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REPORT FROM THE COMMISSION

**26th ANNUAL REPORT ON MONITORING THE APPLICATION OF
COMMUNITY LAW (2008)**

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1. INTRODUCTION

In 2007 the Commission Communication on 'A Europe of results – applying Community law'¹ stated that the Commission would develop the focus of its annual report on strategic issues, evaluation of the current state of the law, priorities and programming of future work. Last year's report² focused on a broad spectrum of current issues and challenges presented by sector and priority actions in the form of: preventive measures; action to manage the *acquis*; problem-solving for citizens; infringements management and new legislation emerging out of the regulatory cycle.

This year's report will follow a structure using greater selection and more detailed comment on some sectors, based on the more detailed picture provided in the accompanying document "Situation in the different sectors" to this Report. The Report largely refers to actions taken under the EC Treaty. Action under the Lisbon Treaty will be the subject of future reports. A communication on the application of Article 260 of the *Treaty on the functioning of the European Union*, concerning the authority of the Commission to ask the Court of Justice to impose financial sanctions on a Member State, is planned for 2010.

2. GENERAL INFORMATION

2.1. Introduction

Under the EC Treaty, Member States have the primary responsibility for the application of Community law. The Commission has the authority and responsibility to ensure respect for Community law. At the end of 2008, the rules of the Treaty were supplemented by some 8 200 regulations and just under 1 900 directives in force throughout the 27 Member States.

2.2. Complaints and infringement procedures

The infringement process plays an essential role in guaranteeing the correct application of the law. The latest figures show around 68% of complaints being closed before the first formal step in an infringement proceeding; around 84% of infringement procedures based on a complaint are closed before the reasoned opinion stage and around 94% before a ruling from the European Court of Justice.

Comparing infringement registration years 1999-2003 with 1999-2007, the average time taken to process infringements, from opening the file to sending the application to the Court of Justice under Article 226 of the EC Treaty, fell from around 27 months to 24. The average time taken to process cases concerning failure to notify Member State measures transposing

¹ COM(2007) 502.

² COM(2008) 777.

directives remained around 14 months. In 2008, no second referral to the Court under Article 228 of the Treaty was made, compared with 7 cases in 2007.

At the end of 2008, the Commission was handling over 3 400 complaints and infringement files. The total number increased by a little less than one per cent from 2007, with a 15% decrease in proceedings for failure to notify measures transposing directives. Complaints accounted for 54% of the total or 64% of all cases on issues other than late transposition of directives, a 9% increase from 2007. The number of own initiative cases under examination at the end of 2008 decreased by 3% compared to 2007.

An average of 55% of the total of required transposition measures in 2008 were late, compared with a 64% for 2007, in the context of a significantly reduced number of directives falling to be transposed in 2008.

2.3. Petitions

The number of petitions to the European Parliament raising issues concerning the correct application of Community law depends on decisions by citizens, businesses and civil society to manifest their concerns in this way. Even if most petitions do not concern, or lead to, infringement proceedings, they provide Parliament and Commission with useful information on citizens' concerns.

In the field of Environment a constantly high number of petitions have been received in particular for the waste sector. In the field of transport the road safety sector accounted for a very high number of petitions. In the Internal Market sector almost half of the petitions tabled concerned the recognition of diplomas. In the Taxation and custom field the most recurrent subject of petitions is taxation of cars.

A significant number of petitions have been received also in the sector of justice, freedom and security, concerning, in particular, the incorrect application of Community law in the field of border management (Schengen Borders Code), the free movement of persons and fundamental rights.

3. CURRENT ISSUES IN IMPLEMENTATION, MANAGEMENT AND ENFORCEMENT CONTRIBUTING TO REGULATORY CYCLES

3.1. Introduction

Community law develops over time according to experience of its application, interpretative rulings, developing technology, increasing expectations of efficiency and evolving political objectives. The process of legislative change is managed through a sequence of stages including review and consultation leading to legislative proposal, adoption, implementation, application, management and enforcement and further review and consultation. Each sector demonstrates a different combination of elements leading to legislative cycles lasting for anything from around two to twenty years.

