into **new infringement cases** which referred to the lack of designation of SACs and of establishing the necessary conservation measures, including management plans. Out of the **126 new infringement cases opened in 2015 on environment** (opened through a Letter of Formal Notice) 58 relate to waste management, 24 to water protection and management and 21 on chemicals. A similar situation can be described **about 2016** where out of 89 new infringement cases on environment, the Commission opened 21 cases on water protection and management, 21 on air quality and 8 on nature protection.

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<sup>63</sup> Monitoring the application of European Union law. 2015 Annual Report. Report from the Commission, COM(2016) 463 final, 15.7.2016 available at:

[http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm);

[http://ec.europa.eu/atwork/applying-eu-law/docs/annual\\_report\\_33/com\\_2016\\_463\\_en.pdf](http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_33/com_2016_463_en.pdf);

[http://ec.europa.eu/atwork/applying-eu-law/docs/annual\\_report\\_33/20160715\\_policy\\_areas\\_en.pdf](http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_33/20160715_policy_areas_en.pdf);

[http://ec.europa.eu/atwork/applying-eu-law/docs/annual\\_report\\_33/20160715\\_member\\_states\\_part1\\_en.pdf](http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_33/20160715_member_states_part1_en.pdf);

[http://ec.europa.eu/atwork/applying-eu-law/docs/annual\\_report\\_33/20160715\\_member\\_states\\_part2\\_en.pdf](http://ec.europa.eu/atwork/applying-eu-law/docs/annual_report_33/20160715_member_states_part2_en.pdf).

<sup>64</sup> Monitoring the application of European Union law. 2016 Annual Report, Commission, COM(2017) 370 final, p6

<sup>65</sup> Monitoring the application of European Union law. 2016 Annual Report, Commission, COM(2017) 370 final, p7.

<sup>66</sup> Environmental Implementation Review, Commission, COM(2016) 316 final p.5 and

Monitoring the application of European Union law. 2016 Annual Report, Commission, COM(2017) 370 final, p.5

The **infringement cases that remained open in 2015** were higher in relation to water legislation followed by waste management and nature protection. The higher number of open infringement cases **in 2016** were on water protection and management (69) followed by waste management (58), nature protection (49) and air quality (48).

In **France** the highest number of complaints from citizens were related to environmental legislation with 48 out of 276 complaints registered in 2015. In 2016 the total number of complaints increased to 315. Those numbers translated into 46 new EU Pilot cases in 2015 and 53 in 2016 out of which 7 related to environmental legislation. **In 2015**, the Commission initiated 5 infringements for non-application of environmental legislation which related to the transposition of Energy Efficiency Directive 2012/27/EU, the lack of waste management plans required under the Waste Framework Directive 2008/98/EC and the non-respect of air quality Directive 2008/50/EC limit values. From 22 new cases of late transposition, 3 were on environmental legislation. **In 2016**, out of 38 infringement cases initiated by the Commission against France, 5 were related to environmental legislation including the lack of waste management plans and waste prevention programmes required under the Waste Framework Directive 2008/98/EC, hunting practices such as illegal poaching and killing of ortolan buntings against the Birds Directive 2009/147/EC, non-compliant transposition of the Mining Waste Directive 2006/21/EC or non-communication of national measures transposing the Directive 2013/39/EU on priority substances in the field of water policy and those transposing the Maritime Spatial Planning Directive 2014/89/EU. France was condemned by the Court of Justice of the EU for failing to provide adequate treatment of urban waste water in several smaller agglomerations. The preliminary rulings issued in relation to environmental legislation related to two important Directives: the Packaging Directive 94/62/EC and the Strategic Environmental Assessment Directive 2001/42/EC. The Court established that a limitation in time of the effects of a declaration of illegality of a national provision adopted in disregard of the Strategic Environmental Assessment Directive 2001/42/EC, may be adopted provided that such a limitation is dictated by an overriding consideration linked to environmental protection.

In **Germany**, while the number of complaints and new EU Pilot files on environmental legislation **in 2015** were not the highest in comparison to other areas such as Justice and consumers, taxation or internal market, 6 infringement cases for non-implementation of environmental legislation were opened including for incomplete transposition of the Energy Efficiency Directive 2012/27/EU, the lack of proper designation and establishment of the necessary conservation measures under the Habitats Directive 92/43/EEC or the non-respect of the Air Quality Directive 2008/50/EC limit-values. From the 22 new cases of late transposition, 4 were on environmental legislation. The number of new infringement cases opened against Germany increased from 88 in 2015 to 91 in 2016. However, **in 2016** only three were environmental cases which were related to the Environmental Noise Directive 2002/49/EC, the transposition of the Seveso III Directive 2012/18/EU and the Directive 2014/27/EU adopting rules for the implementation of the Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances. Two of the six cases referred to the EU Court of Justice in 2016 concerned environmental legislation and in particular the Habitats Directive in relation to the authorisation of a coal power plant in Hambourg/Moorburg<sup>67</sup> and water pollution caused by nitrates from agriculture sources<sup>68</sup>. In addition, one of the cases referred to as a preliminary ruling confirmed that when a plan indirectly connected with the management of a nature site was authorised following a study concluding that the plan is not

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<sup>67</sup> Commission v Germany, C-142/16

<sup>68</sup> Commission v Germany, C-543/16

compliant with the Habitats Directive but before the site was included in the list of sites of Community importance, a subsequent review need to be carried out if that is the only proper step to prevent significant deterioration of the habitat due to implementation of the plan<sup>69</sup>;

In **Greece**, citizens submitted **21 complaints** on environmental cases out of the 144 complaints registered in 2015 and 15 environment complaints out of the 136 registered in 2016. This activity led to **4 EU pilot** files opened in 2015 and **7 EU pilot cases** in 2016. In addition, **35% of the 40 new infringement cases** opened in 2015 by the Commission against Greece were related to environmental legislation including bad application of the Habitats Directive 92/43/EEC as regards designating special areas of conservation and establishing the necessary conservation measures; bad application of the energy performance of buildings Directive and failure to implement the EU Timber Regulation (EU) No 995/2010 and the Forest Law Enforcement, Governance and Trade Regulation (EC) No 2173/2005. Out of 32 cases for late transposition, 11 were on environmental legislation. **In 2016 out of the 42 new infringement cases opened**, those concerning environmental legislation referred to the illegal poisoning of birds against the Birds Directive 2009/147/EC, the lack of designation of special areas of conservation and establishment of the necessary conservation measures under the Habitats Directive 92/43/EEC and the failure to ensure the adequate protection of Lake Koroneia in conformity with the Habitats Directive 92/43/EEC and the Urban Waste Water Treatment Directive and 91/271/EEC or the absence of risk maps under the Floods Directive 2007/60/EC. In addition, Greece has not adopted national measures transposing the Maritime Spatial Planning Directive 2014/89/EU. Interestingly the court cases from the EU Court of Justice in 2015 and 2016 point at key environmental problems in Greece:

- the lack of environmental impact assessments: The Court states that a measure containing a plan or programme falling within the scope of the SEA Directive should be subject to environmental assessment of its impacts even if it only modifies an existing plan to implement a hierarchically superior measure which has not itself been subject to such an environmental assessment<sup>70</sup>.
- the protection of nature resources as Greece failed to comply with the Habitats Directive by not providing adequate protection for the endangered sea turtle *Caretta caretta* in the Bay of Kyparissia;
- waste management as Greece was condemned for its failure to take all the necessary measures to comply with the Court's 2009 judgment finding that Greece was not ensuring adequate management of hazardous waste. The Court ordered Greece to pay a lump sum of EUR 10 million and a daily penalty payment of EUR 30 000
- promotion of coal as the main energy source by granting the public undertaking privileged access to lignite and reinforcing its dominant position on the wholesale electricity market.

These rulings reflect the evidence provided in recent stakeholder reports regarding the main problems of Greece's implementation of environmental law. For example, the Environmental Law review by WWF Greece reports on the systematic adoption of decisions legalising *a posteriori* illegal constructions or settlements even in ecologically sensitive forest areas in breach EU or national law, or decisions annulling official designation of national protected

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<sup>69</sup> Grüne Liga Sachsen and Others, C-399/14

<sup>70</sup> Dimos Kropias Attikis, C-473/14 in relation to Directive 2001/42/EC

areas through joint ministerial decisions or implementation of the Maritime Spatial Planning Directive 2014/89/EU<sup>71</sup>.

**In Spain**, the number of EU Pilot cases and infringements initiated by the Commission in 2015 on environmental legislation reached 7 cases of the 48 new EU Pilot files and 7 (20%) out of the 37 new infringements cases. **In 2015** the infringement cases related to the environment to the late and incomplete transposition of the Energy Efficiency Directive 2012/27/EU and the Oil Stocks Directive and Renewable Energy Directive; incorrect application of the Habitats Directive 92/43/EEC as regards designating special areas of conservation and establishing the necessary conservation measures; non-respect of the NO<sub>2</sub> limit values in the Air Quality Directive 2008/50/EC; failure to implement EU Timber Regulation (EU) No 995/2010 and the Forest Law Enforcement, Governance and Trade Regulation (EC) No 2173/2005; inadequate urban waste water treatment in a large number of smaller agglomerations. While late transposition of EU law is improving and none of the cases relate to environmental legislation, three of them relate to energy legislation with fundamental links to environmental objectives. **In 2016**, out of 424 new complaints registered, the Commission initiated 53 EU Pilots which included 8 environmental files. The number of infringement cases increased to 46 covering several cases related to environmental legislation such as the lack of waste management plans and waste prevention programmes required under the Waste Framework Directive 2008/98/EC; failure to ensure that waste landfills operate in compliance with EU standards; failure to ensure adequate protection of natural habitats and sustainable management of water resources in the area of the Doñana national park; inadequate urban waste water treatment; lack of strategic noise maps and/or action plans required by the Environmental Noise Directive 2002/49/EC; trapping of finches in breach of the requirements of the Birds Directive 2009/147/EC; failure to fully transpose the Offshore Safety Directive; failure to comply with the Energy Performance of Buildings Directive 2010/31/EU. The Court rulings in 2016 were all related to environmental issues where Spain had failed to:

- Ensure the adequate treatment of urban waste water from four agglomerations discharging into sensitive areas;
- Respect the obligations under the Birds Directive 2009/147/EC and the Habitats Directive 92/43/EEC in relation to a project for building a high-speed railway line between Seville and Almeria.
- Comply with the Landfill Directive 1999/31/EC by not taking the necessary measures to ensure that non-compliant landfills do not continue to operate;
- Finally the irregularities in public procurements for managing Structural Funds persist even if the case was lost due to the late action by the European Commission.

It is worth mentioning **Belgium** where more than 30% of the infringements opened by the Commission **in 2015** related to environmental legislation including incomplete transposition of the EED or bad application of the Habitats Directive 92/43/EEC regarding the designation of SAC and the adoption of conservation measures. While the share of environmental cases in **2016** was cut by half, environment was the policy area with the largest number of cases after health and food safety. The main judgments of the Court of Justice related to environmental legislation were issued in preliminary ruling procedures on two issues: the implementation of Article 6 of the Habitats Directive and the promotion of green electricity. In the first case, the Court considered that Article 6(3) of the Habitats Directive must be interpreted as meaning that measures contained in a plan or project not directly connected

<sup>71</sup> WWF's 2017 Environmental Law Review for Greece, <http://www.wwf.gr/images/pdfs/WWF-NOMO-2017-%20Synopsis-EN.pdf>

with or necessary to the management of a site of Community importance and providing for the future creation of the protected area may not be taken into consideration in the required appropriate assessment of the significance of the adverse effects on the integrity of that site when their completion will take place subsequently to the assessment. However, such measures can only be categorised as 'compensatory measures', within the meaning of Article 6(4), if in spite of the negative assessment, the plan or project must be carried out for imperative reasons of overriding public interest and there are no alternative solutions, and the compensatory measures are meant to ensure the overall coherence of Natura 2000. In the second case the Court considers that the exemption of distribution charges limited to green electricity produced in Flanders is incompatible with EU law. It fails to achieve the objective of increasing the production of green electricity and is thus considered non-proportionate discrimination.

In 2015 the Commission opened 4 new EU Pilot files and 3 new infringement cases against **Poland** related to the environment from a total of 41 new EU pilots and 26 new infringement cases. They were related to late and incomplete transposition of the Energy Efficiency Directive 2012/27/EU, late and incomplete transposition of the Energy Performance of Buildings Directive 2010/31/EU, incorrect implementation of the Renewable Energy Directive, non-respect of EU air quality limit values for dust particles and breach of the Environmental Impact Assessment Directive by failing to ensure that exploratory drilling activities are subject to EIA. From the 22 new cases of late transposition, 2 were on environmental legislation. **In 2016**, 12 out of 41 EU pilot related to environmental legislation and 7 out of 42 infringement cases were initiated by the European Commission against Poland. The infringement cases related to strategic issues such as the increased logging in Białowieża Forest, the non-respect of NO<sub>2</sub> limit values set by the Air Quality Directive 2008/50/EC, the failure to comply with the requirements of the Renewable Energy Directive, to communicate measures transposing the Seveso III Directive 2012/18/EU and to fully transpose the Energy Efficiency Directive 2012/27/EU and the Directive on safety of offshore oil and gas operations. In 2016 the Commission referred a case to the CJEU for failure to ensure that the environmental impacts of exploratory mining drillings are properly assessed.

