

## FEEDBACK TO LAW MAKING AND PERMITTING

BIEZEVELD, DR. GUSTAAF<sup>1</sup>

<sup>1</sup> Environmental Public Prosecutor, National Prosecution Office on Fraud and Environmental Crime, P.O. Box 19518, 2500 CM, The Hague, The Netherlands, g.a.biezeveld@om.nl.

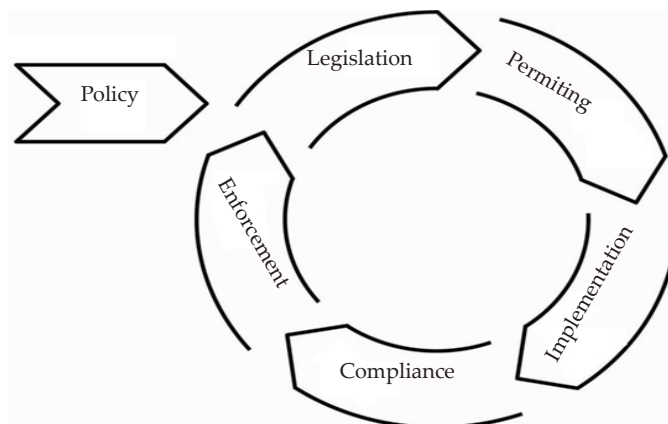
### SUMMARY

The model of the regulatory chain illustrates the existence of mutual relationships between legislation, permitting, implementation, compliance, and enforcement. Therefore, it is necessary that officials who are in charge with one of these regulatory tasks must always be aware of the whole chain and take into account what is required for good functioning of the chain. Due to differences in view and position, such an integrated approach is not always common.

It is in the interest of practitioners like inspectors, investigators, public prosecutors, and judges that the gap between their world and the world of legislators and permitting officials is bridged. In order to increase efficiency and compliance, these two worlds should be brought together. This paper provides examples of bridging this gap based on Dutch experiences. Further, it provides insights of practitioners that can be utilised by legislators and permitting officials.

### 1 INTRODUCTION

It is commonly accepted that the focus of policymakers, legislators, and permitting officials must be on the reality of producers, consumers, and intermediaries, as well as the executive branch of government. In other words: an *execution-oriented* attitude is required. The need for such an attitude can be illustrated by means of the model of the *regulatory chain*, introduced in 1984 by Dr. Pieter Winsemius, former Dutch Minister of Environment:



This chain that is driven by policies, consisting of five links: (1) legislation; (2) permitting; (3) implementation; (4) compliance; and (5) enforcement (including inspections). This model makes clear that the aimed results of policies, legislation, or permits can only be achieved if the following links are in good order. It also shows that the effectiveness and efficiency of execution, compliance, and enforcement are highly dependent on the quality of legislation, standards, and permits. The existence of mutual relationships between the links of the regulatory chain implies that officials who are in charge with one of these links must always be aware of the whole chain and must take into account what is required for good functioning of all links of the chain. Yet, such integrated approach is not common practice, as we all know from experience. This is mainly due to differences in view and position.

We all know that there is a difference between the world seen by inspectors, investigators, and public prosecutors and the world seen from the centres of Government or the offices of permitting officials. As a result, it is my general experience as public prosecutor that policymakers, legislators, and permitting officials have a rather optimistic view on human behaviour and the willingness of men and companies to comply with environmental regulations. This optimism does not always match the experiences of enforcement officials.

They have learned in practice that a majority of men and companies have a calculating attitude. This implies that they are always looking for opportunities to save costs or to make more profits. When they assess the expected profits of non-compliance of governmental rules greater than the risks of non-compliance, a majority of men and companies will choose for non-compliance. As result, enforcement officials are mostly more aware than legislators and permitting officials that environmental laws and permits must be accompanied by good conditions for enforcement and may not provide easy opportunities for non-compliance.

This brings me to another experience: policy makers, legislators and permitting officials are generally not in an adequate position to fully assess what conditions are needed for inspectors, investigators, public prosecutors, and judges to fulfil their enforcement tasks adequately. This applies to all levels of government.

An example of this is the absence of European provisions on co-operation and mutual assistance between competent authorities and inspectors in relation with the enforcement of environmental directives and regulations. In my opinion, such provisions are indispensable for the enforcement of the rules on transboundary activities with chemical substances, products, waste, and protected animals or plants. By comparison, there are European provisions on co-operation and mutual assistance in the field of criminal law, food safety, taxes, and customs.

These different views and positions of policy makers, legislators, and permitting officials on one side and enforcement people on the other side explain to a great extend why both environmental laws and permits quite often are not adequate

from enforcement viewpoint. Therefore, it is a great challenge for all of us to develop means to bridge the gap and bring these worlds together. In other words, how can *input* and *feedback* from the enforcement side be given to legislative and permitting processes at various levels of government?

Based on Dutch experiences, I would like to mention some examples and provide insights of practitioners that can be transferred to legislators and permitting officials. When I speak of practitioners, I really mean people who have practical knowledge based on their own recent experiences. This includes inspectors, investigators, public prosecutors, and judges, as well as those who have to comply with environmental laws and permits (such as a company and its lawyers).

## 2 CHECKLIST FOR LEGISLATORS AND PERMITTING OFFICIALS

From 2001 to 2004, I participated in a joint project of the Dutch Ministry of Environment and the Board of the Public Prosecutors to create better conditions for the enforceability of environmental legislation. This project resulted in a handbook for policy makers and legislators with recommendations on behalf of the enforceability of environmental legislation. These recommendations are based on experiences and insights of practitioners. A summary of these recommendations (the so-called golden rules) that can be used as checklist is included as an annex to this paper.

The Dutch “golden rules” have been used as input for the project “Developing a checklist for assessing legislation on practicability and enforceability” of the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL). For further clarification see Annex 2 and/or visit [http://ec.europa.eu/environment/impel/pdf/pe\\_checklist.pdf](http://ec.europa.eu/environment/impel/pdf/pe_checklist.pdf).

