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EUROPEAN  
COURT  
OF AUDITORS

**Landscape  
Review**

**Putting EU law into practice:  
The European Commission's oversight  
responsibilities under Article 17(1) of  
the Treaty on European Union**

**2018**

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## Executive summary

I The success of many European Union policies depends on Member States putting EU law into practice in their jurisdiction. The European Commission has an obligation under Article 17(1) of the Treaty on European Union to oversee that Member States apply EU law. This role of “guardian of the Treaties” is essential for ensuring the EU’s overall performance and accountability. The Commission’s oversight activities focus on managing the risk of potential breaches of EU law by Member States that may lead to formal infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union (TFEU).

II As the EU audit institution, our audits check whether Member States comply with EU law for the most part only where compliance with EU law is a condition for Member States receiving payments from the EU budget. We may also examine how the Commission performs and accounts for its oversight activities. In response to a request of the European Parliament, we decided to conduct a landscape review covering:

- o the main features of the EU’s legal landscape that make overseeing Member States’ application of EU law challenging;
- o the Commission’s objectives, priorities and resources related to its oversight activities;
- o the main processes the Commission uses to prevent, detect and correct Member States’ potential infringements of EU law;
- o the Commission’s arrangements for ensuring transparency about its oversight activities and their results; and
- o the contribution of public audit at national and EU level with respect to ensuring the application and oversight of EU law in Member States.

III A landscape review is not an audit. It presents descriptions and analyses based on published information and information participants in our review agreed to make public. Our main sources of information were surveys of the Commission’s directorates-general (DGs) and Member States’ representatives, analysis of data provided by the Commission, interviews with institutional stakeholders, and reviews of audit reports.

**IV** We found that the Commission faces a complex legal landscape at EU and Member State level. A number of factors influence the risk of infringements occurring and make overseeing the application of EU law a challenging activity. These include:

- the size of the body of law to be monitored and the complexity of many legal instruments;
- the specificities of policy areas, including the availability of EU funds and alternatives to the infringement procedure; and
- certain features of Member States' legislative and oversight arrangements, including the length of the legislative procedure, transposition preferences and administrative capacity.

**V** In our landscape review, we highlight how the Commission recognises these challenges and has responded so far by:

- setting priorities for enforcement and benchmarks for handling citizens' complaints and suspected infringements;
- organising its oversight by policy area and embedding it within the broader Better Regulation agenda;
- systematically checking transposition, harnessing citizens' complaints and conducting investigations to identify suspected cases of non-compliance;
- strengthening cooperation and information exchange with Member States through an array of tools for promoting compliance;
- communicating directly with stakeholders and reporting publicly about its oversight activities using a wide range of means, including a dedicated annual report.

**VI** We also provide examples of the work Member States' Supreme Audit Institutions (SAIs) and the European Court of Auditors (ECA) have carried out with respect to compliance and oversight at national and EU level.

**VII** In conclusion, we set out some considerations on how the Commission could address the remaining challenges related to its oversight responsibilities. In particular, **we invite the Commission to consider strengthening further its oversight function by:**

- applying the **Better Regulation approach** to its enforcement policy and conducting a stock-taking exercise of the economy, efficiency and effectiveness of its oversight activities;
- developing a more coordinated approach across its services to using the **EU budget** to help ensure Member States apply EU law;
- encouraging its services in different policy areas to share **knowledge and expertise of Member States**, including resources where appropriate;
- **promoting compliance** in a manner that is more targeted to the needs of individual Member States and more consistent across policy areas;
- developing established enforcement priorities and benchmarks for handling cases into **an overall framework for managing oversight activities**;
- providing more **aggregated information and analysis for stakeholders** in its annual report on the handling of cases, including on the duration of cases and the reasons cases are closed.

**VIII** Finally, this landscape review highlights the scope for the ECA to carry work related to the Commission's oversight of the application of EU law by Member States on, for example::

- the contribution the **EU budget** makes to ensuring Member States put EU law into practice;
- the Commission's **oversight arrangements** in specific policy areas;
- aspects of the Commission's **management of complaints and infringement** cases;
- the quality of the Commission's **reporting on the results of oversight activities**.

# Introduction

## Putting EU law into practice

**01** Putting EU law into practice is essential for **delivering results** for citizens and protecting their rights and freedoms. Member States must fulfil their obligations under EU law, including incorporating relevant EU legal acts into national law (“implementation”) as well as applying them in their jurisdiction (“application”)<sup>1</sup>. EU legal instruments are a key means by which the EU achieves its objectives and the **rule of law** is a key value of the EU<sup>2</sup> that all Member States and EU institutions must uphold.

**02** EU laws apply directly or indirectly depending on the type of law<sup>3</sup>. The Treaties, regulations and decisions become binding automatically throughout the EU on the date they enter into force, while Member States must incorporate EU directives into their national legislation by a fixed date before they are applied. In effect, Member States enjoy considerable discretion over how they implement and apply EU law. The European Commission (Commission) is responsible for **overseeing the implementation and application of EU law** by Member States (“compliance”), in accordance with Article 17(1) of the Treaty on European Union (TEU).

**03** The Commission aims to prevent, detect and correct Member States’ non-compliance with EU law. It does so by monitoring Member States’ application of EU law and taking action to promote and enforce compliance (“oversight activities”). The Commission’s oversight activities focus specifically on identifying and acting on cases of non-compliance that may lead to enforcement through the **infringement procedure** under Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU) (“potential infringements”). **Box 1** identifies the four main types of potential infringements.

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<sup>1</sup> Article 4(3) of the TEU.

<sup>2</sup> Article 2 of the TEU.

<sup>3</sup> The Commission provides an overview of EU law at: [https://europa.eu/european-union/law\\_en](https://europa.eu/european-union/law_en)

## Box 1

### Types of potential infringement cases

The Commission identifies four main types of potential infringement cases:

- (1) Member States' failure to notify the Commission within a deadline about measures taken to transpose a directive into national legislation;
- (2) Non-conformity or non-compliance of Member States' legislation with the requirements of an EU directive;
- (3) Infringement of the Treaties, regulations and decisions – where Member States' legislation is not in line with the requirements of the Treaties, regulations and decisions;
- (4) Incorrect or non-application of EU law by a Member State.

**04** Not all types of non-compliance with EU law by Member States give rise to infringement procedures. In some policy areas, EU legal instruments provide **other forms of financial or non-financial sanction**. The Commission does not treat such cases as falling within the scope of its oversight activities under Article 17(1) of the TEU.

### Overview of the Commission's oversight activities

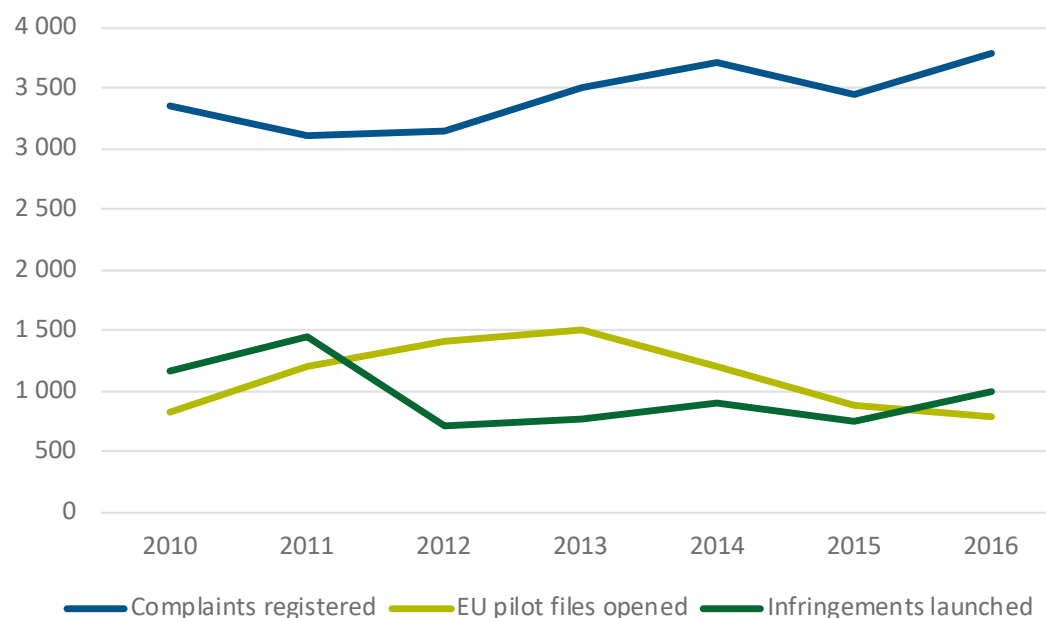
**05** The Commission uses a number of means ("tools") to monitor and enforce compliance (i.e. detect and correct non-compliance). For new directives, **the Commission monitors compliance** by checking whether Member States notified their national implementing measures by the deadline ("notification"); completely transposed the provisions of the directive into national law ("transposition"); and accurately reflected all the provisions of the directive ("conformity").

**06** As regards identifying the other **types of potential infringement**, the Commission handles complaints by individuals or organisations and carries out investigations on its own initiative of potential infringement cases. The Commission handles complaints using a dedicated IT system (CHAPs) and may investigate potential infringements using an online database and communication tool ("EU pilot"). EU pilot is a tool to gather and exchange information about potential infringements with Member States that can be used, in some cases, to achieve compliance. **Figure 1** shows the number of



complaints and potential infringement cases the Commission handled in the period 2010-2016<sup>4</sup>.

**Figure 1 – Potential infringement cases handled by the Commission**



**Source:** ECA based on Commission data

**07** The Commission has **discretionary power** under Article 258 of the TFEU to launch infringement proceedings against Member States that it deems have breached EU law. The procedure empowers the Commission to refer a Member State to the Court of Justice of the European Union (CJEU) and request the latter to impose a financial sanction under Article 260 of the TFEU. **Box 2** sets out the main steps of the formal infringement procedure.

<sup>4</sup> At the time this review was conducted the Commission had not published the data for 2017.

## Box 2

### The formal infringement procedure

The main steps in the process for the Commission are:

- (1) The Commission sends a **letter of formal notice** under Article 258 of the TFEU to the Member State requesting an explanation within a given time limit.
- (2) If the Member State does not reply satisfactorily, the Commission issues a **reasoned opinion** asking the Member State to comply within a given time limit.
- (3) If the Member State does not comply with the reasoned opinion, the Commission may decide on a **referral to the CJEU** under Article 258 of the TFEU. For failure to notify cases, the Commission may propose financial penalties under Article 260(3) of the TFEU at this stage.
- (4) If the CJEU finds the Member State to have breached its obligations under EU law, the CJEU orders the Member State to take the necessary action to comply and the **Commission checks the Member State's compliance** with the ruling of the CJEU.
- (5) If the Member State does not take the necessary steps to comply, the Commission may continue the **infringement procedure under Article 260(2) of the TFEU** by sending a letter of notification to the Member State and referring the case back to the CJEU. In such cases, the Commission can propose, and the CJEU can impose financial sanctions in the form of a lump sum and/or penalties per day or another specified period.

**08** In addition to monitoring and enforcement, the Commission has also developed a number of other tools to help Member States apply EU law correctly and in a timely manner ("**compliance promoting tools**") in order to avoid ("prevent") or resolve infringement cases before referral to the CJEU ("correct").

## A need for transparency, accountability and audit

**09** To safeguard legitimacy and trust, citizens and other stakeholders need to see that Member States put EU laws into practice. This implies ensuring transparency, accountability and **public audit** regarding Member States' application of EU law and the Commission's oversight activities. As we have noted<sup>5</sup>, EU policies that rely on non-budgetary instruments present a specific accountability challenge. As the EU audit institution, for the most part, our audits examine whether Member States comply with EU law where compliance with EU law is a condition of Member States receiving payments from the EU budget or essential to achieving results. We may also examine how the Commission performs and accounts for its oversight activities.

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<sup>5</sup> ECA Landscape Review - Gaps, overlaps and challenges: a landscape review of EU accountability and public audit arrangements (2014), paragraph IV, point (vi).

## Review scope and approach

**10** The Commission’s oversight of the application of EU law by Member States is a **complex topic** covering many EU policy areas. In response to a request of the European Parliament (EP), the ECA decided to carry out a landscape review. The aim of the landscape review is to describe and analyse the EU’s arrangements for overseeing the application of EU law by Member States.

**11** Our study focused on **the Commission’s oversight activities** in its role as “the guardian of Treaties” under Article 17(1) of the TEU related to the infringement procedure. We covered the EU policy areas where Member States must apply EU law in their jurisdiction and the oversight activities of the Commission’s directorates-general (DGs) responsible for those areas (see [Annex I](#)). We did not cover the oversight activities of other EU institutions.

**12** A **landscape review** is not an audit. It presents descriptions and analyses based on publicly available information. This landscape review also includes information that participants in the study agreed to make publicly available for the purpose of the review. Our review involved analysis of data provided by the Commission on its oversight activities, a survey of the DGs, a survey of the Member States, interviews with key institutional stakeholders, and an examination of relevant audit reports of the ECA and Member States’ SAIs (see [Annex II](#)).

**13** The results of our landscape review are reported in sections highlighting:

- the main features of the EU’s complex compliance landscape that make overseeing Member States’ application of EU law challenging;
- the Commission’s strategy for using the powers, tools and resources at its disposal to ensure that Member States apply EU law;
- the way the Commission manages its oversight activities and ensures transparency; and
- the contribution public audit can make at national and EU level to ensuring the efficient and effective application and oversight of EU law.

**14** In conclusion, we highlight some challenges and opportunities for further developing the oversight and audit of the application of EU law.

# Overseeing the application of EU law

## A complex compliance landscape to monitor

### Many and varied EU laws to monitor

**15** The Commission has to monitor the application of a great **many legal acts** of different types with provisions that apply to Member States. The body of EU law (“the *acquis*”) also changes over time, as EU policies and competences develop and the EU adopts and revises the laws that Member States must apply. Potentially all breaches of provisions of EU law that relate to Member States may lead to an infringement procedure. The potential for infringement - and the monitoring activities carried out by the Commission - depends on the type of law in question (see **Box 2**). For instance, directives trigger specific monitoring activities related to their notification and transposition into national law.