The number of infringement procedures in 2015 and 2016 evidences that ensuring the timely and correct implementation of EU legislation in the Member States remains a challenge. The Commission's role to strengthen its response to breaches of EU law is critical. The analysis of the situation in selected Member States evidences the Commission's strategic approach by issuing not only individual cases but also horizontal infringement procedures for breaches of EU law by several Member States. For example, the lack of strategic noise maps and/or action plans required by the Environmental Noise Directive 2002/49/EC triggered infringement cases against several Member States such as Germany and Spain. In addition, the Commission initiated infringement cases linked to the transposition of the Maritime Spatial Planning Directive 2014/89/EU against few Member States such as France and Greece and for the lack of transposition of the Seveso III Directive against several Member States including Germany and Poland.

Member States efforts and priorities need to step up as well.

### 1.2.2. The Commission's role on implementation and enforcement of EU law

The European Commission is in charge of **designing and executing the EU enforcement policy**, which is critical for the credibility of the Union and for the protection of public interests such as the environment<sup>72</sup>.

The Commission has gathered information about the **benefits of the enforcement policy regarding environmental legislation** as a critical step before determining its strategic approach to it. A recent study on the benefits of enforcement action by the Commission in the environmental field concludes that enforcement of environmental legislation such as the Nature Directives obligations relate to Natura 2000 sites designation and proper management brings concrete economic benefits. The calculation was done on the basis of a number of cases where an approximate monetary value of the benefits from enforcement was allocated using an annual and per hectare value of the ecosystems benefits stemming from Natura 2000 sites which was estimated in a range between 130€ - 1,800€. The total benefits of ensuring enforcement of the Nature Directives was estimated on 1,2 billion Euros per case per year. Similar examples on the value of the Commission's enforcement action in other areas are included in the report<sup>73</sup>.

The study evidenced that the Commission action to ensure enforcement of EU legislation is worth. In May 2016, the Commission launched the Environmental Implementation Review (EIR), a two-year cycle initiative to improve the implementation of existing EU environmental policy and legislation<sup>74</sup>. The **EU Environmental Implementation Review** analyses the reasons why Member States seem to have so many problems to implement environmental legislation. After analysing sector by sector the problems of implementation, and proposing the implementation priorities for each policy area, it identified the following common root causes for poor implementation:

the ineffective coordination between local, regional and national authorities, lack of administrative capacity and insufficient financing, lack of knowledge and data, insufficient systems to ensure compliance monitoring and enforcement, including effective and proportionate sanctions and lack of integration and policy coherence. This strategic approach is in line with the recognition of ensuring implementation of EU environmental law as a priority objective in the **Seventh Environmental Action Programme** regulating the Commission action in this policy from January 2014 to 2020<sup>75</sup> and the **2012 Commission Communication** aiming to improve implementation of environmental law<sup>76</sup> with increased knowledge and responsiveness at the national level, setting better information systems and better explaining how EU law is implemented and complied with in practice.

Improving implementation and enforcement of EU law has been a Commission priority for many years. This policy **has evolved** progressively over the past 15 years. As stated on several documents<sup>77</sup>, during the period between 2002 and 2010 the three aims of the EU

<sup>72</sup> Commission "White Paper on European Governance", COM (2001) 428 final available at: [http://ec.europa.eu/environment/pubs/pdf/Final\\_report\\_study\\_benefits\\_enforcement.pdf](http://ec.europa.eu/environment/pubs/pdf/Final_report_study_benefits_enforcement.pdf)

<sup>73</sup> Study to assess the benefits delivered through the enforcement of EU environmental legislation, September 2016

<sup>74</sup> Commission Communication, 'The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results', COM (2017) 63 final, 3.2.2017.

<sup>75</sup> Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet" at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D1386&from=EN>

<sup>76</sup> Communication from the Commission "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness" COM (2012) 95 final.

<sup>77</sup> Commission Communication "Better monitoring the application of Community Law", COM (2002) 725 final. This Communication follows the discussion on the White Paper on European Governance COM (2001) 428 final. Commission Communication "A Europe of results – Applying Community Law", COM (2007) 502 final.

enforcement policy were: to resolve implementation and enforcement problems at an early stage; to strengthen implementation tools; and to reduce the recourse to infringement procedures. However, the **recent Commission Communication 'EU law: Better results through better application'**<sup>78</sup> adopted in December 2016, describes the current enforcement policy as a system that involves three main roles: monitoring how EU law is applied and implemented, solving problems with Member States so as to remedy any possible breaches of the law, and taking infringement action when appropriate. The objective to reduce the use of infringement procedures is not explicitly stated any more. This may have positive consequences in the future ensuring the Commission effectively targets the infringement problem linked to a specific policy (i.e. environmental) rather than focusing on closing the case for reducing the Commission administrative burden. However, the Commission Communication announces that it will focus its enforcement action where it can make a real difference, and on policy priorities, pursuing cases which reveal systemic weakness in a Member State's legal system. The Commission has announced as well that it will launch infringement procedures without relying on the EU Pilot mechanism, unless recourse to EU Pilot is seen as useful in a given case.

Improving implementation of EU law was also listed amongst the aims of the 2010 Commission Communication on Smart Regulation<sup>79</sup> following the 2007 Commission Communication. It 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'<sup>80</sup>.

This approach has been strengthened by the Commission Better Regulation initiative published in 2014 aimed to '*cut red tape, remove regulatory burdens, simplify and improve the design and quality of legislation so that the policy objectives are achieved and the benefits of EU legislation are enjoyed at lowest cost and with a minimum of administrative burden, in full respect of the Treaties, particularly subsidiarity and proportionality. Under REFIT, the Commission is screening the entire stock of EU legislation on an ongoing and systematic basis to identify burdens, inconsistencies and ineffective measures and identified corrective actions.*'<sup>81</sup> It includes a set of measures to improve the quality of the legislation by assessing the impacts prior to their adoption as well as evaluating their implementation on a systematic and structured way to build on the strengths of the legislation and improve the necessary aspects. It promotes the Regulatory Fitness and Performance Programme (REFIT) to strengthen its horizontal regulatory tools: impact assessment, evaluation and stakeholder consultations<sup>82</sup>. This priority was restated by President elect J.-C. Juncker who announced on 10 September 2014 for the period 2014-2019 that the First Vice-President ("right-hand of the President") would be in charge of Better Regulation.<sup>83</sup>

The adoption of EU legislation by the EU institutions is based on an assessment of the need for action at EU level. The impacts, costs and benefits of all legislative proposals are now systematically assessed, including the cost of failure to act. These assessments are submitted by the Commission to the legislator together with the proposal for legislation and is reflected in the Directives objectives. The quality of the legislation is critical, but even more so in areas such as the environmental policy where Member States rely heavily on the EU as initiator of

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Commission Communication "*Implementing European Environmental Community Law*", COM (2008) 773/4 final.

<sup>78</sup> Commission Communication 'EU law: Better results through better application', C (2016) 8600, OJ C 18, 19.01 2017.

<sup>79</sup> Commission Communication "*Smart Regulation in the European Union*", COM (2010) 543 final.

<sup>80</sup> Commission Communication "*A Europe of results – Applying Community Law*", COM (2007) 502 final.

<sup>81</sup> Commission Communication Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, 18.06.2014, COM(2014) 368 final

<sup>82</sup> Ibid

<sup>83</sup> Commission Memo IP/14/984: [http://europa.eu/rapid/press-release MEMO-14-523\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-523_en.htm)

legislation. According to recent literature<sup>84</sup>, in the majority (more than half) of the Member States the environmental legal framework is equivalent to EU environmental law.

Specifically, on environmental legislation, the Commission and the Committee of the Regions have set up a Technical Platform for Cooperation on the Environment with the aim to improve implementation through dialogue and information exchange between the representatives and stakeholders of the regions and Union officials<sup>85</sup>.

Under the recently signed Inter-Institutional Agreement on Better Law-Making<sup>86</sup>, the European Parliament, the Council and the Commission recognise their joint responsibility in delivering high-quality Union legislation. Within the Better Regulation initiative and the REFIT programme, the Commission started a systematic review of existing legislation through Fitness Checks in different policies including environment starting with legislation on water, waste, protection of birds and habitats (Natura 2000) and on chemicals legislation outside of REACH within the environment policy. It is a complex exercise aiming to promote simplification and reduce unnecessary regulatory burdens, inconsistencies and ineffective measures and propose corrective actions, including the streamlining of reporting obligations<sup>87</sup>.

The Treaty stipulates no specific means to ensure **enforcement of EU law**, other than the infringement proceedings specified in Article 258 TFEU. Over time however, the Commission has developed an EU policy on implementation and enforcement of EU law which is not only based on infringement procedures but includes tools to assist Member States with implementation of EU law. The tools to **support** Member States in their implementation include guidelines, implementation plans, networks and committees; other tools aim to ensure **monitoring** of implementation such as scoreboards and barometers, inspection, package meetings, legal reviews, and reporting or other tools to accurately **assess transposition** and implementation of EU legislation by Member States such as the correlation tables or conformity checking studies. The Commission Communication EU Law: Better Results through better application<sup>88</sup> describes an array of strategic tools the Commission intends to stimulate during this period to support Member States and promote implementation while, at the same time, strengthen the enforcement of EU law.

The **enforcement measures** undertaken under Article 258 TFEU are the only ones with legal basis under the Treaties for the Commission to exercise its role as Guardian of the Treaties by initiating the infringement procedure against a Member State. 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 evolved and led to the establishment of two main phases of the infringement procedure. The first one starts with the issuance of 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. The second phase is linked to the reasoned opinion, which delimits the subject-matter of the dispute, so that it cannot thereafter be extended. In the

<sup>84</sup> Ludwig Kramer, EU Environmental Law, Sweet & Maxwell, 2011.

<sup>85</sup> Geert Van Calster and Leonie Reins, EU Environmental Law, Edward Elgar Publishing, 2017, p. 72 and Technical Platform for cooperation on the environment, DG Environment and the European Committee of the Regions at: [http://ec.europa.eu/environment/legal/platform\\_en.htm](http://ec.europa.eu/environment/legal/platform_en.htm) and Committee of the Regions, 'New cooperation platform to support Europe's local authorities in delivering 7<sup>th</sup> Environment Action Programme' at: <http://cor.europa.eu/en/news/pr/Pages/cooperation-platform-environment-action-programme.aspx>

<sup>86</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ L 123 of 12.5.2016)

<sup>87</sup> Commission Communication Better regulation for better results - An EU agenda, 19.05.2015 COM(2015) 215 final; Commission Communication Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook, 18.06.2014, COM(2014) 368 final

<sup>88</sup> Commission Communication 'EU law: Better results through better application', C(2016) 8600, OJ C 18, 19.01 2017 (2017/C 18/02)

reasoned opinion, the Commission argues that the Member State has failed to comply with EU law and requests it to correct the situation.

There are three main types of infringements of EU law. The failure to notify on time the national measures to transpose a directive or the non-conformity/non-compliance of the Member State's legislation with the requirements of EU legislation. These two types of infringements relate to the obligation to transpose EU legislation (mainly Directives) into national law. The third type of infringement is related to the incorrect or bad application of the EU law by national authorities.

The Commission may initiate infringement procedures against one single Member State or may open horizontal cases related to the problem of implementation and legal act. For example, in 2015, we can identify several cases open against several Member States such as the case of bad application of the Habitats Directive 92/43/EEC as regards designating special areas of conservation and establishing the necessary conservation measures<sup>89</sup>. The Commission also issued infringement procedures on the lack waste management plans and waste prevention programmes under the Waste Framework Directive 2008/98/EC<sup>90</sup>. Another horizontal case covered the non-respect of the Air Quality Directive 2008/50/EC limit values<sup>91</sup> or the one on non-implementation of the EU Timber Regulation (EU) No 995/2010 and the Forest Law Enforcement, Governance and Trade Regulation (EC) No 2173/2005<sup>92</sup>.

The Commission developed the '**EU Pilot**' procedure by 2007<sup>93</sup> to improve implementation and reduce the recourse to infringement procedures. This EU Pilot constituted in fact a pre-infringement phase prior to the letter of formal notice providing another opportunity for bilateral dialogue between the Commission and EU Member States with the aim to seek for a solution.

