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COMMUNICATION FROM THE COMMISSION

IMPLEMENTING COMMUNITY ENVIRONMENTAL LAW

COMMUNICATION ON IMPLEMENTING COMMUNITY ENVIRONMENTAL LAW

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PART I: INTRODUCTION

Background

1. The Community is at a crucial point in its environmental policy. The first stage of its policy, that of legislating for the major environmental problems facing the Community, has developed substantially as a result of the Community's work during the last two decades to create a legal framework designed to ensure a high level of protection for the environment in all its aspects. More than 200 pieces of Community environmental legislation have been adopted. Most of these are directives and therefore raised transposition[2] and conformity issues initially and now, given the fact that most have been transposed, give rise to questions of practical application[3] and enforcement[4], whereas Regulations raise only questions of practical application and enforcement.

2. We are now moving into a second stage of strengthening and consolidating the *acquis communautaire* through bringing about changes in current trends, practices and attitudes. The Fifth Community Environmental Action Programme on the environment and sustainable development, which was reviewed recently and on which the Commission has made a proposal to speed up its implementation[5], set out a number of priorities for this work. Implementation and enforcement through shared responsibility is one of these key elements, together with the review and/or simplification of some existing legislation and the broadening of the mix of instruments through Community initiatives on voluntary agreements and on fiscal and economic instruments.

3. Achieving the goal of a high level of environmental protection is only possible if our legal framework is being properly implemented. If the strong *acquis communautaire* on the environment is not properly complied with and equally enforced in all Member States, the Community's future environmental policies cannot be effective and its Treaty objectives cannot be fully and constantly met. The environment will either remain unprotected or the level of protection in different Member States and regions of the Community will be uneven and might, *inter alia*, lead to distortions of competition.

4. In this respect, it is also important to note that in preparation for the enlargement of the Union, the Commission is working closely with the authorities of the applicant countries to assist them in the adoption and implementation of Community law in the field of the

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[2] A definition is given in the Annex.

[3] A definition is given in the Annex.

[4] A definition is given in the Annex

[5] Progress Report from the Commission on the Implementation of the European Community Programme of Policy and Action in relation to the Environment and Sustainable Development "Towards Sustainability" COM (95) 624 final and the proposal for a European Parliament and Council Decision on its review COM 95 647 of 24.1.1996.

environment. [6]

Current position on implementation of Community environmental law

5. Within this context, there are weaknesses in the current state of implementation of Community environmental law in most parts of the Community, and more action is needed in order to improve the situation. The Commission's own statistics on implementation show the following: In 1995, Member States had notified implementing measures for only 91% of the Community's environmental directives, leaving as many as 20 or 22 directives not transposed in some Member States[7]. In the same year the Commission registered a total of 265 suspected breaches of Community environmental law, based on complaints from the public, Parliamentary questions and petitions and cases detected by the Commission: this is over 20% of all the infringements registered by the Commission in that year.[8] In October 1996 over 600 environmental complaints and infringement cases were outstanding against Member States, with eighty five of the latter awaiting determination by the Court of Justice.

6. The Commission's infringement procedures demonstrate the ways in which problems of implementation arise within the Community. Some legislation causes similar difficulties in most Member States: the Commission has had to begin "horizontal" actions against most Member States in relation to the notification of habitat sites under Directive 92/43/EEC[9] and in relation to Directive 91/676/EEC on agricultural nitrates in water[10]. Other infraction procedures show the variety of environmental problems within the Community: although waste disposal is a major concern to European Union citizens and leads to many complaints to the Commission, in some Member States the main concern is illegal waste dumps while in others it is emissions from waste incinerators. Infraction proceedings also show the intractable nature of some environmental problems: many current cases relate to directives adopted in the 1970s: Directive 76/160/EEC on bathing

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[6] Through the Phare programme, approximately 100 million ECU a year is allocated to environmental projects in central and eastern Europe which help national and local authorities to take on and implement Community environmental law, through training programmes and the provision of infrastructure. As far as Cyprus and Malta are concerned, the Commission will continue to support the harmonisation of legislation in the field of the environment in the framework of the *acquis Communautaire* and preparations for their accession to the Union.

[7] Thirteenth Annual Report on Monitoring the Application of Community law (1995), Brussels, 29.05.1996 COM (96) 600 Final.

[8] Figures for 1994 and 1993 are 359 and 383 suspected breaches registered, representing 25% and 28.5% respectively of total suspected infringements registered. Source: Twelfth Annual Report on Monitoring of Community Law (1994), Brussels, 07.06.1995 COM(95) 500 Final.

[9] OJ L 206/7, 22.7.92.

[10] OJ L 375/1, 31.12.91.

water[11] and Directive 76/464/EEC on dangerous substances in surface water[12] are two examples where there are continuing problems of compliance in some Member States. More detailed examples of implementation problems by sector are set out in Annex II to this Communication.

Specific character of Community environmental law

7. The very nature of environmental protection creates challenges which are particular to environmental law as distinct from other fields of law. Environmental protection has to take account of complex inter-dependencies and inter-relationships between the environmental media (air, water, soil) and biodiversity: unless care is taken, action to protect one medium can adversely affect another. It has to bear in mind climatic, seasonal and geographical variations in environmental conditions[13] (an approach which may be sound in one part of the Community may not be sound in another). It has to reflect a constantly changing state of knowledge (often implying a need for significant and urgent innovations, adaptations and changes of approach). Because of the potentially very serious consequences of a lack of foresight, it has to an important extent to be based, both in formulation and interpretation, on the preventive and precautionary principles[14] rather than on a curative approach. Because it touches everyone, it has to involve a comprehensive set of actors, from government, industry and enterprise to the general public, implying often very difficult balancing exercises. Because it relates to general interests in which there is often not a proprietary stake (clean air and water, a healthy biodiversity), it has to envisage methods of ensuring its effectiveness other than methods which are adequate in other fields of law.

8. These characteristics help explain why the implementation and enforcement of Community environmental law is complex and often unsatisfactory. These characteristics could also be found in other sectors of Community law but are particularly salient in the environment field. They are mainly connected with the legal and technical complexity of the matter, which gives rise to numerous questions of interpretation and issues of technical application, as well as difficulties in ensuring the proper coordination of the different national authorities involved in the transposition, practical application and enforcement stages.

9. Indeed, most Community legislation on environmental protection is adopted in the form of directives which must be transposed into national laws, giving Member States the

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[11] OJ L 31/1, 5.2.76.

[12] OJ L 129/23, 18.5.76.

[13] See Article 130r § 2 and 3 of the Treaty: "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions." "In preparing its policy on the environment, the Community shall take account of environmental conditions in the various regions".

[14] See Article 130r § 2 of the Treaty. These principles are evolving in the light of circumstances and new multi-disciplinary insights.

freedom to enact transposing legislation in the form most appropriate to its national conditions. Moreover, whether or not the Community legislation is adopted in the form of directives, competent bodies and institutions within national administrations are primarily responsible for the actual and daily application, in all its aspects, of both directly applicable Community measures (ie. regulations) and national transposing legislation. Within Member States, whether unitary or federal, competence in relation to the practical application and enforcement of Community environment law is frequently shared between or devolved to different levels of the public administration. This decentralisation of the implementation process adds considerably to the complexity of the implementation of Community environmental policy, and thus co-ordination through the "regulatory chain"[15] is required in order to achieve full and correct implementation. Furthermore, the complexity of the inspection and enforcement functions involving the monitoring of a multitude of individual cases requires sufficient numbers of staff with the appropriate professional qualifications and adequately resourced. This is not always the situation in all Member States.