The following sections identify some key aspects of the implementation, management and enforcement of Community law, indicating the contribution they make to legislative cycles,

including some key examples taken from the sectors described in more detail in the accompanying document "Regulatory cycle – Example sectors"³.

3.2. Late transposition and reporting - increased implementation planning and preventive action

The late transposition of directives continues to constitute a wide-ranging and far-reaching obstacle to the timely application of the law. 55% of required transpositions were late in 2008, with many examples extending over two years or more. The roughly four year legislative cycle for adoption and implementation is thereby regularly extended, sometimes for years. This delay reduces the ability of the EU to respond efficiently to the interests of its citizens and economic operators. It undermines coherence in the legal system, reducing legal certainty, transparency and fair conditions of competition. Follow-on work to ensure the correct application of the law is delayed. The situation has improved on last year, but the 15% improvement for the EU-25 sits alongside a 40% decrease in the volume of required transpositions. Internal Market Scoreboard no. 19 identified that in May 2009, there were 22 directives having transposition deadlines over two years ago each with between one and five Member States not having yet completed transposition.

Alongside late transposition is the issue of other kinds of notification required by directives which are communicated late. For example, in 'Climate change – emission trading', infringement proceedings had to be launched against many Member States for late notification of National Allocation Plans (NAPs) for 2008 – 2012. Further work developing both the implementation of the existing *acquis* and its amendment was held up as a result. This late reporting contributed significantly to delays in the next steps required to achieve the 2020 objectives.

Partly to try to avoid late transposition and partly to ensure correct implementation, over recent years increasing recourse has been had to preventive measures in the form of expert meetings and bilateral Commission / Member State dialogue on transposition and implementation issues, improving the possibility to resolve potential problems before they become fixed in law. The Commission and Member States have developed a very substantial additional commitment to the implementation and application of the law with a view to better ensuring that it achieves its objectives. A leading example is the current work programme on the implementation of the Services directive. A detailed and extensive transposition plan provided the basis for more than 30 bilateral meetings held with Member States and 13 meetings of the expert group in 2008 on implementation and the deployment of the Internal Market Information System (IMI) to allow direct exchange of information between Member State competent authorities.

Guidelines are also frequently prepared to assist the implementation and application of new legislation, as has been extensively the case under the REACH regulation. Lists of answers to frequently-asked questions are posted on the internet, such as on the directives concerning dangerous preparations, explosives and fertilisers.

Close attention should be paid to implementation and enforcement issues by the Commission in preparing, and by Parliament and Council when adopting, new legislation to ensure the early and correct application of the law. Review by the European Parliament of the

³ SEC(2009) 1683.

implementation of Community legislation and contacts with national parliaments may also contribute to improved results. Inter-institutional discussion should identify the appropriate methods to be applied to ensure improved results.

3.3. The framework, its implementation and management

The adoption of new EC legislation is often the start, rather than the end, of a process. Framework legislation requires implementing measures. Scientific and technical development leads to the introduction of new working methods. Advance information on possible new regulatory action at Member State level can help to avoid new barriers to free movement. Commission and Member States can best ensure good management of the application of legislation by regularly reviewing implementation and application issues.

For example, initial directives on pesticide levels plant protection products adopted in the 1970s, 1980s and 1990s progressively extended the coverage of EU rules on residues for different crops. This process involved extensive additional implementing work, with six Council implementing directives adopted from mid-1993 to mid-1997 and a further 60 Commission directives adopted in the following ten years before the adoption of Regulation (EC) No 396/2005⁴ consolidating and simplifying the *acquis*.

In parallel, phased implementation of directive 91/414/EEC⁵ on the evaluation, marketing and use of plant protection products was organised through programmes adopted in 1992, 2000, 2002 and 2004, leading up to the Commission's 2006 proposal for a regulation to consolidate and further develop the *acquis*⁶.

There are other ways than committee work in which the application of Community law is managed through collaboration between the Commission and Member States. These include provisions requiring the advance notification of draft regulations and procedures to follow-up on identified problems. In the field of technical standards for goods and Information Society services alone,⁷ over 630 notifications as well as nearly 200 Commission and just over 180 Member State interventions were managed in 2008.

