

THE CHALLENGE OF THE IMPLEMENTATION OF THE ENVIRONMENTAL *ACQUIS COMMUNAUTAIRE* IN THE NEW MEMBER STATES

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SUMMARY

The greatest ever enlargement of the European Union has taken place on 1 May 2004, with the accession of ten new Member States, the extension of the EU territory by twenty-three percent and the increase of population by twenty per cent. Moreover, the accession of eight of the new Member States consolidated the fall of the iron curtain between Eastern and Western Europe which lasted for over 40 years after the Second World War. This article describes the possible difficulties that the new Member States will very likely face to comply with their obligations under EC environmental legislation.

1 INTRODUCTION

A strong emphasis has been put on compliance by the applicants for EU membership with the *acquis communautaire*...

As a result, all new Member States are now presumed to have harmonized their legislation to the EU standards and to comply with the membership obligations. Of course, similarly to previous EU enlargements, a number of unilateral transitional periods have been granted to the new Members (including in the field of environment), and the EU has also “benefited” from a number of multilateral transitional periods (e.g. in free movement of workers or concerning the Schengen *acquis*); and it will take several years before the new countries meet the Maastricht criteria allowing them to participate in the Monetary Union. Another unique feature was the provision of pre-accession financing through ISPA, Phare and SAPARD; indeed around €3.5 billion are expected to be spent in the new Member States, Bulgaria and Romania for environment during 2000-6. However,

all in all, this biggest ever EU enlargement is also believed to be the most carefully and timely prepared one...

2 THE DEFICIT OF IMPLEMENTATION OF THE ENVIRONMENTAL *ACQUIS* IN THE EU-15

The EU environmental policy and legislation has been gradually adopted since the 1970s and is traditionally fighting “for the place in the sun” with the economic policies, in particular with the single market (“growth and competitiveness versus environmental protection”). A number of important judgments of the European Court of Justice helped to identify the mutual position of the two streams of the EU policy: the most recent examples include the *Commission v. United Kingdom* case C-30/01 (judgment of 23 September 2003) on the application of single market legislation with environmental components for Gibraltar or the ongoing litigation in the case *Commission v. Austria* (C-320/03) concerning environmentally driven restrictions of

transport over the Alps. Nevertheless, the environmental *acquis*¹ at present counts for 561 pieces of binding legislation², most importantly Directives, which the Member States are obliged to transpose, implement and enforce. And the field of environmental legislation is a dynamic one, with few new pieces of legislation adopted every year to review existing legislation or to cover new areas (e.g. the “Århus package”). ...

2.1 Specificity of EC Environmental Legislation

There are some peculiarities embodied in environmental directives which distinguish these from other areas of Community law and which are important for realising the causes of the implementation deficit in the Member States.

First of all, EC environmental directives are characterised by a number of secondary obligations (i.e. obligations that have to be complied with at a later stage after the entry into application of a directive). Therefore, ensuring compliance is not limited to a straightforward exercise of transposition, as might be the case in some areas, but it is necessary to ensure at a later stage, e.g. adoption of plans and programmes, designations or establishment of protected zones and areas etc. Some of the secondary obligations also imply establishment of infrastructure and major investments (urban wastewater treatment, drinking water, landfills etc.).

Secondly, compliance with EC environmental law is often related to the use of EC funding (namely LIFE, Structural Funds, Cohesion Fund, TENs and the pre-accession funds) or to funding from loans of the European Investment Bank. When it is required to be informed of projects, the Commission carries out a scrutiny of the utilisation of EC funds to ensure that projects conform with Community legislation especially for environment, competition and public procurement – see Article 12 of Council Regulation (EC) No. 1260/99 laying down general provisions on Structural Funds³, Article 8.1 of Council Regulation (EC) No 1164/94 establishing a Cohesion Fund⁴, as amended, and for the TENs Arti-

cle 7 on Compatibility of Council Regulation 2236/95 as amended⁵).

However, the cohesion policy is implemented in a decentralised way, and therefore the Commission is only made aware of the largest projects (Cohesion Fund and Large European Regional Development Fund (ERDF) projects).

Finally, many pieces of EC environmental legislation have a strong public participation component. This is now emphasized by the forthcoming ratification by the EC of the so-called Århus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Århus, Denmark, on 25 June 1998), whose three pillars require not only access of public to environmental information and public participation in decision-making involving environmental matters, but also access of the public to justice in this domain. Directives corresponding to the three pillars have been adopted or are expected to be adopted to implement the Århus Convention within the European Union legal order.