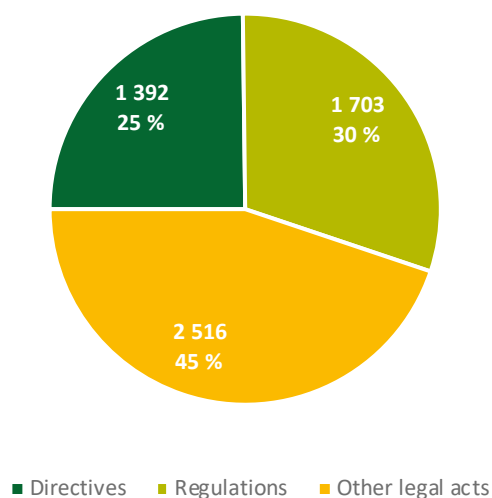
**16** The Commission does not publish an estimate of the overall number of legal instruments that it monitors. All directives create obligations on Member States. However, for many other legal instruments, only certain provisions apply to Member States. As a result, it is in principle difficult to generate an estimate of the number of EU laws that could lead to infringement cases based on the public record of EU law<sup>6</sup>.

**17** In our survey, we asked the DGs responsible for the relevant policy areas to report the number of EU laws they monitor. Collectively they reported monitoring around 5 600 laws of which approximately a quarter were directives, a third regulations and the rest other legal acts (see **Figure 2**). While the figures for directives and regulations are relatively comparable between policy areas, the figures for other legal acts are inherently more difficult to produce on a consistent basis.

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<sup>6</sup> Euro-Lex public database.

**Figure 2 – Types of EU law monitored by Commission DGs**



**Source:** ECA survey of Commission DGs

**18** A number of **features of EU laws** may increase the risk of non-compliance. In our surveys, the most common features cited by both DGs and Member States as implicated in problems in implementing or applying EU law were:

- o the complexity and technical nature of the subject matter and
- o the clarity of EU legislation.

**19** Member States also variously reported a number of other factors that contribute to their difficulties in applying EU law correctly and on time, in particular:

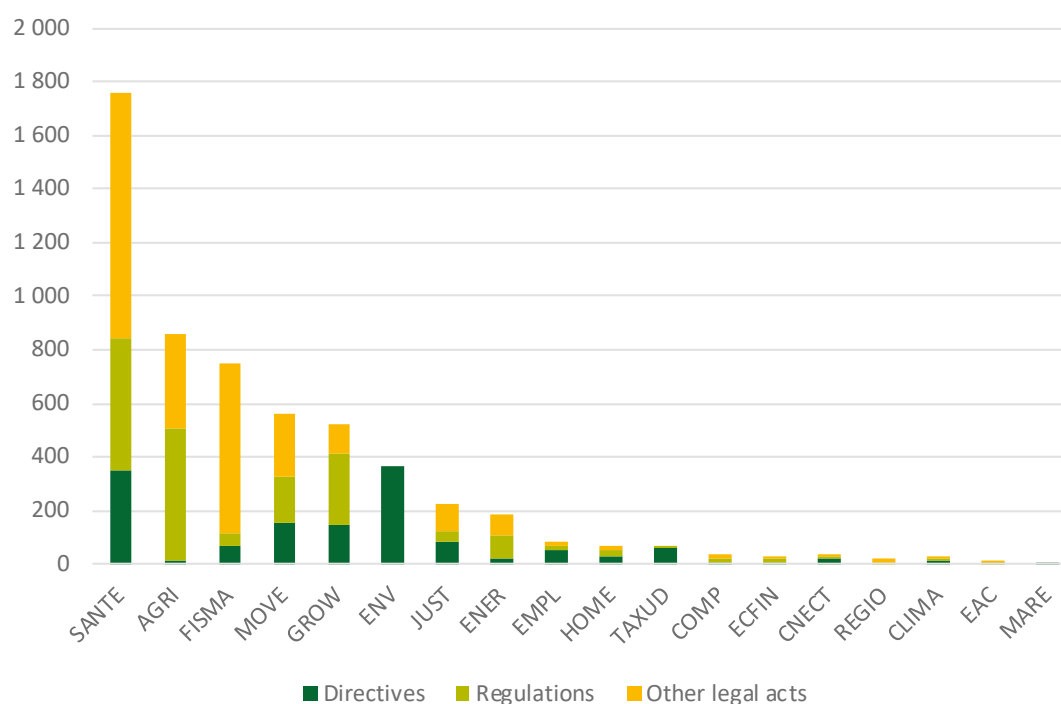
- o any significant non-alignment of new EU requirements with existing legislation at national or regional level;
- o differences in interpretation of provisions of EU law between them and the Commission; and
- o the number of options available at their level in applying the directive.

**20** In effect, **each EU legislative act presents its own specific challenges for Member States** with regard to its correct and timely application.

## Each policy area has its own specificities

**21** The number and type of **legislative acts monitored** by DGs varies considerably between policy areas (see [Figure 3](#)). In our survey, nearly a third of the legal acts with provisions or obligations for Member States fall in the area of public health and food safety (SANTE) with over a quarter of directives in the area of the environment. As regards the balance between the use of regulations and directives, DGs for eight policy areas reported mostly using regulations, seven DGs reported using an equal mix of directives and regulations, and three DGs reported mostly use directives. Member States reported that they had most difficulty in ensuring the timely and correct application of EU law in the policy areas Environment (ENV), Mobility and transport (MOVE), Energy (ENER), Financial stability, financial services and capital markets union (FISMA), and Internal market, industry, entrepreneurship and SMEs (GROW). These are among the areas with the highest number of EU laws to monitor and the highest number of transposition related infringement cases.

**Figure 3 – Considerable variation between Commission DGs in the number and type of EU laws monitored**



**Source:** ECA based on survey of Commission DGs

**22** EU policy areas also vary considerably in the extent to which they mix **legislative and budgetary instruments**. While nine policy areas involve mostly legislative activities<sup>7</sup>, the other nine involve either a balance of legislative and budgetary instruments or mostly the management of EU expenditure. There is also considerable variation in the amounts of funds managed and spent in the different policy areas as well as in the financial management arrangements that apply. In some policy areas, Member States may apply for EU funds for EU programmes or projects that could facilitate their application of EU laws. For example, Member States may propose using European Structural and Investment funds (ESIF) to support important infrastructure projects needed to meet EU environmental standards or apply for technical assistance grants for actions to strengthen their judicial systems.

**23** The Commission's powers to detect and correct Member States' non-compliance with EU law also vary between policy areas, and are in many cases linked to the availability of EU funds. In our survey, most DGs (13/18) reported having some **specific investigative powers** to detect non-compliance with EU law for at least some parts of their policy area<sup>8</sup>. Just over a third of DGs (7/18) considered that reinforcing inspection or investigative powers would be likely to help improve compliance with EU law. Most of these DGs already considered that they had relatively high investigative powers (4/7).

**24** Over a third of DGs (7/18) reported having **specific sanctioning or corrective powers** with respect to Member States in addition to the infringement procedure. The main corrective power DGs reported (5/7) related to areas involving the EU spending. Under the regulations governing EU funds, DGs have management and control systems that help detect cases of non-compliance and impose financial corrections (see **Figure 4**). For example, in agriculture, AGRI<sup>9</sup> detects non-compliance with EU law through the conformity audit mechanism and uses the clearance of accounts procedure to convince Member States to adapt their management and control systems and avoid the imposition of financial corrections. Similar arrangements exist with respect to a number of other funds under shared management<sup>10</sup>.

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<sup>7</sup> DGs that reported mostly legislative activities: CLIMA, COMP, ENER, ENV, FISMA, JUST, MARE, REGIO, SANTE.

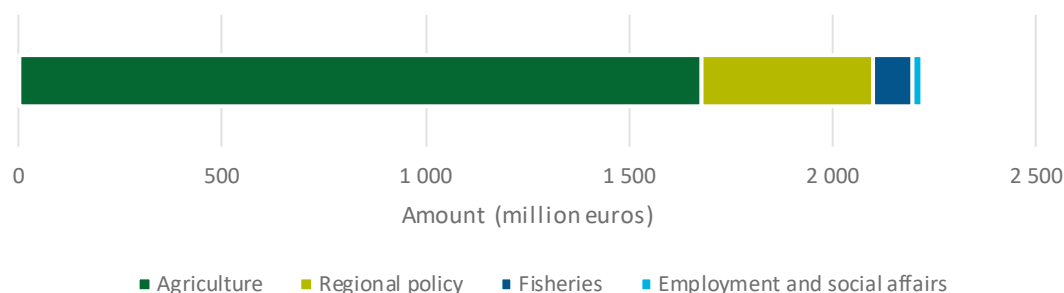
<sup>8</sup> **Annex II** provides a description of how we refer to the results of our surveys.

<sup>9</sup> We refer to the DGs in our survey by their official abbreviations as set out in **Annex I**.

<sup>10</sup> Other funds under shared management with financial correction mechanisms include the European Regional Development Fund, the European Social Fund, the Cohesion fund, and the European Fisheries Fund.



**Figure 4 – Financial corrections and recoveries 2017**



**Source:** ECA based on Commission's Annual Management and Performance Report

**25** In addition, the Commission may order the recovery of unlawful **state aid** from recipients. If the Member State does not comply in due time, the Commission may refer the case to the CJEU, without initiating an infringement procedure under Article 258 of the TFEU. Furthermore, in the context of the **European Semester**<sup>11</sup>, the Commission may recommend that a Member State take measures to strengthen its judicial systems, which if not taken could lead to the withholding of EU funds.

**26** In effect, **each policy area has a unique profile** in terms of the number and types of legislative instruments in force and the availability or not of specific powers to investigate or sanction Member States' non-compliance with certain EU laws. Thus, the reliance the Commission places on the infringement procedure to enforce EU law varies considerably between policy areas.

### Significant differences exist between Member States

**27** There are significant differences between Member States' political, legal and constitutional arrangements, which influence the way they put EU law into practice. In our surveys, DGs and Member States reported how factors related to Member States' legal systems, financial and administrative capacity, and national oversight arrangements may affect their compliance with EU law as well as the Commission's ability to monitor it.

### Law making arrangements and approach

**28** Member States reported considerable difference in terms of their legislative procedures, the levels of government involved, and preferred approach to ensuring

<sup>11</sup> The European Semester is a cycle of economic and fiscal policy coordination within the EU. It is part of the European Union's economic governance framework. Its focus is on the 6-month period from the beginning of each year, hence its name - the 'semester'.

the transposition and application of EU law. These differences help determine the number, type and timing of national implementing measures.

**29** Our surveys of DGs and Member States suggest that the **length of a Member State's legislative procedure** is a key determinant of the time taken to transpose directives. Many Member States (10/27) and DGs (8/17) cited issues related to the legislative process as often being implicated in problems with the transposition or the application of EU law. Many Member States (8/26) reported that regional authorities played a role in the legislative process in at least some cases. Delays in adopting national implementing measures occur even though most Member States (23/27) reported having a mechanism for prioritising the transposition of directives or speeding up the legal process if necessary.

**30** The risk of late transposition depends to some extent on the complexity of the directive and the deadline for implementation. These deadlines are agreed as part of an EU legislative process that involves the EU institutions and the Member States. In our survey, most Member States considered **transposition deadlines** sufficiently long for well-delimited directives with moderate numbers of legal obligations in areas not heavily regulated at national level. However, most Member States also considered transposition deadlines were seldom long enough for directives with a large number of legal obligations, a broad scope, or which affected many national laws. Member States responses suggest that delays in transposing directives are partly attributable to the extent of the coordination or consultation needed within the Member State in order to transpose the directive.

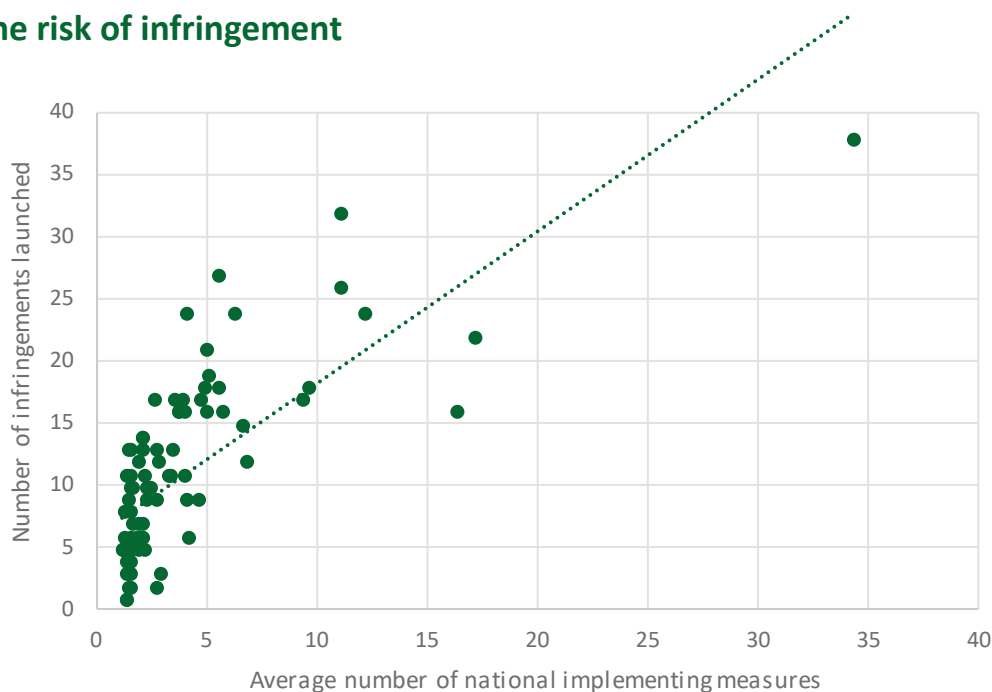
**31** Member States also have different **transposition preferences**. Implementing directives may involve Member States choosing between amending existing and/or adopting new national legislation. While a few Member States expressed a preference for amending existing national legislation where possible, most Member States reported preferring to strike a balance between the two approaches. Member States variously reported that the choice depended on factors such as the nature of the directive in question, the character of the national law in place, and whether the transposition of the directive was part of wider national reforms taking place in the policy area concerned.

**32** Member States also vary in the **types of legislative instrument** used to transpose EU directives into their legal order. Member States' estimates for the period 2014-2016 of the ratio of high level legislation (e.g. Acts of Parliament) to lower level legislation (i.e. delegated / subordinated legislation) varied considerably. While most Member States reported a higher proportion of lower level legislation, over a quarter reported a higher proportion of primary legislation. Estimates for higher-level

legislation varied between 5 % and 80 % and for lower level legislation between 20 % and 90 %.