Implementation powers

10. The Commission, as guardian of the European Community Treaty, has the responsibility of ensuring that Community legislation is applied.[16] It exercises this responsibility mainly through exercising the power to bring infringement proceedings against Member States under Article 169 of the Treaty. This power is a very important and necessary tool for the Commission with respect to enforcement, as shown by the statistics on infringements given above. The Commission intends to continue to make full use of its enforcement powers based on Article 169.

11. An attempt to improve the effectiveness of the Article 169 procedure was made through the Maastricht Treaty by introducing fines against the Member States under Article 171, and this provision is now beginning to be applied. The Commission will also make full use of Article 171 in ensuring full compliance by the Member States with their environmental obligations as defined by the Court of Justice in its judgments in relation to cases brought under Article 169, in order to achieve a strong deterrent effect. Further improvements in the use of Article 169 should arise from the proposals contained in the Commission's recent review of its internal rules on the way in which Articles 169 and 171 are being used[17]. This major review of Commission practice and procedure should considerably enhance the speed and effectiveness with which it can make use of its powers under those Articles.

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[15] See definition in the Annex.

[16] Article 155: " In order to ensure the proper functioning and development of the common market, the Commission shall ... ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied ...".

[17] See also the communication concerning the operation of Article 171 of the Treaty, O J No. C 242, 21.8.96, p. 6.

12. However, it must be recognised that the procedure under Article 169 may be both lengthy and formal, and was not particularly designed with environmental law cases in mind. Because it operates on decisions and actions after they have been taken, even if Community law is applied as a result, it is not always the best way to prevent degradation or damage to the environment from taking place.

13. There are further fundamental problems with the use of Article 169 and Article 171 as the sole means of enforcing Community environmental law apart from the limitations mentioned above. Many environmental regulations and directives have to be applied on a daily basis by large numbers of people throughout the Member States. It would be neither possible nor practical for all the legal actions which could arise from these cases to be channelled through one enforcing authority, the Commission, and one court of law, the Court of Justice. In addition, Article 169 creates a Community "enforcement mechanism" which is directed only against the central governments of the Member States: the Commission is unable to oversee, on the ground, the application of individual decisions (either voluntary or binding) necessary to comply with Community legislation.

14. Nor is it possible for a single, Community wide, judicial enforcement system to take into account the legal and administrative structures at national, regional and local levels within the Member States through which Community environmental measures are applied. The use of such structures is essential to the incorporation of Community environmental law into national systems and to their practical application. Consequently, alternative methods of enforcement which can give full effect to these national and local conditions, which are vital to the proper protection of the environment, are required. More ambitious solutions than can be achieved through changes to practices and procedures under Articles 169 and 171 are therefore required in order to ensure the proper implementation of Community environmental measures.

15. Finally, there is a wide disparity in environmental inspection mechanisms among the Member States. Although the Commission, as the guardian of the Treaty, has the role of ensuring that Member States comply with Community environmental laws, there are no generally applicable Community level mechanisms for the monitoring of the practical application of those laws within the Member States. Thus the Commission has only limited powers to monitor the correct application of Community environmental law. It is almost entirely dependent on information supplied to it on an ad hoc basis by complaints, by petitions to and written and oral questions from the European Parliament, by non-governmental organisations, by the media and by the Member States themselves. Although this information is very valuable to the Commission at the current stage, sole reliance on such ad hoc and unverifiable reporting systems and sources of information could have severely detrimental consequences for the environment in the longer term.

Scope and objectives

16. As it has already been illustrated above[18] and will be shown in detail in Parts II and III of this Communication, the specificities of Community environmental law give rise to

[18] See paragraphs 7 to 9 above.

particular difficulties and challenges in implementation and therefore it is necessary for special consideration to be given to the solutions which should be applied to meet these difficulties and challenges. The Commission considers that an effective implementation of its environmental laws is crucial since failure is likely to put at risk the credibility of the Community with its citizens in creating and putting in place its future environmental policy.

17. Furthermore, on the international stage, implementation of environmental laws and policy will be an important area for discussion in the review of Agenda 21 which will take place as part of the follow up in 1997 to the Rio "Earth Summit". If it is to make an effective contribution to this debate, the Community must have its own implementation policies firmly in place by that time.

18. This Communication is the Commission's initial contribution to taking forward the aims of the Community in this area. It seeks to ensure that environmental laws are fully and correctly transposed within the Community at all relevant levels and that they are applied and enforced in an even way throughout the Community and thus safeguard Europe's environment. The Commission's task, as a guardian of the Treaty under Article 155, is, taking a comprehensive approach, to improve implementation and enforcement and make proposals for improvements at all appropriate levels, and this Communication responds to the demands of political and public opinion that it does so[19]. The European Parliament, in particular, has always been very supportive of a strengthening of the effectiveness of the Commission's action in that respect; this commitment was once more evidenced at the Joint Hearing "Challenges to Environmental Protection: Making the Legislation Work", co-organized by the Parliament and the Commission, and held on 30 May 1996. The approach of the Communication is broad. It presents the "global picture" of the implementation, practical application and enforcement issues of Community environmental law. The approach adopted by this Communication also takes into account the methodology of the "regulatory chain" which demonstrates in successive stages all the problems related to implementation (legislation, transposition, practical application, enforcement and review).

19. The objective is to present a clear analysis of the issues covered by this broad approach and to raise awareness of them (at all levels - citizens, NGOs, regional authorities, Member State governments and Community institutions). In the light of this analysis the purpose of the Communication is to reinforce the obligations which different actors in the regulatory chain (the Commission, Member States, regional and local authorities,

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[19] The importance of implementation of Community law has been emphasized by the Member States in the 19th Declaration to the Treaty on European Union and by President Santer in his investiture address to the European Parliament, as well as in the Commission's own proposal for a European Parliament and Council Decision on the review of the European Community Programme of policy and action in relation to the environment and sustainable development: "Towards Sustainability".

industry, citizens and non-governmental organisations) bear in the "shared responsibility"[20] for the application of Community environmental law, in order to increase the effectiveness and efficiency of environmental policy and law with consequent improvements for the European environment. The remainder of this Communication sets out orientations for achieving those solutions, which will bring improvements to the implementation and enforcement of Community environmental law at all relevant levels and enable the environmental objectives assigned to the Community by the Treaty to be achieved.

Structure of the Communication

20. Issues of implementation, application and enforcement have been examined against the framework provided by the regulatory chain. That analysis has shown that there is a need for a broader range of actions which include aspects which can be considered innovative, aiming to ensure the achievement of specific objectives for which the existing mechanisms seem not to be fully appropriate or efficient, as well as on the existing mechanisms and procedures in order to reinforce and make them even more effective. Parts II and III of the Communication deal respectively with the "innovative approach" and the "reinforcing" one, the two being closely linked in achieving the general objective foreseen, that is to say, good implementation and enforcement of environmental community law.