2.2 The Extent and Types of Problems in Application of EC Environmental Legislation

There are a number of sectors of the environmental legislation which cause more implementation problems than others⁸: nature protection, water and air quality, waste management and environmental impact assessment. In nature protection, the main problems include non conformity of transposing legislation, insufficient designation of Natura 2000 sites, incorrect assessment of plans and projects affecting the protected sites and breaches of requirements for strict protection of species. The water quality issues mainly relate to secondary obligations, such as designations of protected zones, adoption of pollution reduction programmes or construction of sewerage and wastewater treatment systems, while drinking water problems occur in few areas of the EU. Most problems with the air quality, on the contrary, concern lack of transposition or

reporting to the Commission. Non-conformity of legislation and lack of adoption of management plans are the most typical issues in the waste sector, together with the operation of illegal landfills in several Member States. Finally, concerns about environmental impact assessment stem mainly from complaints and are largely procedural, since Directive 85/337/EEC⁹ is a procedural one; the material aspects would refer to obligations from the legislation in other sectors, such as the two major nature protection Directives¹⁰...

The available statistics demonstrate that compliance with EC environmental legislation still proves to be difficult in the EU-15 and the number of infringements per year does not seem to diminish. The Commission tries to take proactive measures to avoid starting full-blooded infringement procedures, such as: package meetings, during which complaints or infringement cases are discussed with the authorities of the Member States; bilateral or multilateral proactive meetings to explain how Member States should comply with their obligations; various guidance documents; or reminder letters on adoption of new directives and deadlines for their transposition. The work of IMPEL, the informal network of Member States and the Commission for the implementation and enforcement of environmental law, has been also beneficial for ensuring consistent implementation and enforcement of the *acquis* throughout the Community, mainly through exchange of information, training of inspectors and development of best practice. Of course, the different breaches vary in gravity – and the aim of the Commission is to focus its attention in pursuing the infringements on serious breaches of a systematic character rather than on individual procedural omissions or isolated individual cases of bad application, which are often at centre of complaints from the citizens. An upstream approach which identifies the systemic shortcomings is preferred to a downstream one which tackles the symptoms. But in any case the deficit of implementation of the environmental *acquis* already in the EU of 15 Members is

obvious and has to be tackled through a combination of both proactive and enforcement means.

3 CHALLENGES OF IMPLEMENTATION OF THE ENVIRONMENTAL *ACQUIS* IN THE NEW MEMBER STATES

We mentioned in the beginning of this article that this enlargement is argued to be the best prepared one ever, since the preparation for membership was monitored by the Commission some seven years prior to accession (starting with the Opinions on Application for Membership of the European Union of the candidate countries on July 1997). Publication of annual reports of the Commission on progress of individual applicant countries in harmonising legislation and practice with the EU was always high on the political agenda and criticisms of slow progress appeared on front pages of newspapers. The monitoring continued even after the signature of the Accession Treaty, with the possibility for the EU to impose safeguard measures should the pace of harmonisation not be maintained.

However, given the rather unsatisfactory record of compliance with EC environmental law by the EU-15, it can be expected that the new Member States will face similar problems. A number of factors, specific for these new countries, confirm such forecasts.

Even more than in the old EU Members, environment is low on the political agenda. This was apparent already in the pre-accession period when various political and economic lobbies were trying to bypass or at least delay adoption of legislation transposing EC environmental directives and budgetary allocations for environmental protection were decreasing. A major challenge is obviously the financing of approximation. The costs of implementing the environmental *acquis* in the ten new Member States were estimated at € 50-80 billion and investments required from these countries were estimated at 2 to 3 per cent of GDP, higher than what is at present being allocated.¹¹

The EU will significantly contribute

to financing implementation by provision of resources from EU funds. € 21.7 billion will be made available to the new Member States from the Structural Funds and the Cohesion Fund until the end of the current budgetary period (31.12.2006), out of which € 3 billion in the Cohesion Fund is earmarked for the environment, while other environmental projects can be supported from the main Structural Funds. These contributions, together with the pre-accession funding from Phare, ISPA and SAPARD instruments, should significantly contribute to financing implementation measures. The experience in the EU15 also shows that national budgets must also be set aside, and indeed should be more substantial.