**33** There is also considerable variation between Member States in the number and scope of **national implementing measures** for any given EU directive. In our data analysis, we noted a correlation between the number of national implementing measures and the number of infringement cases launched in the period 2014-2016 for a given directive (see **Figure 5**). In our survey, many Member States cited the number of national implementing measures needed as a key determinant of the time taken to transpose directives.

**Figure 5 – The number of national implementing measures may increase the risk of infringement**



encouraged to inform the Commission about any “gold plating” measures<sup>13</sup> through the Commission’s electronic tool for notifying national implementing measures<sup>14</sup>.

**35** Some Member States and DGs also noted that **political considerations** at Member State level contributed in certain cases to EU legal acts not being implemented or applied correctly or on time. These comprised cases where Member States:

- have different policy priorities from the Commission;
- may not have agreed with the law or certain provisions within it;
- significant domestic sensitivities or national interests are involved; or
- the electoral cycle or political stability affected the adoption of the legislation.

#### **Administrative and financial capacity**

**36** Sufficient **administrative capacity** plays an important role in ensuring the correct and timely application of EU law. In our surveys:

- Many Member States (8/19) considered administrative capacity to be a key determinant of the conformity of national transposition measures with EU law.
- Most Member States (13/22) rated the legislative work required to transpose EU law into the national legal order as very challenging given the human resources and skills available.
- Most Member States (14/22) and DGs (13/14) also indicated that insufficient administrative capacity was, at least sometimes, implicated in the problems Member States encounter in transposing or applying EU law.
- The DGs responsible for employment, transport and justice policy areas highlighted that administrative capacity was an issue for specific groups of Member States.

**37** Insufficient **financial capacity** can also play a role in the non-compliance of Member States with certain provision of EU law. For example, in cases where

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<sup>13</sup> Inter-institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016.

<sup>14</sup> No Member States currently use the possibility to communicate “gold plating” measures using the available electronic notification tool (MNE).

considerable investment is required to meet EU standards. In such cases, ESIF or other EU expenditure programmes may be available to Member States.

### **Member States' own oversight arrangements**

**38** As they are responsible for putting EU law into practice, Member States put in place their own arrangements for overseeing the transposition of directives, ensuring the correct application of EU laws, and the handling of infringement cases. Although **arrangements vary**, most Member States tend to have a higher degree of centralisation for overseeing the transposition of directives and handling infringement cases than they do for monitoring the correct application of EU law.

**39** Nearly all Member States (21/22) reported that the ministry responsible for a specific policy area was also responsible for the **transposition of EU directives** in that area, in some cases in coordination with the relevant regional authorities involved in the legislative process. Nearly all Member States (25/27) also reported having a specific body responsible for coordinating the transposition of directives. In most cases, the body is also responsible for checking conformity with EU law. In a few cases, however, its role is limited to providing guidance and support. In addition, nearly all Member States also reported having centralised arrangements in place for monitoring the transposition of directives with some Member States using IT systems that provide alerts and notifications regarding upcoming deadlines.

**40** Nearly all Member States (21/22) reported that the primary responsibility for overseeing the **application of EU law** lay with the ministry responsible for the policy area concerned. Many Member States (12/27) reported having a specific body with responsibility for overseeing of the application of EU law. Similarly, most Member States (15/27) reported that the primary responsibility for managing infringement cases lay with the line ministry or department in the policy area concerned. A few Member States (3/27) reported that this responsibility was centralised. All Member States (27/27) reported having a body at central level responsible for the coordination and oversight of infringement cases.

**41** Most national **coordinating bodies** or central authorities responsible for EU law fall under the responsibility of the ministries for Foreign or EU affairs, some under the Justice ministry, and a few under central government (e.g. Office of the Prime Minister, Chancellor or Secretary General). Although nearly all Member States reported having some form of centralized monitoring of transposition exercises and infringement cases, few report publicly on the results. In most Member States, the responsible departments produce non-public reports for either the government or the parliament.

**42** In effect, **each Member State has its own distinctive approach** to ensuring the correct and timely application of EU law in its jurisdiction.

## Commission strategy: priorities, organisation and resources

### Objectives and priorities for oversight activities

**43** The Commission’s approach to overseeing the application of EU law recognises the **challenges** posed by the size and nature of the EU *acquis*, the specificities of the different policy areas where infringements may occur, and the particularities of Member States’ law-making and oversight arrangements.

**44** Given this complex compliance landscape, the Commission has been developing its approach to overseeing the application of EU law over many years in line with a series of communications issued in 2002<sup>15</sup>, 2007<sup>16</sup> and 2016<sup>17</sup>. In reviewing these communications, we have identified a number of key principles, objectives and features of the Commission’s approach to overseeing EU law under Article 17(1) of the TEU. The main underlying **principles** of the current approach, which in most cases derive from the EU’s legal framework, are:

- the upholding of EU law as a pre-requisite for all rights and obligations deriving from the Treaties;
- the systematic risk that non-application of EU law poses to the achievement of EU policy objectives;
- Member States’ primary responsibility for ensuring EU law is applied and providing redress to individual citizens;
- the obligation of sincere cooperation on Member States in the investigation of suspected infringements;
- the discretionary power of the Commission to open and close the infringement procedure and request CJEU to impose penalties;

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<sup>15</sup> Communication from the Commission “Better monitoring of the application of EU law”, COM(2002) 725 final of 11 December 2002.

<sup>16</sup> Communication from the Commission “A Europe for results – applying Community law”, COM(2007) 502 final of 5 September 2007.

<sup>17</sup> Communication from the Commission “EU law: Better Results through Better Application”, C(2016) 8600 final of 21 December 2016.

- the confidentiality of exchanges of information with Member States during the pre-litigation phase of infringement cases;
- the Commission's duty to ensure good administrative conduct in handling complaints from citizens about alleged infringements.

**45** These principles represent fixed elements of the Commission's oversight arrangements. Within the framework provided by these principles, the Commission has developed a strategy for preventing, detecting and correcting infringements of EU law. The main **objectives** of the strategy are to:

- make EU laws easier to implement, apply and enforce;
- empower citizens to monitor and enforce their rights;
- strengthen relations and cooperation with Member States' authorities to identify and resolve infringement related issues;
- deal with serious infringements quickly and firmly while avoiding unnecessary use of the infringement procedure;
- ensure transparency about Member States' application of EU law and the Commission's oversight activities.

**46** In pursuing these objectives, the Commission has also recognised the need to guard against a number of specific **risks** related to the handling of potential infringement cases. In particular, the risks of:

- a **citizens' expectations gap** regarding the nature of the infringement procedure and the possibility of obtaining redress or compensation in individual cases;
- **Member States playing for time** by using the procedural steps in the processes for investigating and handling cases to provide additional time to implement and apply specific legal instruments, or to delay financial sanctions for as long as possible.

**47** To achieve the objectives and manage the risks involved, the Commission has developed an approach with a number of **key features and tools**. As regards EU laws themselves, since 2002, the Commission has embedded its oversight policy in its broader **Better Regulation approach**. A key objective of Better Regulation is to promote clear and simple EU laws. The Commission has developed specific Better Regulation tools to ensure due consideration is given to issues of application and implementation at each stage in the policy cycle, including at the evaluation stage.

**48** As regards empowering citizens, the Commission places considerable **reliance on complaints** as a major source of information for detecting infringements. To encourage complaints, the Commission provides **information to citizens** about their rights under EU and national law. There are also a number of **procedural guarantees for complainants** about the handling of their complaints. The Commission also provides **advice to citizens** on getting redress at national level. In addition, the Commission has developed a number of **alternative resolution mechanisms** for addressing individual cases of non-compliance by Member States with EU law. For example, in relation to the operation of the single market, the EU set up the “SOLVIT mechanism” to help Member States themselves to resolve cases where the rights of individual citizens or businesses under EU law of one Member State are breached by public authorities of another.

**49** As regards cooperating with Member States, the Commission has developed a number of **compliance promoting tools** for anticipating and solving problems with implementing and applying EU law as well as dealing with infringement cases. The Commission also encourages Member States to apply for **financial support from the EU budget**, where available, to enhance administrative capacity and fund the infrastructure needed to apply certain regulations and directives. In addition, through the European Semester, a Member State’s receipt of funds from the EU budget may become conditional on implementing structural reforms strengthening its judicial system.

**50** As regards targeting serious infringements, the Commission’s communications provide a **list of priority infringement cases** (see **Box 3**). In this context, the communications also explain the Commission’s policy in respect of requesting the CJEU to impose penalties on Member States for infringement cases referred under Articles 260(2) and 260(3) of the TFEU. The Commission has also developed **benchmarks for processing complaints and infringement cases** in a timely manner.



**Box 3****The Commission list of priority infringement cases**

The Commission prioritises launching the infringement procedure for cases involving:

- failure to notify and incorrect transposition;
- non-compliance with CJEU rulings;
- damage to EU financial interests;
- violation of EU exclusive powers;
- the capacity of national judicial systems to uphold EU law;
- persistent failure by a Member State to apply EU law correctly.

**51** Over many years, the Commission has developed **annual reporting** on the results of its oversight activities as a key element of transparency. The Commission also provides **public replies** to petitions and questions from the EP about cases of suspected infringement and inquiries by the European Ombudsman about the treatment of complainants. In addition, the Commission maintains a **public record of all infringement decisions** and publishes information about decisions and CJEU rulings through **press releases**.

## Organisation of responsibilities and resources for oversight activities

**52** The Commission is organised into DGs with responsibility for specific policy areas. The **Secretariat General** (SG) plays a central role in coordinating the Commission’s legislative activities. The Commission’s oversight function fits within this structure. The DG that prepares a piece of draft legislation is also responsible for monitoring its application. Where more than one DG is involved in drafting legislation, the Commission’s annual work programme indicates the “lead” DG.

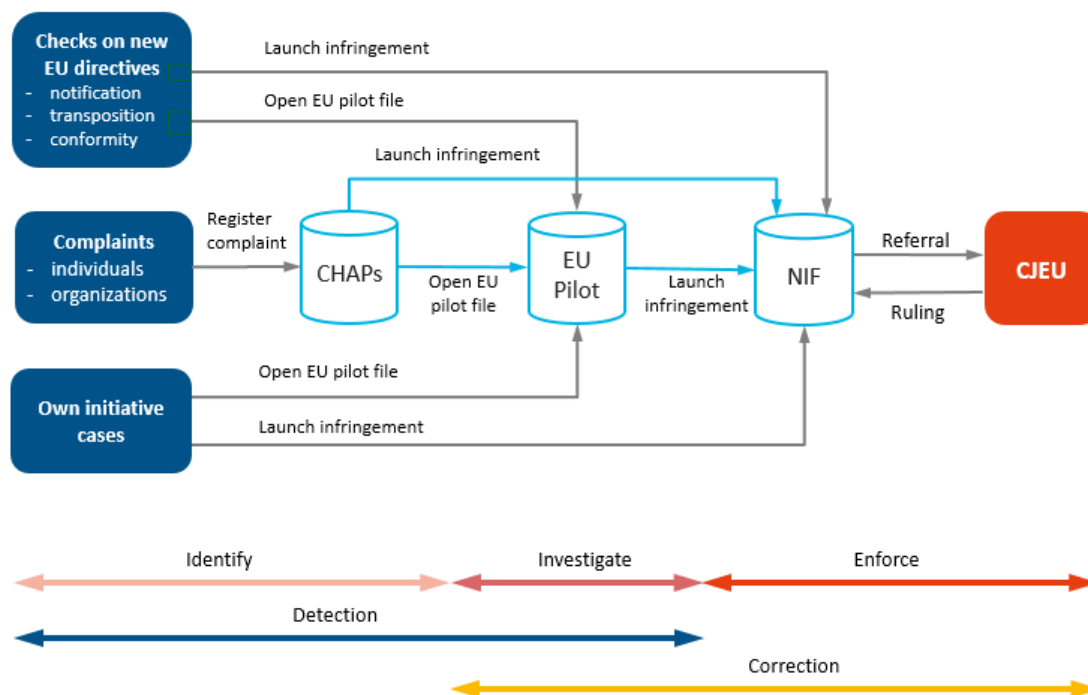
**53** For its legislation, each of the **lead DGs** is responsible for:

- carrying out transposition and conformity checks of Member States’ implementing measures;
- handling complaints and own-initiative cases;
- investigating cases through cooperation and information exchange with Member States;
- proposing whether to launch infringement proceedings and following up cases; and
- promoting Member States’ compliance using an array of tools.

**54** Lead DGs are also responsible for recording their oversight activities in three Commission wide **IT systems** (see **Figure 6**):

- CHAPs – a database for registering and following up complaints received from individuals and organisations;
- EU pilot – a platform for the Commission and the Member States to cooperate and exchange information about suspected infringements of EU law that can, in some cases, be used to achieve compliance; and
- NIF – the database for managing formal infringement cases and recording Commission decisions relating to the different steps of the formal infringement procedure (see **Box 2**).

**Figure 6 – Handling complaints and infringement cases**



Source: ECA

**55** There is considerable variation in **DGs' oversight functions**. Most DGs integrate some oversight activities within policy directorates. In around one third of DGs, policy directorates are also responsible for monitoring and enforcement. In the other DGs, a separate legal service within the DG or a specialised unit in a non-policy making directorate carries out monitoring and enforcement activities. Nearly all DGs organise their handling of complaints, EU pilot procedures and infringement cases by policy sector, legal instrument or Member State. In half the DGs, policy officers primarily responsible for the legislation in question handle the cases of potential non-compliance. In a third of DGs, legal officers are primarily responsible for case handling.

**56** Where law making and oversight functions involve services from different directorates, DGs ensure internal **coordination** through task forces, networks or ad hoc working arrangements. All DGs appoint coordinators for handling infringement cases and over a third of DGs have appointed coordinators for directives. The Commission ensures the overall coordination of its oversight activities through a dedicated unit of the SG and an internal network. Each DG has an "infringement correspondent" who acts as a point of contact with the SG and represents the DG in the network. The network deals with all management issues related to monitoring and enforcing EU law in Member States, promotes coherence and consistency across DGs, and meets twice a year. DGs that share resources (i.e. from the same "family") have sub-networks.