21. The new areas covered in Part II need to be examined and, if retained, made effective by appropriate procedures to be decided upon at a later stage as they deal with:

- the development of Community-wide minimum criteria for the carrying out of inspection tasks by Member State authorities;

- the operation of environmental complaints and investigations procedures within the Member States which will receive and examine complaints from the public about the implementation of Community environmental law;

- increase the opportunities for environmental cases to be dealt with by national courts, through broader access to justice on Community environmental law issues.

22. Action on these three areas will represent important progress towards an even application of Community environmental law throughout the Member States and give European citizens better sources of information and ways of dealing with the concerns they may have in the field of environmental protection. In a sense, it will also make Member States more conscious of their responsibility in ensuring environmental protection by effective application and enforcement of environmental law on the ground.

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[20] European Community Programme of policy and action in relation to the environment and sustainable development "Towards sustainability"; O.J. No C 138/1, 17.5.93. See also Progress Report from the Commission on the implementation of this 5th Action Programme COM(95) 624 final 10.1.1996.

23. Reinforcing the actual system, in particular the issues covered in Part III, is an equal priority issue as it is the very basis of obtaining timely and correct implementation and enforcement. A large part of the actions which are needed in that respect can be dealt with by the Commission and/or Member States without a need for formal measures to be approved. The Commission will take all appropriate initiatives in order to make them effective as quickly as possible.

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PART II: NEW AREAS FOR ACTION

24. Transposition is an extremely important stage in the implementation process when dealing with Directives. The majority of EC environmental legislation consists of Directives which are not in principle directly applicable in the Member States and therefore require additional implementing measures which are only applicable as national law of Community origin. Consequently, timely transposition ensures that the Community law becomes applicable in all Member States more or less contemporaneously and proper transposition (conformity) ensures that national legislation has more or less the same content and achieves the results required by the Community directives.

25. The Commission under Article 155 has the duty to ensure timely and correct transposition by the Member States, by using political pressures and, if necessary, court action under Articles 169 and 171 of the Treaty. It may also need to generally keep under review the practical application of the legislation and its enforcement in order to ensure that they are carried out in a satisfactory manner. However, this is a Community enforcement mechanism directed only towards Member State central governments. The Commission simply cannot monitor the thousands of individual decisions taken each year in accordance with the transposed or directly applicable environmental legislation, in the different parts and levels of authority within the Member States. The daily application and enforcement of those laws in specific cases must be fully ensured by the authorities in the Member States through mechanisms which will strengthen enforcement and, at the same time, ease the control of Member States by the Commission.

Member State inspection tasks

26. Article 5 of the Treaty, as interpreted by the Court of Justice in Case 68/88[21], binds Member States to make whatever provision for enforcement is effective, proportionate, and equivalent to that for Member State's national laws. This general principle of Community law, although fundamental, has resulted in a wide disparity in enforcement agencies or mechanisms among the Member States, with some putting considerable resources into well-supported inspectorates or other agencies which monitor the practical application of Community environmental law and other making lesser provision or none

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[21] Judgment of 21.09.89, case 68/88 (1989) ECR 2965, points 23 and 24

at all. Moreover, where provision is made, it is varied: inspection competencies are not always exercised by a single national body, but are often decentralised or shared among several layers of authority (local, regional, national, etc.). In a number of cases, environmental inspections form only a part of the responsibilities of the relevant competent authorities. In some Member States, such as Denmark or the UK, the competent authority, in addition to inspecting for compliance, also makes decisions on the grant of permits or bringing of court actions for enforcement, while in other Member States (such as the Netherlands) these tasks are separated.

27. This wide disparity cannot be considered as satisfactory with reference to the objective of correct and level enforcement at the Community level. The need exists to ensure that minimum inspections tasks are carried out, such as the process of monitoring whether the requirements of Community environmental laws, in particular those relating to industrial emissions and environmental quality standards, are in practice being applied. The need exists also to ensure that this is the case in all Member States.

28. Given the variety of existing situations described above between the Member States, the achievement of that objective can be obtained by the definition of guidelines which leave to the Member States the choice of the structures/mechanisms they will use to meet it.

    The Commission would be able to define, in cooperation with the Member States, those guidelines and issue recommendations to that effect. The IMPEL network described below could also assist in defining minimum criteria for inspections, and help in capacity building, for instance as to the necessary competencies for the carrying out of inspection tasks.

    On that basis, where inspectorates or equivalent bodies exist and are already operating, in the way foreseen by those guidelines, there will be no need to alter the existing structures. Where inspectorates do not exist, the Commission would consider possible means, if available, for providing capacity-building assistance to help reach them.

29. Such inspection authorities could produce and publish annual reports on the experience acquired during the carrying out of their tasks. These will give useful information on the problems met and addressed, improvements obtained, and could form a very important basis for future action.

    In fact, those annual reports, of which the Commission would be informed, could be used by the Commission in order to ascertain if the objective of even application is being met and to judge whether further action is needed. This further action could, for instance, be the establishment in the future, at Community level, of a limited body carrying out auditing competencies with respect to the fulfilling by the national bodies of their inspection tasks.

    The Commission will consider making recommendations in order to assist Member States in carrying out inspection tasks, by the establishment of guidelines, thereby reducing the currently existing wide disparity among Member State inspections. Further consideration would be given as to whether there might be a need for a limited Community body with auditing competencies.

Member State environmental complaints and investigation procedure

30. Experience at Community level of concerns about the application and enforcement of Community environmental law has been gained in a number of ways. Considerable numbers of complaints are made to the Commission by citizens and environmental non-governmental organisations. The European Parliament is also considerably involved in such problems: petitions are made to its Petitions Committee, and more and more written and oral questions by Members of the European Parliament raise complaints about environmental matters. Complaints are also made to the European Ombudsman, often about matters which have already been the subject not only of Commission consideration but have also been referred to the Parliament. Many of the environmental problems referred to the Community institutions in this way arise from a lack of information or from misunderstandings (by either citizens or administrative bodies) about mainly procedural matters. The mechanisms available to the Community institutions for dealing with such complaints are not necessarily those which are most appropriate to the problem. These complaints might also be dealt with in a more efficient way within Member States, at the local level where they arise and where facts are more easily obtained.

31. Court action to enforce Community environmental law within the Member States also has a number of disadvantages which prevent its being used effectively to protect the environment in such cases. Some of these problems arise in relation to issues of access to justice which are discussed in the next section. However, even apart from questions of access, there are inherent problems within legal systems, including eg. costs and delays, which can make it unhelpful as a means for individuals to enforce Community environmental law: litigation should be the solution of last resort. A non-judicial complaint investigation procedure could have the advantage of avoiding these inherent problems: it could contribute to a quick and low cost settlement of an issue more accessible to the citizen without any need for legal assistance.

32. The advantages of considering environmental concerns at a local rather than Community level, coupled with the characteristics of speed, low cost and ease of use by citizens and environmental organisations, if applied across the Community, could lead to significant improvements in ensuring the proper implementation of Community environmental law. The Commission will therefore consider whether there is a need to establish minimum criteria for a procedural mechanism for handling environmental complaints and carrying out of investigations (a function which could also be similar to the functions of an ombudsman) in cases where problems arise in relation to the practical application and enforcement of Community environmental legislation by public authorities. These tasks could be carried out either within Member State's existing structures, or by the setting up of ad-hoc bodies.