Apart from finding sufficient financial resources to cover remaining investment needs and co-financing of EC-funded projects, two other challenges emerge in relation to EC funding. The first is the so-called conditionality, i.e. compliance of co-financed projects with EC environmental legislation and policy. Another issue, which is specific for the new Member States, is the establishment of adequate administrative capacity to prepare 'pipelines' of projects of sufficient quality and to properly manage the use of EC funds¹². High attention to these issues has proven essential for maximising the utilisation of the EC funds by the beneficiary Member States and should be seen as a priority also by the new Members.

Well performing administrative structures will be necessary not only for administering EC funding, but also in ensuring correct implementation of the EC environmental law in general. Many environmental Directives require issuing of permits, monitoring of pollution and fulfilment of secondary obligations. A number of institutions, both horizontally and vertically, are typically involved in implementing these obligations and they need to be adequately staffed and well coordinated. A number of twinning projects under Phare have been carried out in the Central and Eastern Europe candidate countries prior to accession to strengthen their administrative capacity and to provide relevant training.

Preparedness of administration to cope with obligations arising from EU membership has also been checked through peer reviews in 2002 and 2003, as part of the monitoring of accession preparations.

Other possible drawbacks are deficiencies in law enforcement and a lack of legal culture in the countries in transition. The disobedience of legislation is not primarily seen by the society as a negative feature, especially when it does not affect private individuals or property. Harm to the state property or to a public interest is generally better accepted by the people. This may be particularly relevant for compliance with nature protection obligations, since it is more difficult to carry out monetary valuation of the damage caused to natural features. It is however fair to say that there are positive trends in these countries, and people start to discover the importance of non-material assets, such as clean rivers or biological wealth.

Finally, only slow progress is being made by the new Member States towards ensuring effective public participation in environmental decision-making. Of course the EC legislation (such as on the environmental impact assessment or access to information) directly related to participative democracy has been transposed into national legislation, but experience shows that practical application lags behind. Assaults on the basic principles of public participation were experienced when transposing legislation containing such provisions in the legislative process (such as the transposition of the nature directives in the Czech Republic's parliament). We may therefore expect a number of complaints by the citizens of the new Member States concerning access to environmental information and public participation in decision making.

4 MEASURES TO FACE THE CHALLENGES POSED BY ENLARGEMENT

From 1 May 2004, the ten new Member States are subject to the same obligations as the EU-15. They have to

comply with EC legislation, the national legislation transposing directives in force must be notified by that date and practical compliance must be ensured as well. Specific arrangements apply only in accordance with the transitional periods as agreed during the accession negotiations and spelled out in the Act of Accession¹³. Should the new Member States fail to comply with their obligations, the Commission may initiate the infringement procedure pursuant to Article 226 of the EC Treaty. Similarly, the Commission has a duty to investigate complaints lodged by EU citizens or NGOs against the new Member States.

The Act of Accession of the ten new Member States also foresees a number of intermediate targets within the agreed transitional periods. This is the first enlargement where such an arrangement has been made with the new Member States, with the aim to gradually fulfil the EC legal obligations rather than waiting until the (sometimes extensive) transitional periods elapse. The fulfilment of intermediate targets will be monitored as a matter of priority; non-compliance with these targets may trigger an infringement procedure.

A number of measures to eliminate possible opening of infringements immediately after accession have been undertaken both generally and in the environmental field. As concerns transposing legislation, the acceding countries were invited to use the pre-notification database for gradual storage of transposing legislation in an electronic version, aimed at avoiding a backlog of notifications on the date of accession. Most of the transposing legislation has been notified in this way and is now considered officially notified to the Commission.

Two systematic approaches have been undertaken as concerns ensuring compliance with environmental legislation by the Directorate-General for the Environment of the Commission. Shortly before the accession a series of environmental proactive meetings have been carried out in the new Member States, with the aim to explain to their national authorities responsible for compliance and enforcement how com-

plaint and infringement procedures work in practice, how to prevent escalation of infringements and how to communicate effectively on these matters with the relevant Commission services. Those meetings have been highly appreciated by all new Member States, as they provided first-hand practical information and enabled contact with the Commission counterpart in the matters of compliance with EC environmental law. Such meetings can provide a solid basis not only for bringing infringements to an end in the most effective way, but can also be followed by package meetings and other specific meetings as currently organised with the existing Member States.