In addition, the Treaty on the Functioning of the EU introduced another new tool to simplify enforcement procedures and reduce recourse to infringement within the **judicial phase** under Article 260 TFEU. Generally, financial penalties are imposed if Member States do not comply with the Court rulings (Article 260(2)). However, the modification introduced under Article 260(3) TFEU establishes an unprecedented instrument enabling the CJEU to impose **financial penalties** directly against a Member State for failing to **notify the transposing measures** without the need for a prior court ruling<sup>94</sup>. When lodging the case to the CJEU, the **Commission may propose** the amount of the lump sum or penalty payments which cannot be exceeded by the CJEU judgement, together with the due date for payment. Under the 2017 Communication EU law: Better results through better application<sup>95</sup>, the Commission announced its intention to adjust its practice by systematically asking the Court to impose a lump sum as well as a periodic penalty payment.

The Commission submits annually to the European Parliament and the Council a **report on the monitoring of the implementation of EU law** presenting a summary of the actions undertaken in this regard. The statistics and data in those reports, while are very useful to understand certain trends, reflect the most serious breaches which have been dealt with by the Commission or the complaints of the most vocal individuals or entities<sup>96</sup>.

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<sup>89</sup> against Belgium, Germany, Greece, Ireland, Italy, Portugal, Spain and United Kingdom.

<sup>90</sup> Croatia, Cyprus, France, Italy, Romania and Slovenia.

<sup>91</sup> against Czech Republic, France, Sweden, Germany, Italy, Portugal and Spain.

<sup>92</sup> against Greece, Hungary, Romania and Spain.

<sup>93</sup> Commission Communication "A Europe of results – Applying Community Law", COM (2007) 502 final.

<sup>94</sup> Detailed guidelines about the application of Art. 260(3) TFEU are contained in Commission Communication "Implementation of Article 260(3) of the Treaty", SEC(2010) 1371.

<sup>95</sup> Commission Communication 'EU law: Better results through better application', C(2016) 8600, OJ C 18, 19.01 2017 (2017/C 18/02)

<sup>96</sup> Study commissioned by Parliament, Policy Department C, 'Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness', Brussels, 2013, p. 11

### 1.2.3. The role of the European Parliament in the Enforcement Policy

The European Parliament performs a crucial role in ensuring enforcement and implementation of EU law. This role is played by exercising its powers of scrutiny through the different means at its disposal.

According to Article 14 TEU the European Parliament exercises functions of political control of the Commission, including its enforcement and implementation policy, together with the legislative, budgetary and consultation functions. The European Parliament's role of representing the 'Union's citizens' makes it the natural receptor of petitions by the EU citizens (see below) and the body in charge of organising the relevant hearing with the proponents of successfully registered European Citizens' Initiatives under the auspices of the Committee on Petitions.

It discusses the Commission's actions in general (Article 233 TFEU) and oversees, together with the Council, the Commission's implementing and delegated acts (Articles 290 and 291 TFEU). The European Parliament can present **parliamentary questions** to the Commission and Council in the form of written and oral questions with or without debate (Article 230 TFEU) which generally receive a reply by the relevant EU institution.

It also has the power to set up a temporary committee of inquiry to investigate alleged contraventions or maladministration in the implementation of Union law (Article 226 TFEU) and elects the European Ombudsman, empowered to deal with complaints about instances of maladministration in the activities of the Union institutions, and report on them (Article 228 TFEU).

Rule 183 of the Parliament's Rules of Procedures<sup>97</sup> establishes its standing committees and explains the set-up. There are 20 standing Committees with the committee of Environment, Public Health and Food Safety being the largest legislative committee<sup>98</sup>. The Committees are entitled to propose amendments to draft legislative acts under discussion and to deliver opinions, reports, own initiative reports and resolutions on issues of their subject matter. Those acts may be based on information from requested expert studies, fact-finding missions in Member States, hearings with stakeholders and public debates with citizens and civil society.

One explicit category of the European Parliament's **own-initiative reports** is called the **implementation report** which, introduced in 2008, are typically led by specific Committees as instruments of scrutiny on the implementation and enforcement of EU law covering both transposition and application.

As one of the co-legislators, the European Parliament's role in monitoring the implementation of the acts adopted with its involvement through the different legislative procedures is critical. The Parliament traditionally follows the Commission's enforcement and implementation policy, for example, by regularly examining the Commission's annual report on monitoring implementation of EU law and adopting opinions or non-binding resolutions, e.g. the European Parliament resolution of 26 October 2017 on monitoring the application of EU law 2015<sup>99</sup>, or the resolution responding to the Commission's 2011 Internal Market Scoreboard<sup>100</sup>.

<sup>97</sup> Rules of Procedure of the seventh parliamentary term from February 2013.

<sup>98</sup> Geert Van Calster and Leonie Reins, *EU Environmental Law*, Edward Elgar Publishing, 2017, p. 41.

<sup>99</sup> Resolution adopted on 26.10.2017 (2017/2011(INI))

<sup>100</sup> [http://www.europarl.europa.eu/pdfs/news/expert/infopress/20120522IPR45549/20120522IPR45549\\_en.pdf](http://www.europarl.europa.eu/pdfs/news/expert/infopress/20120522IPR45549/20120522IPR45549_en.pdf),

However, the use of own-initiative reports and resolutions linked to them, often takes too long reducing their impact. For example, the above mentioned resolution on monitoring the application of EU law refers to the Commission report published 15 months ago (July 2016); the recent report on the implementation of the Environmental Liability Directive 2004/35/EEC and the resolution attached to it<sup>101</sup>, has been adopted 18 months after the Commission report. While these reports and resolutions are very useful initiatives pointing at key actions to solve existing problems, the European Parliament could use this tool more effectively.

When EU citizens exercise their right of petition, they address their petitions to the President of the European Parliament (Article 227 TFEU) or to the Petitions Committee. Under Article 227 TFEU citizens may submit **petitions and questions** to the European Parliament which often trigger Commission's action such as EU Pilot investigations or infringement procedures against Member States which may eventually end up before the CJEU.

**In 2016**, the Commission acted upon more than seven cases based on the European Parliament submissions regarding shortcomings in the way some Member States were implementing certain EU laws. For example, in the field of environment, the Commission followed up the case from 2015 and adopted a reasoned opinion against the Member State over its non-compliant transposition of the Directive 2003/4/EC on public access to environmental information and it started EU Pilot discussions with a Member State on waste management implementation. In internal market, the Commission initiated EU Pilot with a Member State about compliance with the rules on public procurement.

**In 2015** the European Parliament alerted the Commission of six cases related to environmental legislation which led to Commission action and several more related to free movement or taxes. A letter of formal notice was sent to Finland over its transposition of the Directive on public access to environmental information. In five other environmental cases, the Commission opened EU pilot cases referred to shale gas, management of wolves, incorrect application of the Directive on strategic environmental assessment and the conformity of national legislation with the requirements of the Directive on public access to environmental information.

These figures are in line with those from previous years. **In 2014** as a result of the European Parliament submission of potential shortcomings in Member States' implementation of EU environmental law, the Commission sent three letters of formal notice related to authorisation of various development projects in France and initiated 13 EU pilot cases related to waste management, water protection and impact assessments. Most of these files concerned Italy, France, Luxembourg and Spain<sup>102</sup>. **In 2013** the Commission initiated 2 cases against Italy regarding the IED and EIA Directive and 6 cases on waste management, water management and nature protection<sup>103</sup>. However, in 2012 the numbers were higher as the Commission initiated 22 investigations and 2 infringement procedures in the field of environmental policy based on the petitions and questions from the European Parliament<sup>104</sup>. In addition, the Commission acted upon 7 petitions on regional policy and 4 on health and consumer policies, 3 questions on transport policy, 2 on agriculture policy and 2 on internal market policy<sup>105</sup>.

The number of petitions triggering infringement cases is relatively low in comparison to the total number, evidencing the need for a more active role from the European Parliament. According to some authors, the Parliament 'does not systematically control the

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<sup>101</sup> Resolution adopted on 26.10.2017 (2016/2251(INI)) and P8\_TA-PROV(2017)0414

<sup>102</sup> 2014 Annual Report on Monitoring the application of Union law, 2015.

<sup>103</sup> Report from the Commission, 31<sup>st</sup> Annual Report on Monitoring the application of EU law (2013), 1.10.2014, COM(2014) 612 final

<sup>104</sup> "30th Annual Report on Monitoring the Application of EU Law (2012)", p. 10 and 47, 55, 58, 59 and 60.

<sup>105</sup> "30th Annual Report on Monitoring the Application of EU Law (2012)", p. 10 and 47, 55, 58, 59 and 60.

implementation and application of the environment legislation which it has decided.<sup>106</sup> One of the main challenges of the Parliament is due to the Parliament rotating system, which may sometimes lead to a deficit of specific expertise required to deal with the complex issues that EU legislation regulates (e.g. environment). In order to rebalance this, the documentary service of the Parliament regularly delivers studies from experts, e.g. on the annual report of the Commission on implementation of EU law. Further, the Members of the European Parliament often recur to interest groups briefings<sup>107</sup>. Another challenge hindering the use of this tool to raise implementation problems is that sometimes petitions tend to take long to be dealt with, discouraging citizens.

The role of the European Parliament in the enforcement policy seems to be limited to raising petitions to the Commission to trigger infringement cases. The European Parliament is not involved in the EU Pilot or in the infringement procedures. However, its involvement at least in those cases triggered by petitions, would improve the transparency and legitimacy of the EU Pilot. In any case, the European Parliament should receive first-hand information of all the EU Pilots opened and the infringement procedures initiated<sup>108</sup>.

The Parliament could also use the opportunity of receiving petitions as a justification for directly checking for itself whether EU environmental law has been fully respected in a concrete situation. It could not only request information from the European Commission, but also organise site visits and provide evidence related to those cases, while demonstrating that the European Parliament is taking citizens' concerns seriously<sup>109</sup>.

#### 1.2.4. The role of EU citizens: the complaints mechanism

Shortcomings in the transposition and/or application of EU law by Member States are not only detected by the Commission's own investigations, in most cases they are brought to its attention by complaints from members of the public, businesses, NGOs or other organisations. Sometimes that requires proper monitoring activities, in particular in relation to the implementation of EU environmental law. While it is not always easy to monitor certain directives given the high degree of technical appliances and expertise required, citizens' complaints remain the main source of information on the application of EU environmental law<sup>110</sup>. Sometimes, NGOs' monitoring work is limited to the most visible infringements. In other occasions, national reports required under certain pieces of EU legislation are a useful source of information for citizens (e.g. to monitor the implementation of the Air Quality Directive 2008/50/EC<sup>111</sup>).

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 every citizen shall have the right to participate in the democratic life of the Union<sup>112</sup>. The European citizens have reacted positively to this opportunity and, as the European Parliament noted, '[i]ndividual complaints by businesses and members of the public remain the main

<sup>106</sup> L. Kramer, *EU Environmental Law*, Sweet and Maxwell, 2011, p. 436.

<sup>107</sup> *ibid*

<sup>108</sup> European Parliament resolution of 26 October 2017 on monitoring the application of EU law 2015 (2017/2011(INI))

<sup>109</sup> Ludwig Krämer, *EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement*, 2016.

<sup>110</sup> Ludwig Krämer, *EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement*, 2016.

<sup>111</sup> ClientEarth monitoring actions on the implementation of the Air Quality Directive are based on data from the national reporting requirements under the Air Quality Directive 2008/50/EC, <http://cdr.eionet.europa.eu/be/eu/aqd> and <https://www.clientearth.org/new-air-quality-data-show-brussels-fails-take-air-pollution-seriously/>

<sup>112</sup> Article 10 (3) TEU.

source for the detection of breaches of European Union law<sup>113</sup>. 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.

In 2015 the number of new complaints registered in the Commission reported 3450 potential breaches of EU law<sup>114</sup>. This represented a reduction in the number of complaints submitted which is lower than the 3505 complaints received in 2013<sup>115</sup> and the 3715 complaints received in 2014. However, members of the members of the public, citizens, business, NGOs or other organisations became very active again in 2016 with a record figure of 3783 complaints registered in the Commission<sup>116</sup>.



Source: own development

The Member States with a higher number of complaints in 2016 were Italy, Spain and France and Italy, Spain and Germany in 2015. The policy areas with the highest number of new complaints in 2016 are related to the issues that affect citizens the most including justice and consumers (919 complaints), employment (679 complaints) internal market, industry and SMEs (483), taxation and customs (406) and environment (348).

Complaints trigger the Commission action, as Guardian of the Treaties, either to initiate an EU Pilot dialogue with one or several Member State regarding a suspected infringement to directly open an infringement procedure if urgency or other overriding interest require immediate action<sup>117</sup>. Therefore, complaints may be the **source for the start of pre-infringement (EU Pilot) or infringement procedures (Letter of Formal Notice)**.

In the 1980s and 1990s, the Commission would address the Member State subject of a complaint and would confront it with the arguments of the complainant, would try to find out the facts and even made fact-finding visits to the place in question. This practice, however, has been abandoned for a number of years. Today, the Commission discusses the issue with the Member State in question through the EU Pilot and tries to solve it in this way. The complainant is informed of the result of the negotiations and may remonstrate, but has no means of carrying his complaint further<sup>118</sup>.