33. Guidelines setting up such minimum criteria would need to be carefully considered: they could for instance cover the power to receive complaints (eg. both from individuals and from environmental non-governmental organisations) regarding the procedures for administrative decisions affecting the environment, to request information from administrative bodies in response to such complaints, and to issue recommendations

(which would be persuasive rather than of a legally binding nature). It would not be necessary for such a mechanism to rule on questions of substance, which are more appropriately considered either by administrative bodies or the courts, according to the administrative and legal systems within the Member States.

34. Procedures similar to this concept already exist in a number of Member States, and can take very different forms. The two main models for such systems which can be found in the Member States are the institution of the independent "ombudsman" and systems for the review of decisions within administrative structures: Member States operating these systems should not in principle have to make changes. Only in Member States where such mechanisms are lacking would there be a need to establish equivalent models following the minimum criteria set up under guidelines in order to fill the gap.

35. Such environmental complaints and investigation mechanisms might also be entrusted with the power of issuing recommendations aiming at solving problems or improving the functioning of the administration in relation to the application of Community environmental legislation. Again, such recommendations would not be binding but would have a strong moral authority and thus generally followed.

The Commission will consider making recommendations for the establishment of minimum criteria for the handling of complaints and carrying out of environmental investigations in Member States where such mechanisms/procedures are lacking.

Access to Justice

36. Judicial litigation is a last resort to solve problems. However, a Community based on the rule of law has to ensure that laws are respected and if necessary enforced. The role of the courts is crucial in that respect, especially for environmental matters where the source of a problem or damage is geographically confined but the effects may be widespread. Access to justice is, in general, sufficiently ensured if economic interests are at stake. Enforcement of legislation designed to create the framework for prosperous business, for instance in the industrial, commercial or agricultural sector, is likely to be encouraged by economic operators with sufficient resources to fight for enforcement. This is not necessarily the case for ecological interests. Economic operators do not perceive their role as being one of supervising other business' compliance with environmental legislation.

37. Enforcement of environmental law, in contrast to other areas of Community law such as the internal market and competition, therefore mainly rests with public authorities, and is dependent on their powers, resources and goodwill. Their ability to take into account the need to protect the environment may be limited by any of these factors. It is therefore important that supplementary avenues for improving enforcement of Community environmental law are available. In particular, actions by non-governmental organisations and/or citizens in relation to the application and enforcement of environmental laws (in administrative, civil or criminal courts, as appropriate to the structures of the Member State concerned) would assist in the protection of the environment.

38. As already mentioned, an important characteristic of environmental law is the frequent lack of a private interest as an enforcement driving force. The environment is often characterised as our "common heritage". This also implies that more often than not there is no private appropriation of many parts of it, such as air, seas, wild flora and fauna. Therefore, it is often the case that deterioration of the environment does not cause immediate reaction, and that even if a problem does arise, there is no means by which individuals can use the law to remedy the problem, or there are no appropriate legal remedies available. Even for Community environmental law, it can be the case that important general principles cannot be enforced by individuals (e.g. polluter pays, preventive and precautionary principles).

39. The importance of wider public participation in shaping environmental policy as a whole is widely recognized[22] and all Member States have non-governmental organisations which enjoy some rights of participation in environmental matters. However, the ability of the public, as such, to take part in legal actions regarding application and enforcement of Community environmental laws differs widely throughout the Community. It varies from participation in certain authorization procedures, through the right of recognised organisations to appeal for the annulment of administrative decisions, to the "*actio popularis*" for environmental purposes. It can however be stated that the public and public interest groups do not as a general rule have sufficient access to the national courts of the Member States in environmental matters.

40. Better access to courts for non-governmental organisations and individuals would have a number of helpful effects in relation to the implementation of Community environmental law. First, it will make it more likely that, where necessary, individual cases concerning problems of implementation of Community law are resolved in accordance with the requirements of Community law. Second, and probably more important, it will have a general effect of improving practical application and enforcement of Community environmental law, since potentially liable actors will tend to comply with its requirements in order to avoid the greater likelihood of litigation.

41. Finally, access to Member States' courts would have the desirable effect of channelling litigation on the enforcement of Community environmental law to the most appropriate level, i.e. regional and national. The use of courts within the Member States for the enforcement of Community environmental measures is desirable for various reasons. One is that there is no possibility that the resources in time and personnel which are available to the Commission and to the Court of Justice in Luxembourg will ever be sufficient for, not even a majority, of environmental cases arising in all Member States to be dealt with through direct actions brought by the Commission in the Court of Justice. In addition, the courts of the Member States are better placed than the Court of Justice to take into account during the proceedings the particular legal, administrative and environmental context of the environmental measure as it applies in each Member State, and to get a

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[22] Principle 10 of The Rio Declaration on Environment and Development proclaimed *inter alia* that: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.....Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

clearer picture of the facts through the evidence of witnesses and the appointment of experts. Moreover they are better placed to grant interim measures which are an extremely useful instrument for preventing damage to the environment.

42. Restrictions on access to the courts arise in two main ways. Firstly, because legal procedures in the Member States create obstacles to the bringing of enforcement actions in relation to environmental law. For example, a special interest may have to be proven in order to bring a case. For reasons of legal history, such special interests are usually of a type which is easy for a property owner or economic operator to satisfy but less easy for environmental interest groups to satisfy. A further example is that appropriate court procedures may not exist to enable environmental interests to be protected: court procedures which are mainly designed to protect economic interests may not provide appropriate forms of action and remedies for environmental problems. Secondly, the cost of bringing enforcement actions in relation to environmental interests may be prohibitive.

43. A number of options are available to the Commission for taking forward action on these matters, including "soft-law" approaches as a first step. Similar issues of access to justice are being considered in the context of the Community action in relation to access to justice for consumers.[23] The Commission has also included provisions on access to justice in various proposals for Community directives.[24] In the context of securing more effective enforcement of Community environmental law[25] it is necessary to look wider than individuals directly affected and include representative organisations seeking to protect the environment. Therefore a possible way towards achieving improved application and enforcement of Community environmental law would be to ensure that environmental NGOs recognised by Member States are given the necessary *locus standi* to bring judicial review actions, which would be against public authorities in the Member States. If such a scheme proves desirable, a first step towards this direction could be a recommendation encouraging Member States to broaden access to justice for non-governmental organisations.

The Commission will examine the need for guidelines on the access to national courts by representative organisations with a view to encouraging the application and enforcement of Community environmental legislation in the light of the subsidiarity principle, taking into account the different legal systems of the Member States.

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[23] COM(95) 712 Final OJ No C 107, 13.4.96, p.3.

[24] See for instance Article 4 of Directive 90/313/EEC on the freedom of access to information on the environment (OJ L 158/56, 23.6.90).

[25] Community law already ensures that those directly and individually affected by a decision of a Community institution can take action in the European Court of Justice, but in the environment there are often difficulties in identifying such persons.