3.4. Inspections and controls – Commission and Member State actions

Member State and Commission inspections and reporting can also play a key role in measuring the extent to which objectives are achieved on-the-ground, identifying different kinds of problem appropriate to be addressed either through management processes, infringement proceedings or legislative amendment.

For example, in aviation security, EC legislation in the early 2000s provided for the development of Member State civil aviation security programmes following common basic standards as well as national audits by Member States and inspections carried out by the

⁴ Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC (OJ L 70, 16.3.2005, p. 1).

⁵ Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ L 230, 19.8.1991, p. 1).

⁶ Proposal for a Regulation of the European Parliament and of the Council concerning the placing of plant protection products on the market - SEC(2006) 930 and SEC(2006) 931.

⁷ Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services.

Commission. The extensive programme of inspections carried out contributed to an estimated 16% improved compliance while identifying the need for additional harmonisation, clarification and simplification. Amending legislation was therefore adopted by Parliament and Council in 2008, further improving the rule-making and setting down basic principles concerning a more far-reaching range of security programmes and internal quality control to be adopted by airport operators, carriers and other entities implementing security measures. In parallel, the Commission extended peer review in the inspection programme in the context of an up-grade of its inspection methodology.

Another example, in food safety, is the work of the Food and Veterinary Office (FVO), which scheduled 256 audits and inspections in 2008 to assure effective control systems and to evaluate compliance with EU standards within the EU, and in third countries in relation to their exports to the EU.

3.5. Stakeholder consultation, information-collection and reporting linked to legislative development

A variety of techniques is applied to gather information on the impact of legislation on-the-ground and to test whether objectives are being met.

On 'Climate change', for example, in January 2008 the Commission proposed an improved and extended EU greenhouse gas emission trading scheme. The proposal resulted from extensive stakeholder consultations during the first trading period from 2005–2007. These confirmed a lack of verified emissions data to back the initial National Allocation Plans (NAPs), leading to: excess issuing of allowances and some cases of windfall profits for industry charging consumers for emission allocations received for free; widely varying Member State allocation methods and levels; and a too long and complex Commission NAPs approval process. The 2008 proposal for amending legislation therefore put forward a fully-harmonised approach for an EU-wide, annually shrinking cap on allowances, targeting a 2005–2020 emission reduction of 21%, while phasing-in auctioning as the principal method of allowance allocation.

Another example concerns late payments under commercial contracts, where initial concern was indicated by the European Parliament in 1994 which led to a Commission recommendation in 1995 as a possible non-legislative way of achieving improvements. Following a further consultation process which confirmed the lack of significant progress, the Commission proposed a directive which was adopted in 2000. A report in 2006 then led to a study, a consultation of the European Business Test Panel and a “Your Voice in Europe” public consultation in 2008. The results, together with the surveys organised in parallel by interested parties in the Member States, confirmed the need for further reinforcement of the rules, which the Commission proposed in 2009.

On Integrated Pollution Prevention and Control (IPPC), the original directive in 1996 set out a ten year implementation programme for the issuing of permits to industrial installations based on their commitment to implementing best available techniques to control the emission of pollutants. In 1999 the Commission sent a questionnaire for Member States to report in 2003 for the 2000–2002 implementing period. The results led to the report made by the Commission in 2005. This identified significant delays in transposition, lack of sufficient clarity in the legislation and the need for both increased co-ordination and speed of implementation and consolidation of provisions; leading to the development of an Action Plan on implementation.

Over the course of 2006 and 2007, the Commission undertook a further review on implementation with all stakeholders, based on Member State reports for the period 2003-2005 as well as a number of additional external analyses. The results provided clear evidence of the need for legislative revision. The Commission therefore adopted in December 2007 a Proposal for a recast Directive on Industrial Emissions to consolidate, extend and clarify existing provisions, tighten emissions limits and increase monitoring and enforcement. The Action Plan on implementation was also updated, involving more harmonised data collection, evaluation and simpler decision-taking procedures. This provided a framework to ensure the full implementation of existing provisions up to 2012 when the focus of attention is expected to move to implementation of the planned new legislation.