In my view, such checklists are an indispensable tool for legislators and permitting officials, but to get the best results they should be used in interaction with practitioners. Its contribution to better regulation is highly dependent on the awareness of legislators and permitting officials that good legislation cannot be made without the contribution of practitioners and their willingness to take the practitioner’s input seriously. Consequently, practitioners should become actively involved in legislative and permitting processes.

## 3 INVOLVEMENT OF PRACTITIONERS IN THE LEGISLATIVE PROCESS

In the Netherlands, it has become practice that the Board of Public Prosecutors is invited by the Ministry of Justice to advise on proposals for new environmental regulations (prepared by the Ministry of Environment, the Ministry of Water management or the Ministry of Agriculture, and Nature). The same happens when environmental regulations are reviewed or evaluated; during which practitioners from the Public prosecutors’ offices or the police with the required expertise are involved to assess the proposals. Quite often advice is asked in a late stage of the

legislative process so that there is little room left for essential changes. Therefore, a more effective way is direct involvement of public prosecutors and the police in an earlier stage by the Ministries concerned.

One of the input activities in which I was involved concerned the making of a new integrated regulation on acts with firework in the interest of the protection of human health and environment. The impetus for this was a serious explosion in a fireworks plant in the city of Enschede in 2000. Twenty-two persons were killed by this explosion and many more wounded. In a vast area houses were destroyed. Research proved that insufficient enforcement by the local government in combination with inadequate legislation had provided an opportunity for the owner to store more hazardous fireworks than was permitted. It was my task to give advice to the legislative officials concerned based on the knowledge and experiences that the police and environmental public prosecutors had gained during the nineties about illegal acts of both companies and private persons with firework. I was assisted by a working group consisting of inspectors and investigators (police) with a broad experience in the fireworks' field – import, trade, store, shows and transport. From the beginning members of this working group were asked to check the adequacy of drafts of the new regulation from the enforcement viewpoint. The Ministry of Environment took our comments very seriously.

That working group also played an important role in preparatory activities on behalf of the implementation and enforcement of the regulation. As a result, the implementation of the new regulation was accompanied by the setting up of a specific comprehensive organisation for the inspection and the collection and exchange of enforcement data about illegal acts with firework. Members of the working group also contributed to training programs for national and provincial inspectors, policemen, public prosecutors and judges.

Based on my experiences I think that there are at least four essential conditions that have to be fulfilled for successful input and feedback by practitioners.

A *first* condition is that the policymakers and legislators have an execution-oriented attitude. This implies that they have an open mind and ear for input and feedback from the enforcement side and are convinced of the benefits for the quality of legislation. This is not ensured on forehand, I dare to say. As far as the Netherlands are concerned I have noticed that within the various ministries an execution-oriented attitude is not yet common practice. Probably the situation in other countries is not quite different.

A *second* condition is that the planning and organisation of the legislative process must provide the time and room needed for input and feedback from practitioners. This must be agreed between the Council of Ministers and the Parliament and, subsequently, the Ministers and the governmental officials involved. The sooner and more frequent input can be given into the process, the more it will contribute

to the quality of legislation. For input and feedback it is not necessary to participate in meetings. Internet is a very efficient means for this purpose.

A *third* condition is that there are capable practitioners available who are able and willing to give input and feedback to policymakers and legislators. It is my experience in the Netherlands that it is not so easy to find the right practitioners. I am sure that there are many practitioners who can contribute to the quality of legislation, but most are unknown to policy makers and legislators. Therefore, the Ministries should be stimulated to set up pools of practitioners in the various fields of environmental policy. These pools can be trained to give input and feedback and to become familiar with the legislative process at the national level.

A *fourth* condition is that policy makers and legislators are able to withstand pressure from the Parliament, non governmental organisations, economic sectors and media to speed up the legislative process. In the Netherlands it has become common practice that ministers are pressed by various groups – directly or via the Parliament – to speed up the legislative process, often with negative effects on practicability and enforceability.

#### **4 INVOLVEMENT OF PRACTITIONERS IN THE PERMITTING PROCESS**

At the provincial level of government it has become practice that provincial inspectors are invited to assess drafts of environmental permits for industrial installations and waste management plants on enforceability. Sometimes also the public prosecutors' office is consulted on the enforceability of specific provisions.

#### **5 FEED BACK FROM CRIMINAL INVESTIGATIONS**

In 2005, the Dutch National prosecution office on fraud and environmental crime, that is charged with the guidance of investigations and the prosecution of environmental crimes, and the investigation departments of both the police and some Ministries agreed to give feedback on found shortcomings of environmental legislation, permits or inspection practices.

The procedure is as follows. At the end of an investigation the chef of the investigation team makes a report with relevant conclusions and recommendations for the legislator or the competent authority, to be approved by the public prosecutor concerned. The report is sent by the head of the investigation department to the Minister of Home Affairs, who will address the report to the responsible Minister or other competent authorities. For example, since 2005, reports have been presented to competent authorities on hazardous and non hazardous waste, contaminated grounds, illegal fireworks, and protected endangered species.

## 6 CONCLUSION

This paper has only provided a few examples, but many more exist. There are other ways of giving input or feedback as well. However, input and feedback take place and both are indispensable for a good functioning of the regulatory chain. They require much from inspectors, investigators and public prosecutors, as well from law makers and permitting officials. In any case, excellent contacts, mutual respect, and the ability to translate enforcement experiences into legislative, judicial and organising solutions are necessary conditions for successful input and feedback.

Therefore, I am convinced that the two worlds can only be brought together if both sides are ready to co-operate and get the opportunity to meet each other and exchange insights and experiences. Only then there is a chance that all parties involved become aware that they are *partners* in one regulatory process in the interest of the protection of the environment, human health and safety. The regulatory chain is not only a model of regulatory activities. It is also a model of co-operation between various governmental officials and offices.