PART III: REINFORCING EXISTING SYSTEMS

44. The proposals made in the remainder of this Communication aim at improving a number of areas in Community environmental law and policy where current practices fall short of the high standards required for effective environmental protection: the quality of legislation, transparency, co-operation at Community and Member State level, monitoring and evaluation of the effects of legislation, knowledge of Community environmental law among practitioners, and the integration of Community funding into the implementation of Community environmental legislation.

Quality of Community legislation

The legislative process

45. Clear drafting of legislation is a prerequisite for a timely and conforming transposition, in the sense that clear obligations may easily and correctly be transposed. Ambiguous, unclear or complicated provisions will cause delays, problems of conformity and problems of practical application which lead to incomplete or uneven implementation throughout the Community. Because the Commission has the exclusive right of initiative on Community environmental legislation it is in a position to take into account the potential difficulties which Member States might have in transposing the resulting Community measure. Drafting of the proposals in such a way, and with a transparent approach, makes the process of transposition an easier one for Member States. For instance, it can ensure that legislation which depends on the subsequent adoption of technical measures is drafted in such a way that delays in adopting those technical measures do not impose impossible implementation deadlines on the Member States, as occurred recently in relation to technical provisions relating to genetically modified organisms[26]. The new General Guidelines on Regulatory Policy, adopted by the Commission in January 1996, which supplement the Commission's Rules on Legislative Drafting ("Règles de technique législative"), should improve coherence in drafting within the Commission. Rigorous application of those rules and guidelines is crucial.

46. It is especially important that when proposals are made the initial text is as clear as possible. Complicated or unclear drafting is likely to make negotiations of the proposal more difficult and to make it more likely that the final legislation will lack clarity and create difficulties for Member States' implementation. This is true both for the negotiations in Council and for amendments proposed by the European Parliament. Although responsibility for drafting and proposing a new directive lies with the European Commission, subsequent developments occur throughout the legislative process in both Council of the European Union and the European Parliament. Unclear and ambiguous drafting of environmental legislation is very often the result of compromises needed at

[26] Commission Guidance on classification adopted under Directive 94/51/EC on the contained use of genetically modified organisms .

the Council level or following the readings of the European Parliament[27]. Even at these later stages the Commission should ensure the coherence, efficiency and practicality of proposals if necessary by amending its own proposals or by withdrawing proposals which will no longer achieve the desired aims.

47. A final point of importance is that legislative texts themselves should contribute to the transparency of the implementation process. This can be done by including in Community legislative texts provisions ensuring that information on implementation will be published, either by the Member States or by the Commission. Some provisions of this nature are already included, for instance as to the publication of reports or as to the public availability of information on the application of the measure[28]. It may however be appropriate, in order to achieve maximum transparency in the implementation of Community environmental legislation for such texts to include provisions requiring the publication by the Member States of additional information on implementation, such as tables of transposition indicating the provision of national law implementing the corresponding provisions of the directives.

The Commission will ensure that all proposals for new Community environmental measures or amendments of existing measures are drafted in accordance with the principles of achieving maximum clarity, transparency and certainty, in order to make the implementation process simpler and quicker. During the legislative process the Commission will seek to cooperate with the Council of the European Union and the European Parliament on issues of drafting and will propose its own drafting amendments where these become necessary as a result of points raised or alterations to its original text made during negotiations.

Sanctions at Member State level

48. Article 5 of the EC Treaty, as interpreted by the Court of Justice, requires Member States to introduce effective, proportionate and dissuasive sanctions which ensure compliance with provisions of Community law. Although this permits Member States discretion to decide upon the sanctions for which they make provision, such sanctions must be equivalent to those used to dissuade breaches of equivalent national legislation[29]. As the Commission has outlined in its Communication to Council and Parliament on the role of penalties in implementing Community internal market legislation[30], the national systems of penalties for the non-fulfilment of obligations under Community law have to be transparent. Transparency is not only the key to mutual confidence but also allows

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[27] These problems are compounded by the need for Community legislation to be available, and equally valid, in all eleven Community languages: compromises brokered in one language can be difficult to translate satisfactorily into all the other languages.

[28] For example the report on implementation of Directive 85/337/EEC, Article 11(3).

[29] Judgment of 21.09.1989, Case 68/88, [1989] ECR 2965, points 23 and 24.

[30] COM(95) 162 of 03.05.1995.

the Commission to evaluate the systems and confine Community action in that respect to what is strictly necessary.

49. The Commission therefore decided to insert in its legislative proposals, in respect of the internal market, explicit provisions stipulating that national implementing measures have to foresee sanctions to be imposed by Member States in case of non-compliance with the provisions of the Directive by individuals or legal persons, and that the legislation related to these sanctions have to be notified to the Commission. Such obligations should be extended to the environment. The objective should be that appropriate sanctions, be they administrative, civil or penal, or a combination of those, according to the choice of national authorities, are available in all Member States and that they are applied in practice so that an even enforcement of Community environmental law is ensured. Publicity for the application of such sanctions in the Member States and at Community level would assist their deterrent effect.

50. General requirements for the imposition of sanctions have already been inserted in Community environmental legislation as in the case of the regulations implementing the CITES Convention on trade in endangered species and the Basel Convention on transboundary movements of hazardous waste. More specific provisions, for example the imposition of administrative penalties such as the withdrawal of permits, could also be included in Community environmental measures where appropriate.

The Commission may include in its proposals for environmental measures a provision requiring national implementing measures to include appropriately deterrent sanctions for non-compliance with the requirements of the relevant directive.

Transparency

Consultations by the Commission

51. The Commission is aware of the need, when formulating environmental legislation, for an open and consultative process in the pre-proposal and drafting stages. Different ways of achieving this are by the use of green papers, for example, the Green Paper on remedying environmental damage;[31] the consultation of formal and informal networks, for example the Consultative Forum on the Environment,[32] the Environment Policy Review Group,[33] IMPEL,[34] meetings with Member State experts and NGOs to discuss policy developments; the publication of the work programme and the holding of public

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[31] COM(93) 47 Final: 14.5.1993.

[32] See Chapter 9 of the 5th Action Programme (footnote 20 above).

[33] See Chapter 9 of the 5th Action Programme (footnote 20 above).

[34] See paragraph 55 below.

hearings, either on its own, for example, on the Commission's future water policy on 28 and 29 May 1996 or jointly with the Parliament, as with "Challenges to environmental protection: Making the legislation work" on 30 May 1996. The Commission needs to ensure that such consultations will be carried out on a more systematic basis with all the persons and organisations with an interest in a particular proposal. It will be important for the Commission to involve in its consultations the European Environment Agency, which is able to provide invaluable information and technical advice on the state of the environment in Europe and the effects of the Community measures taken to protect the environment.

The Commission will consult as widely as possible on the formulation of new proposals for Community environmental measures. Consultations will include the full range of actors who will be concerned with a particular measure.

Consultations by Member States

52. The implementation of Community environmental legislation is particularly likely to affect a wide range of actors. Lack of consultation within Member States can mean that those affected by the proposal are either unaware of the measure or feel that it does not reflect their needs and concerns. They may thus be more likely to impede proper and timely transposition and application of the measure within the Member States. This can be relieved, in some part, by extensive consultation on the measures by the Member States soon after adoption of the Community measure. Where such consultations do not take place, or are insufficient, the transposing legislative process at national level can be made more difficult by protests which only arise at a late stage. More systematic preliminary contacts by the Commission with the interested parties (Member States, IMPEL, NGOs, industry, etc.) when elaborating proposals should facilitate implementation by reducing these problems, but consultations at the Member State level are still likely to be necessary on the text as finally adopted. The addition of details on the likely scope and impact of a proposal in the explanatory memorandum which already accompanies Commission proposals for legislation, should assist Member States in handling these subsequent consultations.