**57** The Commission has some **centralised oversight activities**. A unit in the SG is responsible for monitoring Member States' notifications of transposition measures, DGs' completion of transposition and conformity checks, and DGs' handling of complaints, EU pilot files and infringement procedures (including checking that DGs have properly recorded information in the relevant IT systems). The Commission's Legal Service advises on cases in the pre-litigation phase and manages relations with the CJEU during the litigation phase. DG Budget (BUDG) is responsible for collecting any penalties imposed on Member States by the CJEU.

**58** As DGs organise their oversight functions in different ways, there are no readily available figures for the **human resources** involved. The estimates provided by 13/18 DGs suggest that between 15 to 20 % of Commission staff working in policy areas requiring Member States to apply EU law are involved in oversight activities. However, there is considerable variation between these DGs, in terms of the absolute numbers of staff involved and the proportion of staff each DG devotes to oversight activities. For example, in SANTE around 550 staff (54 %) are involved in oversight activities compared to fewer than ten staff in CLIMA (5 %). No DGs envisaged increasing staff resources in the short term given the Commission's current staffing policy and the pipeline of legislative proposals.

**59** Overall, the vast majority of staff involved in oversight activities are concentrated in the **DGs with high caseloads**. In our survey, the top three DGs providing estimates accounted for over 60 % of the total staff involved.

### Supervision and coordination at Commission and DG level

**60** The Commission supervises and coordinates its oversight activities centrally and at DG level. Over time, the Commission has fixed a number of **benchmarks** for DGs handling of complaints, EU pilot files and infringements (see **Box 4**). The SG monitors DGs' performance against these benchmarks as part of the twice-yearly "coherence" exercises.

#### Box 4

##### Benchmarks for handling complaints and infringement cases

The Commission has fixed the following benchmarks for DG's handling of complaints and infringement cases:

- 1 year to investigate a complaint and either close the case or launch an infringement case (any delays must be explained to the complainant);
- 1 year to refer a failure-to-notify case to the CJEU or to close it;
- 6 months from the transposition deadline / notification to complete transposition checks;
- 16 to 24 months from notification to complete conformity checks;
- 10 weeks to assess Member States' responses to Commission requests in EU pilot;
- 8 to 18 months to refer or close Article 260 of the TFEU cases (12 to 24 months for cases first referred to the CJEU before 15 January 2011);
- DG specific targets for dealing with any backlog of slow cases.

**61** In our survey, most DGs (15/18) reported systematically **monitoring** their handling of complaints, EU pilot files, and infringement cases in order to assess workload, check progress or forward plan. Only three DGs with very few cases reported not systematically monitoring cases (ECFIN, CLIMA and COMP). DGs report on case handling to their respective Commissioners as part of the Commission's monthly infringement cycle. Most services responsible for monitoring cases (13/18) report regularly to their Director General. Other DGs only report to DG level when necessary, for example to highlight cases that need additional steering. Most reports cover the number and outcome of cases as well as the results of the coherence exercise and any general issues regarding enforcement. A few DGs also reported information about their key performance indicators and use of human resources.

**62** As only some DGs oversee Member States' application of EU law, the Commission does not require DGs to report systematically on their oversight activities in their annual activity reports. Half of the DGs in our survey (9/18) reported setting **performance indicators** for their handling of transposition checks, complaints, EU pilot files and infringement cases. For the most part, these DGs use some or all of the benchmarks defined by the Commission (see **Box 4**). Our review of annual activity

reports for the period 2014-2016 showed that different DGs choose to focus on different aspects of their oversight activities. Reported indicators included:

- **Transposition** – the percentage of notifications received from Member States by the deadline (FISMA), the transposition rate or deficit of Member States with respect to directives (GROW, MOVE, JUST, MARKET), the number of directives for which conformity checks by the Commission were not completed within 1 year (JUST);
- **Complaints** – the total number of complaints handled in the year (EMPL, JUST), the percentage of complaints closed within 1 year (JUST), the average number of months needed to handle a case (FISMA);
- **EU pilot** – the number of cases opened and closed during the year (ENV, TAXUD);
- **Infringements** – the percentage of failure-to-notify cases handled by the Commission within deadlines (MOVE, FISMA), the percentage of cases either closed or referred to CJEU within a specified period (JUST), the number of opened, closed or ongoing cases (TAXUD, ENV, SANTE), the number of cases open more than 3 years (MOVE), the percentage of non-conformity cases closed within the deadlines (FISMA), the number of cases proposed for an Commission decision as a percentage of the total number of pending cases (TAXUD), the duration of infringement cases (GROW).

**63** Most DGs (11/18) reported having arrangements in place for **sharing lessons learned within the DG** between those responsible for monitoring and enforcement and those responsible for EU policy and law making. These were either organisational arrangements (5/11) or special groups, meetings or training events (6/11). Similarly, almost half of DGs (8/18) ensure lessons learned are shared with those responsible for evaluation and fitness checks either through organisational arrangements (4/8) or special groups, meetings or training events (4/8). At central level, the Commission ensures coordination by situating the SG unit for “Monitoring the Application of EU law” in the SG directorate responsible for “Better Regulation and Work Programme”, alongside the units for “Evaluation, Regulatory Fitness and Performance” and for “Impact Assessment”.

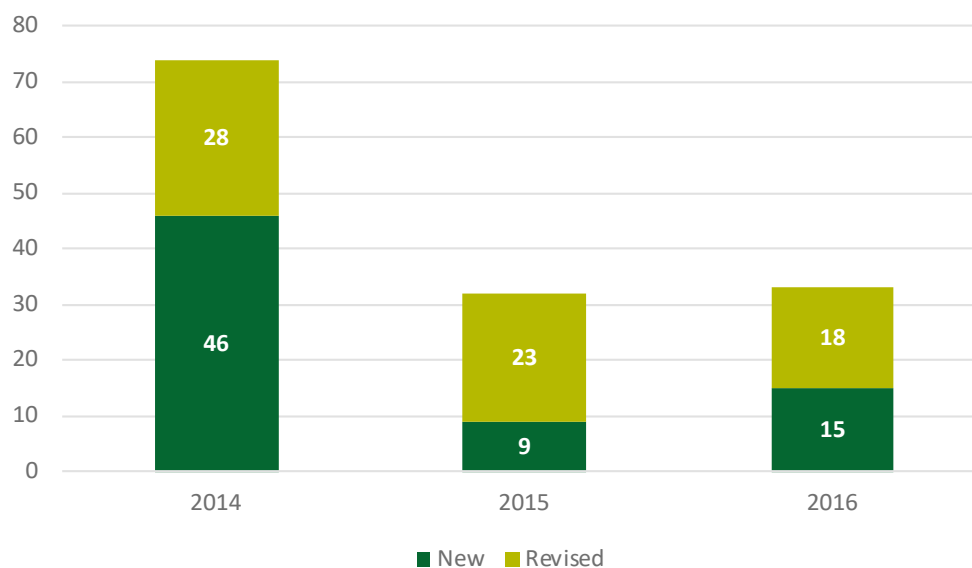
**64** As regards **evaluation and internal audit**, although there have been some studies at DG level, the Commission has not so far carried out an overall assessment of its oversight policy and activities. The Commission’s Internal Audit Service (IAS) audits DGs’ arrangements for monitoring and enforcing EU law. Since 2014, the IAS has completed a number of audits on DGs with significant numbers of directives or infringement cases as part of a programme of audits to be carried out on this topic.

## Management: monitoring, enforcing and promoting compliance

### Checking the implementation of new or revised EU directives

**65** New or revised directives (see [Figure 7](#)) require Member States to notify the Commission of the measures taken to implement the directive into the national legal order. Member States must provide the **notification** by a specified date (usually 2 years after adoption) and inform the Commission of the national implementing measures.

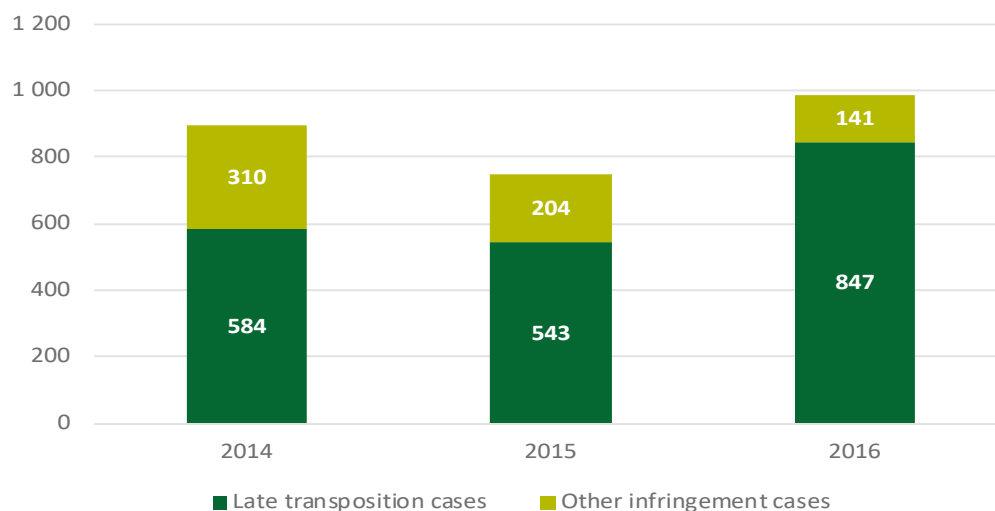
**Figure 7 – EU directives adopted in the period 2014-2016**



**Source:** ECA based on EUR-LEX data

**66** Where a Member State fails to notify the Commission of implementing measures within the deadline, the SG checks with the lead DG before preparing a letter of non-notification for the Commission to adopt and send to the Member State. The majority of infringement cases launched by the Commission relate to the **late transposition** of directives (see [Figure 8](#)).

**Figure 8 – Most infringement cases are for late transposition**



**Source:** ECA based on Commission data

**67** Having received notifications, the Commission assesses whether Member States have implemented EU directives completely and accurately using a two-step approach involving **transposition and conformity** checks. With transposition checks, the Commission examines whether the Member State’s notification includes national implementing measures for every obligation in the EU directive (completeness). With conformity checks, the Commission compares article-by-article the provisions and obligations in the EU directive to the text of the national implementing measures (accuracy).

**68** The lead DG for a directive is responsible for carrying out the transposition and conformity checks and determines the **extent of checking**. Nearly all DGs reported checking the transposition of all provisions or obligations in each directive and for all Member States. Most DGs also reported checking the conformity of national implementing measures for all provisions of each directive for all Member States, with a few DGs focusing checks on only the most important provisions or the provision judged to be at highest risk of being infringed. Under the Commission’s new enforcement policy, since 2017, DGs are required to carry out systematic transposition and conformity checks.

**69** The key driver of the **workload** of a given DG in terms of transposition and conformity checks is the number of directives that have recently entered into force in their policy area. This varies considerably over time as a function of the Commission’s work programme and the EU legislative process. For the period 2014-2016, the DGs in our survey that reported the highest levels of checks were TAXUD, ENV, GROW, ENER and CLIMA. However, as DGs are not required to register the checks they perform in a



consistent way in a central database, not all DGs were able to provide estimates, and the estimates that were provided may not be fully comparable.

**70** Transposition and conformity checks are challenging to perform. DGs need considerable **knowledge** of Member States' legal systems and languages and should perform the checks within certain deadlines. Most of the DGs concerned considered it challenging to complete checks on time due to the relatively short deadlines set in some cases and the need for staff with the requisite skills and expertise.

**71** The **time required** to complete transposition and conformity checks depends on a number of factors. The factors cited most frequently by DGs were:

- the EU directive's length, complexity and/or novelty;
- the quality and timeliness of the supply of information from Member States about their transposition measures;
- the number and complexity of national implementing measures; and
- the availability of resources (including translation services and legal/linguistic knowledge) given competing priorities within the DG.

**72** As DGs are not required to register the checks they perform in a consistent way in a central database, there are no official estimates of the **time taken**. The estimates provided by DGs in our survey suggested considerable variation between the policy areas. As one DG noted, from the day the transposition deadline expires until the end of the conformity exercise can take around 4 to 6 years. DGs reported that conformity checks take considerably longer to complete than transposition checks. One DG noted that the two-step approach is useful, but slows down the overall assessment. The DG suggested that the Commission consider making available the option of including non-conformity issues in non-transposition infringement cases. To speed up the process, another DG has been investigating using language technology to automate checking.

**73** Most DGs with high level of directives to check make use of **outsourcing** occasionally. The main reason DGs cited for outsourcing checks was insufficient internal human resources, including a lack of knowledge of specific Member States' languages or legal systems. Where checks were outsourced, DGs reported that their staff verified the work of the external contractors. Most DGs were either satisfied or very satisfied with the completeness, accuracy and timeliness of the work of the contractor and no DGs reported dissatisfaction with the results of outsourcing checks. However, as one DG noted, outsourcing may increase the overall time needed to complete checks.

## Handling complaints and identifying own initiative cases

**74** The Commission mainly identifies potential infringements regarding **non-conformity with the Treaties, regulations and decisions**, as well as cases of **non-application of directives**, through handling complaints and carrying out investigations on its own initiative. In our survey, overall, DGs considered complaints as the most important source of information for detecting these types of potential infringement case.

**75** DGs receive **complaints** by a number of routes, including directly to a DG or via the Commission's website. The Commission also handles petitions forwarded to it from the EP as complaints. Since 2017, DGs are required to ask complainants who contact them to fill in a standard complaint form. This initiative aims to enable a better categorisation of the nature of the complaint and the complainant in the future.

**76** The Commission receives complaints for a number of different **types of complainant**, including citizens, businesses and interest groups. As DGs were not required to categorise complainants, there are no official estimates of the breakdown by type of complainant. Estimates provided by 13 of the DGs in our survey suggest considerable variation between the policy areas. Ten DGs reported receiving more complaints from individuals than organisations while six DGs estimated receiving 90 % or more of their complaints from individuals. DGs reported receiving more complaints from organisations in the areas of Taxation, Energy and Climate action. Based on a weighted average of the estimates provided by DGs, our survey results suggest that DGs receive around two thirds of their complaints from individuals and one-third from organisations.