## ANNEX 1: GOLDEN RULES FOR ENVIRONMENTAL LEGISLATORS

### 1 PREPARATION

#### *Golden rule 1*

Start every new legislation project with a careful description of the policy problem for which the legislation must offer a solution, and with choosing a suitable direction to the mainlines of the solution. In doing so make deliberate choices concerning the way in which the behaviour of companies, citizens or government bodies is to be influenced.

#### *Golden rule 2*

A good starting memorandum for new legislation is the result of:

- a. teamwork of the policy maker and the lawyer who will draft the legislation
- b. dialogue with practitioners

#### *Golden rule 3*

For new legislation chose as much as possible for a legal framework or a legal basis, with which:

- a. both men and environment can be protected (concerns: purpose)
- b. all consequences for both men and environment can be met (concerns: reach)
- c. limits can be set to all activities and acting (legal) persons, that contribute (to a relatively considerable extent) to the problem (concerns: scope)

Doing so, take into account the existing possibilities of other legal provisions, also of other ministries and authorities.

***Golden rule 4***

Always use the need for new legislation to combine new and existing rules in one law or decree, in case these rules (partly) concern the same issue or the same target group. It benefits the implementation, compliance and enforcement of the rules.

***Golden rule 5***

Constantly be aware that the extent to which and the way in which the freedom of people is limited, is of a direct influence on the (possibilities of the) implementation, compliance and enforcement of the rules.

***Golden rule 6***

Make a well-considered choice concerning the administrative authority that will be competent to implement and enforce the rules, because of:

- a. the nature, volume and complexity of both the implementation- and enforcement tasks in relation to the activities they focus on, and the coherence with other sets of activities;
- b. the potential seriousness and scale of the consequences for men and environment and fair competition in case of non-compliance of the norm;
- c. the level of "mobility" (across administrative borders) of the target group.

***Golden rule 7***

Concerning enforcement make deliberate choices about the role of administrative law, penal law and if desired civil law in the light of:

- a. the collective and individual (legal) interests that an intended set of rules aims to protect as well as the potential nature, scale and effects of infringements on these interests as a consequence of non-compliance of these rules;
- b. the possibilities to inspect and trace offences of the intended set of rules and the efforts this probably will cost;
- c. the extent to which the competent authority for implementation and enforcement can get into a conflict of interest;
- d. the extent to which the target group, citizens and intermediate organisations may have an interest and are willing and capable to take (civil) action themselves against non-compliance of the proposed legislation.

***Golden rule 8***

During the preparation of the legislation develop, together with the involved competent administrative body, a vision on the desired organisation of the inspection. Create political consensus on this topic and lay it down in the explanatory memorandum to the legislation

**Golden rule 9**

In all stages of the preparation of the legislation stay in touch with persons who have practical knowledge on the possibilities to implement, comply and enforce the intended rules.

**Golden rule 10**

Take good care of finding appropriate conversation partners with practical knowledge and create, where suitable, a knowledge pool of experienced practitioners, in co-operation with the administrative bodies involved in the issue.

**Golden rule 11**

In preparing or implementing European legislation, follow as much as possible the same approaches used for the preparation of national legislation.

**2 DESIGN****Golden rule 12**

Always take care that there can be no doubt about:

- a. *what* the norm is that has to be complied with;
- b. to *whom* the rules refer, so by whom they have to be fulfilled or complied with and by whom the inspection on compliance is to be carried out and against whom, if necessary, enforcement action has to be directed;
- c. *how* inspection can be done and how it can be determined whether or not there is compliance with the norm.

**Golden rule 13**

Limit the number of exceptions to the norm as much as possible.

**Golden rule 14**

If an exception is absolutely necessary: describe it in a separate paragraph or article because of clear liability to punishment.

**Golden rule 15**

Assure that non-compliance of each direct or indirect norm is forbidden.

**Golden rule 16**

Assure yourself that every punishable rule has been formulated in such a way that it provides a sound basis for a future indictment. The norm must be formulated in one provision, be as short and coherent as possible and preferably without reference to another article or part(s) of article(s), annexes or other regulations.

**Golden rule 17**

Clearly indicate in every regulation what the 'core provisions' are, so that both the target group and the competent inspection and enforcement officials know which norms have to be fulfilled and enforced under all circumstances.

**Golden rule 18**

Constantly keep in mind while formulating provisions that in enforcement situations all elements of the provision have to be proven. So only use these elements that are absolutely indispensable.

**Golden rule 19**

When drafting a rule that includes a duty to provide for, look for a good balance between space for the addressee's own responsibility and the clarity on the reach of this.

**Golden rule 20**

If you have to choose between a so-called 'target-provision' and a 'means-provision' then let the aspect of 'enforceability by the authorities' have a heavier weight as the consequences of non-compliance for men or environment can be more serious.

**Golden rule 21**

Assure that for each norm with a technical character it is clear *how* it can be determined to what extent the norm is complied with.

**Golden rule 22**

Avoid that the way in which to determine the composition of the leach out values of a substance, product or waste product varies as it is considered to be a substance, a product or a waste product.

***Golden rule 23***

Leave enough room for technical and methodological developments and for the application of adequate inspection and enforcement methods in the description of a certain technique or method that is used to determine the compliance of a norm; preferably by determining that another than the prescribed technique or method is allowed, provided it has the same level or reliability and representiveness.

***Golden rule 24***

Always check if persons who - for the determination of the compliance of a (technical) norm - sample, analyse, measure or calculate or who make use of or provide others with the data acquired from these activities, can be obliged to practice the necessary care.

***Golden rule 25***

Always remember that without obligations to report and register, adequate inspection and enforcement against non-compliance is not possible in the area of (chain)activities with substances, products and waste products.

