

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

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

[Explanatory notes in green shading. Checklist questions in blue shading.]

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

<p>Primary addressees: Commission policy makers, evaluation units, and Member States' policy and legal experts/negotiators</p> <p>Important stakeholders: national authorities competent for implementation</p>
<p>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.</p>
<p>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).</p> <p>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.</p>
<h3>Questions</h3>
<p>5. Does the legislative instrument clearly and unambiguously spell out the requirements and tasks for the national authorities competent for implementation?</p>
<p>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?</p>
<p>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?</p>
<p>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?</p>

- 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

<p>Primary addressees: Commission, Council and European Parliament legal drafting units; MEPs; Member States' legal experts/negotiators</p> <p>Important stakeholders: national authorities competent for implementation</p>
<p>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.</p>
<p>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').</p>
<h3>Questions</h3>
<p>16. Does the preamble clearly state the intended environmental result of the legislation?</p> <p>Does the preamble justify and explain the enacting provisions in simple, understandable terms?</p> <p>Is it fully consistent with these provisions?</p>
<p>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?</p>
<p>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?</p> <p>Is the same term used throughout to express a given concept consistently with the definitions?</p>
<p>19. Is it clear from the provisions of the legislation who are the ultimate addressees of the rights and/or obligations they set out?</p>
<p>20. Are the rights and/or obligations of those to whom the legislation is to apply clearly defined?</p> <p>Has the use of exceptions been minimised?</p> <p>Are any technical standards laid down in the legislation clear?</p>

<p>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?</p>
<p>22. Are the rules formulated in such a way that the addressees can read and understand them easily?</p> <p>Is the wording clear, simple, concise and unambiguous? Have unnecessary abbreviations, 'Community jargon' and excessively long sentences been avoided?</p>
<p>23. Are the various provisions of the legislation consistent with each other?</p>
<p>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?</p> <p>Are any references to other texts precise? Have unnecessary cross-references which make the text difficult to understand been avoided?</p>
<p>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?</p> <p>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?</p>
<p>26. To the extent that the legislation amends or further develops existing legislation, have any opportunities for consolidation sufficiently been considered?</p> <p>Have any opportunities for integration with other relevant pieces of legislation sufficiently been considered?</p> <p>Has any relevant case-law of the ECJ on the existing provisions been taken into account?</p>

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.

Phase of the legislative process: is focused on the proposal stage of the legislative process (and could be a part of IA process), as well as at the stage of transposition into national legislation. Potentially also as part of an ex post evaluation.

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?