

BACKGROUND DOCUMENT TO COMMISSION INITIATIVE ON ENVIRONMENTAL COMPLIANCE ASSURANCE

1. Commission Work Programme 2017

Commission Communication COM (2016), 710 final, *Commission Work Programme 2017 Delivering a Europe that protects, empowers and defends* announces an initiative on environmental compliance assurance under Priority 10, A Union of Democratic Change.

The Communication states that: *"To ensure that the EU's legal instruments have the intended effect, the Commission intends to step up its efforts on the application, implementation and enforcement of EU law. This includes the package of measures for better enforcement of single market rules and, in the environmental area, a REFIT proposal to simplify environmental reporting following the recent Fitness Check, and measures to facilitate access to justice and support environmental compliance assurance in Member States."*

2. What is environmental compliance assurance and how does it relate to implementation?

Environmental compliance assurance is a term to cover the range of interventions used by public authorities to ensure compliance by duty-holders with environmental rules that apply to economic and other activities that directly affect the environment through emissions, discharges or land-related impacts. It has three main components: compliance promotion or assistance by or with the support of public authorities; compliance monitoring (i.e. inspections and other checks) by public authorities; and enforcement by public authorities. Effective compliance assurance is a crucial aspect of effective implementation. **Appendix 1** provides information sources on the concept.

By comparison with compliance assurance, implementation has additional dimensions such as the role of public authorities in framing legislation and carrying out a range of administrative tasks. The way in which Member States implement the *acquis*, including compliance assurance, is addressed by the biennial Environmental Implementation Review (EIR) process, as well as by sectoral implementation actions on e.g. water, waste and air quality. Environmental implementation is about actually doing what was agreed. This includes compliance assurance (ensuring that things are done correctly, according to the rules), political interventions, precautionary measures, governance in terms of quality of public administration and financial instruments.

ENVIRONMENTAL COMPLIANCE ASSURANCE



3. Rules and resulting obligations under EU environmental legislation

Under the 50 or so main instruments that make up the EU environment *acquis*¹, there are many rules that create obligations for individuals and economic operators, including industry, public utilities (including those operated by public authorities) and agriculture ("duty-holders"). These rules and obligations may be set out at EU level in regulations (e.g. rules related to CITES) or be the result of national transposing measures for EU directives. They may take the form of

- *prohibitions* (e.g. on dumping waste, under the Waste Framework Directive, 2008/98/EC);
- *general binding rules* (e.g. contained in EU legislation or those contained in subsidiary Member State implementation measures, such as nitrates action programmes under the Nitrates Directive, 91/676/EEC);
- *rules set out in a permit, authorisation or consent* (e.g. under an industrial permit under the Industrial Emissions Directive, 2010/75/EC or specific derogation); and
- *rules set out in a contract or based on a liability requirement* (e.g. a contract to achieve conservation objectives in a Natura 2000 site under the Habitats Directive, 92/43/EEC, or a rehabilitation action required under the Environmental Liability Directive, 2004/35/EC).

4. General compliance challenges: the spectrum of compliance-related behaviours

Rules may be breached as a result of

- *organised crime* (e.g. illegal waste trafficking),
- *opportunism* (e.g. fly-tipping of waste),
- *ignorance and carelessness* (e.g. unwitting importation of items prohibited under CITES),
- *lack of social acceptance* (e.g. some illegal hunting and trapping)
- *or lack of investment* (as where a municipality with legal responsibility for treating urban fails to make the necessary investment).

The spectrum of behaviours and possible responses is illustrated in the figure below.

¹ To be understood as instruments under the responsibility of DG ENV

TYPES OF BEHAVIOUR AND RESPONSES



5. Compliance challenges across environmental sectors

The behavioral spectrum varies across the different sectors of the environmental *acquis*. For example, environmental crime is most serious in the areas of waste and wildlife legislation. At the same time, problems of under-investment are most salient in the areas of environmental infrastructure.

Appendix 2 presents a summary of the challenges.

6. Compliance assurance: adapting interventions to different compliance behaviours

Given the diversity of behaviours, the range of possible interventions by Member States and their authorities to ensure compliance may also be diverse and can include:

- *compliance promotion* (sometimes referred to as compliance assistance) efforts such as use of guidance and awareness-raising aimed at preventing breaches and encouraging compliance;
- use of different types of *compliance monitoring*, extending from routine industrial inspections in order to detect breaches or verify compliance, to police intelligence-gathering in the case of organised crime, to use of environmental audits to check the effectiveness of spending on environmental infrastructure;
- use of different types of *enforcement and follow-up* to address the breaches that are detected, drawing on
 - *civil and liability law* (to enforce contracts and liabilities),
 - *administrative law and practice* (for administrative sanctions or other administrative actions such as cancellation of a permit or issuing of audit recommendations) and
 - *criminal law* (for criminal sanctions).