Member States should ensure that they have coordination mechanisms which enable proper consultation prior to the adoption of national transposing measures. To assist Member States in their task, the Commission will incorporate in Explanatory Memoranda accompanying its legislative proposals, references to the potential scope of the proposed measure and to its impact within the Member States.

Information strategy for Community environment policy and law

53. A considerable amount of information on the Community's diplomatic, political and regulatory activities as a whole is given to the public by the General Report on the Activities of the European Union and the Annual Report on Monitoring the Application of Community Law. Sectoral reports are published by the Commission on competition policy and on the internal market; the latter is particularly relevant since it also deals with environmental matters in so far as they are closely related to the achievement of the internal market. The monthly Bulletin gives *inter alia* information on new legislation

and infringement proceedings in all sectors covered by Community law. To complete the information concerning the monitoring of the application of Community environmental law given by the Commission's Annual Report on Monitoring the Application of Community Law, this report would contain, beginning with its fourteenth edition (concerning 1996) the following data:

- Details of the legislation notified by Member States as transposing Community environmental directives, including implementation tables showing how that legislation transposes the requirements of directives on the basis of information supplied by Member States.

- Details of action taken by Member States to apply Community environmental law, including such matters as notifications of competent authorities, the creation and notification of programmes under Community environmental legislation and the results achieved.

The Commission's Annual Report on Monitoring the Application of Community Law will (from its fourteenth edition concerning 1996) be expanded to contain details of the legislation notified by Member States as transposing Community environmental law and the actions taken by the Member States to apply those laws. The points covered in this Communication which do not concern the monitoring of Community law and infringement procedures, such as the points on questions of policy and procedure, could be the subject of a follow-up in an "Annual Survey."

Improving cooperation

54. Good cooperation between the Commission and the Member States is essential in order to achieve the ambitious goals pursued by the Community environment policy. At a national level law-making bodies should work closely with the application and enforcement agencies if the whole system is to be workable and efficient. The same is true with regard to the Commission and national competent authorities which should improve their cooperation in order to increase their effectiveness in the shared responsibility of implementation. Direct cooperation between national authorities of different Member States should also be welcomed in relation to cross-boundary environmental enforcement problems such as the detection of illegal traffic in hazardous waste or endangered species.

55. Member States' concern as to the comparability of standards of application and enforcement of Community environmental legislation in different countries led to the creation in 1992 of an informal network of national environmental agencies called the Chester network. In parallel, the Fifth Environmental Action Programme recognised the unsatisfied need for a proper follow up of the application of Community environmental legislation by announcing the setting up of an implementation network comprising representatives of relevant national authorities and of the Commission in the field of

practical implementation of Community measures[35]. The Chester Network was then modified to create the informal EU Network for the Implementation and Enforcement of Environmental Law (IMPEL). Composed of appropriate representatives of the Member States and jointly chaired by the Commission and the Member State holding the Presidency of the Council of the European Union, IMPEL has a rather wide mandate to consider the implementation of environmental legislation, including mainly questions of how to ensure better enforcement by national, regional and local bodies. The present focus on enforcement could be broadened to include implementation and legal policy issues. The work carried out so far has included the following matters[36]:

- A comparison of technical standards and pollution control technology for various types of facility in each of the Member States, resulting in technical guidelines for regulatory bodies for a number of industries, for example, power plants, incinerators, refineries, cement, glass and chip board production.

- Exchange of information and comparison of experience on the permitting of industrial installations in the Member States and examination of the application of EC legislation in Member States and the practical aspects of the regulatory process, for example, reports on the cross-media evaluation of environmental impacts from industrial installations, and on the application of EC Directives on municipal waste incinerators and on large combustion plants.

- Comparison of enforcement arrangements within Member States, dealing with compliance assessment and inspection, for example, a report is to be published in the second half of 1996 outlining the Member States' legislation, organisations and mechanisms for inspection, monitoring and enforcement, including statistics, inspection visits and enforcement actions.

- Exchange programmes for inspectors, providing in-depth understanding of the regulatory systems in each country and, facilitating the future exchange of information between inspectorates, and preparation of "skills and management" manuals for inspectors, covering both the regulatory process and facility inspections.

- Examination and publication, of a report on the monitoring and enforcement mechanisms for the transfrontier shipment of hazardous waste within the EU.

56. IMPEL can play an important role in improving cooperation in implementation matters between the Commission and the Member States and between and within the Member States, but it may also improve coordination between different enforcement agencies within each Member State through internal coordination in preparation of Member States' positions within IMPEL. Just as there is a need for a coordination at the level of the Community and the Member States, there is often also a need for coordination within

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[35] OJ No C 138, 17.5.1993, p. 80.

[36] The papers produced by IMPEL are disseminated through the IMPEL Secretariat, which is hosted by DGXI in the European Commission.

the Member States. Networks could help diminish the problems which arise from the decentralised implementation and enforcement of Community environmental legislation mentioned earlier[37]. If such networks[38] existed or were established in every Member State by the national governments acting with the competent national and regional authorities, IMPEL could then serve to coordinate these Member State networks at a Community level, the purpose being to most usefully exploit the resources available at every relevant level of the Member States. Given the almost complete reliance on publicly funded authorities for environmental enforcement, such co-ordination would lead to economies of scale and help to maximise the return gained from experience in any particular Member State. In addition, the designation of focal points in these national networks could be expected to improve the communication between the Commission and the various relevant national authorities.

The Commission will consider the existing position of the informal IMPEL network as a useful instrument of cooperation and capacity building, and will make proposals for improving, developing and reorganising its tasks. It will encourage the creation of national coordination networks to be linked with IMPEL through the national coordinators.

Reporting, monitoring and evaluation

Evaluation of effectiveness of measures

57. It is noticeable that, despite the large quantity of environmental measures which have been enacted by the Community, in some respects improvements to the environment have not been forthcoming at a desirable rate, and in other respects environmental conditions may in fact have worsened. Past efforts to monitor the effectiveness of Community measures have been hampered by the lack of information on proper implementation: it can be difficult to know whether lack of progress in a particular area is due to the ineffectiveness of Member State's implementation or to the ineffectiveness of the provision made by the directive. Any evaluation of the practical effectiveness of a measure is therefore dependent in the first place on information regarding the implementation of that measure. Once that information has been obtained, it can be ascertained whether the provisions contained in the measure are effective and, if not, whether existing provisions need to be strengthened or whether an alternative approach to the problem is indicated.

58. A review clause is more and more often inserted in Community environmental legislation, and much can be drawn from this exercise in terms of experience and improvement of the legislative framework. It remains to be seen on the basis of the experience to be gained in the application of the reporting requirements, for instance the

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[37] See paragraphs 13 and 14 above.