3.6. Management of legislation by expert groups

Preventive measures are taken with the purpose of ensuring the timely and correct application of the law, thereby avoiding the need for infringement proceedings. Daily management of the *acquis* through around 250 committees and 1 000 expert groups, implementation and technical up-dating work helps to maintain the current validity and practical operability of the legislative *acquis*, facilitating the resolution of problems which could otherwise be the subject of infringement proceedings, and the solution of ongoing infringement procedures.

3.7. Problem-solving for citizens, business and civil society interests

Many issues of interpretation and practical application of the law can be dealt with quickly and effectively, and with EU-wide effect, through the work of Commission and Member State experts in committees and expert groups. Lightweight horizontal instruments, such as SOLVIT and EU Pilot, are also designed to provide quick and direct means to solve the more individual problems of citizens, business and civil society with Community law as it applies to them.

Other, sector-specific instruments, such as clearance of accounts in agriculture, ensuring that financial support payments depend on confirmed respect for the rules, have proven to be effective enforcement tools applicable in certain areas of the *acquis*. There are also mechanisms introduced in sectoral EC legislation providing means for commercial operators to have recourse against national authorities. These include provisions for appeal by telecommunications operators against the decisions of national regulators in the electronic communication sector. There are also the provisions on remedies in public procurement motivated in part by the continuing large volume of complaints received by the Commission and consequential infringement proceedings on respect for Community rules in individual tendering processes. Such remedies provide more direct and timely means of recourse for the enterprises concerned than infringement proceedings brought by the Commission which, by their very nature do not focus on the interests of the parties to the tendering process as such.

Some Community legislation also includes guarantees of procedural recourse between citizens and commercial operators. For example, the growth and diversification of electronic communication services and growing number of service providers led to the introduction under the Universal Service Directive of a mechanism for the settlement of disputes between consumers and service providers that is more flexible, cheaper and less formal alternative to court proceedings. The strengthening of the claim procedures in case of delayed flight departures or cancellations in the air transport sector constitute further examples. EC environmental law also already provides for review mechanisms on refusals to provide

requested environmental information or public consultation in relation to environmental impact assessments and integrated pollution prevention and control permit decisions.

The performance of these systems is monitored and reported regularly, with the first Evaluation Report on EU Pilot in preparation.

3.8. The role of infringement proceedings

The Commission may open infringement proceedings based on different types of claims. A large volume of proceedings concern delays in the communication of Member State measures transposing directives. These proceedings generally do not last for more than some months, but, can lead to an authoritative legal ruling and the application of financial sanctions should the transposition still be delayed. By far the greater number of cases is closed before a first Court of Justice ruling. A large volume of work is required to manage these proceedings.

Infringement proceedings are also used to pursue lack of conformity of Member State laws or regulations and bad administrative practice. The detection by the Commission of potential infringements of Community law occurs in a wide variety of ways linked to the different functions of the Commission. These functions include its own work reviewing the conformity of Member State measures transposing directives, committee and expert group work on the implementation and application of Community law, correspondence and complaints from citizens, business and civil society and work with Member States producing reports on the application of Community law.

The Commission has to ensure coherence, efficiency and fair treatment of Member States in the management of the potential infringements which come to its attention. The Commission has to evaluate whether it is more justified to take specific action on individual potential infringements brought to its attention or to pursue parallel or collective proceedings across a range of different factual and legal circumstances which can strengthen its position. It has to evaluate the most appropriate form of action to be taken at any particular moment, given the volume and variety of problems arising, with consequences for the timing of any recourse to infringement proceedings.

Experience shows that it is often more efficient and equitable to try to resolve recurring or widespread problems through a more systematic approach. Examples of systemic breaches that the Commission has addressed, or is addressing, in the area of protection of the environment have been explained in the Commission Communication in 2008 on the Implementing European Community environmental law⁸. They included breaches of bathing water and drinking water standards and failure to collect and treat urban waste-water, tolerance of illegal waste disposal activities and failure to respect hunting rules or derogation conditions in the area of nature protection.