***Golden rule 26***

Indicate in the introduction to the rules or in the explanatory memorandum on which legal requirement(s) the norms in a governmental or ministerial decree are based.

***Golden rule 27***

When drafting a ministerial decree based on a number of different legal requirements, be aware of the consequences that differences between these legal requirements can have for the practicability and enforceability.

***Golden rule 28***

When changing a norm or penalisation, pay ample attention to the legal transitional stage from the old to the new situation.

***Golden rule 29***

Let, as far as possible, the desired circle of target groups, strongly determine the choice for a specific legal framework or a specific regime of activities or a combination of legal frameworks and regimes of activities.

**Golden rule 30**

Constantly realise that the one who is not part of the target group of a set of rules, is not bound to comply with these rules.

**Golden rule 31**

Take care that the circle of the target group is sufficiently broad to assure that:

- a chain of activities with a substance, product or waste product is closed and
- all (natural or legal) persons that can act contrary to the (aim of the) rules, are under the rules and can be checked for compliance and can be addressed in case of non-compliance

**Golden rule 32**

Nominate categories of target groups that have to deal with more than one set of environmental rules, as much as possible in a uniform way. Anyway this goes for:

- a. the one who carries responsibility for a company
- b. the manager (i.e. owner or keeper) of an activity (either or not in progress)
- c. transporter.

**Golden rule 33**

Keep the description of the scope of a governmental or ministerial decree as simple and short as possible.

**Golden rule 34**

Make sure that the territorial sphere of action of a law is broad enough to, if necessary, also set norms and enforce these on board of your country's aircraft or ships

**Golden rule 35**

Leave out demarcation provisions between laws concerning aim, reach or scope of the norms in laws and decrees. If possible delete existing demarcation provisions.

**Golden rule 36**

Give explicit attention to the penalisation of norms, if enforcement support from the side of the penal law is considered desirable; also think about norms in European directives and regulations.

***Golden rule 37***

Forward a mature proposal to the Ministry of Justice concerning the way in which non-compliance with a norm can be included in the penal code.

***Golden rule 38***

Constantly be aware of the effects that a change of numbers of paragraphs or articles can have for the use of other legal provisions.

***Golden rule 39***

Always take care that there can be no doubt about the question which administrative authority is competent in a concrete situation for the implementation and administrative enforcement, including inspecting compliance with the norms.

***Golden rule 40***

As much as possible put the competence of implementation and administrative enforcement in one hand concerning all the norms that are valid for a recognisable category of target groups.

***Golden rule 41***

Make a coherent administrative enforcement possible of all the regulated activities of all target group, in case of activities with a substance, product or waste product being part of a chain.

***Golden rule 42***

Take care that the inspection on compliance of all norms in relation to all target groups has been properly organised. Make clear who is the competent authority and promote that officials of different authorities have simultaneous competence's to inspect the compliance of the norms.

***Golden rule 43***

Make it possible that, in the case of activities with a substance, product or waste product, that is part of a chain, coherent chain inspections on all regulated activities and target groups can be carried out.

### 3 IMPLEMENTATION

**Golden rule 44**

Properly and timely prepare the introduction of new legislation, in co-operation with those that have to implement it, comply with it and enforce it. Don't forget the police and the public prosecutor's office.

**Golden rule 45**

Make an implementation plan focused on the timely realisation of a situation in which all categories of actors have the *knowledge* and the *ability* to do what is necessary for a proper implementation, compliance and enforcement, and that these actors in vast majority are *willing to act* and *do act*.

**Golden rule 46**

Take at least two years for aftercare of new legislation.

### 4 FEEDBACK AND EVALUATION

**Golden rule 47**

Always offer the ones that have to implement, comply or enforce the new legislation the opportunity to provide feedback in a practical way. Inform people what has been done with their feedback.

**Golden rule 48**

Always evaluate the functioning of legislation against the background of the policy problem for which it was intended to provide a solution.

## ANNEX 2



IMPEL Project

“Developing a checklist for assessing legislation on practicability and enforceability”

project report – abridged version

( full version can be found at: [http://ec.europa.eu/environment/impel/pdf/pe\\_checklist.pdf](http://ec.europa.eu/environment/impel/pdf/pe_checklist.pdf) )



### Introduction to IMPEL

- The European Union Network for the Implementation and Enforcement of Environmental Law is an informal network of the environmental authorities of EU Member States, acceding and candidate countries, and Norway. The European Commission is also a member of IMPEL and shares the chairmanship of its Plenary Meetings.
- The network is commonly known as the IMPEL Network.
- The expertise and experience of the participants within IMPEL make the network uniquely qualified to work on certain of the technical and regulatory aspects of EU environmental legislation. The Network's objective is to create the necessary impetus in the European Community to make progress on ensuring a more effective application of environmental legislation. It promotes the exchange of information and experience and the development of environmental legislation, with special emphasis on Community environmental legislation. It provides a framework for policy makers, environmental inspectors and enforcement officers to exchange ideas, and encourages the development of enforcement structures and best practices.
- Information on the IMPEL Network is also available through its website at: <http://europa.eu.int/comm/environment/impel>

### Summary and overview of the checklist

- In the policy debate on better legislation at the European and national level, there is a growing consensus on the need to address the implementation deficit. EU legislation, including environmental legislation, is too often not properly or fully implemented across Europe. There is real evidence of practicability and enforceability problems caused by the way legislation is designed and written and by poor implementation conditions.
- Problems of practicability arise when competent authorities in the Member States encounter difficulties in the practical application of legislation, because insufficient attention has been paid to the need for proper transposition into national law and application through individual administrative decisions, or to the need for adequate infrastructure and resources. Problems of practicability may also be faced by the regulated target group when their obligations as defined by the legislator are unclear or unrealistic. At the end of the regulatory chain, legislation, to be credible and effective, also needs to be enforceable by competent authorities if the regulated target group fails to comply. Enforceability requires thoughtful consideration, at an early stage, of such issues as the technical and practical feasibility of monitoring and inspection, the resources required to detect and prove violations, and the availability and deterrent effect of administrative or penal measures to sanction offenders.
- In order to encourage policymakers, legislators and stakeholders to devote more attention to likely problems of practicability in implementation and enforceability throughout the legislative process, with a view to anticipating and remedying practicability and enforceability problems through a pro-active approach, IMPEL, the European Union Network for the Implementation and Enforcement of Environmental Law, initiated a project aimed at producing a practical checklist to assess the practicability and enforceability of existing and new legislation with the aim of improving the overall implementation of EU environmental law in the Member States.