While the Commission 2016 report on implementation of EU law, confirms the important role of complaints in identifying wider problems of EU law implementation affecting the interests of citizens and businesses, it highlights the need for a proper understanding of the nature of the infringement process<sup>119</sup>. The Commission defines the purpose of the

<sup>113</sup> European Parliament Report on the 28<sup>th</sup> annual report on monitoring the application of EU law (2010) (A7-0330/2012), p. 8, pt. 30. The Commission Communication "Relations with the complainant in respect of infringements of Community Law", COM (2002) 141 final, pt. 5 stated that it 'has regularly acknowledged the vital role played by the complainant in detecting infringements of Community law'.

<sup>114</sup> European Commission Annual Report: 'Monitoring the application of European Union law. 2015 Annual Report'. COM(2016) 463 final

<sup>115</sup> 2014 Annual Report on Monitoring the application of Union law, 2015.

<sup>116</sup> European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>117</sup> European Commission 'Monitoring the application of European Union law. 2015 Annual Report'. COM(2016) 463 final

<sup>118</sup> Ludwig Krämer, EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement, 2016.

<sup>119</sup> European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

infringement procedure as a mechanism to raise issues of wider principle and announces that those cases that can be satisfactorily dealt with by other mechanisms at EU and national level, the Commission will, as a general rule, direct complainants to the national level<sup>120</sup>. It is not clear how the concept of 'issues of wider principle' would be determined or the implications of such policy, which might jeopardize the treatment of certain cases whose effective resolution might require the EU involvement due to the national circumstances or interests.

In June 2012 the Commission adopted the Communication updating the previous one from 2002<sup>121</sup> regarding the **handling of complaints** and in particular the relations with the complainant in respect of the application of Union Law<sup>122</sup>. This Communication acknowledges the crucial role of the complainants in supporting the Commission detect infringements of EU law and sets out non-legally binding rules guiding the adoption of the 'administrative measures when handling complaints and assessing the infringement for the benefit of the complainant'<sup>123</sup>.

There are no major requirements for the complaint to be registered within the Commission services. It needs to be submitted on-line or on paper, in writing (by letter, fax, e-mail) in one of the official languages of the Union and be properly signed with full address; it has to refer explicitly or implicitly to a specific Member State, be related to acts or omissions involving public authorities and fall within the scope of Union law<sup>124</sup>. While the Commission recommends complainants to use the standard form, it is not a requirement which must be satisfied<sup>125</sup>. The Commission is required to issue an acknowledgement of all complaints within fifteen working days of receipt, stating the registration number to be quoted in any correspondence. There is no need for the person submitting a complaint to prove having a formal interest in bringing proceedings or being individually and directly concerned by the alleged breach of EU law<sup>126</sup>, as it is required for legal standing before the Court according to Article 263 TFEU.

Under rule 7 once complaints are examined, subsequent infringement proceeding may be launched. The Commission is required to contact complainants and inform them in writing, of each procedural step (letter of formal notice, reasoned opinion, and referral to the Court or closure of the case). Complainants' involvement in the EU Pilot procedure or the pre-infringement and infringement procedure is currently limited to being the receptor of information from the Commission. The Commission 2015 Annual report states that the 'Commission actively associates citizens to the handling of their complaints, informing them of the decisions taken throughout all stages of the procedure'. The complainants' role is often discussed based on the transparency principle, the effectiveness of the system and the Commission's own principles of good governance (openness, participation, accountability, coherence and effectiveness) that are required for legitimacy of any administrative action, including enforcement measures<sup>127</sup>.

<sup>120</sup> European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final, p. 4.

<sup>121</sup> Commission Communication "Relations with the complainant in respect of infringements of Community Law", COM (2002) 141 final, pt. 5 states that it 'has regularly acknowledged the vital role played by the complainant in detecting infringements of Community law'.

<sup>122</sup> COM (2012) 154 final, Communication from the Commission "Updating the handling of relations with the complainant in respect of the application of Union law" adopted on 2.4.2012.

<sup>123</sup> Ibid

<sup>124</sup> "Updating the handling of relations with the complainant in respect of the application of Union law", p. 4-5.

<sup>125</sup> The standard complaint form is published in the Official Journal of the European Union and available at the following address: [http://ec.europa.eu/atwork/applying-eu-law/make\\_a\\_complaint\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/make_a_complaint_en.htm) or [https://ec.europa.eu/assets/sg/report-a-breach/complaints\\_en/index.html](https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/index.html).

<sup>126</sup> "Updating the handling of relations with the complainant in respect of the application of Union law", p. 4, pt. 2

<sup>127</sup> European Parliament, Legitimacy and EU administrative law: Future prospects. Note. Dr Melanie Smith, 2011.

Rule 8 requires the Commission to investigate complaints with a view to reach a decision to issue a letter of formal notice or to close the case within not more **than one year from the date of registration of the complaint**. Where this time limit is exceeded, the Commission will inform the complainant in writing, however it would only be upon the complainant's request.

Decisions on the infringement procedural steps are taken by the College of Commissioners and the public is informed through the publication of press releases, which are not always systematic. However, decisions prior to the start of the infringement procedure including the EU Pilot, and their duration are taken by the services with no publicly available information about them and no internal review procedure. The complainant will only be informed if the Commission official decides to do it. As certain authors have pointed out, '...the Commission's handling of potential infringements, its investigation of complaints, petitions and other practices are not controlled, it has a quasi-monopoly – unlimited discretion on whether and with what intensity it looks into cases of non-compliance by a Member State.'<sup>128</sup>

For example, the Commission Report 2016 on implementation of EU law states that 3,783 new complaints registered by the Commission in 2016, triggered 270 EU Pilots, which together with the 520 due to own Commission initiative amount a total of 790 EU Pilots. The 348 complaints related to environmental legislation led to 151 EU Pilots. There is no information about what happened with the 3,000 complaints that did not trigger any level of action, including the 200 complaints on environmental legislation. Even if one could consider that some of the complaints were treated directly as part of the 986 new infringements initiated in 2016 (out of which 89 concerned environmental legislation), the numbers are surprising and there is no publicly available information about how the complaints were treated.

Similarly, in the 2012 Commission annual report on monitoring the application of EU law states that 3141 new complaints were registered but 2.859 processed<sup>129</sup>. It is not clear what happened with the difference (about 300). Furthermore, following an "initial assessment of more than 2.800 submissions in 2012, the Commission opened bilateral discussions with the Member State concerned in relation to 621 complaints in order to clarify whether EU rules had been breached. The other 2.238 complaints "have not been further processed because either EU laws were not breached or the Commission lacked competence or the correspondence did not qualify as complaint."<sup>130</sup> The numbers are surprising and there is no publicly available information that helps understand how they were treated.

Some of the above-described problems would be solved or would improve with some of the actions suggested in the latest European Parliament resolution on monitoring the application of EU law. It calls on the Commission to involve petitioners in EU Pilot procedures initiated in relation to their petitions. It also proposes the adoption of a Regulation on an open, efficient and independent European Union administration, following the resolutions of 15 January 2013 and 9 June 2016. The regulation would aim at setting out various aspects of the administrative procedure – including the role of the citizen when sending complaints, citizens' access to the file of the case on which they sent a complaint, the notifications or binding time limits. Such a proposal for regulation, annexed to the 2016 resolution, aims to reinforce citizens' rights and transparency<sup>131</sup>.

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<sup>128</sup> Ludwig Krämer, *EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement*, 2012.

<sup>129</sup> "30th Annual Report on Monitoring the Application of EU Law (2012)", p.10

<sup>130</sup> *Ibid*

<sup>131</sup> European Parliament resolution on monitoring the application of EU law 2015, 26.10.2017 (2017/2011(INI))

## 2. TRANSPOSITION OF EU LAW

### 2.1. Trends

Transposition into national legislation of EU directives is mandatory. According to Article 288 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. However, Regulations are binding and directly applicable in all EU Member States, which means that they do not need to be transposed into national law<sup>132</sup>, but national legislation might be required to ensure their implementation. According to Article 291 of the TFEU, Member States shall adopt all measures of national law necessary to implement legally binding Union acts. Article 192(4) reiterates this obligation requiring Member States to implement the different measures adopted in pursuance of EU environmental policy.

The EU approves nowadays on average 80 directives, 1200 regulations and 700 decisions per year. By 2015, the *acquis* of the EU consisted of 11.500 regulations and 1.900 directives in addition to the primary law (the Treaties)<sup>133</sup>. The monitoring of the measures adopted to ensure the transposition of Directives and the application of Regulations fall within the competence of the Commission as Guardian of the Treaties. On the transposition side, the 2009 Commission Communication on 'A Europe of results' highlighted that reducing late transposition was a priority for the Commission<sup>134</sup>. This objective has been reiterated systematically in the Commission Annual Reports since it is considered essential to ensure the effectiveness of European policies<sup>135</sup>.

Most directives include a specific article requiring Member States to transpose their provisions into national law and a deadline for such transposition (e.g. Article 23 of the Habitats Directive 92/43/EEC). The transposition period ranges between one and five years from the Directive's date of its adoption or publication. 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 the adoption and implementation of EU legislative acts are agreed in protocols annexed to the Accession Treaty.

The transposition trends depend on the legislative activity. In general, the legislative activity of the Union has decreased which has an impact on the number of transposition problems. For example, the area of judicial cooperation was based on Framework Decisions, which needed to be updated into directives following the Lisbon Treaty<sup>136</sup> and has triggered a very active legislative activity in this field.

The analysis carried for the EP in 2013<sup>137</sup> evidenced a continuous trend of late transposition in Member States which led in 2012 to a Commission action where late transposition infringements were launched against more than two thirds of the Member States for some directives. This trend has been confirmed by the Commission 2013 Annual report on the

<sup>132</sup> Article 288 TFEU

<sup>133</sup> "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 2

<sup>134</sup> Commission Communication on 'A Europe of results – Applying Community Law', p 9.

<sup>135</sup> 29<sup>th</sup> Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p.7.

30<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 7

European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final p.28

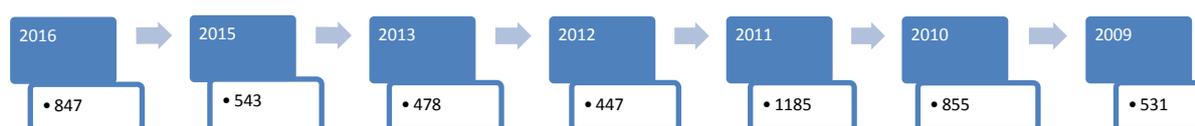
European Commission 'Monitoring the application of European Union law. 2015 Annual Report'. COM(2016) 463 final p. 27

<sup>136</sup> Article 9 of the Protocol to the Lisbon Treaty on Transitional Provisions

<sup>137</sup> Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

monitoring of the application of EU law<sup>138</sup> which reported that the Commission launched procedures against 24 Member States concerning late transposition of Directive 2010/31/EU on the energy performance of buildings. The 2013 annual report identified four policy areas with the highest number of new cases of late transposition: transport (115 procedures), health & consumers (108), environment (63) and internal market & services (53) similar to the areas identified in the annual report for 2011 and for 2010<sup>139</sup>. The 2014 Annual report recognises late transposition remains a persistent problem.

While the Commission 2012 Annual report highlighted a steady increase in the number of late transposition cases over several years (2011 (1185), 2010 (855), 2009 (531)), the 2013 report referring to 2012 announced a decrease in the legislative activity of the Union, with the subsequent decrease in the number of directives to be transposed and thus in the number of infringements for late transposition. Since then the numbers have been steadily increasing.



#### Late transposition cases

The high number of infringement procedures, which in 2016 rose again, remains an issue of concern for the Commission as it prevents correct implementation. The Commission report highlights the great importance the Commission attaches to ensuring the effective application of the law<sup>140</sup>.

The policies with a higher number of new late transposition infringements in 2016 were internal market, enterprise and SMEs with 264, health and food safety with 147, financial services and capital markets with 116, mobility and transport with 54 and environment with 50. Similar issues were subject to late transposition infringements in 2015 including financial services, transport, environment and internal market. Similarly, the policy areas with more infringements of late transposition launched in 2014 were Health and consumers with 128 new infringement cases, Environment with 127, Transport with 76 and Internal Market with 76. These results show a persistent trend as the four policy areas with more new cases of late transposition infringements launched in 2013 were environment (168 procedures), health & consumers (58), internal market & services (47) and transport (36). In 2012 environment was still one of the main policy areas with a high number of cases of late transposition (63) but only in third position after Transport (115 procedures), Health and Consumers (108) and before 53 cases in Internal Market & Services. Similar areas were identified in the annual report for 2011 and for 2010<sup>141</sup>.

The Commission report on monitoring the application of EU law published in 2016<sup>142</sup> reflects the legislative activity linked to the climate and energy package. In particular, the report refers to the actions to systematically check the conformity of national legislation with:

- the Third Energy Package Directives,
- the Offshore Safety Directive,

<sup>138</sup> "30th Annual Report on Monitoring the Application of EU Law (2012)", p. 8

<sup>139</sup>, 28<sup>th</sup> Annual report on monitoring the application of EU law (2010), COM (2011) 588 Final.