Recurring or widespread problems may also indicate lack of clarity in legislative drafting which may also be more appropriately resolved through legislative amendment than enforcement action. Legislative amendment can bring the additional benefit of legal development. Even where a Court of Justice interpretation of the law in a particular case may give rise to wider-ranging implications for other Member States, follow-up action by the Commission through infringement proceedings across a number of Member States can

⁸ COM(2008) 773.

constitute a more prolonged and complex legal process leading to more diverse and less transparent results than the adoption of amending legislation, which can bring some additional guarantees of clarification and accessibility.

Likewise, while Treaty provisions are usually effectively directly enforced through infringement proceedings, co-ordinated action by the Commission and Member States can also constitute an efficient, consistent and collaborative way to address the wide-range of issues arising. For example, the diversity of the services economy and the variety of issues arising in sometimes widely differing contexts can make a harmonised approach unsuitable while the direct enforcement of Treaty rules requires a case-by-case approach. This is why the Community legislator adopted the Services Directive in 2006 to codify and specify the criteria set out in the EC Treaty applicable to the right of establishment and cross-frontier service provision and to institute a wide-ranging review of Member State authorisation systems and legal requirements for access to, or the exercise of, service activities. Similar considerations motivated the adoption in 2008 of the "goods package" of measures including the regulation on procedural aspects of the application of the principle of mutual recognition for the free movement of goods. These measures can, of course, be accompanied by continuing direct enforcement of Treaty provisions through infringement proceedings.

Infringement proceedings should in any case not become an automatic function, as they cannot always be managed within a strict time-frame determined solely by the context of each individual file. They rather have to be managed in the wider context of considerations such as: possible recourse to quicker and more effective ways of resolving the issues; the overall legal certainty in the sector concerned, parallel issues in other Member States giving rise to considerations of due and fair process and the most efficient means of achieving the overall objectives of Community law.

3.9. Legislative simplification - a Better Regulation target

The Commission's agenda on 'Better Regulation – Simplification' has also led to legislative amendment to reduce costs for producers, increase transparency and access to the market and clarify the law. For example, on construction products, the Better Regulation mandate led to the launch of a widespread consultation on the functioning of the directive adopted in the late 1980s. This in turn led to an extensive reform designed to improve understanding and access, reduce costs of compliance and improve clarity and effectiveness, particularly for small manufacturers. The reform focused on the delivery of information on product performance, the clarification of the guarantees flowing from CE marking, the development of stricter criteria for independent bodies verifying performance and the introduction of more flexibility in the demands for testing the products.

While the Better Regulation agenda can provoke legislative clarification and simplification, it can also restrain recourse to legislation, justifying substantial consultation and market testing before the case is made out for a legislative initiative, as already described in connection with the development of EC law on late payments in commercial transactions.

3.10. The role of legislation in ensuring transparency and access to the law

Transparency, understanding of the law and enforceability are all aided by common and consistent sets of legal provisions at the EU and Member State level. Where clear legislation and case law exists side-by-side there can still be justification for legislative amendment to improve transparency and access to the law, just as when a sequence of EC legislative

amendments calls for codification. This explains the interaction between Court of Justice case law and EC legislative development, with some combination of both often required to achieve the desired result.

4. CONCLUSIONS

In this report the Commission reviews certain aspects of the current position in the application of Community law and:

- suggests an inter-institutional dialogue on the causes and possible ways of reducing late transposition;
- emphasises the importance of attention being paid to implementation planning and enforcement mechanisms in the development of new legislation;
- draws attention to the variety of management and enforcement tools available to ensure the correct application of the law and commits itself to a transparent policy on the use of these instruments to produce the greatest understanding, clarity and effectiveness of the law;
- confirms the priorities for the work of the Commission set out in the accompanying document to this Report on the "Situation in the different sectors"⁹, including the management of infringement proceedings to maximise the benefits for citizens and business.

⁹ SEC(2009) 1684.