### Box 5

#### Complaints received from organisations

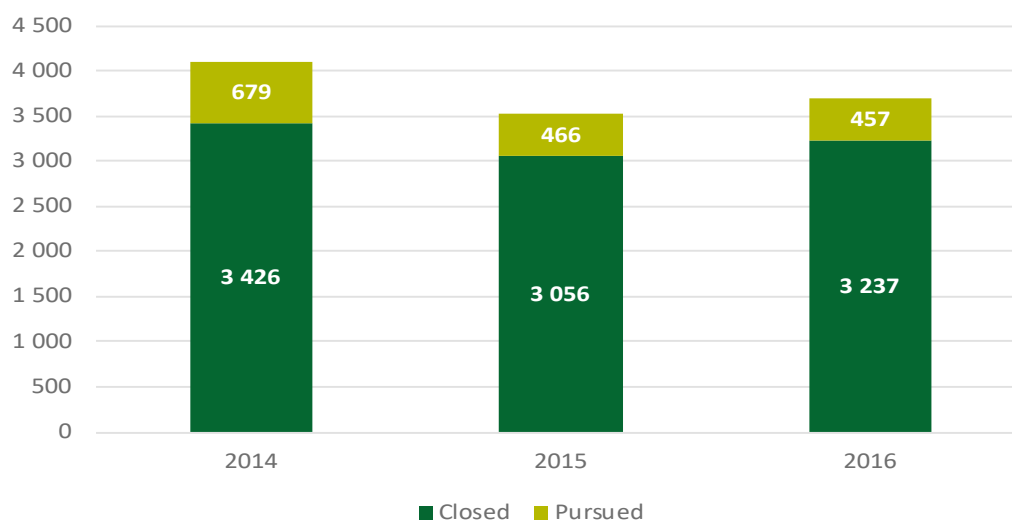
The Commission receives complaints from one or more different types of organisation depending on the policy area. The main types of organisation involved in the different policy areas are:

- Associations representing producers, consumers, businesses or citizens – AGRI, CLIMA, EAC, FISMA, GROW, HOME, JUST, MARE, MOVE and SANTE;
- Non-governmental organisations / public bodies – CNECT, EMPL, ENV, HOME, JUST, MARE, REGIO, SANTE and HOME;
- Law firms - ECFIN, ENER, MOVE and TAXUD.

**77** Complaint handling **procedures** are defined in a Commission Communication<sup>18</sup>. DGs are required to record complaints in the CHAPs system. The Commission is obliged to reply directly to complainants and keep them informed of any action taken (or not taken) in order to comply with its code of good administrative conduct and ensure transparency.

**78** The DG responsible first assesses whether to investigate a complaint. The Commission has established criteria covering those cases where DGs should not pursue a complaint. Most complaints do not lead to an investigation in EU pilot or an infringement procedure (see **Figure 9**).

**Figure 9 – Most complaints do not lead to infringement cases**



**Source:** ECA based on Commission data

**79** The Commission does not publish figures on the **reasons for not pursuing complaints**. In our survey, most DGs (13/18) reported that they did monitor the reasons. The most common reasons that DGs gave for not pursuing a complaint were:

- no EU law was breached or non-EU competence in the matter raised by the complainant;
- insufficient indications from the complaint of a general practice (i.e. not limited to the specific complaint);

<sup>18</sup> COM(2012) 154 final on “Updating the handling of relations with the complainant in respect of the application of Union law” and complemented by the Annex to C(2016) 8600 final on “EU law: Better Results through Better Application”.

- the complainant's problem could be resolved through national Courts or through an alternative mechanism (e.g. SOLVIT);
- the complainant did not provide sufficient information even after being invited to complete the complaint;
- the complaint relates to a Member State's transposition of a directive in a general way that is undergoing transposition or conformity checking;
- there is a pending preliminary ruling proceeding of the CJEU under Article 267 of the TFEU on the same issue;
- there is a EU or national legislative proposal under consideration that addresses the complaint's problem;
- there are national legal proceedings pending on the same issue.

**80** As regards **strengths**, DGs variously noted that the complaints handling process was:

- a direct source of information about the implementation and application of EU law by Member States;
- a means for the Commission to support EU citizens directly in a transparent and user-friendly way that may also provide an opportunity to aid citizens to understand EU governance and responsibilities better;
- focused only on pursuing relevant complaints.

**81** As regards **limitations**, DGs variously described a number of factors that made it challenging to handle complaints efficiently and effectively to the satisfaction of complainants:

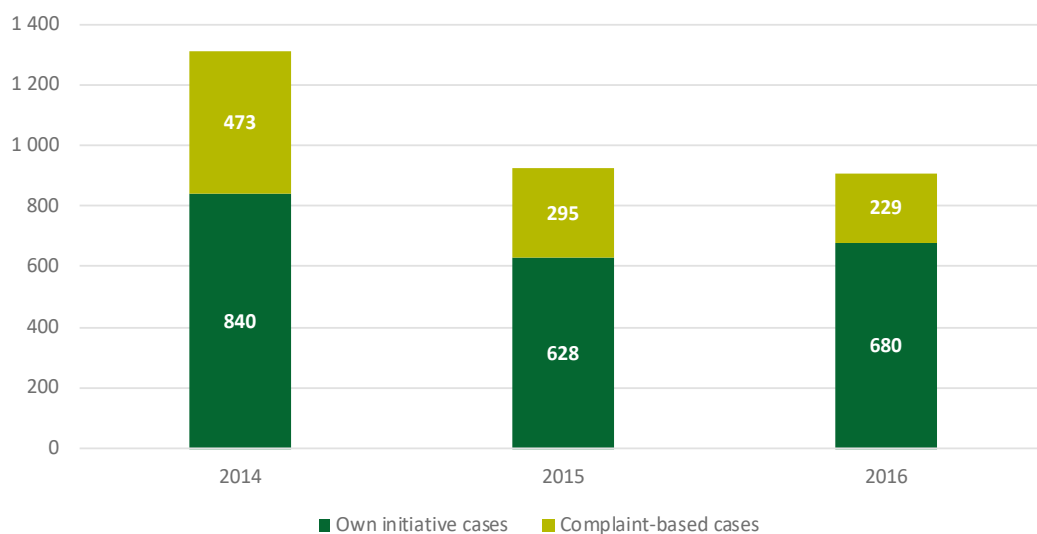
- many complainants have unrealistic expectations about the Commission's powers and capacity to resolve specific cases or provide insufficient information about their case;
- the activity is complex and time-consuming, requiring considerable skill and judgement, but yields relatively few infringement procedures;
- the way the Commission is organised can make it difficult to deal with many complaints about the same problem or individual complaints relevant to more than one Commission service.

**82** DGs reported handling significantly different **numbers of complaints** during the period 2014-2016. For example, TAXUD reported handling around 950 cases per year whereas CLIMA and ECFIN handled less than ten cases per year compared to an overall average per DG of around 200 cases.

**83** As regards **own initiative cases**, for those areas where they exist, DGs considered inspection, investigative or control powers as the most important source for identifying potential cases of infringement. Around a third of DGs considered fitness checks and evaluations as well as press and media reports as important sources of information. DGs also highlighted a number of sources of other information as very important in their policy areas, including national inspection reports (ENV), EU supervisory agency reports (FISMA), and audit reports (REGIO). DGs for policy areas where the SOLVIT mechanism applies did not consider it as among the most important sources of information for identifying potential infringement cases.

**84** DGs also reported handling significantly different **numbers of own initiative cases** in the period 2014-2016. For example, during the period, ENER reported handling over 200 cases per year while REGIO, EAC and ECFIN had none. DGs also reported significantly different ratios of complaints handled to own initiative cases. Most DGs handle many more complaints than own initiative cases, except for ENER, SANTE and MARE. Those DGs receive relatively few complaints but have investigative powers that generate own initiative cases. Overall, more own initiative cases are investigated than complaints (see [Figure 10](#)).

**Figure 10 – More own initiative cases than complaints lead to investigations**



**Source:** ECA based on Commission data

## Investigating cases through EU pilot

**85** In cases of suspected infringement, DGs may investigate the case with the Member States concerned using the **EU pilot** mechanism<sup>19</sup>. The EU pilot is an electronic tool to gather information about suspected breaches of EU law by Member States in confidence. In some cases, it can be used to achieve compliance without recourse to the formal infringement procedure.

**86** EU pilot provides a means for the Commission and the Member States to hold a structured dialogue within set **deadlines**. DGs create “files” in EU pilot for each potential infringement case. The DG sends a query to the Member State concerned, which has 10 weeks to reply. The DG then has 10 weeks to assess the response. Following the assessment, the DG either closes the case, asks for further information, or proposes that the Commission launches a formal infringement procedure.

**87** In our survey, nearly all Member States considered that the Commission provided adequate information in EU pilot on suspected infringements. Member States highlighted the main **strengths** of the EU pilot as:

- avoiding infringement proceedings and promoting the timely correction of instances of non-compliance;
- contributing to a mutual understanding of EU law and Member States’ implementing measures;
- fostering a cooperative culture between Commission DGs and national authorities;
- being a user-friendly way to structure communication within specific deadlines;
- helping to coordinate and raise awareness within Member States of compliance issues; and
- empowering citizens by providing a means to investigate suspected breaches of their rights by a Member State.

**88** As regards **limitations**, a few Member States (5/27) noted that slow responses by DGs sometimes undermined the effectiveness of EU pilot in resolving specific cases. A few Member States also noted that, since 2017, the Commission has stopped systematically using EU pilot to investigate certain types of cases before launching the

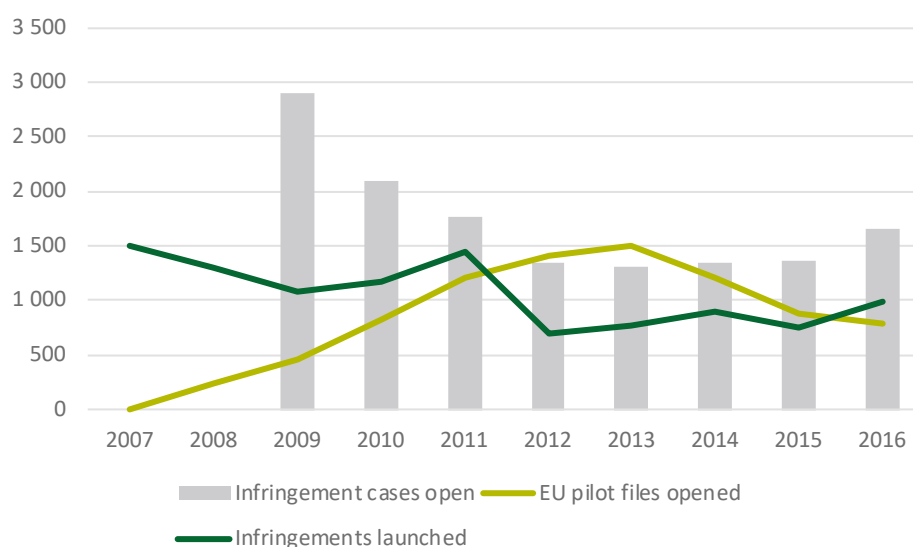
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<sup>19</sup> The platform began as a “pilot” project proposed by the Commission involving 15 volunteer Member States in 2008 with the remaining Member States joining between 2010 and 2013.

infringement procedure as part of its new enforcement policy. These Member States warned that it might end up taking more time to resolve such cases in a timely manner. Some Member States also noted that using the EU pilot platform helped them to oversee and handle cases in a coordinated manner.

**89** The introduction of EU pilot in 2008 led to a fall in the launching of new infringement procedures for a number of years as new cases were investigated first through the platform. Consequently, open infringement cases also fell for a number of years. In 2016, the number of new infringement cases rose above the number of new EU pilot files (see [Figure 11](#)).

**Figure 11 – EU pilot files and infringement cases**



**Source:** ECA based on Commission data

## Enforcing EU law through the infringement procedure

**90** The Commission enjoys discretion with regard to launching the **formal infringement procedure**. Once a DG has established sufficient evidence of a potential infringement, it prepares a decision for the Commission to launch the procedure. Articles 258 and 260 of the TFEU set out the steps of the procedure (see [Box 2](#)), which apply to each type of case. Each step in the procedure offers an opportunity for the Member State to comply and for the Commission to close the case.

**91** The Commission must authorise each step of the formal infringement procedure. In consultation with the Commission's Legal Service, DGs prepare proposals for **Commission decisions** on specific cases. The unit of the SG responsible for the monitoring of the application of EU law puts the batch of proposals on the agenda of Commission meetings. The Commission takes decisions on infringement cases at

around ten meetings a year (i.e. every month except over the summer). The number of decisions per meeting varies considerably depending on the number of cases in the pipeline.

**92** During the **pre-litigation phase** of the formal infringement procedure (Steps 1 and 2), the Commission tries to work with the Member States to resolve the issue and avoid referring the case unnecessarily to the CJEU. In our survey, most DGs (15/18) reported communicating with Member States during the pre-litigation phase through “political” or administrative letters as well as discussing outstanding cases with Member States’ representatives in “package” meetings or other forums. A few Member States noted difficulties in coordinating responses to administrative letters. In practice, the Commission closes most cases in the pre-litigation phase before making a referral to the CJEU (Step 3).

**93** As regards **challenges**, nearly all DGs (17/18) reported finding it demanding to handle infringement cases on time with most DGs (15/17) recognising the level of skills and expertise needed as a major contributory factor. While nearly all Member States reported the deadlines for replying to letters of formal notice and reasoned opinions (Steps 1 and 2) were usually sufficient for simple cases (23/24), most Member States reported that they were seldom sufficiently long for very complex cases (20/24). Most Member States reported that they found the Commission’s letters and opinions an adequate basis on which to prepare a response (12/23). Many other Member States considered they were partially adequate (11/23). A few Member States noted that Commission documents sometimes lacked clarity and that the quality varied depending on the DG or the case.

**94** Once referred to the CJEU, the time taken before a ruling on the case depends on the handling procedures of the CJEU (Step 4). The **length of cases at the CJEU** can depend on a number of factors, in particular the complexity of the case. If the Commission makes a further referral to the CJEU under Article 260(2) of the TFEU (Step 5), the time taken to resolve the case may increase considerably. The time taken before the CJEU rules on whether to impose a financial sanction will depend on how long the Member State was given to comply with the previous ruling, the time taken by the Commission to re-notify the Member State about its continued non-compliance, and how long it takes the CJEU to deliver a ruling.

**95** The Commission settles or withdraws many cases before a ruling by the CJEU (Steps 4 and 5). In the event, only a small proportion of infringement procedures result in **financial sanctions** being imposed on Member States under Article 260(2) of the TFEU (Step 5). In such cases, the infringement procedure may have taken many years. Penalties are applied on a daily basis until the Member State notifies that it has



complied with the ruling (periodic penalties). Where a Member State complies before the final ruling, the CJEU can impose a “lump sum” penalty to reflect the prior period of non-compliance. BUDG manages the calculation and collection of penalties.