[38] In this context, it should be explored whether the EIONET telematics network under the European Environment Agency could play a useful role as regards implementation.

first report to be published by the Commission in pursuance of the Reporting Directive, which concerns the water sector, is due only in June 1997, whether the practical arrangements to be taken by the Member States with a view to collect the relevant information are workable and the data collected reliable. In-depth assessment of the effects of a measure requires the collection of relevant information, data and experience. The Reporting Directive[39] and the new network on environmental information set up at Community level under the coordination of the European Environment Agency[40] could prove very helpful in this respect, especially considering the fact that scientific and technical assessment is of great importance when appraising the effectiveness and efficiency of environmental legislation. Other means of ensuring the feed-back from Member States and from those affected by the legislation to the Commission should also be explored.

Through the most effective use of the Reporting Directive, and close cooperation with the European Environment Agency, the Commission will ensure that the best possible information is available on the effectiveness of Community environmental measures and can be used in the formulation of its policies on environmental protection. The Commission will launch and coordinate case studies to evaluate the transposition, application and enforcement of selected provisions of Community environmental law. It will aim to ensure a wide dissemination of the information resulting from those case studies.

European Environment Agency

59. The European Environment Agency was set up in 1990[41] to provide the Community and the Member States with objective, reliable and comparable information at the European level which will enable them to take the requisite measures to protect the environment, to assess the results of such measures and to ensure that the public is properly informed about the state of the environment. The Agency therefore has a crucial role to play in the provision of information which will enable the evaluation of the effectiveness of Community environmental measures. This role is equally important in relation to the Commission's work on the formulation and adoption of Community environmental legislation and on its implementation: the provision of information and technical advice on the Commission's new proposals for environmental protection. The Agency is therefore a vital link in the regulatory chain, in that its role links the end of the regulatory chain in relation to measures which have been adopted and implemented to the beginning of the regulatory chain in relation to the measures which follow on from the earlier legislation, amending it as necessary so that it can more effectively and

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[39] Council Directive 91/692/EEC of 23 December 1991 standardizing and rationalizing reports on the implementation of certain directives relating to the environment (OJ No L 377 of 31.12.93, p. 48).

[40] Council Regulation (EEC) 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and observation network (OJ No L 120 of 11.5.1990, p. 1).

[41] Council Regulation (EEC) 1210/90 of 7 May 1990 (see previous footnote).

efficiently protect the environment. The EEA could also be more actively involved in the assessment and the follow up of the reports received under the Reporting Directive and other directives with specific reporting requirements (e.g. the Birds Directive).

The Commission will closely involve the Agency on the evaluation of the effects of Community measures, and ensure that the information, knowledge and skills of the Agency are fully utilised in assisting the Commission in its role of formulating proposals for new Community environmental measures and reviewing existing legislation.

Promoting knowledge of Community environmental law

60. Implementation starts with knowledge of the provisions to be implemented. Community directives are usually applied on the basis of the transposing national act, which is usually sufficiently well known by the competent national authorities and in a form familiar to them. Timely and correct transposition is therefore crucial to the practical application of a directive. Furthermore it should be ensured that the implementing national measures clearly refer to their Community origin, thus allowing the national judges to interpret them accordingly and to ensure primacy of Community measures vis-a-vis any conflicting national provisions. The situation is, however, different if transposition is lacking, incomplete or wrong. As the Court stated in its judgment Costanzo/Milano[42], not only national courts but every national authority has to apply directly applicable provisions of European law by putting aside incompatible provisions of national law. This is, in fact, a difficult task, as the Advocate General pointed out in his conclusions to the above mentioned case. Even if the competent authorities have knowledge of the relevant provisions, there might be the tendency to avoid their application. Although European law has primacy over national law and is part of the national legal orders, there may be resistance among practitioners to the application of laws which have a format which can be very different to that usually in place in the Member States.

The Commission will consider initiatives for financial and technical assistance for increasing awareness in Community environmental law, in particular by judges, lawyers and officials of the Member States. Community finance in the framework of "Life 2" can also contribute to horizontal measures such as telematic networks or training in relation to the improvement of the application and enforcement of environmental legislation.

Community funding and the implementation of Community environmental law

61. There are different sources and forms of Community funding relating to the environment.

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[42] Judgment of 22.6.1989, C-103/88, [1989] ECR 1839 (1870).

Funding under "Life"[43] contributes exclusively to the development and the implementation of environmental policy, but other financial instruments provide for important funding for the environment even though they are not specific to the environment. Under the Cohesion Fund[44], which provides assistance for environmental and transport infrastructure projects, eligible measures include projects which aim at full compliance with Community environmental legislation, in particular in three sectors: water supply and water quality, waste water treatment and solid waste. In the Member States eligible for assistance from this Fund, Community funding of environmental projects may be important in assisting them to apply and enforce Community environmental legislation. In addition, assistance under the Structural Funds,[45] which principally consists in co-financing of operational programmes and national aid schemes, may include projects with environmental aspects to them.

62. Community funding[46] must, in accordance with the integration principle, take into consideration the environmental laws of the Community.[47] Nor should the Commission co-finance projects which have a negative impact on environmental interests which are protected under Community legislation, such as special areas of conservation protected under the Habitats Directive, unless the project complies in principle and practice with the protective requirements of that legislation. It is also important that all Community funds are granted in an appropriate policy context. Not just Community environmental legislation, but also Community environmental policy, is to be taken into account in the grant and expenditure of Community funds[48]. Any proposal for Community funding should be assessed against and comply with Community environmental policy and legislation.

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[43] Council Regulation (EEC) No 1973/92 of 21 May 1992 establishing a financial instrument for the environment, (OJ L 206 of 22.7.1992).

[44] Council Regulation (EC) No 566/94 of 16 May 1994 establishing a Cohesion Fund (OJ L 72 of 16.3.94). Financial perspectives for environmental projects in 1996 amount to approximately 1.7 billion ECU.

[45] Council Regulation (EEC) No 2081/93 of 20 July 1993 amending regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ L 193 of 31.7.1993).

[46] This reference also includes those EAGGF actions which relate to structural funding, ie the Guidance Section of the Fund.

[47] For instance, the Community should not in principle fund sewerage projects if the Member State which receives the funding has not transposed the Urban Waste Water Treatment Directive, since in such a case the legal framework defining the practical modalities for individual project is lacking.

[48] See eg. Article 8(1) of Council Regulation (EC) No. 1164/94 establishing a Cohesion Fund (OJ No L 130/1 of 25.5.94).

63. Once a decision to grant Community funding has been made, compliance with the requirements of the Community's environmental law and policy must be assured. Community regulations granting financial assistance to Member States require as a matter of principle that the competent authorities should ensure that the recipients of the aid will comply with the requirements of Community policy and law on the environment. This principle applies whether or not there are existing infringement proceedings in relation to the project benefitting from Community financing, since it is the Commission decision granting the funding itself that requires compliance with Community environmental law and policy. The possibility of suspending payments or requesting repayment is an important tool in ensuring compliance with Community environmental policy and law in relation to Community financing. The Commission should enhance its compliance checking and monitoring of Community funded projects.

The Commission will consider additional measures to ensure that the Community's environmental objectives and the requirements of European Community environmental law are fully integrated into decisions to grant financial assistance to Member States and in the monitoring of projects financed by the Community.

