

COMMUNICATION FROM THE COMMISSION “EU law: Better results through better application” (2017/C 18/02)

Member States ‘concerns regarding the use of EU Pilot initiative in the future

In its recent communication published on the January 19th “*Better results through better application*”, the Commission has presented its new orientations of its enforcement policy. The Commission presents paths for increasing the efforts on the application, implementation and enforcement of EU law.

Although the communication recalls that Member States have the primary responsibility for applying EU law (art. 4 TFEU), the Commission, as a guardian of the Treaties (art. 17 TEU), has also a major role to play in the correct and timely enforcement of EU law.

The communication emphasizes the importance of the dialogue between Commission’s services and Member States and seeks to reinforce it through high-level bilateral meetings, compliance dialogues and expert groups. It applies, to the field of infringement, the Commission's commitment to be “bigger and more ambitious on big things, and smaller and more modest on small things”, and therefore the Commission will prioritize the infringements according to criteria in order to tackle the most important breaches of EU law affecting the interests of its citizens and business. In parallel with this more strategic approach, the Commission will resort to other mechanisms at EU and national levels where certain categories of cases do not present such strategic added-value.

The Commission also bases the strengthening of its enforcement policy in the capacity building in Member States and evokes several paths to increase their capacities such as a better use of EU law networks, sharing of enforcement best practices and the continued promotion of training for national jurisdictions and Member States ‘administrations in accordance with article 197 TFEU.

These main elements of the communication hence are based on a partnership approach between Commission’s services and Member States where dialogue, cooperation and shared responsibilities are the keys for the better results.

These key-values make it difficult to understand for the signing Member States and to agree with the new approach of the Commission regarding the use of EU PILOT. The communication announces that “*the Commission will launch infringement procedures without relying on the EU Pilot problem-solving mechanism, unless recourse to EU Pilot is seen as useful in a given case. The working arrangements with the Member States on EU Pilot will now be adjusted accordingly.*” Besides, it is not clear whenever the opening of EU Pilot cases will be «seen as useful in a given case». This creates uncertainty for the member states with regard to the use of EU PILOT by the Commission.

EU PILOT has been set-up following the previous communication on EU law application as the general pre-infringement mechanism by which Member States and Commission’s services dialogue and cooperate before entering into formal infringement procedures. This is reflected in the EU Pilot Guidelines which provide the following: “*EU Pilot is used before the first step in an infringement proceeding (under Article 258 TFEU) is taken by the Commission*”. The initiative was launched in 2008¹ with the aim to avoid lengthy infringement procedures and to facilitate speedy resolution of problems for the benefit of citizens and businesses and achieving compliance with EU law obligations. Member States voluntarily participate in EU PILOT.

In fact, through the dialogue in EU Pilot, problems have often been solved, ensuring compliance with the obligations of EU law, without being it necessary for the Commission to launch formal infringements procedures. Also the General Court recognised that the sole purpose of EU Pilot procedures «*is to avoid the lengthier and more complex infringement procedure and, where appropriate, the necessity of bringing an action for failure to fulfil obligations*»². Thus, the EU Pilot phase is not merely a “lengthy step” added to the infringement process.

¹ The initiative finished its project phase in June 2012 with the last Member States joining it.

² Decision of 25.9.2014 of the General Court in T306/12 Spirlea, Darius Nicolai Spirlea and Mihaela Spirlea, p. 62.

Since its launch, the initiative has proved to be a remarkable tool for constructive dialogue and effective cooperation between Member States and Commission's services. These achievements are perfectly reflected through a resolution rate of up to 75% of the cases submitted. Even though the objective of 70-day delay both for the Member States and the Commission's services is not always met, EU PILOT has proved to be swifter than regular infringement proceedings (50-month average before the ECJ is seized, more than 15 months before the ECJ gives its ruling). Accordingly, the number of formal infringement procedures during the last 5-year period decreased³ which reflects the effectiveness of this structured dialogue and proves the usefulness and positive impact of EU PILOT in promoting a more efficient enforcement of EU law⁴.

By dividing among cases (75%) that can be resolved at early stage from those for which a fully-fledged infringement and, eventually, a failure-to-comply procedure is resorted to (25%), the EU PILOT system is perfectly in line and an important part of the system of verification of Member States' compliance with EU law as envisaged in by the Treaty. This has been underlined by the General Court (25.09.2014, *Spirlea*, aff. T-306/12, paragraph 66) which also added that this system is an indispensable means of carrying out initial factual verification and obtaining the initial evidence of an infringement of EU law.

It is worth highlighting that the EU-Pilot is not a completely new tool. Before its launch COM services reacted to complaints or internal analysis with administrative letters, in which Member State were confronted with the case and asked for clarification and proposals for solutions. These administrative letters were replaced by the EU-Pilot. Compared to the practice of administrative letters the EU-Pilot is much more structured – with clear deadlines and transparency for the coordination units in the Member States.

As any initiative and project, EU PILOT can certainly be improved. The Member States supporting this initiative are open to discussion with Commission's services to identify where progress can be achieved. The Commission recently launched a brand new EU Pilot database which could however be further modernized and integrated with other electronic tools such as CHAP, MNE and INF/NIF is as a concrete example of what can be done in that respect.

It will therefore be inconsistent with the approach proposed by the Commission in this communication and, beyond, with the role which is played by the EU Pilot system in the monitoring of compliance of EU law as envisaged in the Treaty to renounce to the use of it at its full potential. Fair cooperation, dialogue and prevention are at the heart of the pre-litigation phases as well as of the communication on better results⁵.

Signing Member States are strongly convinced that EU PILOT has proved its efficiency and great utility. In structuring and organizing the dialogue between Commission's services and Member States, quite often on complex cases, EU PILOT has drastically improved the understanding on both sides and, in turn, a very significant decrease of the number of infringement procedures, thus improving correct implementation of EU law and reducing administrative burden on the side of the Commission and the Member States

They therefore request the Commission to strongly consider the continued use of the present approach to the EU Pilot system whereas remaining open to the further improvement of this initiative. Limitation of use of the EU Pilot system would deprive the system of its added value and consequently decrease the efficiency of solving problems with application of EU law.

Signing Member States : Cyprus, Poland, the Netherlands, Czech republic, Germany, Malta, Italy, Bulgaria, Portugal, Latvia, Spain, Lithuania, Slovenia, Croatia, Greece, Ireland, Austria, Slovakia, Hungary, Estonia, Luxembourg and France.

³ Report from the Commission – 32nd Annual Report on monitoring the application of EU law (2014), COM(2015) 329]

⁴ In its own reply to recommendation 8 of special report 5/2016 of the European Court of Auditors "*Has the Commission ensured effective implementation of the Services Directive ?*", the Commission recognized itself that "*Since the introduction of EU pilot the number of infringement procedures, and thus of referrals to the Court of Justice, has drastically diminished, due to the fact that solutions are often found within the framework of EU pilot. The primary goal of the Commission's policy is to convince MSs to take action so as to address issues of compliance*".

⁵ In this respect, it is worth mentioning the Council Conclusions adopted by the Competitiveness Council in May 2016 where the Council underlined the European Court of Auditors' view that the EU Pilot is a useful tool for cooperation between Member States and the Commission (see Council Conclusions on the ECA Special Report no 5/2016 – doc. no. 8552/16)