**96** The lead DG is responsible for monitoring any subsequent related non-compliance issues or further cases of bad application by the Member State through complaints or own initiative investigations.

**97** As regards **strengths**, most DGs (13/18) highlighted the infringement procedure’s role in exerting pressure on Member States to comply with EU law, deter non-compliance, and highlight implementation difficulties. Various DGs also highlighted as strengths the high-level, structured, and transparent nature of the process, the Commission’s discretion in using the procedure, and the visibility of the results. In addition, a number of DGs saw using the infringement procedure as a good way for the Commission to signal to Member States and citizens that it takes non-compliance with EU law seriously. In our survey, nearly all Member States reported that the financial sanctions imposed by the CJEU in infringement cases exerted a strong deterrent effect (25/26). In the period 2014-2016, the total financial sanctions imposed on Member States for not complying with a judgment of the Court of Justice of the European Union was 339 million euros<sup>20</sup>.

**98** As regards the **limitations** associated with the infringement procedure, many DGs (8/18) highlighted the length of the procedure. DGs also variously noted:

- the burdensome nature of the process (cases require “a high level of proof”);
- the need for considerable knowledge and skills;
- lengthy and complex decision-making within the Commission;
- the need to exercise judgement as to whether to pursue or close cases;
- the confrontational nature of infringement cases;
- difficulties in dealing with politically sensitive cases and cases of partial compliance;

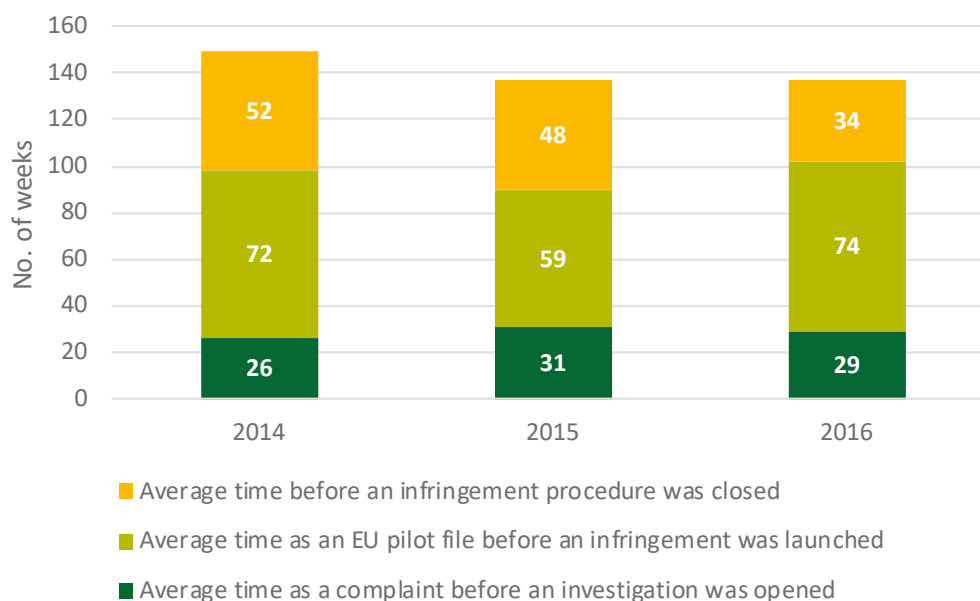
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<sup>20</sup> General Budget of the European Union - Outturn figures given for financial years 2014, 2015 and 2016 under Article 711, “Penalty payments and lump sums imposed on a Member State for not complying with a judgment of the Court of Justice of the European Union on its failure to fulfil an obligation under the Treaty”.

- o the challenge of ensuring equal treatment of Member States; and
- o launching infringement proceedings being counterproductive in some cases.

**99** As regards the **Commission's discretion** with respect to the formal infringement procedure, many Member States (9/22) considered it facilitated the effective enforcement of EU law in Member States. Many others (10/22) considered that it partially facilitated effective enforcement. A few Member States (3/22) considered that it did not facilitate effective enforcement. The main concern expressed by many Member States (10/22) related to the Commission no longer systematically using the EU pilot mechanism to exchange information on certain types of cases prior to launching an infringement procedure. **Figure 12** illustrates how many weeks were spent on average in the period 2014-2016 in handling complaints, conducting investigations through EU pilot and managing infringement cases before they were closed. This suggests that complaint-based infringement cases take around 140 weeks to resolve with around half the time spent investigating the complaint through EU pilot prior to launching the formal infringement procedure.

**Figure 12 – Time taken to resolve infringement cases**



**Source:** ECA based on Commission data

## Using tools to promote compliance

**100** In addition to the monitoring and enforcement measures, the Commission deploys **an array of “tools”**, at different phases in the policy cycle, to help Member States apply EU law correctly and on time (“compliance promoting tools”). When preparing proposals, the Commission may require the DG responsible to draw up an **implementation plan** setting out the main challenges Member States will face and the measures they will be expected to take. They may also provide **guidelines** for Member States on how to interpret, implement and apply the EU legal instrument. A directive may also require Member States to provide **explanatory documents** setting out how they have transposed the provisions of the directive into national law.

**101** During the implementation and application phases, the Commission deploys a number of **meeting-based tools**. These include **committees** of Member States’ representatives established by a directive, Commission coordinated **networks** of Member States’ representatives in charge of implementation, **expert groups** set up by the Commission to provide advice, or **workshops** the Commission may hold with specific Member States. In some policy areas, DGs also hold **“package meetings”** with specific Member States to discuss implementation issues and infringement cases. In addition to these meeting-based tools, the Commission may use **scoreboards** or **barometers** to highlight Member States’ performance with respect to the implementation of EU law.

**102** DGs are responsible for **using these tools** to provide support to Member States with respect to the legal instruments in their policy area. The Commission does not keep a central record of the use of all these tools by DGs. In our surveys<sup>21</sup>, we asked DGs and Member States about the use and effectiveness of each tool as well as their main strengths and limitations. We also asked Member States about the administrative burden certain tools imposed on them and their preferences for using the tool more or less often. We present the results of our analysis for each tool in **Annex III. Figure 13** provides an overview of how highly the DGs and Member States rated the main tools.

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<sup>21</sup> In developing our questions, we drew upon those posed in structured interviews with officials of the Commission and Member States in 2013 by the EP Policy Department C: Citizen’s rights and constitutional affairs for the EP Legal Affairs committee.

**Figure 13 – Effectiveness of compliance promoting tools**



**Source:** ECA based on survey of Commission DGs and Member States

**103** In general, **DGs and Member States rated the promotional tools as effective** (i.e. at least "medium" effectiveness, a score of "3"). Overall, DGs rated the effectiveness of promotional tools slightly more highly than Member States. This is largely the result of DGs rating explanatory documents with correlation tables and package meetings significantly more favourably than Member States.

**104** **Implementation plans** are the least frequently used tool. DGs and Member States also considered them to be the least effective overall. Although they were recognised as highlighting key implementation challenges, they were considered to be of limited usefulness as they were often prepared too early in the process and do not address the specificities of individual Member States.

**105** **Guidelines** are among the most widely used tools. Both DGs and Member States considered them to be highly effective, in particular for complex legislation. Guidelines were considered to play an important role in ensuring a common understanding of EU directives even though they do not provide a definitive interpretation of EU law. Most Member States considered more use should be made of guidelines.

**106** **Explanatory documents with correlation tables** were considered highly effective by DGs in facilitating the transposition and conformity checking of national implementation measures. Many Member States reported preparing such documents

for their own use as part of their procedures for ensuring the correct transposition of EU directives and rated their effectiveness highly. However, Member States that did not prepare explanatory documents with correlation tables reported finding them very burdensome to prepare. DGs and Member States variously recognised that explanatory documents also contribute to legal certainty and transparency about how EU law is put into practice.

**107** Most Member States advised the Commission to make more use of **meeting-based tools**. This was in spite of the significant administrative burden involved in participating in such forums. However, a number of Member States noted that approaches differed between DGs and that there was scope for the Commission to develop a more targeted and consistent approach to their use. Although Member States recognised the role scoreboards could play in encouraging Member States to improve their performance, most did not favour increasing their use.

## Ensuring transparency about compliance and oversight

**108** The Commission faces high **expectations of transparency** on the part of citizens and stakeholders with respect to the handling of all types of infringement cases, Member States' compliance with EU law and the Commission's own oversight activities:

- Individual complainants expect to be informed about what action will be taken to resolve their problems and to be informed of progress;
- Member States expect to get fair and consistent treatment with respect to monitoring and enforcement;
- EU legislators expect to be informed about the implementation and application by Member States of the EU laws they have adopted; and more generally
- other EU institutional stakeholders, such as the European Economic and Social Committee (EESC), the Committee of the Regions (CoR) and the European Ombudsman, and the general public expect to be informed about both Member States' compliance with EU law and the Commission's performance of its oversight activities.

**109** The Commission uses a number of **tools to communicate and report** to these different audiences about specific cases, Member States' compliance issues and the Commission's own oversight activities, while ensuring confidentiality where required.

**110** As regards **specific cases**, the main means for communicating with individual complainants is through written correspondence. The purpose of the correspondence is to keep complainants informed about the Commission's handling of the complaint and explain the reasons for any Commission decisions not to investigate the complaint or to close the case. The Commission has established a number of administrative guarantees for complainants (see **Box 6**).

## Box 6

### Administrative guarantees for complainants

In line with good administrative conduct, the Commission guarantees complainants that it will:

- register and acknowledge the receipt of their complaint within 15 working days;
- notify them in writing of any decision to further examine the case with the Member State concerned;
- notify them in writing of any decision to close a case or open a formal infringement procedure;
- explain any decision to close a case in a “pre-closure letter” and give the complainant 4 weeks to comment;
- inform the complainant after 1 year if the complaint has not been closed or an infringement procedure opened.

**111** Once the Commission has opened a formal infringement procedure, the complainant may follow the subsequent stages of the procedure via the Commission’s public record of the infringement procedure decisions and related press releases. The progress of cases referred to the CJEU can be followed through the CJEU’s website.

**112** As regards **Member States’ compliance** with EU law, certain EU laws make provision in review clauses for the Commission to produce implementation reports<sup>22</sup> about the transposition of directives. Transposition issues may also be highlighted in other types of published ex-post review, such as “Fitness Checks” and evaluations.

**113** For directives specifically related to the Single Market, the Commission provides indicators and information on a range of implementation and application issues in the **Single Market Scoreboard (SMS)**. The scoreboard includes a range of indicators including a number related to the transposition of directives, infringement cases and EU pilot files (see **Box 7**).

<sup>22</sup> Also referred to as “monitoring reports” or “transposition reports”.

**Box 7****Single Market Scoreboard indicators related to Member States applying EU law****Transposition**

- Transposition deficit (% of all directives not transposed)
- Progress over the last 6 months (change in the number of non-transposed directives)
- Long overdue directives (2 years or more)
- Total transposition delay (in months) for overdue directives
- Compliance deficit (% of all directives transposed incorrectly)

**Infringement**

- Number of pending infringement proceedings
- Change over the last 6 months (change in the number of infringement cases)
- Duration of infringement proceedings (in months)
- Duration since Court's ruling (in months)

**EU pilot**

- Average time taken by Member States to respond to a Commission query compared to the 10-week benchmark

**114** More generally, the Commission communicates about the results of its **oversight activities** and aspects of its performance through the **Annual Report on Monitoring the Application of EU law**. The Commission prepares the report primarily for the EP. The Legal Affairs committee of the EP scrutinises the report each year as the basis for a EP report. The Commission has maintained a consistent approach in terms of the contents and presentation of the annual reports over a number of years, adding information and analysis at the request of the EP. In this context, the EESC has invited the Commission to request its opinion on the annual report to provide an opportunity to register the views of organised civil society on the application of EU law. It has also encouraged the Commission to place more emphasis on public information about infringements in general <sup>23</sup>. Similarly, the CoR noted the importance of increasing public access to information about the application of EU law given the

<sup>23</sup> Opinion of the EESC on Monitoring the application of EU legislation of 18 October 2017.



important role that local and regional authorities play with respect to putting EU law into practice<sup>24</sup>.

**115** During the period 2014 to 2016 that we reviewed, the Commission's annual reports consisted of a well-illustrated high-level report (around 30 pages) and two annexes providing detailed information and charts on each of the 28 Member States and each of the relevant policy areas. The high-level summary describes the EU's infringement policy, highlights the contribution that the Commission's oversight activities make to the relevant priorities of the Juncker Commission, and explains the respective responsibilities of the Commission and the Member States with respect to the application of EU law. The summary also provides analysis of key aspects of the Commission's handling of complaints and infringement cases and the rulings of the CJEU, including illustrative examples. However, the Commission does not provide **information and analysis** on a number of matters of general interest to stakeholders (see **Box 8**).

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<sup>24</sup> The point was made by officials of the CoR in written response to questions posed in the preparation of this landscape review.

**Box 8****Annual reporting on the Commission's oversight activities**Analysis provided by the Commission:

- total complaints and infringement cases handled during the year;
- the 5-year trends for complaints and infringement cases;
- the number of open complaints and infringement cases;
- information on preventative activities, including selected compliance promoting tools (i.e. guidelines, implementing plans and explanatory documents);
- information on Member States' performance with respect to procedural deadlines.

Analysis not provided:

- the average duration of each step in the processes for handling complaints and infringement cases;
- the relationship between the trends for complaints, EU pilot files and infringement cases;
- the length of time complaints and cases have been open;
- information on the use of other compliance monitoring tools (e.g. the main meeting-based tools);
- information on the Commission's performance with respect to benchmarks for handling complaints and infringement cases.

**116** In this context, we note that the European Ombudsman, based on a strategic inquiry, suggested in 2017 that the Commission should *provide more information on its performance in resolving actual breaches of EU law under the pre-infringement procedures – and on the average duration of the process – in its annual report on “Monitoring the application of EU law”*.<sup>25</sup>

**Public audit of compliance with EU law****Public audit at national level**

**117** As part of our review, we invited **Member States' SAIs** to identify audit reports related to the application of EU law, for the period 2013-2017, in order to get an

<sup>25</sup> Strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission's handling of infringement complaints.

overview of the work of SAIs in this area. Out of 185 reports from 13 SAIs, we reviewed the 62 reports whose contents we assessed to be most relevant to the scope of our landscape review. These reports reflected both compliance and performance audit perspectives.