- The checklist, as presented in this report, was developed through a process designed to draw upon the practical experience of members of the IMPEL Network in the implementation and enforcement of EU environmental law. A draft checklist was prepared by experts in consultation with a project team and international review group consisting of legal and enforcement experts, based on research into practicability and enforceability problems and various existing national and European initiatives and tools designed to address these problems. The draft checklist was discussed at an international project workshop with the participation of experts from 17 IMPEL Member countries and EU institutions. Participants to the workshop assessed the provisions of two pieces of EU legislation, the IPPC-directive and the Waste Shipment Regulation, with the aim of exploring practicability and enforceability issues and testing the checklist. The checklist was further refined in light of the workshop's findings and recommendations. The checklist was finalised taking into account the views of the review group and the IMPEL Cluster on Better Legislation.
- The checklist is designed to enable actors and stakeholders in the legislative process to assess EU environmental legislation (and associated national legislation and implementation efforts) on various aspects of practicability and enforceability, both *ex ante* and *ex post*. Practicability and enforceability considerations can be assessed and addressed at various stages of the legislative process by different actors: policy and legal experts and officials of the Commission and of the Member States, Members of the European Parliament and their staff and the legal/drafting services of the European Parliament and Council secretariats. In their different capacities and roles, all these actors can have a decisive influence on the design and wording of environmental legislation. Stakeholders such as national authorities competent for implementation and enforcement, European networks like IMPEL, the regulated community and NGOs, can also use the checklist to provide input into the legislative process based on their own insights and experiences.
- The checklist is structured in five sections to facilitate its use at various stages of the legislative and implementation process. It takes into account the differences between different types of EC legislative acts. The questions are intended to help users address the relevant issues thoroughly. However, not all questions are relevant at all stages of the process, and users may decide to use parts of the checklist selectively, based on their specific role in the process, expertise and concerns.
- In most cases, it will not be possible to answer the questions by "yes" or "no". Users are encouraged to approach them rather as open questions. In a way, asking the questions is as important as answering them. In fact the questions here below can be used in different ways: as a real checklist, as a questionnaire and as an aide-mémoire.

### **Project Recommendations**

1. All actors at the different stages of the EU legislative and implementation process should take Practicability and Enforceability (P&E) issues into account.

Relevant stages are:

- During the pre-legislative (pre-proposal) phase: when drafting proposals and organising Impact Assessment (IA) and consultative processes on draft proposals for legislation;
- During the formal EU legislative procedure: when negotiating legislative proposals;

- After adoption of EU legislation: when transposing the adopted legislation or establishing complementary legislation at Member State level;
- During implementation of legislation: when securing sound implementation conditions;
- After implementation of legislation: when carrying out ex post assessments and review processes.

Actors are: European Commission, Council, European Parliament, Member States (through Council and at transposition/implementation stage).

2. Stakeholders - parties who have an interest in practical and enforceable legislation and who can give insights on how to achieve this – should be consulted in a timely manner to ensure that relevant experience on practicability and enforceability is taken on board.

Stakeholders are: national authorities competent for implementation and enforcement, the judiciary, IMPEL and other Implementation and Enforcement Networks.

3. In order to get involved and to time efforts, stakeholders need a clear, accurate and up-to-date timetable of the Commission legislative agenda (roadmaps), including information on what issues are involved.
4. Actors and stakeholders are recommended to use the P&E Checklist to ensure that all relevant P&E issues are taken into consideration and that P&E issues are assessed and addressed in a structured way.
5. The P&E Checklist can be used stand alone or in conjunction with other better legislation tools, like the *Joint Practical Guide* of the EU institutions. It is recommended to explore the possibilities of incorporating elements of the P&E Checklist in the Guide and in the Impact assessment Guidelines of the European Commission.
6. More effort is needed to secure that stakeholders have sufficient capacity to provide the necessary input, to maximize synergies between existing networks and to make sure that the full range of stakeholders (e.g. public prosecutors) get involved.

#### *IMPEL specific Recommendations*

7. IMPEL cluster 3 (Better Legislation) is recommended to use the P&E Checklist when offering advice on the practicability and enforceability of new and existing legislation on basis of IMPEL Members experience. It is suggested that the Cluster apply the Checklist on some more legislation to develop it further.
8. IMPEL members are recommended to use the Checklist in national fora and to exchange experiences on its use, for example in the IMPEL cluster 3. IMPEL is recommended to provide for translations of the Checklist in the IMPEL country languages so as to get the broadest uptake possible.
9. IMPEL and its members are recommended to promote the Checklist, contacting all relevant actors and stakeholders in the EU legislative process both on a national and EU level and using a proper communication strategy.

10. IMPEL is recommended to consider developing links to relevant networks and Better Legislation initiatives from interested parties. In particular IMPEL should look for opportunities to promote the P&E Checklist in connection with *The Barriers to good environmental regulation* Paper, currently developed by The Heads of European Environmental Protection Agencies Network.

## The IMPEL Checklist on Practicability and Enforceability

### A. Questions relating to legislative policy and the choice of legislative instrument

**Primary addressee:** Commission policy makers and MS experts involved in the consultation process.

**Phase of the legislative process:** very early stage of the legislative process, as part of IA when there is a proposal, and potentially as part of an ex post evaluation.