<sup>140</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>141</sup>, 28<sup>th</sup> Annual report on monitoring the application of EU law (2010), COM (2011) 588 Final.

<sup>142</sup> European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

- the Energy Efficiency Directive,
- the Energy Performance of Buildings Directive,
- the Renewable Energy Directive,
- the Oil Stocks Directive,
- the Radioactive Waste Directive.
- the EU Emissions Trading System Directives
- the Fuel Quality Directive and
- the Geological Storage of Carbon Dioxide Directive

In 2016, the Commission launched EU Pilot dialogues and infringement procedures for non-compliance with reporting obligations, mainly under the Energy Efficiency and Energy Performance of Buildings Directives and the Security of Gas Supply Regulation. This resulted in nearly 100 % compliance with the reporting obligations in question.

The 2016 Commission report on implementation of EU law, highlights that combating late transposition is a long-established priority for the Commission and announces the Commission intention to ensure swifter compliance by launching infringement procedures without relying on the EU Pilot mechanism, unless recourse to EU Pilot is seen as useful on a case by case basis. The Commission has also announced its commitment to reinforce the sanctions with a request for daily penalties applicable under Article 260(3) TFEU for non-communication of transposing measures on time<sup>143</sup>.

## 2.2. Monitoring measures

### *Conformity checking studies and correlation tables*

Conformity checking studies are a specific tool for monitoring the correct transposition of EU law and therefore need to be carried out systematically. They assess the effectiveness of transposition.

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.

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 Parliament (see below).

Correlation tables are generally not publicly available since the Commission does not disclose them to the public because they are considered confidential information essential for the launch of infringement actions and whose disclosure could undermine the purpose of the investigations (Article 4 of Regulation 1049/2001). However, the correlation tables only reflect an analysis of publicly available legislation with no confidential information in it and each study contains a disclaimer stating that the Commission is not responsible for the content of the study. Studies on the transposition of an EU environmental directive are “environmental information”, to which Regulation 1367/20016 provides a right of access<sup>144</sup>.

<sup>143</sup> European Commission ‘Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>144</sup> Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on access to information, participation in decision-making and access to justice in environmental matters to Community institutions and bodies, OJ 2006, L 264 p.13.

The studies have the objective of informing the Commission of the state of the law in each of the Member States. The Commission has discretion to accept the conclusions of a study or not and to act upon it by initiating an infringement procedure against a Member State under Article 258 TFEU. As pointed out by certain authors, the conformity studies are not part of the procedure under Article 258 TFEU – such a procedure has not even begun when the study is made<sup>145</sup>. Therefore, nothing would prevent the Commission from systematically making this information directly accessible to the public in electronic form or through a register, under Article 4(2) and 6 of Access to documents Regulation 1367/2006.

The Commission discussion paper 'High Level Working Group on Competitiveness and Growth'<sup>146</sup> on compliance and assistance plans regarding the Single Market Strategy refers to the **Data analytics tool**. The 2017 Commission Communication 'EU law: Better results through better application'<sup>147</sup> announces that the Commission is developing such tool to improve the monitoring of Single Market legislation<sup>148</sup>. This tool should speed up the assessment of the compliance of national measures with EU law, identify gaps and incorrect transposition, and possibly detect 'gold plating' measures which are not related to the transposition of directives.

In early 2016, the Commission initiated a pilot project for the development of a Data analytics tool which could detect incorrect or incomplete transposition of EU legislation and ultimately identify gold plating. The aim of such a tool is to improve monitoring of Single Market legislation. Several methodologies have been tested in order to develop an algorithm which would allow the tool to recognise with the necessary degree of accuracy the completeness and correctness of transposition, while taking into account the specificities of EU languages and the type of transposition (e.g. in a single or in multiple documents). The current methodology seems to be delivering good results, however not all EU languages have been tested yet. The pilot project is expected to finish in 2017<sup>149</sup>.

### **Request for a compulsory nature of correlation tables/explanatory documents**

Correlation tables or explanatory documents are effective tools for promoting a good understanding of national transposition measures and for monitoring the transposition of EU law<sup>150</sup>.

In 2003, the Inter-institutional agreement on better law-making<sup>151</sup>, referred officially for the first time to correlation tables. It requested (point 34 of the Agreement) the Council to **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 to the recitals of the Directives, in order to prevent them from being compulsory and subject to judicial scrutiny.

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<sup>145</sup> Ludwig Krämer, EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement, 2012

<sup>146</sup> <http://data.consilium.europa.eu/doc/document/ST-5253-2017-INIT/en/pdf>

<sup>147</sup> 2017/C 18/02; available at:

[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN)

<sup>148</sup> Single Market Strategy Communication (COM(2015) 550 final)

<sup>149</sup> <http://data.consilium.europa.eu/doc/document/ST-5253-2017-INIT/en/pdf>

<sup>150</sup> Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304.

<sup>151</sup> EP, Council, Commission, "Interinstitutional agreement on better law-making", OJ C 321.

Given the systematic refusal by Member States to submit correlation tables responding to a mandatory obligation - as requested by the Commission and the EP, these two institutions agreed in the 2010 Framework Agreement<sup>152</sup> 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.

The EU institutions and the Member States agreed in the Joint Political Declaration of 28 September 2011 that Member States, when notifying national transposition measures to the Commission, may also have to provide documents explaining how they have transposed directives into their law<sup>153</sup>. However, the majority of Member States communicate the transposing legislation without correlation tables. In those cases, the Commission typically develops them within a certain time and use the results to initiate infringement procedures for non-communication or for non-compliance of national legislation with the EU law.

Without the explanatory documents the Commission would need considerable resources and numerous contacts with national authorities to track the methods of transposition in all Member States. ‘As transposing measures must be merged with a complex existing legal framework, the resulting transposition exercise produces hundreds of measures to be examined.’<sup>154</sup> In 2016, the Commission requested explanatory documents in 20 out of 40 proposals for directives submitted to the European Parliament and the Council. The 37 Directives that the Parliament and the Council adopted during the year included eight for which the Commission had requested explanatory documents. In all eight, the agreed recital requesting such documents was maintained in the final text<sup>155</sup>. For example, one of the 20 Directives concerns the **environment** sector. The Commission received 9 explanatory documents for the Directive 2015/1480/EU on the assessment of ambient air quality (including 2 correlation tables). Five of the 20 Directives for which the Member States had undertaken to provide explanatory documents concern the **internal market**.

The European Parliament has called the Commission to strengthen enforcement of EU law based on structured and systematic transposition and conformity checks of national legislation, in full compliance with the EU Treaties. Acknowledging that Member States do not deliver in all cases on their commitment to provide explanatory documents together with the national measures transposing the directives, it calls on the Commission to support Member States in the process of drawing up these explanatory documents and correlation tables<sup>156</sup>. However, the European Parliament should also ensure that the Commission has sufficient resources to carry out the correlation tables for all necessary EU legal instruments and request that correlation tables and conformity checking studies are made available to the public. The Parliament also requests the Commission to include information about the explanatory documents in the annual reports on the application of EU law. It also stresses the role that the Parliament can take in encouraging closer cooperation and strengthening the links with the national parliaments in the law-making process, including the adoption of legislation correctly transposing the EU law<sup>157</sup>.

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<sup>152</sup> Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304.

<sup>153</sup> Joint Political Declaration of 28 September 2011 between the Commission and the Member States (OJ 2011/C 369/02) and a Joint Political Declaration of 27 October 2011 between the European Parliament, the Council and the Commission (OJ 2011/C 369/03).

<sup>154</sup> Commission ‘Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>155</sup> Ibid

<sup>156</sup> European Parliament resolution of 26 October 2017 on monitoring the application of EU law 2015 (2017/2011(INI))

<sup>157</sup> Ibid

### 2.3. Enforcement measures

The Commission 2016 Annual report confirms the trend of raising numbers of late transposition infringements, which reached the number of 847 cases in that year<sup>158</sup>. The 2014 annual report confirmed the 2013 report's statement that the decrease in the legislative activity of the Union has led to a subsequent decrease in the number of directives to be transposed and thus in the number of infringements for late transposition<sup>159</sup>. However, there was an increase in new late transposition infringements in 2014 compared to the previous year: 585 new transposition infringements were launched in 2014 compared with 478 in 2013.

Monitoring timely transposition is a Commission priority and is considered essential to ensure the effectiveness of European policies<sup>160</sup>. While late transposition infringements remain a problem, the Commission has noted that once infringement procedures are opened, national measures are usually communicated swiftly<sup>161</sup>. The fear of fines improves compliance. Officials from Commission and Member States acknowledged during the interviews for the 2013 study for the EP on implementation of EU law<sup>162</sup> that the potential fines imposed under Article 260(3) TFEU at the start of the procedure have acted as an incentive for Member States to establish systems enabling to transpose directives within the deadlines laid down by the legislator. This trend is still valid in 2016 when out of the 868 transposition cases open in 2016, 498 could be closed due to the action by Member States.

The Commission continues to systematically apply this fast-track provision and reiterated in its 2016 Communication *EU law: Better results through better application*, that for late transposition infringement cases, it would systematically ask the Court to impose a lump sum as well as a periodic penalty payment. In 2016 the Commission referred three new cases to the Court involving two Member States, Luxembourg (with one case on the Single European Railway Area Directive and another one on the Regulation on the classification, labelling and packaging of substances and mixtures where a daily penalty of EUR 8,710 was proposed) and Romania (1 case on the Directive on sulphur content of marine fuels daily penalty of EUR 38,042) which were withdrawn because the Member States adopted the necessary legislative measures and 4 other referral decisions were closed due to satisfactory action by the Member States before submitting the case to the Court. However, five cases with a proposal for daily penalties remained open: 1 case each against Belgium, the Netherlands, Poland, Romania and Sweden<sup>163</sup>.

The situation in 2016 reflects a positive trend since 2012 when the Commission referred a higher number of late transposition infringements to the Court with a request for financial sanctions under Article 260(3) TFEU. **Twelve Member States were involved in 35 such decisions in 2012:** Poland (10 cases), Slovenia (5), the Netherlands, Finland (4 each), Belgium, Cyprus (3 each), Germany, Bulgaria, Slovakia, Luxembourg, Portugal and Hungary (one each). The proposed daily penalty ranged from € 6,000 to € 315,030. Lump sum payments were not requested.<sup>164</sup>

<sup>158</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>159</sup> 31<sup>st</sup> Annual Report on monitoring the application of EU law (2013) (COM(2014) 612 final);

Monitoring the application of EU law. 2014 Annual Report. COM(2015) 329 final

<sup>160</sup> 29<sup>th</sup> Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p.7. 30<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 7; European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final p.28; European Commission 'Monitoring the application of European Union law. 2015 Annual Report'. COM(2016) 463 final p. 27

<sup>161</sup> Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p.14.

<sup>162</sup> Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

<sup>163</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final p.32;

<sup>164</sup> "30<sup>th</sup> Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 5

The trend of lower numbers was observed in 2014 when the Commission referred 4 cases with a request for daily penalties in 2014 concerning environmental/energy legislation. The Commission referred Belgium and Finland to the Court for failure to fully transpose the Energy Performance of Buildings Directive and proposed a daily penalty of €42,178 for Belgium and €19,178 for Finland. The Commission also referred Ireland to the Court for partial transposition of the Electricity Directive and proposed a daily penalty of €20,358. In a separate case, the Commission referred Ireland to the Court for failure to fully transpose the Renewable Energy Directive and proposed a daily penalty of €25,447. However, the latter case was withdrawn. Decisions for referral were also taken in other sectors, apart from energy, but in these cases the Member States adopted the necessary transposition measures before the applications were sent to Court and thus avoided the Court procedures<sup>165</sup>.

In 2015, the Commission continued to bring late transposition infringement cases to the Court of Justice with a request for daily penalties under Article 260(3) TFEU. Five Member States were referred to the Court in 2015: Poland (two cases) and Germany, Greece, Luxembourg and Slovenia. Three of these cases were concerned environmental legislation, in particular the transposition of the Directive on waste electrical and electronic equipment<sup>166</sup>.

When complete transpositions are achieved at a very late stage in the judicial procedure, Member States benefit from an undue prolongation of the transposition deadline set by the legislator equally for all Member States which could lead to market distortions as it negatively affects overall legal certainty and the level playing field in the Internal Market.

A major barrier to transposition is the vagueness of the directives. About 80% of officials interviewed under the above-mentioned study<sup>167</sup>, both at EU and Member State level, considered that the provisions of EU law are not clear, which is mostly due to the compromises of the decision making procedure and their complex, technical, subject matter. Another key reason for delay seems to be the differences in the interpretation and understanding of EU law provisions between national authorities and the EU institutions and the national legislative procedures.

Generally, it is acknowledged that longer transposition deadlines would not contribute to a more accurate transposition of EU legal instruments since Member States have enough time to transpose them timely and accurately. Additionally, Member States have an opportunity to agree on longer transposition deadlines during the negotiation phase.