Collectively, these interventions are referred to as compliance assurance.

7. Effective environmental compliance assurance systems

These different kinds of intervention should complement rather than compete with each other. For example, compliance promotion prevents behaviours that otherwise need to be addressed by compliance monitoring, and enforcement ensures that inspections not only detect breaches but lead to effective follow-up.

One general approach that has emerged is to undertake inspections and other compliance assurance interventions on the basis of *risk*. Risk assessment can be used at both strategic and operational levels. At strategic level, it offers a means of estimating the extent to which non-compliance is likely to occur and its impact, allowing broad priorities to be established. At operational level, it offers a means of targeting inspections and other interventions in the most efficient manner.

Environmental compliance assurance systems function effectively only if there are *fit-for-purpose authorities* who can identify problems and act to prevent and respond to them. This includes sufficient legal powers and mechanisms for *coordination and cooperation* between different authorities to ensure consistency, avoid duplication of work and reduce administrative burden.

The capacity of environmental compliance assurance systems to learn from experience depends on an ability to examine empirically how compliance assurance works in practice. No less than business, the authorities charged with compliance assurance need to have the right data - i.e. records - and the ability to ‘mine’ them efficiently and effectively. At the same time, they need to minimise administrative burdens.

Transparency can be ensured through publication of compliance assurance and enforcement policies and their outputs and outcomes.

Structured mechanisms for inter-action with the citizens, including *complaint handling*, are also a key feature of modern environmental compliance assurance systems. Apart from being a potentially useful source of information, complaints – and how authorities respond to them – are an indicator of public concerns and public confidence.

The effectiveness of Member States' compliance assurance can relate to and depend on many factors, notably organisational structures, the range of activities undertaken and the means of targeting these, and the good administrative arrangements that apply. **Appendix 3** sets out an indicative list of key dimensions of compliance assurance focused on *organisation, activities and good administration*.

8. Existing EU instruments relevant to environmental compliance assurance

There is no single over-arching EU instrument that addresses environmental compliance assurance.

Interpreting the general EU treaty provision on loyal co-operation², the Court of Justice of the European Union (CJEU) has held that Member States are bound to have sanctions for breaches of European law that are effective, proportionate and dissuasive and to nullify the unlawful consequences of a breach of EU law³. The Environmental Crime Directive,

² Article 4(3) of the Treaty on the European Union or TEU

³ See for instance case C-201/02, *Wells*.

2008/99/EC, requires Member States to have on their statute book criminal penalties for the most serious environmental offences. The Environmental Liability Directive, 2004/35/EC, requires Member States to operate a system of liability for environmental damage.

This case-law and the two Directives concerned presuppose that breaches of EU environmental law will be detected and instances of environmental damage identified.

Unlike many other EU policy areas, EU environment policy currently has a very limited legislative framework on compliance monitoring. It consists mainly of a set of non-binding general criteria on inspections set out in Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States (“RMCEI”) and some sectoral binding inspection provisions⁴.

RMCEI encouraged Member States to follow criteria for organising, planning, carrying out of and reporting on inspections of fixed industrial installations. Its essential features are now found in the Industrial Emissions Directive, 2010/75/EU which in addition contains provisions on minimum inspection frequencies to be determined using risk-assessment⁵. This has had a positive effect in many Member States, safeguarding minimum administrative capacity to carry out inspections. Other parts of the environmental *acquis* contain less detailed references to inspections (e.g. waste legislation), and much environmental legislation (e.g. water and nature legislation) is silent on the matter.

Apart from their limited coverage of the environment *acquis*, both the RMCEI and the binding provisions have a narrow focus on inspections and do not take account of the wider aspects of compliance assurance, including the link between compliance monitoring and compliance promotion and enforcement.

9. Role of practitioner networks and successful practices

Despite only partial coverage of the concept in EU legislation, many Member States have been active in trying to ensure and develop successful practices on compliance assurance.