**Explanatory remarks:** The questions in this section relate to the choice of the legislative instrument – whether directive or regulation. They are inspired by relevant policy documents on the application of the principles of subsidiarity and proportionality and on ‘better regulation’. In practice the choice of legislative instrument might well have been made before the Impact Assessment and the IA is only carried out on the actual proposal – i.e. after the choice between regulation or directive (or other instrument) has been made. In this case the evaluation of the practicability and enforceability of proposed legislation arises only after the basic policy choice to have recourse to legislation as an instrument has already been made.

In the Inter-institutional Agreement on better law-making of 16 December 2003, the European Parliament, the Council and the Commission have recalled the definition of the term ‘directive’ in Art. 249 of the Treaty, which provides: ‘A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’ The same Inter-institutional Agreement further states that, in formulating proposals for directives, ‘the Commission will ensure that a proper balance is struck between general principles and detailed provisions, in a manner that avoids excessive use of Community implementing measures.’ In the Agreement, the Commission commits itself to ‘explain and justify to the European Parliament and to the Council its choice of legislative instrument’.

The following provisions of the 1997 Protocol on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty are also directly relevant to the choice of legislative instrument: ‘The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. (...) Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as

possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.'

### Questions

1. If the proposed choice of legislative instrument is a Directive, is this choice justified in view of its contents and purpose?

Does it provide sufficient flexibility to facilitate its transposition and insertion into the national legal systems of the Member States, without compromising the effective achievement of the results it pursues?

Is the Directive sufficiently clear about the results to be achieved by Member States?

2. If the proposed legislative instrument is a Directive, has a proper balance been struck between general principles and detailed provisions?

Does the Directive allow for the use of different regulatory instruments and alternative options for implementation and, if so, is it sufficiently clear under what conditions these instruments and options can be applied?

Where desirable flexibility is provided by the Directive, would it nevertheless be useful to provide complementary, non-binding guidance material for national authorities in charge of transposition and implementation?

Where flexibility is considered undesirable, would the choice of a Regulation not have been more appropriate in view of the perceived need for a fully harmonized approach?

3. If the proposed choice of legislative instrument is a Regulation, is this choice justified in view of its contents and purpose?

Is it necessary that the intended measures be applied in a uniform manner in all Member States?

If there is no true need for uniform application, would the choice of a Directive not have been more appropriate in view of subsidiarity considerations?

4. If the chosen legislative instrument is a Regulation, are its provisions actually capable of direct application in all Member States?

Has the need for complementary legislation clearly been identified?

## B. Questions relating to the suitability for transposition and implementation

**Primary addressees:** Commission policy makers, evaluation units, and Member States' policy and legal experts/negotiators

**Important stakeholders:** national authorities competent for implementation

**Phase of the legislative process:** is primarily focused on the proposal stage of the legislative process (and could be a core part of IA process). Potentially also as part of an ex post evaluation.

**Explanatory remarks:** This set of questions addresses the next stages in the EC regulatory chain, from the perspective of the public authorities competent for transposition and implementation in the Member States. Issues of practicability from the perspective of the regulated community are no less important, but are addressed by a separate set of questions (see section D).

Transposition, as explained above, is only relevant where the EC legislative instrument used is a Directive. In this case, implementation in the Member States follows transposition into their domestic law. In the case of a Regulation, no transposition is required, and the directly applicable provisions of the EC legislative instruments are to be implemented as such, though complementary provisions of domestic law may be required to enable effective implementation. Because of this fundamental difference between both types of legislative instrument, additional specific questions have been developed to complement the general ones that are common to both choices.

### Questions

5. Does the legislative instrument clearly and unambiguously spell out the requirements and tasks for the national authorities competent for implementation?
6. To the extent that EU institutions or EU bodies, specifically established under the legislative instrument or designated by it, are given implementation tasks, is the division of responsibilities between these institutions or bodies and the competent national authorities clearly spelled out?
7. Does full implementation of the legislative instrument require the adoption of implementing measures at the EU level (i.e. delegated rule-making through comitology procedures)? If so, are such measures likely to be adopted in time?
8. Has the need for any support on EU level for the national authorities competent for implementation prior to the date of application of the legislative instrument (e.g. through guidance materials or other practical measures) sufficiently been considered?
9. Has the need for any cooperation between the Member States (and, if relevant, between Member States and non-member States) in the implementation of the legislative instrument sufficiently been considered?

Has sufficient attention been given to the possible need for exchange of experience on EU level between the national authorities competent for implementation after the coming into force of the legislative instrument?

10. Are the implementation burdens for the (national and, where applicable, European) authorities competent for the implementation of the legislation clear? (human resources, financial resources, knowledge and/or training, performance of new functions, ICT, organisational structure, etc.)

Are these burdens proportionate to the intended results?

Has a proper balance been struck between public and private burdens?

11. To the extent that the legislative instrument imposes monitoring and/or reporting obligations on national authorities, are these obligations proportionate to the intended results and has the resulting administrative burden been kept as low as possible?
12. To what extent are/were national authorities competent for implementation involved in the development of the legislation at the appropriate stages of the legislative process and have their opinions on implementation burdens been taken into account ?

#### **Specific question for Directives**

13. Is the time period allowed for transposition of the Directive into national law adequate (e.g. for administrative changes or making investments)? Does the date by which the Directive is to be transposed leave Member States sufficient time to properly prepare their implementing bodies for the practical aspects of implementation?

#### **Specific questions for Regulations**

14. To the extent that the provisions of the Regulation are not fully self-executing, does it leave Member States sufficient time to adopt whatever complementary national legislation may be required for its full implementation?
15. Does the date by which the Regulation comes into effect leave Member States sufficient time to properly prepare their implementing bodies for the practical aspects of implementation?