It can 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, Member States have a responsibility to comply with deadlines. In addition, the Commission has announced<sup>168</sup> that while it will continue to systematically support Member States, it will also strengthen its response pursuing breaches of transposition of EU law through infringement procedures without relying on the EU Pilot mechanism, unless recourse to EU Pilot is seen useful on a case by case basis and continuing to apply the reinforced the sanctions regime under Article 260(3) TFEU.

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<sup>165</sup> 2014 Annual Report on Monitoring the application of Union law, 2015.

<sup>166</sup> European Commission 'Monitoring the application of European Union law. 2015 Annual Report'. COM(2016) 463 final p. 30

<sup>167</sup> Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

<sup>168</sup> Communication *EU law: Better results through better application*, 19.01.2016 and the Annual Reports on implementation and enforcement of EU law such as 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final p.32

### 3. IMPLEMENTATION/COMPLIANCE PROMOTING TOOLS

'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 is the infringement proceedings mechanism, currently contained in Article 258 TFEU. Other tools have been developed under different legal bases, such as provisions in secondary EU legal instruments (e.g. committees, correlation tables, etc.), or the general Article 17 TEU (e.g., used as legal basis to introduce conformity-checking studies).

Compliance-promoting tools can be classified according to the phase of the policy cycle in which they are used. According to the latest Commission Communication *EU Law: Better results through better application*, the commission's current enforcement policy involves: monitoring implementation of EU law; solving problems with Member States and remedying any possible breaches of the law and taking infringement action when appropriate. Monitoring measures to assess compliance of national measures with EU law are conformity checking studies, scoreboards and barometers, inspection, package meetings, fitness checks, legal reviews, and reporting. Measures to assist Member States with implementation include: guidelines, implementation plans, networks and committees.

An additional compliance promoting tool that could be further strengthened is the Press releases linked to other compliance-promoting tools to increase awareness and political pressure. The use of Scoreboards, for example, could, 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.

An interesting remark regarding compliance promoting tools from the study for the EP on implementation of EU law published in 2013<sup>169</sup> has had a useful impact. The study suggested that the best results in promoting compliance could be achieved through a more strategic use of the different compliance-promoting tools taking the characteristics of each EU instrument into account, on a case by case basis according to criteria based on the social and political relevance, impact or technical difficulty of each EU instrument. The Commission Communication *'EU law: Better results through better application'*<sup>170</sup> applies this strategic approach and announces those implementation and compliance promoting tools that the Commission intends to use in a more systematic way.

Following this strategic approach, the Commission published on the 3<sup>rd</sup> of February 2017 the Environmental Implementation Review package including a Communication proposing specific actions to improve the situation and an annex suggesting priorities for action on better environmental implementation by each of the EU Member States. The annex summarises the suggested actions contained in the 28 EIR country reports focusing on those that should be considered a priority in each Member State<sup>171</sup>.

Further, on 2 May 2017, the Commission published the 'compliance package' including the following measures: the Single Digital Gateway, the Single Market Information Tool (SMIT) y SOLVIT.<sup>172</sup>

<sup>169</sup> Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., *Tools for ensuring implementation and application of EU law and evaluation of their effectiveness*, European Parliament – Policy Department C, Brussels, 2013

<sup>170</sup> Commission Communication *'EU law: Better results through better application'*, C(2016) 8600, OJ C 18, 19.01 2017 (2017/C 18/02)

<sup>171</sup> Commission Communication *'The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results'* COM(2017) 63 final. And

<sup>172</sup> [http://europa.eu/rapid/press-release\\_IP-17-1086\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1086_en.htm)

### 3.1. Monitoring measures

#### *Package meetings*

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.

The 2017 Commission Communication '*EU law: Better results through better application*'<sup>173</sup> refers to high-level bilateral meetings as a tool to be used in a more systematic way across the range of legislative areas. This is consistent with the Single Market Strategy<sup>174</sup>, where the Commission proposes to organise compliance dialogues with Member States. These dialogues may cover infringement cases as well as broader enforcement issues. Furthermore, the Commission discussion paper on High Level Working Group on Competitiveness and Growth<sup>175</sup> deals with the 'compliance and assistance plans' in relation to the Single Market Strategy and includes 'Compliance dialogues with Member States' as follows:

'The Commission would also like to learn more about alternative problem solving mechanisms developed by Member States (at national or regional level). A further topic for discussion would be the assessment of effects of non-compliance on a country's economic performance in terms of growth and/or investment. To test the format, the Commission decided **to** organise pilot meetings with three Member States (Belgium, Ireland and Italy). Based on this experience and the feedback received, the Commission will assess the exercise. The compliance dialogue with Belgium will kick off the pilot phase on January 25, 2017'

Whole, package meetings between the Commission and the Member States should be encouraged and made more systematic, it is also important to increase transparency by, for example, making the agenda of the meetings (of parts thereof) public.

The role of the **European Parliament** in those meetings should be improved. The Parliament could be invited 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. The European Parliament could also be involved or notified about them.

#### ***Dialogue on the enforcement of specific provisions of EU law***

This tool goes beyond the regular dialogue between the Commission and Member States. It refers to specific measures (such as the letter signed in 1999 by Commissionaires on environment and regional policy in order to ensure that Member States would designate protected areas under the Natura 2000 network established by the Birds and Habitats Directive) that are taken as a pre-condition for the effective use of European Structural and Investment Funds.

<sup>173</sup> Commission Communication 'EU law: Better results through better application', C(2016) 8600, OJ C 18, 19.01 2017 (2017/C 18/02)

<sup>174</sup> Commission Communication 'Upgrading the Single Market: more opportunities for people and business', 2015.

<sup>175</sup> <http://data.consilium.europa.eu/doc/document/ST-5253-2017-INIT/en/pdf>

## 3.2. Measures to assist with implementation

### *Implementation guidelines discussed with stakeholders and EP*

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<sup>176</sup> (e.g. Article 5 TFEU). They are also developed when secondary law provisions request them. 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.

The Commission guidelines provide the Commission's view on the interpretation of a specific piece of EU law and ensure a harmonised implementation. Currently, the Guidelines are discussed with Member States and sometimes stakeholders are also involved. The involvement of the European Parliament would not only contribute to their improvement but would also facilitate their implementation.

### *Commission Transposition and Implementation Plans (TIPs)*

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. The plans also may provide for a wide range of tools to help Member States implement EU laws, such as guidance documents, expert groups and dedicated websites.

Developing TIPs on the side of the Commission is part of the Commission's 'Smart Regulation' approach. Since 2008, risk-based Transposition Implementation Plans<sup>177</sup> are systematically prepared for all new important environmental directives, for example the Industrial Emissions Directive<sup>178</sup>. Furthermore, the Commission now requires TIPs to be developed in every Directive on health and consumer protection.

According to the latest Commission report on implementation and enforcement of EU law<sup>179</sup>, in 2016 the Commission prepared an implementation plan to ensure the effective transposition and implementation of three proposals it issued for Directives on passenger ship safety. The plan lists the actions needed to implement simplification measures and identifies the main technical, legal and time-related implementation challenges.

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<sup>176</sup> According to Article 5 TFEU, the Union is required to define guidelines for coordination of economic and employment policies.

<sup>177</sup> 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.

<sup>178</sup> Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) OJ L 33.

<sup>179</sup> European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

The Commission Communication 'EU law: Better results through better application'<sup>180</sup> refers to existing tools that the Commission intends to continue using in a more systematic way:

### ***Committees and expert groups***

The Commission will continue to rely on them, to foster implementation and assess how this legislation is implemented since it has been proved to be an effective way of ensuring that the Member States commit to the implementation of EU law.

Those expert groups also seem to have a function of raising Member States' capacity.

### ***Capacity building in Member States***

The Commission aims to encourage and support Member States to improve their capacity to enforce EU law and provide remedies in order to ensure that operators, individuals or business can fully enjoy their rights. Networks and the exchange of best practice are key aspects of this effort.

The Commission confirms its intention to support Member States improve the effectiveness of their national justice systems through the European Semester and to support justice reforms and judicial training with EU funds. The Commission intends to increase training programmes for national judges and other legal professionals such as the current ones on competition rules or environmental legislation<sup>181</sup>.

EU law barometers or scoreboards such as the EU Justice Scoreboard<sup>182</sup> are also considered a tool that feeds into this process by providing a comparative overview of the quality, independence and efficiency of national justice systems. This makes it easier to identify shortcomings and best practices and keeps track of progress.

The Commission has also developed certain tools to support EU citizens and businesses and ensure they can benefit from their rights under single market rules. The SOLVIT programme provides them with an appropriate redress mechanisms. At the same time, the evidence gathered through cases in SOLVIT can help the Commission identify potential breaches of EU law, thus making SOLVIT a smart enforcement tool<sup>183</sup>.

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<sup>180</sup> Commission Communication 'EU law: Better results through better application', C(2016) 8600, OJ C 18, 19.01 2017 (2017/C 18/02)

<sup>181</sup> [http://ec.europa.eu/environment/legal/law/training\\_package.htm](http://ec.europa.eu/environment/legal/law/training_package.htm).

<sup>182</sup> Communication 'The 2016 EU Justice Scoreboard', COM(2016) 199 final of 11.4.2016.

<sup>183</sup> European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final p.8

## 4. EU PILOT AND INFRINGEMENT PROCEDURE

### 4.1. The procedures and implementation trends

The **EU Pilot** is the pre-infringement tool designed for enhancing the existing enforcement system of implementation of EU law. The EU Pilot is part of the administrative phase but prior to the infringement procedure. It is accompanied by an IT platform, which enables an exchange of information and documents between the Commission and the relevant Member State.

According to the Commission Communication 'A Europe of Results – Applying Community Law'<sup>184</sup>, the EU Pilot 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. The same text underlines that it is 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 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<sup>185</sup>. In addition, it replaces the cumbersome 'pre-258 letter procedure' passing through the Permanent Representations of Member States with a more structured and clear system. Started in April 2008 in a few Member States, it now operates in all of them.

In some instances, it has been defined as a 'tool for dialogue and problem-solving with the Member States'<sup>186</sup>. Therefore, 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'<sup>187</sup>.

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 it. Within ten weeks the European Commission decides whether to close the case or to open an infringement procedure<sup>188</sup>. However, as there are no mandatory rules regulating this procedure, informal dialogue between the Commission and Member States may take longer before closing the case or sending the letter of formal notice; informal discussion may also take place before the start of the EU Pilot itself.

Most cases are solved before an infringement procedure is initiated under Article 258 TFEU. According to the latest Commission annual report on monitoring the application of EU law, **in 2016**<sup>189</sup> the Commission initiated 790 new EU Pilot files with the highest number of cases related to environmental legislation (151). It follows a **decreasing trend** over the last years since in **2015** the Commission opened 881 new EU pilot cases, reaching levels lower than in 2011. While the number of new EU Pilot files initiated by the Commission was growing between 2011 (when there were 1201 EU pilot cases) and 2013 (with 1502 EU pilot cases), the decreasing trend initiated in 2014 (with 1208 EU Pilot files) has continued in 2015 and 2016.

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<sup>184</sup> Communication from the Commission "A Europe of Results – Applying Community Law", COM (2007) 502 final.

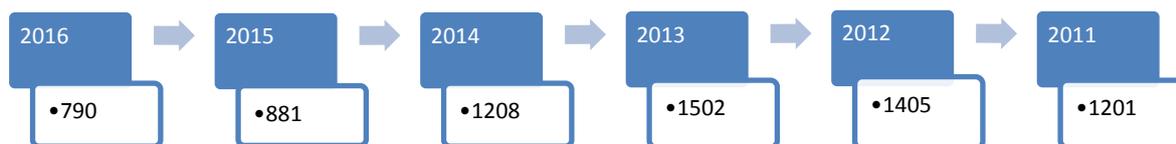
<sup>185</sup> Report from the Commission, EU Pilot Evaluation Report, COM (2010) 70 final, p. 2; Report from the Commission, Second Evaluation Report on EU Pilot, COM (2011) 930 final, p. 2.

<sup>186</sup> 28th Annual Report on Monitoring the Application of EU Law (2010), COM(2011) 588 final, p. 2.

<sup>187</sup> Ibid.

<sup>188</sup> Report from the Commission, Second Evaluation Report on EU Pilot, COM (2011) 930 final, p. 2.

<sup>189</sup> European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final p.32



**Number of new EU Pilot cases. Source: own development**

The sources of EU Pilot cases may be complaints, petitions by citizens to the European Parliament, questions from Members of the European Parliament, or Commission's own initiative. A natural or legal person<sup>190</sup> 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<sup>191</sup> and trigger action under the EU Pilot system. Out of the total number of files opened in **2016**, 270 cases were triggered by complaints and 520 were opened by the Commission on its own initiative. This follows a similar trend in **2015**, where 295 cases were triggered by complaints and 578 were opened by the Commission on its own initiative. In 2012, out of the 1405 new EU Pilot cases, 784 were own initiative by the Commission and 621 complaints<sup>192</sup>.