**118** Although the SAIs audits covered a variety of **policy areas**, most related to Environment and energy, Taxation and Transport. Many of the environmental and energy policy reports (24 reports) focused on the implementation of complex directives such as the Water Framework Directive or the Waste Framework Directive. The second most frequently covered policy area was Taxation policy (nine reports), with more than one report covering the subsectors of e-commerce and VAT. The area with the third most represented policy was Transport (eight reports), covering various topics from the rail to roads transport. From the other policy areas, Financial and economic governance, Agriculture, Regional development and other specific topics linked to the Single Market were represented in the SAI reports, including issues like public procurement or state aid.

**119** A few performance audits of the Member State's public administration examined the causes of late transposition but only in the context of a single policy or a specific EU legal instrument. In most cases, the **audit objectives** related to the performance of a national policy where some provisions of EU law were in force. In these cases, the SAIs were primarily assessing the effectiveness of national policy measures in achieving their objectives. These audits did not typically include any of assessment the national procedures for transposition and implementation of EU legislation into the national law.

**120** Nevertheless, a significant number of reports at least referred to the timeliness of **transposition** of EU law and took note of delays. In a few cases, the SAIs analysed reasons for such delays and assessed any other potential insufficiencies or inconsistencies of the transposition of the EU law into the national legislation. One audit report identified a risk of late transposition based on analysing national legislation against commitments stemming from the EU law. Another audit report included an overview of the national procedure for the transposition of EU directives. In addition, some reports mentioned formal **infringements or EU pilot cases** related to the audited subject, with a few SAIs also providing an overview of the consequences of non-compliance with EU law, including the financial impacts.

**121** A few audits covering ongoing infringement cases, included a qualitative **compliance assessment** of provisions of national legislation with EU law. One audit report included an analysis of the national implementing measure prepared for transposing a directive. Another report included recommendations that were taken

into account when implementing the directive concerned. A further report estimated the costs of adjustment related to implementing the requirements of a new directive under transposition.

**122** In several cases, the audit reports were not limited to central government. These audits assessed the measures adopted at **regional and local level** in order to implement commitments stemming from the EU law.

**123** We found one case of an SAI carrying out a **cross-government performance audit** on the efficiency of implementation of the EU law by the national administration that assessed the underlying processes and factors affecting both the timeliness and correctness of implementation of EU law (see **Box 9**).

### Box 9

#### Audit of the national processes for the implementation of EU law

“The purpose of this audit was to investigate which internal administrative matters and matters due to the operating environment provide the necessary prerequisites for efficient implementation of EU legislation.”

The audit examined:

- (1) Whether **the implementation of EU law improved** over years (distinguishing between late transposition and incorrect implementation cases);
- (2) Whether the government ensured **effective conditions for implementation** (assessing the situation at various ministries, supporting measures, guidance, planning);
- (3) Whether the implementation is compliant with the EU law and the **principles of good law drafting** (assessing the transparency, implementing instruments, prioritisation and division of responsibilities);
- (4) Whether the government used effectively the **margin of manoeuvre provided by the directives** (examining issues such as discretion and transparency and tools such as correlation tables or impact assessments).

**124** Finally, a number of SAIs provide **overviews in annual reports** of transposition of EU law (usually based on the official EU statistics) and infringement cases against the Member State.

## Public audit at EU level

**125** The ECA is responsible for the **audit of EU revenue and expenditure**. This includes compliance with EU financial regulations. It also includes performance audit of policies and expenditure programmes. In this context, the ECA's audits sometimes cover issues related to Member States' compliance with EU law.

**126** We reviewed the ECA's special reports in the period 2014-2017. We identified 11 out of 106 reports that raised **issues related to Member States' application of EU law** or the Commission's oversight activities under Article 17(1) of the TEU.

**127** For the most part, the observations in our special reports that relate to the application of EU law concerned cases where the failure to transpose EU directives correctly or on time risked undermining **performance in a specific policy area**. In some cases, we also made observations on the length of time it took infringements to be resolved. As regards the Commission's **oversight activities**, one audit included an assessment of transposition and conformity checks carried out by the Commission in the area of energy policy. We also published one report specifically focused on the Commission's performance in ensuring the effective implementation of a directive<sup>26</sup>.

**128** Our findings, observations and conclusions in these reports illustrate a number of problems reported by DGs and Member States in our surveys, for example:

- **clarity of EU law** – we observed that barriers to implementation persisted in some cases due to vague drafting in the Services Directive and that the Commission had been reluctant to take infringement measures partly due to a lack of solidity in the legal base<sup>27</sup>;
- **gold plating** – we found that operators and other market participants in different Member States may be facing different requirements and rules from those specifically defined in EU law or guidelines relating to the Emission's Trading System (ETS)<sup>28</sup>;
- **Member States having difficulty transposing directives on time** – we observed that the transposition deadline was only met by eight Member States with the

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<sup>26</sup> SR 5/2016 - Has the Commission ensured effective implementation of the Services Directive?

<sup>27</sup> SR 5/2016.

<sup>28</sup> SR 6/2015 - The integrity and implementation of the EU ETS.

last Member State completing the transposition 2 years and 5 months after the deadline<sup>29</sup>;

- **impact of Member States' financial capacity constraints** – for the Drinking Water Directive, we concluded that water quality and access to it improved in three Member States, but investment needs remained substantial<sup>30</sup>;
- **persistent non-conformity by Member States** – as regards combatting food waste, we found a longstanding contradiction between EU and Member States' rules regarding the legality of selling products after the expiry of their best before date<sup>31</sup>;
- **DGs' difficulty in checking transposition and conformity** – we concluded that the transposition and conformity checks carried out by the Commission did not assure the success of the implementation of the legal acts that pursued the EU's objective<sup>32</sup>;
- **delays in launching the infringement procedure** – we found that the procedure against one Member State started 4 years after the conformity check was carried out<sup>33</sup>;
- **significant delays in handling EU pilot files** – we concluded that whilst EU pilot was a useful tool for cooperation between Member States and the Commission, it often led to delays in the launching of infringement procedures<sup>34</sup>. In addition, where cases of non-compliance were resolved during the investigation, we noted that it did not contribute to creating an established EU legal practice in the area in question<sup>35</sup>.

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<sup>29</sup> SR 5/2016.

<sup>30</sup> SR 12/2017 - Implementing the Drinking Water Directive: water quality and access to it improved in Bulgaria, Hungary and Romania, but investment needs remain substantial.

<sup>31</sup> SR 34/2016 - Combating Food Waste: an opportunity for the EU to improve the resource-efficiency of the food supply chain.

<sup>32</sup> SR 16/2015 - Improving the security of energy supply by developing the internal energy market: more efforts needed.

<sup>33</sup> SR 12/2017.

<sup>34</sup> SR 12/2017.

<sup>35</sup> SR 5/2016.

# The way forward: challenges and opportunities

## Opportunities exist for the Commission to further strengthen oversight in line with its obligations under the Treaty

**129** The Commission has developed its oversight of the application of EU law over many years in order to meet its obligation under Article 17(1) of the TEU. In so doing, it has developed an approach in response to the key challenges it faces in monitoring and enforcing EU law in the Member States. We identified a number of areas where we see remaining challenges.

**130** The Commission has embedded its oversight function in a broader **Better Regulation approach**. This will continue to provide benefits and opportunities to ensure new and revised laws are as simple and easy to apply as possible. In this context, the Commission could consider carrying out a **“stocktaking” exercise of oversight policy** covering relevant aspects of the economy, efficiency and effectiveness of its oversight activities.

**131** In some policy areas, Member States may apply for support and technical assistance from the **EU budget** for actions that may enhance their financial and administrative capacity to implement and apply EU law correctly and on time. Using budgetary instruments also provides the Commission with additional opportunities to prevent, detect and correct non-compliance. The Commission could consider developing a **consistent and coordinated approach to using EU funds** to reinforce its ability to promote, monitor and enforce Member States’ application of EU law both within and across policy areas.

**132** The Commission’s oversight function is **organised by policy area** and many DGs integrate responsibilities for law making and oversight. This provides benefits, including helping to manage the inherent risks of non-compliance associated with specific EU legislation. Our review highlights how other inherent risks affecting more than one policy area stem from specificities at Member State level. We also highlight the Commission’s arrangements for sharing information and good practice between DGs. In addition, our review highlights the challenge some DGs face in ensuring the timely availability of Member State knowledge and expertise. The Commission could consider taking further measures to **enhance the sharing of Member State knowledge**

**and expertise** between policy areas, including the sharing of resources where appropriate.

**133** The Commission has strengthened **relations and cooperation with Member States' authorities** through a number of tools for exchanging information. Among other things, Member States have noted that such tools help them to coordinate their own activities. We consider that the Commission could consider developing further the tools for **ensuring a coordinated flow of information between the Commission and Member States** with respect to suspected and actual infringement cases to take account of the change in enforcement policy since 2017.

**134** In general, we found that Member States favour the Commission further developing its **compliance promoting tools**, despite the administrative burdens they impose on Member States. The Commission could consider enhancing coordination across its services with respect to the development and deployment of such tools to ensure **a more targeted and consistent approach across policy areas** that takes due account of the burdens imposed on Member States. We have also highlighted the **scope for Member States to provide more and better explanatory documents**. These documents play an important role in ensuring transparency to citizens about the national legislation that gives effect to their rights under EU law, as well as in enhancing the Commission's ability to check, in an efficient and effective manner, that Member States have transposed EU laws completely and accurately. EU legislative authorities could consider systematically requiring Member States to provide clear and consistent explanations about how they have implemented EU directives.

**135** The Commission has established enforcement **priorities and benchmarks** for handling cases and a number of DGs already monitor and report on their oversight activities in their annual reports. The Commission could consider developing these existing elements into **an overall framework** with indicators and targets covering the economy, efficiency and effectiveness of its oversight activities. Such a framework could provide a basis for developing a more strategic and consistent approach to the management of oversight related resources and processes over time.

**136** The Commission faces high expectations of **transparency**. The Commission deploys a variety of tools to communicate with and report to stakeholders about its oversight activities, including monthly press releases concerning infringement related decisions and an annual report that provides high-level, wide ranging and detailed information. Our review has highlighted additional information that may be of general interest to stakeholders. The Commission could consider developing its annual reporting further to take account of stakeholders' expectations, including providing



**more information about the Commission's overall handling of cases** while respecting complainants' and Member States' rights to confidentiality.

## Public audit of the oversight of compliance with EU law

**137** Our landscape review shows that Member States' **SAIs and the ECA** have covered issues relating to how the Member States and the Commission ensure compliance with EU law mostly as part of performance audits of public spending in specific policy areas. However, few audits have focused specifically on the oversight arrangements at national and EU level for ensuring the correct and timely application of EU law. This landscape review highlights the scope for the ECA to carry out work related to the Commission's oversight of the application of EU law by Member States on, for example:

- the contribution the **EU budget** makes to supporting Member States in putting EU law into practice;
- the Commission's **oversight arrangements** in specific EU policy areas;
- the Commission's **management of complaints and infringement** cases;
- the quality of the Commission's **reporting on the results of oversight activities**.

# Annexes

## Annex I — Scope: DGs and policy areas

**AGRI:** Agriculture and Rural Development\*

**CLIMA:** Climate Action

**CNECT:** Communications Networks, Content and Technology\*

**COMP:** Competition

**ECFIN:** Economic and Financial Affairs

**EAC:** Education, Youth, Sport and Culture

**EMPL:** Employment, Social Affairs and Inclusion\*

**ENER:** Energy\*

**ENV:** Environment\*

**FISMA:** Financial Stability, Financial Services and Capital Markets Union\*

**GROW:** Internal Market, Industry, Entrepreneurship and SMEs\*

**SANTE:** Health and Food Safety\*

**HOME:** Migration and Home Affairs\*

**JUST:** Justice and Consumers\*

**MARE:** Maritime Affairs and Fisheries\*

**MOVE:** Mobility and Transport\*

**REGIO:** Regional and Urban Policy

**TAXUD:** Taxation and Customs Union\*

\* Indicates the 13 policy areas reported on by the Commission in its Annual Report on “Monitoring the application of EU law”

## Annex II — Approach: sources and methods

- We analysed data provided by the Commission from the main IT systems for handling complaints and infringement cases (CHAPs, EU pilot and NIF).
- We carried out a survey of 18 Commission DGs (see ***Annex I***).
  - The survey included questions about DGs' policy area, organisation, case handling, compliance promoting tools, and monitoring and reporting arrangements in the period 2014-2016.
  - In referring to the results of the survey, we generally use the following formulations:
    - “nearly all” – all but one or two DGs replying;
    - “most” – more than half of DGs replying;
    - “many” – more than a third but less than half of DGs replying;
    - “some” – more than three but fewer than a third of DGs replying;
    - “a few” – up to three DGs replying.
  - When referring to the results, in some cases, we indicate the total number of respondents to the question (i.e. x replies / y respondents).
- We carried out a survey of the Member States.
  - 27 out of 28 Member States replied to our survey. Replies were coordinated by the legal advisors of the Member States' permanent representations and were provided on the basis that specific Member States would not be identified.
  - Not all respondents replied to all questions. In referring to the results of the Member States survey, we use the same approach as for our survey of DGs as described above.
- We held interviews with key EU institutional stakeholders from the European Parliament, the European Economic and Social Committee, the Committee of the Regions and the European Ombudsman.
- We reviewed a range of Commission documents, including communications on enforcement policy, DGs' annual activity reports and annual reports on “Monitoring the application of EU law”.
- We reviewed 11 relevant audit reports of the ECA and 62 relevant reports of Member States' SAIs for the period 2013-2017.

## Annex III — Compliance promoting tools

### Implementation plans

The Commission prepares implementation plans for legal acts that it considers would benefit from supporting measures. The implementation plan **accompanies the Commission's legislative proposal**, along with an impact assessment. It identifies the technical, compliance and timing challenges facing the Member States and lists the Commission support actions (i.e. the other promotional tools to be used). Implementation plans may also include Member States actions and monitoring arrangements.

The Commission prepares relatively **few implementation plans** (between one and four each year over the 2014-2016 period covering three policy areas). Some DGs also produce internal implementation plans. Overall, DGs and Member States rated them as of “medium” effectiveness. While most Member States replying (10/18) did not favour more use of Commission implementation plans, a few Member States that found them effective did favour their increased use.