### **C. Questions relating to the quality of the legislation**

**Primary addressees:** Commission, Council and European Parliament legal drafting units; MEPs; Member States' legal experts/negotiators

**Important stakeholders:** national authorities competent for implementation

**Phase of the legislative process:** This is at the proposal stage - where the concepts of the proposal (objectives, targets, target audience, timescales) have been worked out and need translation into robust legislative language.

**Explanatory remarks:** These questions relate to the intrinsic quality of legislative drafting and are formulated in such a way that they can be applied to any existing or proposed provisions of EC environmental legislation, whether in the form of a Directive or a Regulation, referred to as 'the legislation' (in the event of legislative proposals this obviously should be read as 'the proposed legislation').

## Questions

16. Does the preamble clearly state the intended environmental result of the legislation?

Does the preamble justify and explain the enacting provisions in simple, understandable terms?

Is it fully consistent with these provisions?

17. Does the legislation contain any provisions without legislative character (e.g. wishes, political statements) which may confuse the addressees or seem to contradict the actual normative provisions?

18. Have all the key terms been properly defined, while avoiding excessive detail in definition which may hamper enforcement? Are the definitions clear and consistent with the definitions in related legislation?

Is the same term used throughout to express a given concept consistently with the definitions?

19. Is it clear from the provisions of the legislation who are the ultimate addressees of the rights and/or obligations they set out?

20. Are the rights and/or obligations of those to whom the legislation is to apply clearly defined?

Has the use of exceptions been minimised?

Are any technical standards laid down in the legislation clear?

21. Besides the actual target group, will other parties be confronted with the legal effects of the legislation and, if so, does this come across clearly?

22. Are the rules formulated in such a way that the addressees can read and understand them easily?

Is the wording clear, simple, concise and unambiguous? Have unnecessary abbreviations, 'Community jargon' and excessively long sentences been avoided?

23. Are the various provisions of the legislation consistent with each other?

24. Is the legislation consistent with existing legislation (including any international conventions binding on the EC) and has pointless repetition of existing provisions been avoided?

Are any references to other texts precise? Have unnecessary cross-references which make the text difficult to understand been avoided?

25. Does the legislation contain annexes or refer to implementing rules to be laid down at EC level (delegated legislation), guidelines, technical reference documents or other documents that have to be taken into account for purposes of implementation and/or enforcement?

If so, is the legal status of these instruments clear and do they themselves meet the practicability and, where relevant, enforceability criteria of this checklist?

26. To the extent that the legislation amends or further develops existing legislation, have any opportunities for consolidation sufficiently been considered?

Have any opportunities for integration with other relevant pieces of legislation sufficiently been considered?

Has any relevant case-law of the ECJ on the existing provisions been taken into account?

#### D. Questions relating to the practicability of compliance by the regulated target group

**Primary addressees:** Commission policy makers, evaluation units, Member States' policy experts/negotiators

**Important stakeholders:** national authorities competent for transposition and implementation and regulated target groups (e.g. industry)

**Phase of the legislative process:** is focused on the proposal stage of the legislative process (and could be a core part of IA process). Potentially also as part of an ex post evaluation.

**Explanatory remarks:** This set of questions is aimed at assessing the likely response of the regulated target group to the legislation, bearing in mind that the political choice to have recourse to legislation as a policy instrument has in principle been made. It draws most heavily on the *Table of Eleven*, a tool developed in the Netherlands which can help map the strong and weak points of rules with respect to the likelihood of compliance and the feasibility of enforcement. It consists of eleven dimensions, which together determine the extent to which legislation is complied with. The eleven dimensions are formulated with a view to achieving the highest possible practicability in the fields of policy development and law enforcement. See also Annex 4.

In applying this part of the checklist, users should be aware that what matters for the ultimate addressees of the legislation is not so much the EC legislative text itself, but their perception of it, as they are confronted at their level with either the provisions of domestic law transposing the requirements of a Directive, or the directly applicable provisions of a Regulation, as interpreted and applied by competent national authorities in the domestic legal context, together with relevant complementary provisions of national law. Since all of these elements are not fully known at the time EC legislation is drafted, users of the checklist will have to make a number of assumptions about these various factors which will influence the target group's perception and resulting behaviour. The relevance of some questions and the possibility of answering them with any degree of confidence will vary widely according to national circumstances. If it is not possible to address some questions during the legislative process at the EU level, the same questions will most likely have to be addressed at the stage of transposition or elaboration of complementary national legislation. To the extent that the ultimate impact of the legislation on the target group depends on choices made in a national legislative process, this section of the checklist will be of particular importance for those involved in this process.

Like all other sections, this section of the checklist has been drafted from the perspective of public authorities concerned with ensuring the highest possible level of compliance with rules that have been or are intended to be laid down. It is not primarily concerned with evaluating the burden and cost of compliance for the regulated community, which is an issue that normally should be addressed at an earlier stage in the policy development process, when the political decision whether or not to legislate, rather than how to legislate, is made. Obviously, the practicability of compliance is a question that is closely related to that of administrative burdens and compliance costs for the private sector, which are key issues for consideration in IA procedures. Consequently, those responsible for carrying out such procedures at the EU or Member State level may also find the questions in this part of the checklist useful, as will representatives of the regulated community who may be consulted during the IA process. The answer to some questions is likely to vary considerably depending on who answers them.

### Questions

27. Is it clear who belongs to the target group?

Will it be clear to the target group what obligations it will be expected to comply with?

Is the target group actually capable of understanding the rules as formulated?

28. Are the obligations implementable (achievable/realistic) for the parties to whom they are addressed?

If there is no specific target group, are the parties responsible for implementation clearly identified or identifiable?

29. In the target group's perception, are the policy and rules embodied in the legislation likely to be regarded as reasonable and acceptable, and the burden of complying with them as not disproportionate?

Does the target group feel it shares responsibility for putting this policy into practice?

30. In the target group's perception, does compliance with its obligations cost relatively little time, money and effort?

31. In the target group's perception, could breaking the rules be thought to yield little or no advantage (i.e. no incentive not to comply) or even disadvantages (i.e. positive incentive to comply)?