Of particular importance are the efforts of the network of environmental inspectorates, IMPEL⁶, which has developed a range of successful practice guidance. Also of note are the networks of environmental prosecutors, ENPE⁷, specialist environmental police, EnviCrimeNet⁸ and judges active in the field of the environment, the European Forum of Judges for the Environment (EUFJE)⁹. These four networks are now engaged in cross-network cooperation¹⁰. Other networks may also be relevant, such as the Better Regulation Interest Group (BRIG) attached to the network of European environmental agencies (NEPA), the EUROSAI Working Group on Environmental Auditing¹¹ which is made up of national audit bodies and the European Court of Auditors and promotes good practices on environmental auditing with a focus on systemic issues.

⁴ Such as Article 23 Industrial Emission Directive 2010/75/EU and Article 20 Seveso III Directive 2012/18/EU.

⁵ These provisions were included upon proposal of the European Parliament.

⁶ European Union Network for the Implementation and Enforcement of Environmental Law, www.impel.eu

⁷ European Network of Prosecutors for the Environment, <https://www.environmentalprosecutors.eu/>

⁸ <http://envicrimenet.eu/EN/>

⁹ www.eufje.org

¹⁰ <http://www.impel.eu/events/eu-environmental-enforcement-networks-conference/>

¹¹ <http://www.eurosaiwgea.org/Pages/aboutus.aspx>

10. Existing support for Member State compliance assurance systems and efforts

There are already foundations on which to develop Commission support for Member State compliance assurance in line with the CWP 2017:

- *Environmental Implementation Review*: This 2016 Commission initiative¹² addresses a broad set of issues and strategies to improve environmental implementation through a biennial process of analysis, agenda-setting and dialogues at the level of the Council and bilaterally with the Member States. One of the EIR deliverables is country-specific reports for the EU-28 on implementation of EU environmental *acquis* and policy. One of the chapters covers "the enabling framework" and this includes environmental compliance assurance;
- *Financial support for EU practitioner networks*: Under the LIFE Regulation, IMPEL is provided with an annual grant and ENPE benefits from LIFE project funding. The EU Forum of Judges is financially assisted to hold an annual conference. *Collaboration with networks*: The Commission currently collaborates closely with IMPEL, ENPE, EnviCrimeNet and the EUFJE. For example, there is co-ordination between DG ENV thematic units and IMPEL on individual IMPEL projects. These IMPEL projects have, amongst other things, led to the development of a range of guidance and other tools to help national practitioners;
- *Role of Europol and Eurojust*: Europol has a contact point on environmental crime and close relations with EnviCrimeNet. Similarly, Eurojust takes account of the work of ENPE.
- *Sectoral work*: There is a range of sectoral work to support compliance assurance. For example, there is a Wildlife Trafficking Action Plan and the Commission has worked with the Bern Convention on enforcement initiatives in relation to the illegal killing of wild birds.
- *Support for compliance assurance through the LIFE Regulation and other EU funding instruments*: The LIFE Regulation supports projects directly relevant to compliance assurance and is an important source of information on best practices. For example, support has been given to a significant number of projects focused on compliance assistance (e.g. improving social acceptance and rewarding excellence in the delivery of nature conservation objectives). DG RESEARCH and DG HOME have both provided important funding for research on environmental crime (e.g. the EFFACE project).

Environmental compliance assurance is relevant to the following: cross-compliance, customs co-operation, the quality of public administration, action against fraud and corruption, earth observation technologies.

It is relevant to numerous calls by the European Parliament to improve the implementation and enforcement of EU environment law and is a concept supported by the Committee of the Regions.

11. Questions to stimulate reflection

¹² http://ec.europa.eu/environment/eir/index_en.htm

The following are a number of questions intended to stimulate reflection in advance of the Stakeholder Conference:

- (1) What are your views on the compliance challenges at Member State level and how these can be addressed with support from the European Commission?
- (2) Are there any specific compliance challenges that would benefit from specific support measures, e.g. in relation to waste crime?
- (3) What are your views on how useful practices in compliance assurance can be identified, developed and shared for the benefit of practitioners and Member State authorities by means of a toolbox?
- (4) What are your views on Commission co-operation with EU practitioner networks as a means of supporting compliance assurance in the Member States, and do you consider that it should be strengthened?
- (6) What are your views on how the Commission should provide feedback to the Member States on how it assesses their environmental compliance assurance systems, in particular in light of Environmental Implementation Review (EIR)?
- (7) What are your views on how EU financing, notably but not exclusively under the LIFE Regulation, should be used to support compliance assurance by practitioner networks and Member State authorities?

Appendix 1

GENERAL SOURCES OF INFORMATION ON ENVIRONMENTAL COMPLIANCE ASSURANCE

Environmental compliance assurance is not a fixed concept but rather a conceptual framework within which there is room for variation and innovation in the use of different monitoring, promotion and enforcement tools.