As regards **strengths**, DGs acknowledged their role in helping to anticipate problems and manage multiple supporting actions. Member States variously commented that they were useful in some areas, helped efficient implementation, promoted Member States' commitment, aided common understanding, and provided a timetable for implementation.

As regards **limitations**, DGs noted that they were sometimes prepared too early and then needed updating, often lacked Member States' commitment, and imposed an administrative burden for Member States. Member States also variously highlighted that implementation plans did not always take account of differences between Member States, limited Member States' discretion, and promoted compliance only indirectly.

### Guidelines

The Commission provides **written guidance** to Member States and/or stakeholders on how to implement and apply certain EU legal instruments. Guidelines contain interpretation of EU law that is binding for the Commission. Guidelines must be adopted by the Commission.

Guidelines are among the most **frequently used** tools. DGs reported mainly producing guidelines where they anticipate implementation challenges but also in some cases in

response to implementation difficulties or at the request of Member States. Both DGs and Member States rated guidelines as among the most effective tools.

As regards **strengths**, DGs cited that they foster common understanding, clarify legal provisions, and identify specific problems. Member States reported guidance as being particularly useful for complex legislation. They variously highlighted the beneficial role guidelines play in explaining the Commission's viewpoint, clarifying implementation issues, contributing to legal certainty, facilitating transposition, and reducing the risk of divergent Member State practices.

As regards **limitations**, DGs noted that the Commission has limited legal competence to interpret EU law, Member States were not always willing to follow Commission guidelines, and guidelines could require considerable work to prepare and may be too long or provided too late. Member States variously noted that they did not provide a definitive interpretation of EU law. They also highlighted that guidelines did not always provide the right level of detail or sufficiently reflect the circumstances of individual Member States. In addition, in some cases, guidelines limited Member State discretion, reduced Commission flexibility to respond to unforeseen circumstances, and were not based on sufficient consultation with Member States. The CoR also noted in response to our questions that uncertainty about the legal status of guidance and contradictions between EU legislation and guidance documents sometimes confused local and regional authorities.

Overall, Member States were more positive than negative about the clarity, timeliness, scope and level of detail of guidelines. Most Member States considered that **more use** should be made of guidelines (12/20).

### **Explanatory documents**

Member States may produce documents explaining the relationship between the components of the directive and the corresponding parts of their national transposition instruments. Explanatory documents **accompany Member States' notification of their transpositions measures**. They may be required in the legal act. The Commission assesses legal instruments and proposes whether explanatory documents should be required. The Commission does not usually propose requiring explanatory documents for directives with few legal obligations in well-delimited policy sectors not heavily regulated at national level. Explanatory documents may include - or take the form of - correlation tables.

Complex directives may request Member States to provide the Commission with explanatory documents regarding their national transposition measures. All DGs with significant numbers of directives rated explanatory documents that included

correlation tables as highly **effective**. They also considered that explanatory documents without correlation tables were considerably less effective. Most Member States (18/23) rated explanatory documents with correlation tables as effective, although a few Member States did not (5/23).

Many Member States prepare correlation tables, or something similar, for their own purposes. For the other Member States, preparing correlation tables represents a considerable additional **administrative burden**. Most Member States reported usually preparing correlations tables if asked to provide an explanatory document (17/23).

Most DGs favoured Member States following a **standard template** (including correlation tables) when preparing explanatory documents. While some Member States (7/23) agreed that a standard template would make them more likely to prepare explanatory documents with correlation tables, a few Member States that do not produce explanatory documents with correlation tables disagreed (3/5).

As regards **strengths**, DGs highlighted that well prepared explanatory documents provided a useful overview of Member States' national implementing measures. They variously noted that this helped the Commission to understand the legal issues in specific Member States and to make comparisons between Member States. DGs considered that well prepared explanatory documents also helped both Member States and the Commission to ensure complete and accurate transposition, in some cases reducing the need for DGs to outsource checking. Member States variously acknowledged the role explanatory documents play in helping both Member States and the Commission. They also highlighted explanatory documents' positive contribution to legal certainty and transparency about national implementation measures.

As regards **limitations**, DGs variously highlighted that Member States were not required to produce explanatory documents and not always willing to produce them. They also noted that the quality of Member States' explanatory documents varied considerably, in particular with respect to the clarity, completeness and usefulness of the information provided. Member States highlighted the administrative burden involved, the lack of focus on the intended results of legislating, and the need to update explanatory documents to take account of subsequent changes in national legislation.

Most Member States (13/19) considered it appropriate to ask for explanatory documents only for very complex directives. While most Member States advised no change in the **level of use** of explanatory documents (11/21), more Member States favoured increasing rather than decreasing their use. The Member States advising a decrease tended to be those that used explanatory documents the least (4/5).

Member States ranked the burden of producing explanatory documents with correlation tables as relatively high compared to other tools, higher than producing explanatory documents without correlation tables.

### **Committees, networks, expert groups and workshops**

As regards the main meeting-based tools, the Commission deploys **committees, networks, expert groups and workshops** to promote good implementation of EU law in all the policy areas with significant numbers of directives:

- **Committees** – Directives may establish committees to assist the Commission with their implementation. They are composed of representatives of Member States and chaired by the Commission. The representatives may include experts who provide advice and take part in peer review. Committees provide formal opinions on proposals for implementing acts.
- **Networks** – To enhance cooperation, the Commission may set up informal networks of Member States' representatives in charge of the implementation of specific EU law. National representatives take part voluntarily in networks. Networks may also include stakeholder representatives.
- **Expert groups** – The Commission may set up expert groups to get advice on the implementation of EU law.
- **Workshops** – The Commission holds workshops to consult with Member States as well as to facilitate and promote the implementation of EU legal instruments. Workshops may be organised at a technical level or at a high political level (involving a Commissioner and/or high-ranking Member State officials).

DGs and Member States rated the effectiveness as medium-to-high **effectiveness**, with Member States rating them a little higher than DGs. On average, Member States and DGs rated expert groups as slightly more effective than the other three tools.

Of the four tools, **DGs use expert groups** the most often followed by workshops. Most DGs also often use networks and workshops. While committees are used at least sometimes in most policy areas, in a few areas they are seldom used (5/15). Most of the DGs concerned reported using committees and expert groups systematically for legislation in their policy areas. By contrast, they reported tending to use networks and workshops only in cases where they anticipated implementation difficulties. Most Member States favoured only deploying these tools where the Commission anticipates implementation difficulties or in response to requests from Member States. Only a few

Member States considered that the Commission should deploy them systematically for all new directives or policies.

As regards **participation**, most Member States reported participating at least sometimes in committees, networks, expert groups and workshops (18/27). However, few Member States reported always participating (2/27). The extent to which stakeholders other than Commission or Member States' representatives (e.g. Member States' SAIs, civil society representatives etc.) participate in committees, networks, and expert groups varies.

Most DGs organise **workshops** (10/16) shortly after the adoption of the legal instrument but they can be organised prior to adoption or later if needed. Most Member States considered workshops most useful shortly after the adoption of the legal instrument (12/17) or a few months later to allow for a first assessment of the transposition challenge (4/12). A few Member States (4/17) considered they were more useful when legislation was being prepared or adopted.

While **external stakeholders** sometimes participate in the committees in a few areas (4), they participate more frequently in networks and expert groups across a wider range of policy areas. Participation also varies by Member State. Most Member States replying (14/27) reported stakeholders from their Member State participating sometimes or seldom with only two Member States reporting stakeholders participating more often.

As regards **strengths**, DGs recognised the opportunity all four tools provided to foster cooperation, discuss specific issues with Member States and promote common understanding of legislation, exchange experiences, and highlight good practices. DGs also specifically highlighted committees' contribution to informed decision-making and expert groups' role in developing guidance. Member States variously noted the same general strengths, emphasising the opportunity these tools provided to explore common challenges and solutions to the problems of applying EU law. Member States also specifically highlighted the access committees and expert groups provided to expertise as well as the opportunity networks provided for less formal consultation.

As regards **limitations**, DGs variously highlighted the non-binding nature of any solutions, the need to follow up the results of meetings, the unwillingness of Member States to participate in some cases, the quality of expertise of participants, and the resources involved. Member States variously highlighted that the points dealt with in meetings were often not relevant to other Member States, the need for the right people to participate in the meetings, the risk of overlap between these tools, a lack of transparency in their use, and the scope for rationalising their use overall.



Many Member States also noted that these tools to be relatively burdensome in terms of the time, costs and people involved. Overall, Member States rated the **administrative burden** imposed by these four meeting-based tools as “medium” with workshops rated as imposing a higher burden than the other three tools.

Despite the burdens involved, most Member States (12/20) advised the Commission to make **more use** of the meeting-based tools. No Member States considered that these tools should be used less.

### Package meetings

The Commission holds “package” meetings with representatives of a Member State from national, regional or local level to solve a number of compliance problems (i.e. transposition difficulties, EU pilot files and infringement cases). They are usually organised by policy area on an ad hoc basis.

Unlike other meeting-based tools, only a few DGs make systematic use of **package meetings** (5/15). They are some of the DGs with the highest levels of open infringement cases (5/7 of those with more than 100 open cases). Two DGs reported using alternatives to package meetings: GROW reported putting in place compliance dialogues with three Member States; and CNECT reported organising annual fact-finding missions to all Member States in a given policy field.

The DGs that use package meetings considered them highly **effective**. Nearly all Member States replying considered package meetings effective (22/23). Although most Member States rated them highly (12/23), they rated package meetings lower than the other four meeting-based tools overall. Some but not all Member States take the opportunity to participate in package meetings.

As regards **strengths**, DGs variously reported that package meetings provided an opportunity to discuss issues related to a specific Member State, improve understanding of a Member State’s difficulties, and find out about the latest developments in a Member State as well as foster cooperation and trust with national authorities. Member States variously highlight that package meetings provided insight into the Commission’s views, aided mutual comprehension, and enabled exchange of views on multiple cases. Member States also considered package meetings a good way to deal with many issues and cases at once, including those of a crosscutting nature.

As regards **limitations**, DGs variously noted the risk of not finding solutions, the administrative burden of preparing and arranging meetings, the reliance on the right people from the Member State attending, and a lack of transparency of the process. Similarly, Member States noted that package meetings could represent a significant

administrative burden and depended on being able to bring together all the relevant people, which could be difficult if more than one government department was involved. Member States also noted that package meetings were not held regularly enough - if at all - in some policy areas, sometimes tried to deal with too many complex issues at once, and did not always lead to rapid solutions.

Like other meeting-based tools, most Member States rated the **administrative burden** imposed by package meetings as “medium”.

Most Member States replying advised the Commission to hold **more package meetings** (12/20). Many Member States advised no change in the use of package meetings. Only one Member State, which reported a high frequency of package meetings, advised making much less use of package meetings.

## Scoreboards

The Commission may publish scoreboards (or barometers) to enable the public to **compare the performance of Member States** in achieving specific goals, including regarding the correct and timely application of EU law in particular policy areas.

Although the Commission publishes a number of scoreboards<sup>36</sup>, only the **SMS** includes indicators and information about the transposition of directives, EU pilot files and infringement cases<sup>37</sup>. The SMS covers the directives considered to have an impact on the functioning of the Single Market. This includes directives directly related to the freedom of movement of persons, goods, services and capital across borders within the EU, as well as directives with a direct impact on the Single Market. The directives relate to policy areas such as taxation, employment, social policy, education, culture, public health, consumer protection, energy, transport, environment<sup>38</sup>, information society and media.

On average, the DGs concerned rated the scoreboard as being of medium **effectiveness** and providing a moderate level of motivation to Member States to comply with EU law. Member States rated the effectiveness of scoreboards and the motivation they provide to improve compliance more highly.

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<sup>36</sup> E.g. the Justice Scoreboard, the European Innovation Scoreboard, and the State Aid Scoreboard.

<sup>37</sup> The Commission’s Annual Report on “Monitoring the application of EU law” also includes results of the Commission’s oversight activities by Member State.

<sup>38</sup> Except nature protection.

As regards **strengths**, DGs reported that scoreboards provided a user-friendly overview of performance, enabled comparison between Member States over time, and harnessed peer pressure while promoting transparency, awareness, and public engagement. Member States variously highlighted similar benefits. They also noted the role scoreboards could play in helping Member States identify where to focus their efforts to improve compliance.

As regards **limitations**, DGs variously highlighted the willingness of Member States to comply, the lack of policy specificity, the costs and burdens of preparation, and the risk of Member States reacting negatively. Member States variously noted that scoreboards provided oversimplified assessments, included some misleading indicators, missed the fact that many problems relate to specific pieces of legislation, and did not fairly reflect that Member States have different starting points and legal systems. Member States also noted that the effectiveness of the SMS was limited by the delay in publishing the data, the reporting period not being aligned with the calendar year, and the lack of sanctions for poor performance.

Most Member States replying did not advise increasing or decreasing the **level of use** made of scoreboards (15/18). Only two Member States favoured more use of scoreboards and only one Member State advised making much less use of scoreboards. Overall, Member States responding to our survey were not in favour of the Commission increasing the use of scoreboards.

# Acronyms and abbreviations

**BUDG:** Directorate-General for Budget

**CoR:** European Committee of the Regions

**CJEU:** Court of Justice of the European Union

**DG:** Directorate General of the European Commission. A full list of the DGs in our survey is provided in [Annex I](#).

**ECA:** European Court of Auditors

**EESC:** European Economic and Social Committee

**EP:** European Parliament

**ETS:** Emissions Trading Scheme

**ESIF:** European Structural and Investment funds

**EU:** European Union

**EUR-LEX:** The official public record of European Union law

**SAI:** Supreme Audit Institution

**SG:** Secretariat General of the Commission

**SMS:** Single Market Scoreboard

**TEU:** Treaty on European Union

**TFEU:** Treaty on the Functioning of the European Union

## Landscape review team

This landscape review was produced by Audit Chamber V – headed by ECA Member Lazaros S. Lazarou - which has a focus in the areas of financing and administering the Union.

The review was led by ECA Member Leo Brincat, supported by Neil Kerr, Head of Private Office and Annette Farrugia, Private Office Attaché; Alberto Gasperoni, Principal Manager; James McQuade, Head of Task; Michael Spang, Attila Horvay-Kovacs and Jitka Benesova, Auditors.



*From left to right: Annette Farrugia, Alberto Gasperoni, Leo Brincat, Neil Kerr, Jitka Benesova, James McQuade, Attila Horvay-Kovacs.*

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