The Commission annual report states that in 2015 it handled 969 EU Pilot files and closed 726 of these after receiving satisfactory answers from the Member States concerned. This gives a **resolution rate** of 75 %, exactly the same as in 2014. The resolution rate in 2016 however was a bit lower (72%) as the Commission handled 875 EU Pilot files and closed 630 of these after receiving satisfactory answers from the Member States concerned.

According to the 2016 Commission annual report, as a whole 1175 EU Pilot cases **remained open** during the year 2016 similarly to the 1 260 EU Pilot files that **remained open** at the end of 2015.

In 2016 the highest number of EU Pilot concerned Italy (98), Spain (75) and France (73). Almost similarly to the situation in 2015 where most of them concerned Italy (111), Spain (78), and Poland (74).

Similarly to 2015, environment remained the main policy area affected **in 2016** with 295 open files, followed by justice (161) and internal market, industry, entrepreneurship and SMEs (143). In 2015 there were 298 **open EU Pilot files** related to the environment policy followed by justice (191) and taxation and customs (141).

In 2016, most EU Pilot files which led to formal infringement procedures concerned the following policy areas: environment (53 cases), internal market, industry, entrepreneurship and SMEs (38), energy (29), and taxation and customs (25). Hungary and Germany had the highest number of files in EU Pilot which were pursued through infringement procedures, followed by Spain and Poland.

<sup>190</sup> Commission Communication "Updating the handling of relations with the complainant in respect of the application of Union law", COM (2012) 154 final, p. 4, pt. 1.

<sup>191</sup> Point 3 of "Updating the handling of relations with the complainant in respect of the application of Union law", p. 4, pt. 2; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0154&from=EN>.

<sup>192</sup> "30th Annual Report on Monitoring the Application of EU Law (2012)", p.10-11

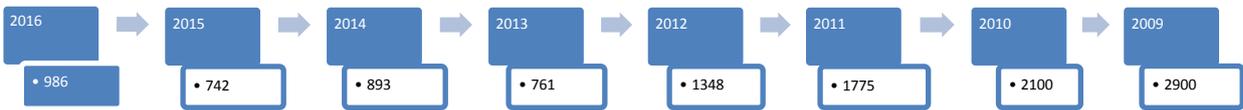
**The infringement procedure**

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 legal basis for any infringement procedure brought by the Commission against a Member State lies in Article 258 TFEU. This provision recognises the Commission’s power within the respect of its discretionary 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. 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.

The Commission is not obliged to open formal infringement procedures – even if it considers that a breach has occurred. In exercising its role as Guardian of the Treaties, the Commission enjoys discretionary power in deciding whether or not, and when, to start an infringement procedure or to refer a case to the Court of Justice<sup>193</sup>. Decisions during the infringement phase are taken collectively by the college of Commissioners<sup>194</sup>, while decisions on the pre-infringement phase are taken by the services with no control. For example, a decision to close a case would not be subject to any internal review process even if the complainant would request it.

The data in the latest Commission annual report on monitoring the application of EU law published in 2017 evidences that the number of new infringement procedures over the last years has steadily decreased although 2016 had a larger number of infringement cases in relation to 2016. While in 2016 the Commission launched **986** new procedures by sending a letter of formal notice, in 2015 initiated 742 new infringement procedures and 893 new cases of infringement procedures in 2014<sup>195</sup>. The decreasing trend has been reflected from the preceding years and in 2009 the number of new infringement procedures was 2.900, in 2010 the number went down to 2.100, in 2011 decreased to 1.775, in 2012<sup>196</sup> declined to 1.343 and in 2013 the Commission reached historic numbers launching only 761 new infringement procedures<sup>197</sup>.



**Trend in the number of new infringement procedures. Source: own development**

<sup>193</sup> 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”, p.8; COM (2012) 154 final, p. 8  
 Commission Communication EU law EU law: Better results through better application (2017/C 18/02)referring to :  
 Case C-329/88, Commission v Greece [1989] ECR 4159; Case C-317/92, Commission v Germany [1994] ECR I 2039; Case C-562/07, Commission v Spain [2009] ECR I-9553; Case T-571/93 Lefebvre and others v Commission [1995] ECR II 2379; Case C-531/06, Commission v Italy [1009] ECR I 4103.

<sup>194</sup> Case C-191/95, *Commission v. Germany*, [1998] 5449.

<sup>195</sup> Monitoring the application of Union law, 2014 Annual Report, 2015.

<sup>196</sup> “30th Annual Report on Monitoring the Application of EU Law (2012)”, COM(2013) 726 final, 22.10.2013, p. 12

<sup>197</sup> Report from the Commission, 31<sup>st</sup> Annual Report on Monitoring the application of EU law (2013), 1.10.2014, COM(2014) 612 final

The countries with the highest number of new infringement cases according to the latest Commission 2016 report on the monitoring of EU law are Portugal, Belgium, Austria and Spain while in 2015 the countries with highest number of infringement cases were Cyprus, Greece, Spain and Germany. The report includes the following chart providing a breakdown by Member State.

It is worth highlighting that at the end of 2016 there were **1657** infringement cases that remained open, representing an increase in relation to the **1368** infringement cases that remained open in 2015 and following a trend from a slight increase from the previous year but still below the **1775** cases that were opened at the end of 2011.

The most **infringement-prone policy areas** remain generally the same over the years. While the Commission identified that in 2012 the policy areas with a higher number of infringements are Environment with 20% of the cases, Transport (15%), Taxation (14%) and Internal Market (13%), in 2011 the figures were similar with Environment (17%), Internal Market (15%), Transport (15%) and Taxation (12%) according to the 2012 Annual Report<sup>198</sup>. Similarly in 2015, the policy areas with a higher number of infringement cases are Environment, Transport, Financial services and capital markets. While in 2016 Internal Market/Industry/Enterprise and SMEs is the policy with highest numbers followed by Environment, Financial services and capital markets, Mobility and transport and Migration.

In 2016, the Commission closed 520 infringements after sending letters of formal notice while it closed 474 in 2015. However, in 2016 the Commission closed less cases after sending reasoned opinions with 126 cases closed in comparison to 183 cases in 2015.

### The judicial phase

**In 2016** the Court gave 28 judgments under Article 258 TFEU concerning mainly Portugal, Greece, Spain and the UK. In 2015 the Court gave 25 judgments under Article 258 TFEU. In 2016, 95 infringement procedures were still open after a Court ruling because Member States concerned had not yet complied with judgments under Article 258 TFEU. The main Member States concerned were Greece (14), Spain (8), Germany and Italy (both 7) and the majority were related to the environment (37), transport and mobility (13), taxation and customs (9), and the internal market (8). Of these 95 cases, 3 had already been referred to the Court for the second time. In 2016, the Court delivered 2 judgments under Article 260(2) TFEU. It imposed penalty payments on Greece and Portugal.

The situation was similar **in 2015**, when there were 85 infringement procedures still open after a Court ruling because Member States concerned had not yet complied with the judgments under Article 258 TFEU. Most of these cases involved Greece (10), Poland (8) and Spain (7) and were related to environment (35), transport (12), taxation (9) and health and consumer protection (7). In 2015, the Court delivered three judgments under Article 260(2) TFEU. It imposed penalty payments on Italy and Greece.

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<sup>198</sup> 29<sup>th</sup> Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p. 2 and 3

## 4.2. Effectiveness and Transparency

### Effectiveness

The objectives of the **EU Pilot** are threefold and therefore, the analysis of its effectiveness depends on the weight granted to each of them. The assessment carried out by the European Parliament in 2013, evidenced differing views between the EU and Member State officials and the stakeholders interviewed<sup>199</sup>.

The report reflected the view of the EU and Member States officials which considered the EU Pilot 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 was seen as 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 on EU Pilot measured its success on the number of cases closed and the consequent decrease of the infringement cases<sup>200</sup>. Furthermore the Commission Report on monitoring the application of EU law published in 2012, stated 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'<sup>201</sup>.

On the other hand, stakeholders interviewed within the framework of the study for the European Parliament published in 2013<sup>202</sup> expressed their expectations that this tool would provide solutions to the problems caused by breaches of EU law. Moreover, this close relationship is often translated in long timeframes for dealing with cases. As the rules for dealing with EU Pilot cases or for handling complaints are not legally binding, certain cases take longer than six months providing certain Member States with additional time for non-compliance. This reduces EU Pilot's effectiveness since Member States count on that additional flexibility for not complying with EU law.

The assessment of the EU Pilot shows some flaws in terms of the effectiveness to achieve its objectives, its transparency and its efficiency. There are **no legal bases** in the Treaty for any pre-infringement procedure and, therefore for the EU Pilot. The EU Pilot tool takes place prior to the letter of formal notice, aiming to find a solution through a privileged dialogue. However, 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. Those problems have been recognised in the latest annual Commission report on implementation of EU law which states that 'the recourse to EU Pilot adds a lengthy step to the infringement process, which in itself is a means to enter into a problem-solving dialogue with a Member State.'

As noted in previous sections 1.2.2, the EU enforcement policy has evolved in the last years and the objectives do not seem to include the reduction of infringement cases. The 2012 Commission Report highlighted that the key objective of the EU Pilot is resolving problems of application of EU law rapidly, before entering into formal infringement procedures<sup>203</sup> (thus, reducing the number of infringement cases) and promoted the use of such a speedy resolution mechanism. Few years later, the turning point is to be found in the 2016

<sup>199</sup> Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

<sup>200</sup> Report from the Commission "EU Pilot Evaluation Report", COM(2010) 70 final, 3.3.2010, p. 6 p.; Report from the Commission "Second Evaluation Report on EU Pilot", COM(2011) 930 final, 21.12.2011, p. 7.

<sup>201</sup> "29th Annual Report on Monitoring the Application of EU Law (2011)", COM(2012) 714 final, p. 2.

<sup>202</sup> Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

<sup>203</sup> "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, p.7

Commission Communication on EU law: Better results through better application<sup>204</sup>, which limits the use of EU Pilot:

'The structured problem-solving dialogue between the Commission and Member States, known as EU Pilot, was set up to quickly resolve potential breaches of EU law at an early stage in appropriate cases. It is not intended to add a lengthy step to the infringement process, which in itself is a means to enter into a problem-solving dialogue with a Member State. Therefore, the Commission will launch infringement procedures without relying on the EU Pilot problem-solving mechanism, unless recourse to EU Pilot is seen as useful in a given case.'

The latest Commission annual report on implementation of EU law confirms it stating that it 'will henceforth launch infringement procedures without relying on the EU Pilot mechanism unless recourse to EU Pilot is seen as useful in a given case.'<sup>205</sup>

While the measure of success being the number of case closed has been criticised, the Commission continues measuring the progress of the EU Pilot through this parameter in the annual reports on implementation of EU law. The Commission closed 1175 EU files during 2012 representing a 68.34 % resolution rate<sup>206</sup>, it closed 630 in 2016 giving a resolution rate of **72 %**, which is below the 2015 and 2014 levels where 75% was reached.

The deterrent effect of the **infringement procedure** is beyond any doubt. Further, its capacity as an enforcement tool to promote compliance with EU law is broadly recognised. However, the Commission intends to reduce the number of infringements, even if this is not stated as an objective in itself. In the latest annual report on implementation of EU law, the Commission highlights the need for a proper understanding of the nature of the infringement process<sup>207</sup>. The Commission defines the purpose of the infringement procedure as a mechanism to raise issues of wider principle and announces that those cases that can be satisfactorily dealt with by other mechanisms at EU and national level, the Commission will generally direct complainants to the national level<sup>208</sup>. It is not clear how the concept of 'issues of wider principle' would be determined and how this objective fits with the Commission's role attributed by Article 17(1)TEU to ensure the correct application of the Treaties. The implications of such policy have not been fully developed but it might jeopardize the treatment of certain cases whose effective resolution might be better achieved at EU level due to the national circumstances or interests involved.

The European Parliament could monitor the implementation of this policy and request the Commission to clarify how the priorities are set.

Key problems affecting the effectiveness of the infringement procedure 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 to complainants or to the public on the status of the cases, arguments and reasons behind decisions. It is argued that the effectiveness could be improved with an increased involvement of complainants in the procedure framed under 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.

<sup>204</sup> Commission Communication EU Law: Better Results through better application (2017/C 18/02)

<sup>205</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>206</sup> "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p.11

<sup>207</sup> European Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final

<sup>208</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final, p. 4.

## National inspections and EU level inspections of Environmental infringement cases

The effectiveness of the EU Pilot and the infringement procedure depends on the information gathered on the relevant infringement cases. While some information is submitted through citizens' complaints, additional data is often needed to effectively manage and decide on the 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. 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)<sup>209</sup>. 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 2008 Parliament Resolution<sup>210</sup>, 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 European Parliament could revisit this issue and request the harmonisation required for effective implementation.

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.

Furthermore, the 30<sup>th</sup> Annual Report on monitoring the application of EU law refers to inspections under the maritime sector<sup>211</sup>. 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<sup>212</sup>.