The following are useful general sources of information on the concept and/or different aspects of it:

- *Make it Work*, a grouping of Member States interested in better regulation in the field of the environment, has compiled a document setting out drafting principles on which it believes any EU legislation on the matter should be based¹³.
- *OECD* has published a range of material on the concept, drawing from experiences of OECD members not only in Europe but elsewhere, e.g. US and Canada¹⁴;
- *INECE* is the global "network of networks" in terms of environmental compliance assurance and has compiled voluminous material¹⁵.
- *IMPEL* Europe's network of environmental inspectorates, through its website has published a range of documents on different aspects of compliance assurance as well the results of IMPEL peer reviews¹⁶.
- Relevant studies prepared for the Commission¹⁷;
- Academic research focussing on some aspects of compliance assurance¹⁸ and the work of the *Avosetta Group* which consists of environmental legal academics and has produced valuable analysis of implementation of certain EU environmental instruments¹⁹.

Information is also available via websites of individual national compliance assurance authorities.

¹³ http://www.ieep.eu/assets/1791/MiW_drafting_principles_on_compliance_assurance_July_2015.pdf

¹⁴ See in particular *Ensuring environmental compliance: trends and good practices, OECD 2009 and other studies at: <http://www.oecd.org/environment/>*.

¹⁵ <https://inece.org/>

¹⁶ <http://www.impel.eu/topics/>

¹⁷ See for instance at <http://ec.europa.eu/environment/legal/law/inspections.htm>

¹⁸ See for instance an overview of relevant studies at: http://ec.europa.eu/environment/integration/research/newsalert/pdf/environmental_compliance_combatting_environmental_crime_56si_en.pdf as well as the outcomes of the project 'European Union Action to Fight Environmental Crime' (EFFACE) at <http://efface.eu/>.

¹⁹ <http://avosetta.jura.uni-bremen.de/contents.html>

Appendix 2

INDICATIVE LIST OF KEY COMPLIANCE ASSURANCE CHALLENGES AND RESPONSES BY SECTOR

Sector	Challenge/problem, related DPSIR ²⁰ indicators, information sources	Types of inspection and check/responsible bodies	Types of follow-up/enforcement/responsible bodies	Types of compliance promotion/responsible bodies
1. Waste				
<i>Waste movements</i>	Illegal or irregular movement of waste, including trafficking by organised crime: <i>waste statistics</i>	Inspections, surveillance and investigations, <i>inspectories, customs, police</i>	Administrative and/or criminal sanctions, <i>inspectories, prosecutors</i>	SME guidance
<i>Waste facilities</i>	Under-investment in waste infrastructure: <i>waste statistics, complaints</i>	Audits, inspections, <i>audit bodies, inspectories</i>	Audit recommendations, corrective action (i.e. investment), sanctions, <i>audit bodies, inspectories, prosecutors, ministries</i>	Capacity-building
	Unlawful waste facilities, <i>waste statistics, complaints</i>	Inspections, surveillance and investigations	Administrative and/or criminal sanctions, corrective action, including environmental liability, <i>audit bodies, inspectories, prosecutors, ministries</i>	SME guidance, awareness-raising, including on environmental liability
2. Water				
<i>Diffuse water pollution</i>	Nutrient pollution from agriculture: agricultural intensity: <i>agricultural statistics, water quality monitoring data</i>	Inspections and surveillance, e.g. catchment walking ²¹ , <i>inspectories</i>	Warnings, administrative sanctions, <i>inspectories</i>	Best-practice guidance
<i>Water industry (UWWT, drinking water)</i>	Nutrient pollution from untreated waste-water, contaminated drinking water: under-investment or poor management: <i>UWWT and drinking water compliance data; water quality monitoring data</i>	Audits, inspections, <i>audit bodies, inspectory</i>	Audit recommendations, corrective action (i.e. investment), sanctions, <i>audit bodies, inspectories,</i>	Capacity-building, Structured Implementation and Information Frameworks (SIIFs)
3. Industrial facilities	Lack of compliance with industrial permit and/or major-accident planning rules and/or REACH rules, <i>permit and related statistics, pollution incidents, complaints</i>	Inspections of facilities, <i>inspectories</i>	Warnings and other preventive action, including environmental liability and permit re-writes; administrative and/or criminal sanctions, <i>inspectories, prosecutors</i>	Best practice guidance, e-permits
4. Projects subject to Environmental Impact Assessment	Project development without environmental impact assessment or screening; failure to implement mitigation/compensation, <i>complaints</i>	Inspections and surveillance, <i>inspectories</i>	Warnings and other preventive actions, i.e. suspension of works and project development until its impacts are properly assessed. Use of sanctions, <i>inspectories, prosecutors,</i>	Best practice guidance
5. Air quality	Non-compliance with air quality limit values, <i>air quality data</i>	Inspections for facilities, surveillance and other checks for traffic and vehicle rules	Administrative sanctions <i>inspectories, police</i>	Awareness-raising, tax incentives
6. Nature and biodiversity				