DG Environment of the Commission has also launched a systematic conformity check for the ten new Member States, building on a similar experience with the EU-15. The objective is to analyse, within the next two years, transposing legislation for the main Directives and remove any non-compliance in an early stage, in close collaboration between the Commission and the Member States concerned.

Concerning complaint and infringement procedures, the same priorities as the ones for the EU-15 will apply, in line with the White Paper on European Governance¹⁴ and the Commission Communication on Better Monitoring of Community Law¹⁵. The first priority will be the non-communication cases (in the absence of notification of transposing measures), followed by the cases of non-conformity (based on the conformity checking exercise) and horizontal bad application cases (secondary obligations, transitional periods contained in the Act of Accession including intermediate targets to be met and conditionality of EC funding). Of course this will not exclude handling of all received complaints, as required by the EC Treaty and by the Commission Communication to the European Parliament and the European Ombudsman on the Relations with the complainant in respect of infringements of Community law¹⁶. Such non-priority complaints can be handled through alternative means (e.g. package meetings) and the

complainants should be encouraged to use the available national means of redress.

5 CONCLUSIONS

In this article, the possible difficulties that the new Member States will very likely face to comply with their obligations under EC environmental legislation were tentatively addressed. The key messages could be summarized as follows.

1. During the period prior to accession, the maximum possible was done, under close surveillance of the Commission. Therefore all obligations should in theory have been formally fulfilled by 1 May 2004. However, we can however expect that there will be failures, gaps and omissions.
2. It is natural that there will be infringements and that the Commission will receive complaints from citizens from the new Member States; this has been the case for all previous EU enlargements. It is also likely that the number of cases will be growing gradually rather than in a single step. Experience with the EU-15 shows that the more public awareness you raise the more complaints are triggered by the citizens who know better their rights.
3. The spectrum of problems, complaints and infringement cases against the new Member States is not expected to significantly differ from the situation in EU-15. It is also likely that they will concern similar issues, although there may be some specific aspects, such as the requirements to implement the investment heavy environmental *acquis*, inadequate administrative capacity or the lack of legal culture, which might cause some variations compared to the business-as-usual in the EU-15.
4. Limiting escalation of infringements will require effective use of proactive measures as described above, including bilateral meetings with the national authorities to discuss complaints, infringement cases or difficulties in implementation.

The same is of course valid for the existing Member States.

5. The EC funding should be to the maximum possible extent prioritised for co-financing of measures bringing about compliance with obligations of the environmental *acquis*. Good project preparation will have to be ensured. In turn the *acquis* itself must also be respected for the construction and financing of infrastructure projects.
6. Finally, the performance of countries which just acceded to the European Union will be under strong scrutiny, since this is the biggest ever enlargement and the new Members are less developed compared to the EU-15 average. The success or failure of this enlargement will be crucial for deciding about potential future enlargements of the EU and it would also be the most suitable response to the recent escalation of anti-European trends both in the old and the new Member States.

6 REFERENCES

- 1 Based mainly on Article 175 of the EC Treaty, but also on Articles 95 and 308 of the EC Treaty
- 2 Data from CELEX database, 19 May 2004; including all amendments and technical adaptations.
- 3 OJ L 161, 26/06/1999, p. 1.
- 4 OJ L 130, 25/05/1994, p. 1.
- 5 OJ L 228, 23/09/1995, p. 1.
- 8 For details, see Fourth Annual Survey on the implementation and enforcement of Community environmental law – 2002; Commission Staff Working Paper SEC(2003)804.
- 9 OJ L 175, 05/07/1985, p. 40.
- 10 Directive 79/409/EEC, OJ L 103, 25/04/1979, p. 1, and Directive 92/43/EEC, OJ L 206, 22/07/1992, p. 7.
- 11 Communication from the Commission to the Council and the European Parliament on 2003 Environment Policy

Review, COM(2003)745 final, page 38.

¹² Communication from the Commission on the Challenge of environmental financing in the candidate countries, COM (2001)304 final, p. 3.

¹³ Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the

Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L 236, 23/09/2003, p. 33.

¹⁴ COM(2001)428 final, p. 25.

¹⁵ COM (2002)725 final, p. 11.

¹⁶ COM(2002)141 final.