32. In the target group's perception, could complying with the rules be thought to yield any advantages?

33. Can compliance with or contravention of the rules be easily and unambiguously established by the target group (e.g. through a fixed measurement method)?

34. In the target group's perception, is it likely that any violation would soon be noticed by its peers?

Does the target group's community generally disapprove of such violations?

35. Is there likely to be any horizontal supervision (e.g. financial auditing, disciplinary codes, auditing for certification) which may encourage or facilitate compliance with the rules laid down in the legislation?
36. Are there easy ways of avoiding compliance with the rules? Have the fraud-susceptible points in the legislation been identified and can measures be taken to address them ?

## E. Questions relating to the enforceability of the legislation

**Primary addressees:** Commission, Council and European Parliament legal drafting units; MEPs; Member States' legal experts/negotiators

**Important stakeholders:** national authorities competent for enforcement (e.g. public prosecutors) – who know how the enforcement system works in practice.

**Explanatory remarks:** These questions address the final link in the regulatory chain: the possibility and likely effectiveness of the use by national public authorities of legal, administrative and other means at their disposal to check compliance and to convince or if necessary compel the ultimate addressees of the legislation to comply with their obligations, where they are found to be unwilling to do so without coercion. Enforceability, too, depends on a wide range of different factors, some of which are very difficult to judge at the time of drafting legislation at the EU level. Since compliance checking, inspection and enforcement remain essentially determined by national law, these questions will normally have to be addressed mostly at the stage of transposition (for Directives) or elaboration of complementary national legislation (for Regulations), taking into account specific national circumstances. However, if it is expected that the effectiveness of a piece of EU legislation heavily depends on adequate enforcement in the Member States, it is also crucial to already explore in the proposal phase what provisions should be regarded as key, what in practice is needed in terms of enforcement, whether the Member States have sufficient means in this respect and whether the EU legislation should contain concrete and detailed enforcement requirements. This also applies to the issue of enforcement co-operation between Member States in case of transboundary activities. Finally, users of the checklist should be fully aware of the fact that the decision to impose criminal sanctions on violators of environmental law ultimately depends on independent judicial authorities who operate in accordance with general procedures, rules and principles of criminal law whose rationale is unrelated to the objectives of environmental policy.

### Questions

37. Is it clear which authorities will be in charge of checking compliance, carrying out inspections and enforcing the legislation and what their tasks and obligations will be?
38. To what extent were these authorities involved in the development of the legislation at the appropriate stage of the legislative process?

Has their opinion on the enforceability of the legislation and the burden involved been sought and taken into account?

39. Has the need for any support on EU level for the national authorities competent for inspection and enforcement prior to the date of application of the legislation sufficiently been considered?

Has the possible need for common guidance materials been anticipated?

40. What non-coercive means will be available to competent national authorities to achieve compliance without having recourse to formal enforcement action (e.g. penalties, coercive measures) under administrative or criminal law? Are such means likely to be effective or is recourse to enforcement action likely to be frequently required?

41. Is it clear what provisions should be enforced and what provisions should have priority in this respect (core provisions of the legislation)?

Is it clear what means of enforcement under administrative and/or criminal law can be used under the terms of the legislation and are these likely to be effective?

42. Are the inspection and enforcement burdens for the competent authorities clear (human resources, financial resources, knowledge and/or training, performance of new functions, ICT, organisational structure, etc.)?

Are these burdens proportionate to the intended results?

43. Are the monitoring and measurement methods to be employed consistently defined?

Is the compliance checking effort expected of competent authorities realistically feasible?

44. Is sufficient capacity for the performance of the inspection and enforcement tasks available?

45. Where relevant, has the need for any cooperation and/or exchange of experience between competent national authorities in the actual inspection and enforcement of the legislation sufficiently been considered?

46. To the extent that EU-level bodies, specifically established under the legislation, are given tasks directly related to inspection or enforcement, is the division of labour between these bodies and the competent national authorities clearly spelled out?

47. Has the date on which the legislation will enter into effect been established in such a way as to allow sufficient preparation time for the national authorities competent for inspection and enforcement?

48. In the target group's perception, will there be a high risk of detection of a violation in the event of an inspection (i.e. a records inspection or a physical inspection) by the competent authorities?

Is the inspection technology used sophisticated enough?

Will there be a major real risk of detection in an inspection?

49. In the target group's perception, will there be a high risk of a violation detected by others than the authorities (e.g. those exercising horizontal supervision or the general public) being reported to the authorities?

Does the target group think that people generally know which authorities to report detected violations to and would be generally inclined to do so?

50. In the target group's perception, will there be a high risk of incurring a sanction if a violation is detected in an inspection or reported to the authorities?

Will there a major objective risk of a sanction being imposed once a violation has been detected or reported?

51. In the target group's perception, will the type of sanction associated with the violation and additional disadvantages of being sanctioned (e.g. damage to reputation) be regarded as sufficiently severe to have a deterrent effect?

*Excerpt from the Proceedings of the International Network for Environmental Compliance and Enforcement's (INECE) Eighth International Conference, Linking Concepts to Actions: Successful Strategies for Environmental Compliance and Enforcement, held 5-11 April 2008, in Cape Town, South Africa.*

Reproduction of this document in whole or in part and in any form for educational or non-profit purposes may be made without special permission from the INECE Secretariat, provided acknowledgement of the source is included.

The INECE Secretariat would appreciate receiving copies of any materials that use this publication as a source.

Opinions expressed are those of the authors and do not represent the views of their governments or organizations, the INECE Secretariat, or Cameron May.

Please access <http://www.inece.org/conference/8/> for the full Proceedings.

INECE Secretariat  
2300 Wisconsin Ave, NW Suite 300B  
Washington, DC 20007  
[inece@inece.org](mailto:inece@inece.org)  
<http://www.inece.org>