The need for further monitoring/inspections/investigation powers at EU level (i.e. by the Commission)<sup>213</sup> in the environmental policy is often subject to discussion. According to information made available to the public in 2013<sup>214</sup>, the Commission planned to propose a new horizontal binding instrument on environmental inspections, after the full impact assessment had been carried out; however, this proposal has never seen the light. While it is clear that the Treaties provide the necessary legal basis for such activity by the Commission, 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 also discussed during the adoption of the Regulation establishing the EEA.

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<sup>209</sup>Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States [2001] OJ L 118.

<sup>210</sup>EP Resolution on the Review of Recommendation 2001/331/EC providing for Minimum Criteria for Environmental Inspections in the Member States, TA (2008) 0568, 20 November 2008.

<sup>211</sup> "30th Annual Report on Monitoring the Application of EU Law (2012)", p. 58

<sup>212</sup> 28th Annual Report on Monitoring the Application of EU Law (2010), p. 9.

<sup>213</sup> Communication from the Commission "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness" COM (2012) 95 final, 7.3.2012.

<sup>214</sup>[http://ec.europa.eu/environment/resource\\_efficiency/haveyoursay/current\\_consultations/framework\\_en.htm](http://ec.europa.eu/environment/resource_efficiency/haveyoursay/current_consultations/framework_en.htm), accessed on 12 March 2013.

The EU level inspections on environmental legislation could just be a tool to monitor cases of implementation of relevant EU law subject to EU Pilot and infringement procedures, ensuring that the Commission obtains the necessary data to decide on them or to provide evidence when the cases are before the CJEU.

The EP should continue to work towards the adoption of an EU legislative act enabling EU inspections on environmental legislation either through specific staff in DG ENV or through the EEA, which would require revisiting its 1990 call for the EEA to support the Commission in carrying out this inspection role<sup>215</sup>.

### **Transparency and access to information**

The lack of complainants' involvement in the EU Pilot and of their access to the documents stored/exchanged within EU Pilot is seen as one of the main shortcomings of this tool by stakeholders<sup>216</sup>. 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. There is an apparent contradiction between the sophisticated character of the tool and the opacity of its information<sup>217</sup>.

Transparency issues are mainly link to discussions on the role of the complainants in the EU Pilot and on the public access to documents. 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.

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 establishing privileged discussions in a constructive dialogue aiming to reach solutions to the breaches of EU law. Furthermore, the importance of preserving the Commission's discretionary power in deciding actions at a later stage 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 and compromise on solutions that 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.

The need for a closed dialogue between Commission and Member States is questioned by stakeholders, however 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 requests are based on the consideration that access to the EU Pilot database enabling complainants to have access to the documents and participate in the discussions would make

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<sup>215</sup> Art. 20 of the Regulation 1210/90 on the establishment of the EEA

<sup>216</sup> Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

<sup>217</sup> Ibid

this tool more effective, efficient and transparent. Some Member States provided examples where the involvement of complainants in the EU Pilot process has increased the effectiveness in solving the problem of breach of EU law in the particular Member State. For example, stakeholders in Sweden follow up the correspondence between the Commission and the government in ongoing EU Pilot cases based on the recognition of their participation by Swedish law.

However, a recent CJEU ruling published in May 2017<sup>218</sup> related to the public's access to EU Pilot documents confirms the interpretation that documents within the EU Pilot should not be disclosed to the public. In the specific case, Sweden requested the CJEU to annul the decision from the General Court in the *Spirlea v. Commission* case of 25 September 2014 where access to the documents exchanged between the Commission and the Member State was denied by referring to the LPN case<sup>219</sup> and the 'overall presumption of confidentiality' during the 'infringement procedure' as follows:

'The disclosure of the documents concerning an infringement procedure during its pre-litigation stage would, in addition, be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings (para 63).'<sup>220</sup>

The General Court argued in 2014 that while the EU Pilot is not regulated by the Treaties, the similarities with the infringement procedure require the presumption of confidentiality to be applicable to EU Pilot as well and stated:

'the element unifying the Court's reasoning in all of the judgments concerning access to documents in investigation procedures in which a general presumption of refusal of access was recognised is that access is wholly incompatible with the proper conduct of those procedures and is likely to jeopardise their outcome [...] That unifying element is equally applicable to EU Pilot procedures, in which a general presumption is, essentially, dictated by the need to ensure the proper conduct of such procedures and to ensure that their purpose is not undermined (para 57).'

The ruling of the CJEU in May 2017 states:

'Thus, so long as, during the pre-litigation stage of an inquiry carried out as part of an EU Pilot procedure, there is a risk of affecting the nature of the infringement procedure, altering its progress or undermining the objectives of that procedure, the application of the general presumption of confidentiality of the documents exchanged between the Commission and the Member State concerned is justified, in accordance with the solution adopted by the Court in the judgment of 14 November 2013, *LPN and Finland v Commission* (C-514/11 P and C-605/11 P, EU:C:2013:738). That risk exists until the EU Pilot procedure is closed and there is a definitive decision not to open a formal infringement procedure against the Member State.' (para 45)

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.

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<sup>218</sup> Case C-562/14 P Kingdom of Sweden v European Commission; can be accessed at: <http://curia.europa.eu/juris/documents.jsf?num=C-562/14>

<sup>219</sup> Cases C-514/11 P and C-605/11 P LPN and Finland v the Commission.

<sup>220</sup> Idem

On the other hand, the current regulatory framework for handling complaints and infringement procedures is not legally binding. The citizens' involvement needs to be improved and properly recognised. Greater transparency of the infringement procedure can be regulated while respecting the CJEU jurisprudence, requiring motivated arguments to justify refusal for access to documents (including those of infringement procedures) under Article 4 of Regulation 1049/2001/EC<sup>221</sup>.

Improvements for greater transparency of the **infringement procedure** have been carried out by the European Commission since the last report where the European Parliament called the Commission to improve the existing database on infringements<sup>222</sup>. The new database hosted by the Commission website provides access to an efficient and user-friendly tool, which enables to search through clear filters and obtain information on the status of infringements per policy area, thematic sector within the policy area and Member State<sup>223</sup>.

While the discretionary power of the Commission to decide on the opening and closure of infringement procedures<sup>224</sup> needs to be preserved, it is therefore acknowledged that it is not incompatible with an improved access to the database on infringements.

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<sup>221</sup> Joined cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723

<sup>222</sup> Ballesteros, M. Monitoring the implementation of EU law: tools and challenges. Briefing. European Parliament, Policy Department C: citizens' rights and constitutional affairs. Legal affairs. October 2014

<sup>223</sup> [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement\\_decisions/?lang\\_code=en](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en) accessed on July 2017.

<sup>224</sup> 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 and Commission Communication EU law EU law: Better results through better application (2017/C 18/02) referring to : Case C-329/88, *Commission v Greece* [1989] ECR 4159; Case C-317/92, *Commission v Germany* [1994] ECR I 2039; Case C-562/07, *Commission v Spain* [2009] ECR I-9553; Case T-571/93 *Lefebvre and others v Commission* [1995] ECR II 2379; Case C-531/06, *Commission v Italy* [1009] ECR I 4103.

## 5. MAIN RECOMMENDATIONS FOR EUROPEAN PARLIAMENT ACTION

All EU Institutions have certain responsibility in ensuring implementation and enforcement of EU law. Under the recently signed Inter-institutional Agreement on Better Law-Making<sup>225</sup>, the European Parliament, the Council and the Commission recognise their joint responsibility in delivering high-quality Union legislation and in the Joint Declaration on the EU's legislative priorities for 2017, the three institutions reiterate the commitment to promoting the proper implementation and enforcement of existing legislation. However, the number of infringement procedures in 2015 and 2016 evidences that ensuring the timely and correct implementation of EU legislation in the Member States remains a challenge.

The European Parliament performs a crucial role in ensuring enforcement and implementation of EU law. This role is played by exercising its powers of scrutiny through the different means at its disposal. Improvements in the use of these tools have been identified as follows:

- The Parliament's own-initiative reports and resolutions linked to them, often take too long reducing their impact. While these reports and resolutions are very useful initiatives pointing at key actions to solve existing problems, the European Parliament could use this tool more effectively.
- The number of petitions dealt with by the European Parliament under Article 227 TFEU and triggering infringement cases is relatively low in comparison to the total number. Maybe there is a need for more active role from the European Parliament on this topic.
- The role of the European Parliament in the enforcement policy seems to be limited to raising petitions to the Commission to trigger infringement cases. The European Parliament is not involved in the EU Pilot or in the infringement procedures. However, its involvement at least in those cases triggered by petitions, would improve the transparency and legitimacy of the enforcement policy. The European Parliament should be notified of all EU Pilots opened and the infringement procedures initiated<sup>226</sup>.
- The Parliament could also use the opportunity of receiving petitions as a justification for directly checking for itself whether EU environmental law has been fully respected in a concrete situation. It could not only request information from the European Commission, but also organise site visits and provide evidence related to those cases, while demonstrating that the European Parliament is taking citizens' concerns seriously<sup>227</sup>.
- The European Parliament should follow up on the implementation of the actions suggested in the recent resolution on monitoring the application of EU law where it calls on the Commission to involve petitioners in EU Pilot procedures initiated in relation to their petitions. It also proposes the adoption of a Regulation on an open, efficient and independent European Union administration, following the resolutions of 15 January 2013 and 9 June 2016. The regulation would aim at setting out various aspects of the administrative procedure – including the role of the citizen when sending complaints, citizens' access to the file of the case on which they sent a complaint, the notifications or binding time limits. Such a proposal for regulation, annexed to the 2016 resolution, aims to reinforce citizens' rights and transparency<sup>228</sup>.

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<sup>225</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ L 123 of 12.5.2016)

<sup>226</sup> European Parliament resolution of 26 October 2017 on monitoring the application of EU law 2015 (2017/2011(INI))

<sup>227</sup> Ludwig Krämer, EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement, 2016.

<sup>228</sup> European Parliament resolution on monitoring the application of EU law 2015, 26.10.2017 (2017/2011(INI))

- The European Parliament should request the Commission to report on its priority setting regarding its enforcement policy announced in the Communication 'EU law: Better results through better application'. The Commission states that it will focus its enforcement action where it can make a real difference, and on policy priorities, pursuing cases which reveal systemic weakness in a Member State's legal system.
- The European Parliament should support the Commission in strengthening the enforcement policy in relation to the infringement procedure. The Commission has defined the purpose of the infringement procedure as a mechanism to raise issues of wider principle and it has announced that those cases that can be satisfactorily dealt with by other mechanisms at EU and national level, the Commission will generally direct complainants to the national level<sup>229</sup>. The European Parliament might want to question the objective to reduce the Commission action to complaints related to strategic cases in relation to the Commission's role attributed by Article 17(1)TEU. The Parliament should request clarification of the interpretation and implementation of concept of 'issues of wider principle' and ensure that it does not jeopardize the treatment of certain cases whose effective resolution might be better achieved at EU level due to the national circumstances or interests involved.
- The European Parliament should promote more transparency in the handling of complaints. Decisions prior to the start of the infringement procedure including the EU Pilot, and their duration are taken by the services with no publicly available information about them and no internal review procedure. For example, there is no publicly available information about how about 3000 complaints submitted to the Commission in 2016 were treated. While the approach to reduce the use of the EU Pilot is welcome, the European Parliament should ensure a more transparent implementation of the enforcement policy.
- The European Parliament should closely monitor action by the Commission on its call to strengthen enforcement of EU law based on structured and systematic transposition and conformity checks of national legislation, in full compliance with the EU Treaties<sup>230</sup>. However, the European Parliament should also ensure that the Commission has sufficient resources to carry out the correlation tables for all necessary EU legal instruments and request that correlation tables and conformity checking studies are made available to the public. The Parliament should systematically requests the Commission to report on the explanatory documents in the annual reports on the application of EU law.
- The Parliament should act on its role to encourage closer cooperation and strengthen the links with the national parliaments in the law-making process, including the adoption of legislation correctly transposing the EU law<sup>231</sup>.
- The European Parliament could follow more closely the development of the package meetings between the Commission and Member States to solve compliance problems subject to infringement procedures. The Parliament could be invited or, at least, notified of their occurrence as well as on the meetings between the Commission and the relevant complainants or NGOs.
- The European Parliament could be involved and contribute to the development of Commission Guidelines on the implementation of EU law and facilitate their implementation.
- The EP should continue to work towards the adoption of an EU legislative act enabling EU inspections on environmental legislation either through specific staff in DG ENV or through the EEA, which would require revisiting its 1990 call for the EEA to support the Commission in carrying out this inspection role<sup>232</sup>.

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<sup>229</sup> Commission 'Monitoring the application of European Union law. 2016 Annual Report. COM(2017) 370 final, p. 4.

<sup>230</sup> European Parliament resolution of 26 October 2017 on monitoring the application of EU law 2015 (2017/2011(INI))

<sup>231</sup> Ibid

<sup>232</sup> Art. 20 of the Regulation 1210/90 on the establishment of the EEA



## DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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