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PART IV: CONCLUSION

64. The Commission considers that priority has to be accorded to measures to improve the implementation of Community law as the Community moves into an era of consolidating the *acquis communautaire* so far achieved in the environmental field.

65. Furthermore, the Commission concludes from experience, that the current means of ensuring implementation, which relies principally upon the use of the procedure under Articles 169 and 171 of the Treaty although important, powerful and necessary, have proved to be insufficiently speedy and appropriate for protection of the environment from breaches of Community law. Certainly, some of the problems which are related to the special features of environmental law can be reduced through broadening the mix of environmental instruments, but there is also a need for a greater diversity and decentralisation of control mechanisms.

66. Consequently, the Commission, in this Communication introduces a new broad approach, encompassing the whole regulatory chain and all relevant actors. It suggests a number of new proposals aimed at improving the state of implementation of Community environmental law at all levels.

67. The Commission expects to raise awareness on the overall picture of implementation and enforcement drawn by this Communication at all levels, and thereafter to exercise fully its right of initiative in the light of responses to the Communication and the debate about what should be done to improve the situation, by all actors concerned, at all different levels.

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ANNEX I: DEFINITIONS

The "Regulatory chain" is the whole process through which legislation is designed, conceived, drafted, adopted, implemented and enforced until its efficiency is assessed. It is a methodological tool allowing for a "holistic" approach to address instruments of environmental policy.

"Transposition" in this Communication means any legislative, regulatory or administrative binding measure taken by any competent authority of a Member State in order to incorporate into the national legal order the obligations, rights and duties enshrined in Community environmental directives. Transposition thus includes not merely the reproduction of the words of a directive in national law, but also any additional provisions, such as the amendment or repeal of conflicting national provisions, which are necessary in order to ensure that national law as a whole properly reflects the provisions of a directive. In some Member States, transposition measures have to be adopted at national/central level only, while in some others, regional authorities have exclusive competence in certain fields of environment policy (e.g. nature conservation falls within the competence of the German and Austrian Länder). It may also happen that both levels have to take transposing measures in case of shared competencies.

"Practical Application" is defined as the incorporation of Community law by the competent authorities into individual decisions, for instance when issuing a permit or devising executing a plan or programme. Community legislation is directly applied by national authorities in case of regulations and directly applicable provisions of directives. However, once a directive is correctly transposed, it is applied through the national transposing measures. It also includes providing the infrastructure and provisions needed in order to enable competent authorities to perform their obligations under Community law and to take the appropriate decisions.

"Enforcement" is defined broadly as all approaches of the competent authorities to encourage or compel others to comply with existing legislation (eg. monitoring, on-the-spot controls, sanctions and compulsory corrective measures) in order to improve the performance of environmental policy with the final goal of improving the overall quality of the environment.

ANNEX II: IMPLEMENTATION PROBLEMS BY SECTOR

Problems of implementation and enforcement arise in all sectors in relation to which the Community has adopted environmental laws. This Annex gives more details of the types of implementation and enforcement problems which arise in just four sectors: water, waste, nature protection and environmental impact assessment.

Water

In relation to the improvement of water quality, the size and the complexity of the obligations imposed by the traditional approach of the Community legislation in this area, which relies principally on fixing quality objectives, establishing clean up programmes and systems of prior authorisation and the compilation of reports, still creates considerable problems for the administrations of the Member States. Some of the Member States have major difficulties in satisfactorily applying the Community directives in this area.

The case of Directive 76/464/EEC on dangerous substances discharged to surface water is a good example. The Commission is taking infraction proceedings against many Member States for non-notification of pollution reduction programmes for substances in List II of the Annex to the Directive. The application of Directive 76/160/EEC on bathing waters continues to raise problems in several Member States.

In relation to Directive 91/676/EEC on agricultural nitrates, several Member States have still not notified their national transposing measures. Most Member States have problems in relation to the application of the Directive (lack of designation of vulnerable zones, absence of codes of good agricultural practice, failure to put in place surveillance programmes, non-communication to the Commission of reports required by Article 10 of the Directive). The Commission is following closely the problems of the application of this Directive in the Member States, and is opening infraction proceedings in appropriate cases.

The Commission also receives complaints on the quality of drinking water (Directive 80/778/EEC): often the lack of adequate technical infrastructure is behind the complaints about this directive. The task of the Commission in ensuring compliance with Community standards is sometimes rendered more difficult by the methods used in some Member States to enforce water quality standards.

Waste

Community legislation on waste management applies to a great number of waste recovery and disposal operations carried out by economic operators; each and every of these operations should normally be processed in accordance with Community waste legislation and transposing national legislation; waste disposal facilities being subject to a permit system while waste recovery facilities should be at least registered. Even shipping waste between

Member States is covered by a Community Regulation.

The whole system therefore relies to a very great extent on the performance by national, regional and/or local competent authorities of the different actions necessary with a view to processing the numerous permit applications, granting the permit under the conditions prescribed by the laws and regulations, monitoring the compliance by the economic operators with the permit and the conditions set out therein and, in case of non compliance, taking corrective measures and sanction the non compliance. Moreover, the competent authorities are also responsible for enforcing waste legislation with respect to activities which are illegal per se in the absence of any permit granted (e.g. illegal dumping of waste).

Most of the more difficult problems of implementation in the waste sector relate to failures of application within the Member States: illegal dumping, bad disposal practices, and the pollution of water through the direct discharge of waste into water. To be effective, this whole system requires a decentralized network of competent authorities be in place and to actively fulfil their roles; decentralization constitutes a more cost effective response to the environmental challenge posed by waste since a very good knowledge of the actual situation on the spot is absolutely necessary in order to correctly and efficiently apply the law as the factual circumstances require it.

Nature

The most important Community instruments in the field of nature are Directive 79/409/EEC on the conservation of wild birds and Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna. These directives give rise to considerable problems of implementation, and together they annually generate a significant number of complaints.

The Commission is well placed to play an important role in ensuring the adoption and conformity of national legislation as well as the achievement of major Community goals such as the establishment of Natura 2000 (a Community network of protected sites). However, the majority of complaints made in relation to these two directives concern threats to individual sites, where the Commission faces considerable difficulties. Site-specific complaints often call for a consideration of complex and localised factors, and will also often also relate to quickly evolving circumstances (for example, they may concern damaging projects which are already being carried out). The centralised enforcement mechanism currently available to the Commission is unsuited to dealing with such complaints, particularly in terms of speed of response, use of experts with local knowledge, and site visits.

Environmental Impact Assessment

Directive 85/337/EEC on environmental impact assessment constitutes one of the most frequent legal basis for complaints, petitions, parliamentary questions and infringement procedures.

Infringement procedures by the Commission mostly result from incorrect transposal into the national legal orders: conformity problems still subsist in several Member States, most notably

concerning the transposition into national law of the categories of projects listed in Annex II of the Directive.

Complaints and petitions tend mostly to be about the quality of the impact assessment studies, the examination of alternatives, and the failure of competent authorities to act on opinions validly expressed at public inquiries. It is very difficult for the Commission to investigate and intervene in such cases, the Directive being primarily of a procedural nature and not giving to the Commission enforcement powers to investigate the quality of the assessments or to monitor the results of the assessment process.

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