²⁰ DPSIR refers to "driving forces" (e.g. an economic activity), "pressures" (e.g. manufacturing processes), "state of the environment" (e.g. surface water quality), "impact" (e.g. low fish populations due to pollution) and "response" (e.g. anti-pollution legislation and support measures to implement it).

²¹ This is technique used by the Scottish Environmental Protection Agency which consists of surveying, recording and following-up farm-related pollution by monitoring river catchments on foot.

<i>Habitat damage or loss</i>	Unauthorised habitat destruction or damage, <i>favourable conservation status indicators, complaints</i>	Surveillance, inspections, investigations, <i>wildlife authorities, agriculture inspectorates</i>	Warnings and other preventive action, including environmental liability; rehabilitation, including via liability; administrative and/or criminal sanctions, <i>wildlife authorities, inspectorates</i>	Awareness raising
<i>Species protection</i>	Illegal hunting, poisoning, <i>favourable conservation indicators, complaints</i>	Surveillance and investigations	Administrative and/or criminal sanctions, <i>wildlife authorities, police and prosecutors</i>	Awareness-raising
<i>Wildlife trafficking</i>	Illegal import of timber and CITES species, <i>seizures and other statistics</i>	Inspections, surveillance and investigations, <i>inspectorate police, customs</i>	Administrative and/or criminal sanctions, <i>wildlife authorities, customs, police and prosecutors</i>	Awareness-raising

Appendix 3

INDICATIVE LIST OF KEY DIMENSIONS OF COMPLIANCE ASSURANCE

Headline dimension	Comments	Assessment criteria
1.Organisation	This relates to the allocation and division of responsibilities for compliance assurance activities. Allocation will typically be to a range of authorities, e.g. communes, specialist environmental agencies, general law enforcement bodies.	<ul style="list-style-type: none"> a) Coverage, by (i) geography, (ii) subject-matter and (iii) compliance assurance chain²². b) Clear mission. c) Legal powers to carry out inspections and other checks and carry out follow-up and enforcement actions. d) Capacities, i.e. resources, skills and training. e) Absence of conflicts of interest f) Co-ordination and co-operation, by (i) geography, (ii) subject-matter and (iii) compliance assurance chain²³.
2.Activities	This covers all the different types of intervention to ensure compliance.	<ul style="list-style-type: none"> a) Risk-based approach that can identify (i) likelihood of non-compliance/liability based on compliance and other data and analysis of duty-holder conduct and (ii) impacts on the environment, human health and respect for the law. b) Inspections and other checks (notably, surveillance, investigations, audits) that reflect the risk analysis, and include forward-planning. c) Compliance promotion actions that reflect the risk analysis. d) Follow-up and enforcement that reflects the risk analysis and covers achieving the cessation of a harmful non-compliant activity (including under liability or by way of permit withdrawal), correction (including through revised permit conditions), remediation (including under liability) and sanctioning (whether through administrative or criminal law).
3.Good administration	This covers the way that administrations interact with the public and each other	<ul style="list-style-type: none"> a) Clear internal "how to" guidance for compliance assurance practitioners b) Information and data-sharing between authorities and with stakeholders and the public (e.g. including in the framework of the INSPIRE Directive²⁴). c) Public participation, in particular in framing compliance assurance strategies. d) Complaint-handling and ad hoc mechanisms for handling citizen grievances and responding to incidents and accidents (including liability) or otherwise engaging with civil society. e) Publication of compliance assurance policies, strategies, statistics and evaluations

²² The "compliance assurance chain" is intended to describe the necessary links between work done by professionals who monitor compliance and professionals who promote or enforce it. In particular, it covers the relationship between inspectors and police, on the one hand, and prosecutors and courts, on the other (the latter having a particular concern for burden of proof and the adequacy of files provided by inspectors and police).

²³ This includes participation in both national and European networks of practitioners such as IMPEL which are devoted to promoting co-operation and sometimes co-ordination between national practitioners.

²⁴ Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE).