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*Citation for published version (Harvard):*

Cavoski, A 2016, 'An Assessment of Compliance Strategies in the Environmental Policy Area', *European Law Review*, vol. 41, no. 2, pp. 252-274.

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# An Assessment of Compliance Strategies in the Environmental Policy Area

Aleksandra Čavoški\*

**Abstract:** This article assesses methods and tools deployed by the Commission to ensure compliance in the environmental sector. This assessment is made using Tallberg's theoretical interpretation of enforcement and management strategies within the EU. The author analyses the statistical data provided in the Commission's annual reports on monitoring the application of EU law, as well as environmental infringement judgments delivered between 2007 and 2013. This examination of the environmental policy area and sources for non-compliance validates the complementary deployment of both strategies as they offer a variety of preventive and coercive measures. However, the analysis demonstrates that the Commission uses the management approach more effectively to ensure compliance in the environmental policy area. Although the Commission is making progress under the enforcement approach in the field of the environment, its potential has not been fully realised without a more rigorous application of Article 258 and the imposition of sanctions under Article 260.

## 1. Introduction

The issue of compliance with EU law is a matter of perennial debate. It has been analysed both by political scientists and lawyers trying to identify reasons for non-compliance and to assess methods of improving compliance in the EU.<sup>1</sup> The main focus of legal research has been on enforcement mechanisms, in particular the infringement procedure which is seen as the primary vehicle in ensuring compliance with the EU *acquis*. Compliance records vary depending on the policy area, although some policy areas, such as transport, environment, internal market and services, and justice, have long standing poor records. As the European Commission releases its latest 31<sup>st</sup> Report on Monitoring the Application of EU Law, it is again apparent that the environment remains an area of concern when it comes to the implementation of EU law. Despite a downward trend in the overall number of infringements from 2007 to 2013, the number of environmental infringement cases rose in 2013.<sup>2</sup> By the end of 2013, 1300 infringement cases remained open and of these 334 were environmental infringements, representing 26 per cent of the total.<sup>3</sup>

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<sup>1</sup> *Compliance and Enforcement of EU Law*, edited by M. Cremona, (Oxford University Press, 2012); TA Börzel, "Non-compliance in the European Union: pathology or statistical artefact?" (2001) 8 *Journal of European Public Policy* 803; M. Mendrinou, "Non-compliance and the European Commission's Role in Integration" (1996) 3 *Journal of European Public Policy* 1; G. Falkner and O. Treib, "Three Worlds of Compliance or Four? The EU-15 Compared to New Member States" (2008) 46 *JCMS* 293; P.M. Haas, "Compliance with EU Directives: insight from international relations and comparative politics", 5(1) *Non-compliance in the European Union: pathology or statistical artefact*; A. Dashwood and R. White, "Enforcement Actions under Article 169 and 170", (1989) 14 *ELR* 388; J Mertens de Wilmars and IM Verougstraete, "Proceedings against Member States for Failure to Fulfil their Obligations" (1970) 7 *CMLR* 385; F. Snyder, "The Effectiveness of European Community Law: Institutions Process, Tools and Techniques" (1993) 56 *Modern Law Review* 19; P. Wenneås, *The Enforcement of EC Environmental Law*, (Oxford University Press, 2007); R. Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Hart Publishing, 2009); L. Borzsák, *The Impact of Environmental Concerns on the Public Enforcement Mechanism under EU Law* (Wolters Kluwer, 2011); C. Harlow and R. Rawlings, "Accountability and Law Enforcement: the Centralised EU Infringement Procedure", 31 *E.L.Rev* 447; I. Kilbey, "Financial Penalties under Article 228(2) EC: Excessive Complexity?" (2007) 44 *CMLR*

<sup>2</sup> COM(2014) 612, p. 11

<sup>3</sup> See fn.2, pp. 11-12.

Does this indicate poor rule conformance in this policy area and a sluggish response by the European Commission? This article will assess methods and tools deployed by the Commission to evaluate their effectiveness in reducing non-compliance in the environmental sector and identify the comparative effectiveness of those tools. This will be done by using Tallberg's theoretical interpretation of enforcement and management within the EU.<sup>4</sup> This broad approach best explains the Commission's role in ensuring compliance by bringing together the management and enforcement strategies. In examining compliance with international regulatory agreements, Tallberg challenges the conception of enforcement and management as competing strategies for achieving compliance. Tallberg tests this approach by looking at the centralised and active system of supervision conducted by the EU institutions and the decentralised system of supervision which relies on courts and individuals to alert the Commission of cases of non-compliance. He also examines the sources of non-compliance which necessitates the complementary use of the two strategies.

Tallberg's approach is particularly relevant in examining compliance with the EU environmental *acquis* as this policy area encompasses a wide range of issues and requires member states to incur costs and put in place complex legislative and administrative systems. This requires a comprehensive approach which brings together all EU institutions, member states and citizens and provides a variety of preventive and coercive measures. The paper assesses compliance at the centralised level with the Commission at the forefront as "guardian of the Treaties" as this system still remains the primary vehicle of compliance in this policy area. Both under the management and enforcement umbrella at the central level, the Commission successfully included citizens' perspectives into its approach to environmental compliance and addressed the negative perception of the Union as "an affair of the élites".<sup>5</sup> By empowering citizens and various public interest groups to participate in the decision-making process and supporting compliance by submission of complaints, the Commission made centralised enforcement more appealing for wider public groups than resorting to the private enforcement mechanism. As Harden argues, a complaint to the Commission has a number of advantages as compared to bringing proceedings in national courts, including no cost to the complainant and no need for a specific interest in the infringement, which is of special importance in environmental cases.<sup>6</sup> No less important for the environmental policy area is the Commission's expert knowledge required to make the scientific and economic appraisals necessary to identify certain infringements when national courts are not in position to do so.<sup>7</sup>

The paper argues that, while the complementary nature of the enforcement and management strategies identified by Tallberg improves compliance in this policy area by addressing various causes of non-compliance, management strategies deployed by the Commission are more effective in supporting compliance. First, the paper will explain Tallberg's approach to compliance and identify how methods and tools used by the Commission fit within this. Second, the paper will apply Tallberg's interpretation of enforcement and management strategies to the environmental policy area and assess if the Commission's approach enables compliance in this policy area. The author will use information and data provided in the Commission's annual reports on monitoring the application of EU law and statistical data available on the DG

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<sup>4</sup> J. Tallberg, "Path to Compliance: Enforcement, Management and the European Union", (2002) 56(3) *International Organisations*, pp. 609-643

<sup>5</sup> R. Rawlings, "Engaged Elites Citizen Action and Institutional Attitudes in Commission Enforcement", (2000) 6(1) *European Law Journal*, pp. 4-28

<sup>6</sup> See I. Harden, "What Future for the Centralised Enforcement of Community Law", (2002) 55 *Current Legal Problems* 495, p. 505

<sup>7</sup> See fn.6, p. 506.

Environment website from 2007 to 2014. Finally, the paper will examine the sources of non-compliance in this policy area by analysing all environmental infringement judgments delivered between 2007 and 2013.<sup>8</sup>

## 2. What is the Commission's approach to compliance?

The issue of compliance in the European Union has warranted significant scrutiny due to the fact that, unlike in member states, compliance is reliant on a greater number of actors, institutions and processes. Pressman and Wildavsky's point that "the longer the chain of causality, the more numerous the reciprocal relationships among the links and the more complex implementation becomes" is particularly relevant in the EU context.<sup>9</sup> Despite the fact that the EU, as a supranational institution, faces challenges ensuring compliance, Tallberg recognises that it effectively employs a combination of management and enforcement strategies to induce compliance.<sup>10</sup>

Under the enforcement approach, states are seen as rational actors which are incentivised to comply by the likelihood of detection through monitoring and the threat of sanctions.<sup>11</sup> According to Tallberg "monitoring and sanctions constitute the two central elements of this strategy".<sup>12</sup> Monitoring ensures transparency, while the risk of sanctions potentially raises the costs of non-compliance. Unlike many international regimes, the EU successfully developed the infringement procedure under Article 258 TFEU (ex 226 EC) as the main mechanism for enforcing EU law. Initially, this procedure lacked effectiveness as the Court of Justice (ECJ) was not given the power to impose financial penalties. This was changed with the Maastricht Treaty which introduced the procedure for sanctioning member states under Article 260 TFEU (ex 228 EC). Tallberg recognises that within the formal framework of the infringement procedure, both the enforcement and management processes are used both to put pressure on member states and to incentivise compliance as an attractive option.<sup>13</sup>

Under the management approach, Tallberg argues that non-compliance is best addressed through a problem-solving strategy of capacity building, rule interpretation and transparency.<sup>14</sup> States' receptiveness to the management strategy may be explained by the fact that non-compliance is not necessarily a deliberate decision to breach a provision but rather is a result of capacity limitations or legal vagueness and ambiguity of rules. From a theoretical perspective, the distinction between the enforcement and management approach provides an explanatory model that allows assessing the Commission's tools for compliance according to two particular methodologies. This is not the case with some other methodologies used to assess compliance that primarily focus on national adaptation by member states to the EU *acquis* rather than analysing the Commission's approach to compliance.<sup>15</sup>

Smith takes a similar approach to Tallberg by departing from a traditional view of infringement procedure as a single function provision and perceives Article 258 TFEU as a multi-functional

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<sup>8</sup> Annex 1. This was done by searching the ECJ case law database through the numerical access browser.

<sup>9</sup> J.L. Pressman & A.B Wildavsky, *Implementation*, (Berkeley/London University of California Press, 1984) XXIV

<sup>10</sup> See fn.4, p. 610

<sup>11</sup> See fn.4, p. 611

<sup>12</sup> See fn.4, p. 612

<sup>13</sup> See fn.4, p. 617

<sup>14</sup> See fn.4, p. 613

<sup>15</sup> See C. Knill and A. Lenschow, "Compliance, communication and competition: patterns of EU environmental policy making and their impact on policy convergence", (2005) 15(2) *European Environment*, pp. 114-128; TA. Borzel "Why there is no 'southern problem'. On environmental leaders and laggards in the European Union", (2000) 7(1) *Journal of European Public Policy*, pp. 141-162,

mechanism.<sup>16</sup> This work considers the role of Article 258 TFEU in the context of good governance and the quest for greater legitimacy in the EU.<sup>17</sup> According to Smith, Article 258, as a centralised enforcement mechanism, has many different functions including the constitutional mechanism of enforcement, compliance and integration; executive policy choice; a forum for citizen and institution interaction; an administrative and regulatory tool and an institutional forum for debate, control and accountability.<sup>18</sup> Although Smith focuses solely on Article 258, she also recognises several features of this mechanism, some of which may be regarded as examples of the management approach as put forward by Tallberg.

Which methods and tools are used by the Commission and can they be placed within the enforcement and management approaches? Although its main enforcement tool is the infringement procedure under Article 258 TFEU prescribed by the founding EEC Treaty, the Commission recognised the importance of management strategies as the most appropriate method to support enforcement in its quest for compliance. In its 21<sup>st</sup> Annual Report on Monitoring the Application of Community Law, the Commission concentrated on management tools by identifying ways of improving the pre-litigation procedure.<sup>19</sup> Such improvements included: strengthening of contacts between the Commission and member states; providing better information to citizens in a more systematic manner; bilateral meetings of national experts with the Commission services to discuss transposition issues before directives have to be implemented; better use of guidelines and interpretative texts developed by the Commission; establishment of rapid inter-service contacts before the adoption of new directives; as well as other ways of ensuring better transparency in the process of implementing and applying EU law.<sup>20</sup>

The complimentary nature of the enforcement and management strategies was discussed within the wider context of remedying the democratic deficit facing Europe in the wake of the Laeken Declaration on the Future of the European Union.<sup>21</sup> As a way of involving citizens and organisations in shaping and delivering EU policy, the Commission proposed a set of measures to achieve better policies, regulation and delivery in its White Paper on European Governance.<sup>22</sup> This advocated an interaction of strategies that could be classified as either management or enforcement encompassing the use of different policy tools, simplification of existing EU legislation, publication of guidelines and use of expert advice and more vigorous pursuit of infringements committed by member states.<sup>23</sup> The importance of this policy document is that it combines the two approaches not only as a way of ensuring compliance but also mitigating the democratic deficit in the EU.<sup>24</sup>

One of the landmark documents recognising the two-track approach is “A Europe of Results – Applying Community Law” published in 2007.<sup>25</sup> Still, if we look at the areas of improvement highlighted in the policy document, the Commission increasingly deployed the management strategy as being more effective. As a result of growing difficulties of applying Community law in a progressively diverse EU, the Commission recognised prevention by devoting increased attention to implementation through the policy cycle and the efficient and effective information

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<sup>16</sup> M. Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Routledge 2010)

<sup>17</sup> See fn.16, pp. 18-20

<sup>18</sup> See fn.16, p. 15

<sup>19</sup> COM(2004) 0839

<sup>20</sup> See fn.19

<sup>21</sup> Presidency Conclusions Laeken 2001

<sup>22</sup> COM(2001) 428

<sup>23</sup> See fn.22, p. 5

<sup>24</sup> See fn.22. p. 7

<sup>25</sup> COM(2007) 0502

exchange and problem-solving as examples of the management approach. Although it falls within the infringement procedure as the main enforcement vehicle, the Commission placed an emphasis on management measures by prioritising cases that require a more immediate response by the Commission. The final measure was the enhancement of dialogue with citizens and other EU institutions in all stages of implementation which encompasses both the enforcement and management approaches.

In 2008 the Commission prepared a special policy document addressing the implementation of European Community environmental law where it demonstrated how the new tactic set out in “A Europe of Results – Applying EU Law” applied in this policy area.<sup>26</sup> The Commission focused mainly on the management approach as the most beneficial mechanism to improve compliance records within the context of a more transparent and effective inter-institutional co-operation and communication with the public. Prevention of breaches throughout legislative and post-legislative activities occupied an important place in this complex and wide ranging policy area. The Commission emphasised its preference for problem-solving as a management tool mechanism to respond to specific concerns of the European public. More immediate and more intensive treatment of important infringements was recognised as a management measure albeit with the aim of improving the enforcement approach of the Commission. The focus on management tools in this policy area is best explained by the need to apply the relevant environmental *acquis* “to a wide range of natural conditions” and in different national and administrative structures.<sup>27</sup>

Unlike all previous policy documents, the most recent document on “Better Governance for the Single Market” places a greater focus on the enforcement approach and reiterates a zero tolerance policy of the Commission when it comes to non-implementation of the EU internal market *acquis*.<sup>28</sup> As the internal market *acquis* encompasses the regulation of goods and services it directly impacts the environmental policy area. Even though the document recognises various management measures such as setting up informal contacts with national officials and expert groups as an important part of the policy-making process, the Commission reiterates its prerogative to “use its enforcement powers with utmost vigour” and calls on member states to cooperate more effectively to that end.<sup>29</sup> This sudden change of heart may be explained by high expectations from the Commission to use Article 260 more effectively for imposing financial penalties which was amended by the Treaty of Lisbon with the aim of improving compliance.

### 3. An Examination of the Environmental Policy Area

The environmental policy area was always identified as one of the most challenging areas for the implementation of the EU *acquis* as it encompasses a wide range of issues such as air and water quality, water protection, waste management, climate change, GMOs, soil protection, nature and biodiversity, chemicals and environmental impact assessment. This is reflected in the number of infringement cases; the environment features as one of the areas with the highest number of infringements.<sup>30</sup> This has put enormous pressure on the Commission to deploy both management and enforcement strategies to address a plethora of different causes of non-compliance. This raises a question of the extent to which those strategies ensure compliance, as well as their relative effectiveness when compared to each other. As Tallberg points out, the principal means of ensuring rule conformity at the centralised level is a system “whereby EU institutions hold states responsible for their violation but also attempt to improve their capacity

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<sup>26</sup> COM(2008) 773

<sup>27</sup> See fn.26, p. 3.

<sup>28</sup> COM(2012) 259/2

<sup>29</sup> See fn.28, p. 3

<sup>30</sup> See fn.2; See also COM(2013) 726

to comply”.<sup>31</sup> This is not an easy task for the Commission as it continuously faces two main operational challenges; the scale of policies and insufficient resources to police the EU more effectively. Smith points out some improvements made in regard to the environmental policy area. From 1997 to 2007, the internal resources the Commission deployed to prosecuting environmental infringements have far outweighed similar resources deployed in the internal market sector.<sup>32</sup> In addition, DG environment is one of the few DGs with a unit specifically responsible for infringements.<sup>33</sup>

### *3.1. The Commission’s Management Approach to the Environment*

Under the management approach, Tallberg argues that non-compliance is best addressed through a problem-solving strategy of capacity building, rule interpretation and transparency.<sup>34</sup> He points at four prominent strategies. First, the EU uses economic funds to enable adjustment to EU rules. Second, the Commission negotiates transitional periods with new acceding countries to give them time to make necessary adjustments. Third, the Commission tries to close knowledge gaps by fostering cooperation with national authorities. Finally, the Commission issues interpretative guidelines in certain policy areas as necessary.

The enforcement approach was conceived in the founding treaties through the infringement procedure as the main vehicle of ensuring rule conformity. However, the Commission quickly understood the financial, administrative and legal implications of the environmental *acquis* on member states and promptly embraced the tools under the management approach in this policy area as more effective. This is evidenced by the wide use of financial instruments under the management umbrella to enhance compliance with the EU environmental *acquis*. LIFE is regarded as a central EU financial instrument covering environmental, nature conservation and climate action projects.<sup>35</sup> It was launched in 1992 and has been implemented through four cycles so far.<sup>36</sup> Since 1992 4,171 projects were financed through this programme amounting to approximately €3.4 billion euros for the protection of the environment.<sup>37</sup> The priorities set out in the EAP and thematic strategies are reflected in each LIFE programme phase and the Commission ensures that selected projects are in line with the EAP’s objectives. In addition, structural and cohesion funds are also significant for the environment, despite the fact that they fall under the umbrella of regional policy.<sup>38</sup> Regional policy has evolved over time to provide significant assistance through these funds. Between 2007 and 2013, the total amount of structural and cohesion funds allocated to environmental programmes has doubled since the previous period to around €100 billion and now constitutes 30 per cent of the total.<sup>39</sup> No less important is CAP, which underwent several reforms as it had become unsustainable in its original form and gradually became greener.<sup>40</sup> An example of this change was the Single Farm Payment System where direct support to farmers is subject to the principle of cross-compliance, which means that

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<sup>31</sup> See fn.4, pp. 614-615

<sup>32</sup> See fn.16, p. 125

<sup>33</sup> See fn.16, p. 136

<sup>34</sup> See fn.4, p. 613

<sup>35</sup> <http://ec.europa.eu/environment/life/index.htm>

<sup>36</sup> LIFE I: 1992-1995, LIFE II: 1996-1999 and LIFE III: 2000-2006; LIFE+ IV: 2007-2013, <http://ec.europa.eu/environment/life/about/index.htm#history>

<sup>37</sup> See fn.35

<sup>38</sup> the European Regional Development Fund, the European Structural Fund and Cohesion Fund

<sup>39</sup> [http://ec.europa.eu/regional\\_policy/sources/docgener/presenta/working2008/work\\_en.pdf](http://ec.europa.eu/regional_policy/sources/docgener/presenta/working2008/work_en.pdf) p. 16

<sup>40</sup> See S. Hix and B. Hoyland, *The Political System of the European Union*, 3rd edn (Palgrave Macmillan, 2011)

farmers must comply with public health, animal and plant health standards; environmental standards and animal welfare standards in order to receive payments from CAP.<sup>41</sup>

The management approach has proven very successful in addressing environmental issues in the accession process. Transitional periods for environmental *acquis* are an inevitable reality in the accession negotiations. The Commission regularly negotiates transitional arrangements with states acceding to the EU, providing them with sufficient time to adjust to new behavioural requirements.<sup>42</sup> As practical implementation and enforcement require development of “necessary administrative, technical and scientific infrastructure to protect and improve the quality of the environment”<sup>43</sup> and the obligation to apply laws and policies in a decision-making process, national authorities find implementation a demanding, complex and costly task. As each accession country is expected to adopt all laws and put in place required administrative or judicial procedures by the date of accession,<sup>44</sup> the EU, in certain circumstances, allows transitional measures which should be “limited in time and scope”<sup>45</sup>. Transitional measures are the most numerous for the environmental *acquis* and almost all countries that joined the EU requested a wide range of transitional measures which were incorporated in the accession treaties.<sup>46</sup> The biggest challenge so far was the accession of the ten countries in 2004 and the two remaining central and eastern European countries in 2007, when gloomy scenarios about the effects of their membership on EU environmental policy were put forward due to the various differences between the old and new member states.<sup>47</sup> The practice of negotiating transitional periods was more recently confirmed during the accession of Croatia, which negotiated a wide range of transitional measures concerning the environment.<sup>48</sup>

Capacity-building and rule interpreting are prominent strategies to ensure rule conformity concerning the EU environmental *acquis*. The use of these management tools is even more significant for the environment as this policy area encompasses many various sectors and relies on scientific evidence and technology. The Commission recognised the need to assist member states throughout the whole policy cycle. One of the first measures is to work closely with member states during the transposition period and provide member states with sufficient guidance. To that effect, the Commission uses “transposition implementation plans”, which represent an “inventory and planning of protective measures to take during the transposition measures”.<sup>49</sup> Those plans include transposition checklists; interpretative transposition aide memoires and guidelines and peer-reviewable transposition scoreboards.<sup>50</sup>

The Commission also holds regular meetings with national authorities and provides support for networks and expert groups such as the European Union Forum of Judges for the

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<sup>41</sup> Art. 5 of the Council Regulation (EC) establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003, OJ L30

<sup>42</sup> See fn.4, p. 615

<sup>43</sup> J. McCormick, *Environmental Policy in the European Union*, (Palgrave, 2001), p. 135

<sup>44</sup> SEC(97) 1608, p. 9

<sup>45</sup> Guide to the Negotiations(2002), Directorate-General Enlargement, p. 67

<sup>46</sup> See Annexes V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of the Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (2003), OJ L 236; *Annexes VI and VII of the Treaty of Accession of the Republic of Bulgaria and Romania* (2005), OJ L157

<sup>47</sup> See Petr Jehlička & Andrew Tickle, “Environmental Implications of Eastern Enlargement: The End of Progressive EU Environmental Policy?”, *Environmental Politics*, (2004)13:1 and J. Birger Skjærseth and J. Wettestad “Is EU enlargement bad for environmental policy? Confronting gloomy expectations with evidence”, (2007) 7 *Int Environ Agreements*, pp. 263–280

<sup>48</sup> Annex V of the Treaty of Accession of Croatia (2012), OJ L112

<sup>49</sup> <http://ec.europa.eu/environment/legal/law/compliance.htm>

<sup>50</sup> See fn.49



Environment<sup>51</sup> and the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL)<sup>52</sup>. Rule interpreting represents a valuable tool in the implementation of the EU environmental *acquis*. As the legislation often introduces concepts different to those in national jurisdictions and may be at times highly technical, the Commission issues interpretive guidelines to avoid ambiguity among national authorities. Those guidelines are prepared for all environmental policy areas, though special attention is given to areas where the infringements are more prominent (see Figure 5) such as waste management, water quality, nature protection, REACH and environmental impact assessment.<sup>53</sup> In addition to guidelines, the Commission issues digests of the ECJ's *acquis* in certain policy areas recognised as challenging for implementation.<sup>54</sup>

### 3.2. Infringement procedure – Bringing together the Management and Enforcement Approach

If a member state fails to comply with the EU environmental *acquis*, compliance can be enforced by instituting an infringement procedure under Article 258 TFEU.<sup>55</sup> This procedure is a hybrid which benefits from the complementary nature of management and enforcement approaches. The former approach involves the use of management tools to improve monitoring and problem solving mechanisms in the pre-litigation stage before instituting an infringement proceeding through an EU pilot, as well as in the administrative phase of Article 258 TFEU encompassing informal contacts with the member state concerned, a letter of formal notice and a reasoned opinion. The latter approach entails monitoring and imposition of sanctions which requires both an analysis of the judicial phases of Article 258 and Article 260 TFEU. However, an examination of the infringement proceeding demonstrates a greater effectiveness of the management tools deployed by the Commission to support compliance within the infringement procedure.

The Commission monitors compliance with EU environmental rules through its own in-house monitoring system. It developed several management tools to that effect. These include the practice of collecting national reports sent by member states in fulfilling reporting obligations as part of the transposing process and database management systems for monitoring the transposal of directives.<sup>56</sup> The Commission also compiles reports and prepares comprehensive statistical data on the implementation of the EU environmental *acquis* which is available on the DG Environment website.<sup>57</sup> The use of these tools improved the Commission's capacities to investigate breaches of EU environmental *acquis* on its own initiative evidenced by the high number of identified infringements in this policy area. In 2013 the Commission identified 199 environmental infringements which is significantly less than in 2012 and 2011 when the Commission identified 386 and 376 infringements respectively.<sup>58</sup> However, compared to data from earlier years, in particular 2010 when the Commission identified 190 infringements in all policy areas, it can be argued that the Commission's management approach is more effective.<sup>59</sup>

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<sup>51</sup> <http://www.eufje.org/index.php/en/>

<sup>52</sup> <http://impel.eu/about/>

<sup>53</sup> E.g. Guidance document on the Waste Framework Directive and Guidelines for the establishment of the Natura 2000 network in the marine environment;

<sup>54</sup> Environmental Impact Assessment (EIA) of Projects - Rulings of the Court of Justice 2013 and Nature and Biodiversity Cases - Ruling of the European Court of Justice 2006 available at [http://ec.europa.eu/environment/legal/law/cases\\_judgements.htm](http://ec.europa.eu/environment/legal/law/cases_judgements.htm)

<sup>55</sup> See more about the infringement procedure in environmental cases in S. Grohs, "Article 258/260 TFEU Infringement Procedures: The Commission Perspective in Environmental Cases" in *Compliance and Enforcement of EU Law*, edited by M. Cremona, (Oxford University Press, 2012);

<sup>56</sup> See fn.16, p. 113

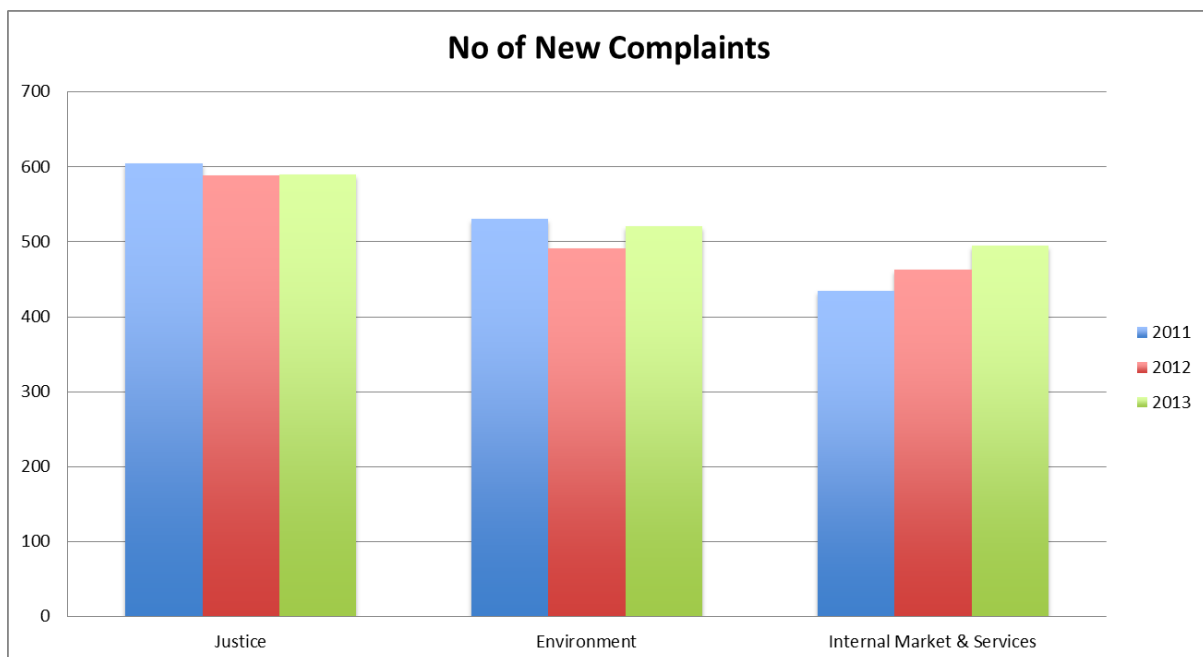
<sup>57</sup> <http://ec.europa.eu/environment/legal/law/statistics.htm>

<sup>58</sup> See fn.2, p. 9; See also COM(2013) 726, p. 7 and COM(2012) 714, p. 7

<sup>59</sup> SEC(2011) 1094, p. 4

The Commission also successfully empowered citizens, businesses and NGOs to provide it with information about the state of the environment. A good illustration is the use of national inventories of Important Bird Areas (IBA) compiled by a non-governmental organisation, Birdlife International, when the necessary scientific information provided by Member States is lacking.<sup>60</sup> In time, better engagement with citizens on the wider identification of infringements resulted in a high number of complaints submitted by citizens, various social groups and business which have an important investigative function in this policy area. To that effect, the Commission developed a central registry (CHAP ) for recording received complaints and a special complaint form for complex and technical areas such as nature.<sup>61</sup>

**Figure 1: Complaints by citizens, businesses and NGOs<sup>62</sup>**



In 2013 the highest number of complaints was filed against Italy and Spain<sup>63</sup> and concerned nature protection, water quality and protection, waste management and environmental impact assessment.<sup>64</sup> This corresponds not only to environmental sectors identified with the highest number of infringements (Figure 5), but also to member states committing the highest number of infringements.<sup>65</sup> The activism of citizens and social groups confirms the high priority of the environment in the EU and the importance of citizens' perspectives as a part of the centralised enforcement system. According to the Special Eurobarometer on the environment, 95 per cent of interviewed European citizens cherish the environment as an area personally important to

<sup>60</sup> SEC(2010) 1143, p. 170

<sup>61</sup> <http://ec.europa.eu/environment/legal/law/complaints.htm>

<sup>62</sup> The table was compiled based on data available in the Commission annual reports on monitoring the application of EU law. No data were available for 2014; there are also no comprehensive data for the period from 2007-2010. [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm)

<sup>63</sup> In 2013 out of 471 complaints against Italy, 64 concerned alleged environmental infringement, while in case of Spain it was 65 out of 439 complaints.

<sup>64</sup> See fn.2, p. 7

<sup>65</sup> See Commission annual reports at [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm)

them.<sup>66</sup> The only drawback with complaints submitted by individuals and, to a lesser extent by NGOs, may be the quality of complaints focusing on individual incidents rather than systemic breaches by member states.<sup>67</sup> This requires an in depth examination by the Commission which is always short staffed for these purposes. Nonetheless, the data suggest that individual complaints are of reasonably good quality as indicated by the Commission's willingness to proceed. For example, in 2012 Commission received 588 environment complaints and decided to process 512 cases, whereby in time it closed 293 cases and transferred 131 to EU pilot discussions with member states.<sup>68</sup>

Over time, the Commission has also developed stronger ties with the other EU institutions. The European Environment Agency, which is seen as the most natural partner and ally, gathers and disseminates information about the state of the environment to the Commission. Likewise, the Commission's improved dialogue with the European Parliament through petitions and questions is not only an important source of information but also a sign of inter-institutional support for Commission efforts to ensure compliance. For example, in 2012 the Commission initiated two infringement cases and 22 EU pilot discussions with member states following questions and petitions from the European Parliament.<sup>69</sup> In 2013, the Parliament informed the Commission about several important breaches by Italy concerning EU rules on industrial emissions, compliance with the polluter-pays principle and compliance with the Environmental Impact Assessment Directive.<sup>70</sup>

Another example of the effective use of the management approach is demonstrated by the wide use of problem solving mechanisms in the environmental policy area. As EU environmental law is becoming more complex and the number of member states is rising, there has been greater focus on resolving disputes in the pre-litigation stage before launching an infringement procedure. One of the mechanisms extensively used is the EU Pilot, both in regard to complaints confirmed by the Commission and in regard to its own initiative cases. This negotiation instrument was introduced by the Commission and several volunteer member states in 2008 and it represents a first step in resolving issues with member states concerning the application of EU law within a short deadline of 20 weeks.<sup>71</sup> It is used by the Commission to inform a member state about potential legal and factual problems arising from the implementation of the EU *acquis* and to clarify them at an early stage. In June 2012 two further member states, Malta and Luxembourg joined the scheme. This mechanism found extensive usage in cases of environmental infringements compared to other policy areas.

## Figure 2: EU Pilot Investigations in 2013

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<sup>66</sup> Special Eurobarometer 416, Attitudes of European Citizens towards the Environment, [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_416\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_416_en.pdf).

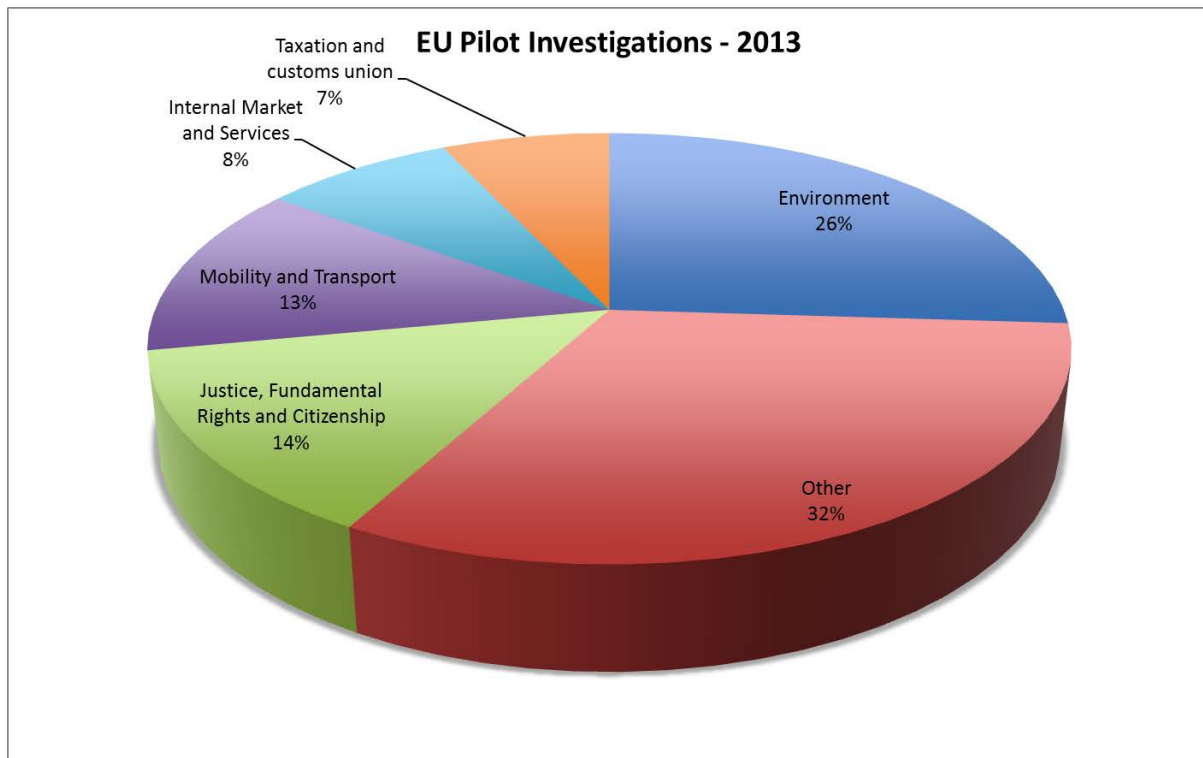
<sup>67</sup> See more in B. Jack, "Enforcing Member State Compliance with EU Environmental Law: A Critical Evaluation of the Use of Financial Penalties", (2010) 23(1) Journal of Environmental Law, pp.73-95

<sup>68</sup> COM(2013) 726 (complete report), p. 55

<sup>69</sup> See fn.68, p. 55

<sup>70</sup> See fn.2, p. 8

<sup>71</sup> See fn.2, p. 9



Source: EU Pilot<sup>72</sup>

Of the 1,502 investigations launched in the EU Pilot between January and December 2013, 26 per cent concerned environmental issues, making it the leading policy area within this EU scheme.<sup>73</sup> The highest number of cases also related to the environment from 2010 to 2012.<sup>74</sup> In 2013, the highest number of EU pilot files was opened with Italy (147), Spain (107) and the UK (89) and involved bilateral discussions regarding the application of the EU environmental *acquis*, in particular nature *acquis*, waste *acquis* and violations of environmental impact assessment obligations.<sup>75</sup> The success rate of this mechanism is consistently high from 2011. In 2013 the success rate was 74 per cent, in 2012, 75 per cent and in 2011, 88 per cent.<sup>76</sup> In 2012, several important environmental cases were closed on non-communication or inadequate application of major pieces of EU environmental *acquis* including Waste Framework Directive, Packing Waste Directive, Directive on Electrical and Electronic Waste, Environmental Impact Assessment Directive and Directive on Strategic Environmental Assessment.<sup>77</sup>

The comparative effectiveness of the management approach is also evidenced by the use of the problem-solving mechanism as a part of the formal infringement procedure under Article 258 TFEU. As Tallberg points out, “dispute settlement is primarily viewed as clarifying common

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[http://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/eu\\_pilot/index\\_en.htm#main\\_contentSec1](http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm#main_contentSec1) accessed on 15 December 2014

<sup>73</sup> Followed by 14 % cases concerning justice, fundamental rights and citizenship, 13 % related to mobility and transport, 8 % related internal market & services and 7 % concerned taxation and customs union; [http://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_governance\\_tool/eu\\_pilot/index\\_en.htm#main\\_contentSec1](http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm#main_contentSec1)

<sup>74</sup> See fn.68; See COM(2012) 714 and COM(2011) 588.

<sup>75</sup> See fn.72

<sup>76</sup> See SWD(2014)358, p. 40; See fn.68, p. 55; See COM(2012) 714 (complete report), p. 51. Success rate in environmental policy area are not available before 2011.

<sup>77</sup> See fn.68, p. 55

norms through interpretation and adjudication, rather than providing enforcement”.<sup>78</sup> If a member state fails to resolve the issue at the pre-litigation stage, the Commission will resort to a formal infringement procedure by sending a letter of formal notice and a subsequent reasoned opinion. The highest number of letters of formal notice and reasoned opinions in 2013 addressed to member states concerned the environmental *acquis*.<sup>79</sup> As the disclosure of any of the documents relating to the investigative procedure is not permitted while an infringement case is ongoing, it is DG Environment practice to regularly publish press releases containing more information on the status of the procedure and the type of environmental infringement.<sup>80</sup> It also informs citizens of its intention to refer the case to the ECJ or to ask the Court to impose fines on member states that failed to comply with a delivered judgment under Article 258 TFEU. This ‘name and shame’ strategy can certainly enhance compliance before the case is referred to the ECJ.

The statistical data indicate reasonable success due to the Commission’s approach in encouraging the use of problem solving management strategies within the infringement procedure. There is a steady downward trend in open infringement cases which signifies a positive outcome in trying to reach an agreement with the member state before the case is referred to the ECJ (Figure 3). The sudden surge of cases in 2013 and, to a lesser extent, in 2014 is explained by more new directives requiring transposition by 2013 than in previous years.<sup>81</sup> However, there are certain limitations in using the data provided by the Commission in its annual reports. As the Commission changed its methodology in presenting the data on application of the EU law from 2011, it is often challenging to identify certain data consistently from 2007 to 2013. Likewise, there is also an occasional discrepancy between the environmental data presented in the Commission’s annual reports and the same type of data available on the DG Environment website.<sup>82</sup>

**Figure 3: Open DG Environment Infringements (end of each year)<sup>83</sup>**

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<sup>78</sup> See fn.4, p. 614

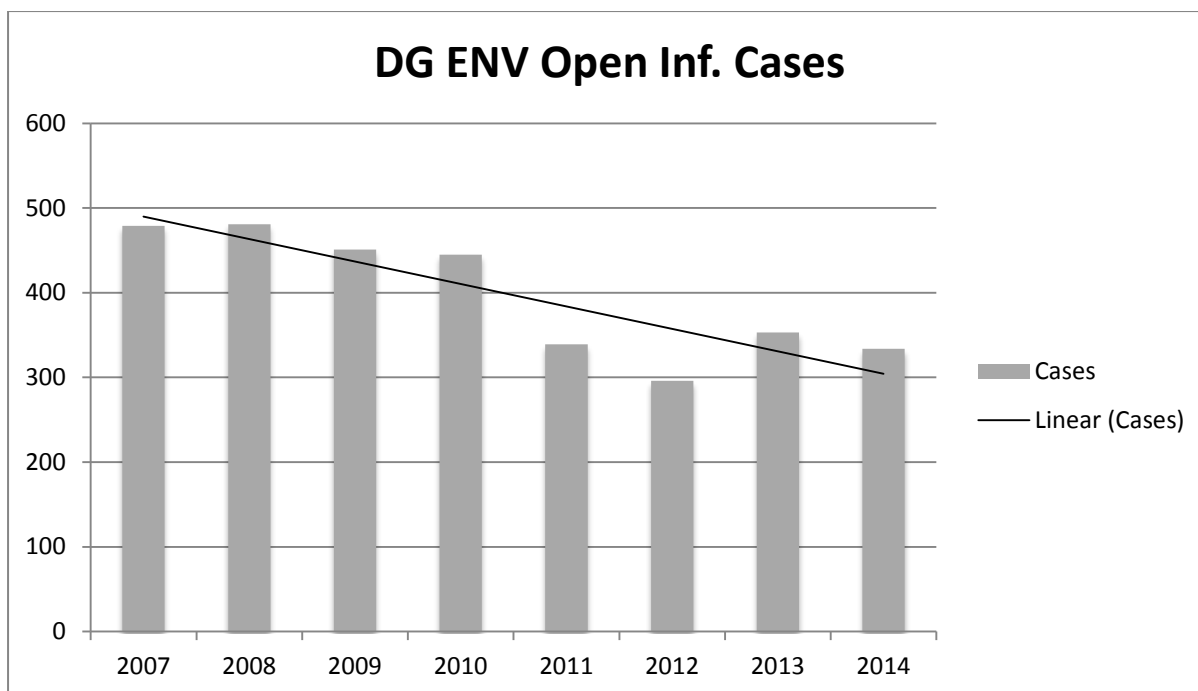
<sup>79</sup> See fn.2, p. 11 - In 2013, out of 761 letters of formal notice 223 concerned environmental infringements followed by 94 in regard to transport and 69 in regard to health issues, while 52 reasoned opinions out of a total of 217 concerned the environment.

<sup>80</sup> See [http://ec.europa.eu/environment/legal/law/press\\_en.htm](http://ec.europa.eu/environment/legal/law/press_en.htm)

<sup>81</sup> 74 in contrast to 56 in 2012. See fn.2, p. 3

<sup>82</sup> See for example the data on the number of open infringement cases in 2013 and 2014 on the DG Environment website (<http://ec.europa.eu/environment/legal/law/statistics.htm>) and Commission’s annual reports). See L. Conant in *Compliance and Enforcement of EU Law*, edited by M. Cremona, (Oxford University Press, 2012);

<sup>83</sup> The table was compiled based on data available on the DG Environment website <http://ec.europa.eu/environment/legal/law/statistics.htm>



If the matter of environmental dispute is not resolved through bilateral discussions with member states, the case is referred to the ECJ and the Court delivers the judgment under Article 258 TFEU. In the last three years, the rate of compliance improved and there a slight decrease in the number of cases of member states failing to comply with the decision delivered under Article 258 TFEU.<sup>84</sup> However, these findings do not apply equally to the environment; member states tend more often not to comply with a judgment under Article 258 TFEU in this policy area than would be the case in other policy areas. This is usually the case with ‘laggards’ such as Italy, Spain and Greece which have less impressive compliance records.<sup>85</sup> Member states make a decision not to comply with the ECJ’s judgement in this policy area as it gives them more time to adjust to new rules and practices until the Commission decides to launch the procedure under 260 TFEU.<sup>86</sup>

Statistical data collected by DG Environment demonstrate some changes in compliance by certain member states. Those data help in identifying defaulting states with the highest number of environmental infringements and are published annually with the intention of encouraging member states to improve their compliance record. Although Borzel argues that non-compliance with EU environmental *acquis* is not a ‘southern problem’, as there is a substantial variation not only between states but also between different policies within states, the statistical data speak in favour of more prominent southern laggards including Italy, Spain and Greece, with Italy in the lead.<sup>87</sup> Likewise, France, Belgium, Ireland and Poland are frequently identified as countries with a worrying number of environmental infringement cases.<sup>88</sup> Still, the Commission’s approach to

<sup>84</sup> See fn.2, p. 13 - At the end of 2013, it is estimated that 113 judgments passed under Article 258 had not been fully complied with by the member states concerned. There were 128 cases in 2012 and 77 in 2011; See fn.68, p. 9 and COM(2012) 714, p. 10.

<sup>85</sup> See fn.65

<sup>86</sup> In *Commission v Ireland* (C-374/11), the Irish government emphasised that time available to enact the legislation must be taken into account by the Court when imposing a penalty and that the time available to comply with the judgment under Article 258 TFEU was not sufficient.

<sup>87</sup> TA. Borzel, “Why there is no 'southern problem'. On environmental leaders and laggards in the European Union”, JEPP, (2000) 7(1)

<sup>88</sup> See fn.65

compliance since 2007 has had varying success in member states, as Figure 4 demonstrates. Countries are divided between ‘improvers’ (with a decreasing linear trend in the number of environmental infringement cases) and ‘non-improvers’ (those with an increasing linear trend). For example, Italy, as one of the member states with the highest number of environmental infringements, is the biggest improver over time having had 60 cases in 2007 and 18 in 2014. Other laggards such France and Ireland also reduced the number of infringement cases. Leaders such as Sweden and Finland have been consistently low over time. A promising avenue for further research would be an exploration of the reasons for the discrepancy in improvement between member states.

**Figure 4: Environmental infringements per member state 2007-2014 Trend<sup>89</sup>**

Improvers		Non-improvers	
Country	Linear Trend	Country	Linear Trend
IT	-5.12	SE	0.05
IE	-4.77	AT	0.15
UK	-2.74	DE	0.15
FR	-2.45	SK	0.24
MT	-2.43	CY	0.30
LU	-2.36	EL	0.55
PT	-2.05	PL	0.62
ES	-1.83	SL	1.15
LT	-1.81	BG	1.24
EE	-1.67	RO	2.40
CZ	-1.52		
DK	-1.30		
BE	-1.19		
NL	-0.81		
LV	-0.69		
HU	-0.56		
FI	-0.14		

However, the enforcement approach demonstrates certain weaknesses which make it less effective in ensuring compliance. One of the important variables is the length of time taken by the infringement procedure as member states take this into account when making a decision not to reach an agreement with the Commission during bilateral discussions. Effectively, member states are buying time as they know that the Commission will close the case at any point of the proceeding before the ECJ delivers a judgement, provided that a member state carries out measures to comply.

In cases of direct actions, which includes the infringement procedure, the average time taken was 20 months between 2010 and 2014.<sup>90</sup> In 2013, the duration of proceedings increased significantly to 24.3 compared to 16.7 months duration in 2010<sup>91</sup>, though minor improvements were made in 2014.<sup>92</sup> According to Kramer’s analysis of environmental policy covering the period from 1992

<sup>89</sup> The table was compiled based on data available on the DG Environment website <http://ec.europa.eu/environment/legal/law/statistics.htm>

<sup>90</sup> Court of Justice of the European Union, Annual Report, 2014, p. 108

<sup>91</sup> See fn.90, p. 108

<sup>92</sup> 20 months

to 2005, the average duration of the infringement procedure in environmental cases was 19 months.<sup>93</sup> These results do not even take into account the duration of the pre-litigation procedure including the dispatch of the letter of formal notice and the reasoned opinion.<sup>94</sup> According to the Commission's data in 2007 "it takes an average of 19 months to close a complaint before a letter of formal notice is sent; 38 months when a case is closed between the letter of formal notice and reasoned opinion; and 50 months when the case is closed after the reasoned opinion and before the case is sent to the Court".<sup>95</sup> This certainly shows that the Commission and the ECJ are not expeditiously dealing with infringement cases and the duration of the proceeding remains of the Achilles heel of the enforcement approach.

Another weakness in regard to the enforcement approach relates to poor application of the final avenue to remedy non-compliance by using Article 260 TFEU. This proceeding enables the Commission to enforce subsequent compliance with the Court decisions delivered under Article 258 TFEU. The advantage of this procedure is the possibility of imposing a financial penalty on the defaulting member state. The number of Court judgments under Article 260(2) TFEU is slightly higher in cases related to the environment. In 2014, the Commission asked the Court to impose fines on certain member states in two instances.<sup>96</sup> In 2013, four environmental cases were referred to the Court under Article 260(2) TFEU and two out of four Court judgments delivered in the same year concerned the environment.<sup>97</sup> In 2012, two out of three delivered judgments again were related to the environment, involving non-compliance with the Waste Framework Directive and the Environmental Impact Assessment Directive.<sup>98</sup> If those results are compared to data from 1998 to 2007, when the Court imposed six fines in all policy areas, we can see that the Commission is making strides, though the higher number of penalties imposed is expected in this policy area as most of the infringements concern the environment.<sup>99</sup>

Furthermore, the use of Article 260(3) TFEU introduced in the Lisbon Treaty did not improve the enforcement approach significantly as it is rarely used in this policy area. In the last three years, there has been a sluggish initiative of the Commission to use this mechanism to ensure prompt transposition of environmental directives despite the commitment made in the 2011 Communication to use this new instrument more effectively.<sup>100</sup> This may be explained by the Commission's reluctance to impose additional financial strains on member states in an area that already requires investment of significant resources for the transposition of environmental directives. In 2011, there were only two cases of referrals to the Court under 260(3) TFEU against Poland for the non-communication of national measures for transposing directives on ambient air and marine strategy framework,<sup>101</sup> while in 2012 the Commission referred Bulgaria, Hungary, Poland and Slovakia to the court, proposing financial penalties for 'late transposition' of the Waste Framework Directive.<sup>102</sup> In 2013 no referrals were made under Art 260(3) TFEU in regard to the environmental *acquis*.<sup>103</sup> The lack of pressure on member states also aligns with the

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<sup>93</sup> Ludwig Krämer, "Statistics of Environmental Judgments by the EC Courts of Justice", J Environmental Law 18(3) (2006) 407, p. 413

<sup>94</sup> See fn.93, p. 413

<sup>95</sup> See fn.25, p. 5

<sup>96</sup> C-167/14 and C-557/14; Three judgements were delivered in 2014 under Article 260(2) TFEU. See Commission Staff Working Document "Monitoring application of EU law in EU policy areas, pp. 62-72 available at [http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm)

<sup>97</sup> SWD(2014) 359, p. 38 and p. 42

<sup>98</sup> SWD(2013) 433, pp. 24-25 - *Commission v Ireland* (C-279/11) and *Commission v Ireland* (C-374/11)

<sup>99</sup> See fn.16, p 128; see also P. Wennerås "Sanctions against Member States under Article 260 TFEU: Alive, but Kicking?" (2012) 49 CMLR p. 145. – He states that only 14 cases have been brought before the ECJ under 260 TFEU from 1993 to 2012.

<sup>100</sup> Communication from the Commission — Implementation of Article 260(3) of the Treaty, OJ C 12, 15.1.2011

<sup>101</sup> SWD(2012) 400, p. 8

<sup>102</sup> See fn.68, p. 55

<sup>103</sup> See fn.97



new Commission's post-austerity agenda to further stabilise national economies and boost jobs growth and investment.<sup>104</sup>

#### 4. Non-compliance with the EU Environmental *Acquis*

In order to demonstrate enforcement and management as complementary strategies to induce compliance, Tallberg explores sources of non-compliance. He argues that “non-compliance in the EU can best be explained by incentives for defection associated with national adjustment to EU rules, and legislative and administrative capacity limitations in the member states”.<sup>105</sup> Thus, the use of the preventive and coercive measures seems to be the ideal approach to ensure rule conformity. As the environmental policy area encompasses many different sectors it is important to examine if these same reasons explain non-compliance and if there are any reasons specific only to this area. This is also an opportunity to assess the effectiveness of each strategy in addressing those sources of non-compliance in the environmental policy area.

The infringement procedure is initiated when a member state ‘has failed to fulfil an obligation under the Treaties’ which may include several distinct types of breaches in any environmental sector. The highest number of infringements in 2013 concerned the waste *acquis*, followed by water and nature *acquis* infringements. In its policy document on implementing European Community environmental law in 2008, the European Commission identified several environmental sectors as particularly challenging, including problems of illegal landfills, urban waste water treatment, gaps in a key network of European nature sites and compliance with environmental assessment.<sup>106</sup> Breaches in relation to industrial installations, air pollution and climate change were recognised as other challenging environmental segments.<sup>107</sup> Statistical data from 2007 to 2014 demonstrate notable improvements in regard to nature and water protection, although this does not include the problem of treatment of urban waste water (Figure 5). The latest 4<sup>th</sup> Report Water Framework Directive (WFD) explains this improvement by the active use of management tools by the Commission, involving improved dialogue with the member states with the aim of clarifying WFD requirements and proposing the best tools for its implementation.<sup>108</sup> The nature sector benefited significantly from the use of LIFE financial instrument which assisted member states in drawing Prioritised Action Frameworks under Article 8 of the Habitats Directive.<sup>109</sup> Reasonable progress can also be identified in regard to the environmental impact assessment, despite the slight increase in 2014. Unfortunately, waste non-compliance rose sharply in 2012, although compliance has improved from 2013.

#### Figure 5: Infringements by Environmental Sector<sup>110</sup>

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<sup>104</sup> See Jean-Claude Juncker, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Political Guidelines for the next European Commission, [http://ec.europa.eu/about/juncker-commission/docs/pg\\_en.pdf](http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf).

<sup>105</sup> See fn.4, p. 623

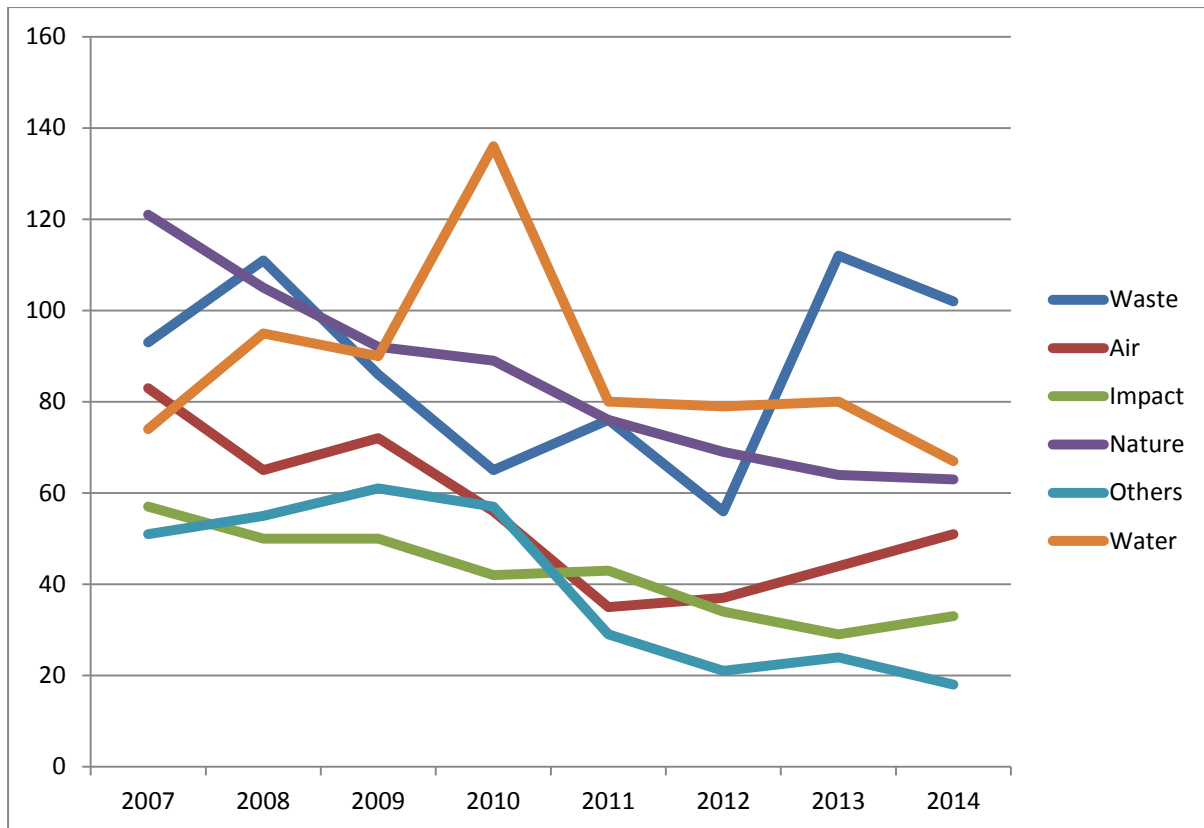
<sup>106</sup> See fn.26, pp. 3-4

<sup>107</sup> See fn.26, pp. 3-4

<sup>108</sup> COM/2015/0120, pp. 3-4

<sup>109</sup> <http://ec.europa.eu/environment/life/news/newsarchive2015/june/index.htm#PAFs>

<sup>110</sup> The table was compiled based on data available on the DG Environment website <http://ec.europa.eu/environment/legal/law/statistics.htm>



The most significant breaches in the environmental policy area involve non-communication of infringements, incorrect transposition and the insufficient application or enforcement of the environmental *acquis*. Although non-communication is defined as a “failure of a member state to notify legislation which transposes a specific directive before a deadline given in a directive”<sup>111</sup> or “missing or partial notifications of directives’ national transposition measures”<sup>112</sup>, this is a misleading definition as this failure may also include absolute failure to transpose a directive. Since non-communication is especially significant in the environmental policy area as directives represent the most frequent source of EU environmental law, it would be more appropriate to make a clearer distinction between the two types of breaches in the Commission reports and data published by DG Environment. This would allow the Commission to use enforcement tools more forcefully by deploying Article 260(3) TFEU in cases of non-communication of national transposing measures.

Incorrect or incomplete transposition is another type of infringement presented on the graph as “non-conformity” cases, while inadequate application and enforcement are presented as “bad application” cases. More effective management of non-communication and non-conformity cases is recognised as a priority for the Commission as “they present the greatest risks, widespread impact for citizens and businesses”.<sup>113</sup> Although there is a slight increase in the number of late transposition cases in 2013 compared to previous years, there is a general downward trend in non-communication and non-conformity cases from 2007.<sup>114</sup> The slight rise in 2013 and 2014 was triggered by a greater number of new directives to implement from

<sup>111</sup> <http://ec.europa.eu/environment/legal/law/statistics.htm>

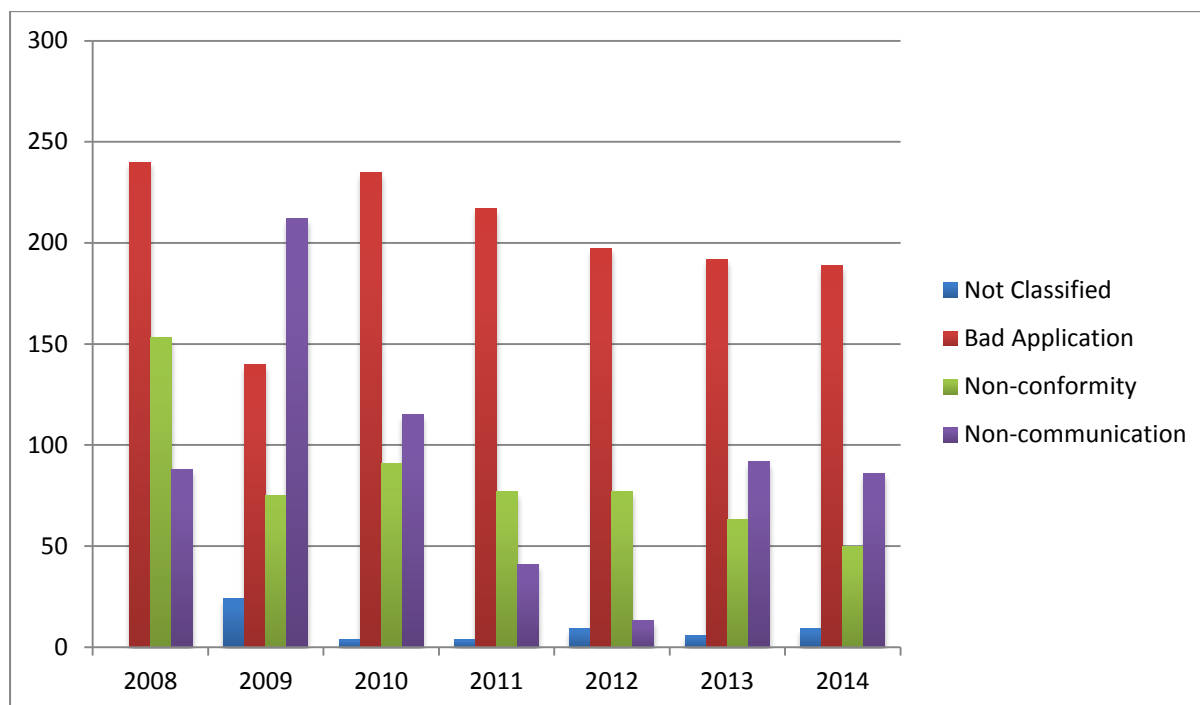
<sup>112</sup> Sn fn.68, p. 64

<sup>113</sup> See fn.25, p. 9

<sup>114</sup> 478 new late transposition cases infringements were launched in 2013 compared to 447 procedures in 2012; See fn.2, p. 3

2013.<sup>115</sup> Less visible results can be noted for inadequate application of EU law. Still, overall results confirm the effective complementary use of both the enforcement and management strategies.

**Figure 6: Infringements by stage**<sup>116</sup>



#### 4.1. Sources of Non-Compliance

In assessing the effectiveness of the complementary use of management and enforcement strategies, Tallberg divides sources of non-compliance in two groups. First, non-compliance as a preference looks at the behavioural adjustments imposed on member states by EU rules.<sup>117</sup> If a member state has to make significant legal and behavioural adjustments, then the expectation of full compliance will be reduced. Second, non-compliance may result from capacity limitations and they can include a great variety of potential restrictions.<sup>118</sup> Can we identify the same sources of non-compliance concerning the environment that would justify the two-track approach pursued by the Commission? Can we also assess their comparative effectiveness to this end? An analysis of all environmental judgments delivered from 2007 to 2013<sup>119</sup> validates the same reasons for non-compliance which are more likely to be expected in the environmental policy area as the requirements for behavioural, legal, administrative, financial and other adjustments are higher in this sector. However, this analysis also reveals some additional sources of non-compliance caused by the complexity and technical nature of the environmental *acquis*.

Non-compliance as a preference seems like a rational choice in this policy area. The explanation lies in costly legal and institutional adjustments required by the environmental *acquis*, especially in

<sup>115</sup> See fn.2, p. 3

<sup>116</sup> The table was compiled based on data available on the DG Environment website <http://ec.europa.eu/environment/legal/law/statistics.htm>

<sup>117</sup> See fn.4, p. 626

<sup>118</sup> See fn.4, p. 626

<sup>119</sup> See Annex 1

sectors such as waste<sup>120</sup> and water<sup>121</sup>. Interestingly, non-compliance as a preference in this policy area is also caused by a need to make behavioural adjustments that would lead to changes in widely rooted social traditions amongst the general population in certain member states.<sup>122</sup> Finally, the deliberate choice not to comply is often seen in the application of new rules.<sup>123</sup>

Capacity limitations as another recurrent source of non-compliance are even more prominent in relation to the environmental *acquis*. Constitutional structures in decentralised member states such as Belgium<sup>124</sup>, Spain,<sup>125</sup> and Italy<sup>126</sup> and are often invoked as a reason for non-compliance. Likewise, gaps in internal coordination and external coordination within the wider context of capacity limitations are quite common in the environmental policy area and relate both to centralised and decentralised member states. Insufficient technical knowledge can also be regarded as another capacity limitation that delays the implementation of a very technical environmental *acquis*.<sup>127</sup>

Beside those two main categories of non-compliance, as recognised by Tallberg, the environmental policy area generates other reasons that may render the process of rule conformity more complex. The Commission may have disagreements with member states on scientific knowledge and how scientific findings should be applied in certain instances.<sup>128</sup> Non-compliance in a significant number of environmental cases is also caused by frequent disagreements over the meaning of certain terms or clarity and precision of a provision which may cause misinterpretation or misunderstanding of certain directives. This equally applies to all environmental sectors and to all member states.<sup>129</sup> The understanding of a provision leads to another issue of how best to implement certain environmental provisions. Finally, compliance in the environmental policy area often depends on the priority given to what a member state may consider an overriding public interest.<sup>130</sup>

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<sup>120</sup> Typical examples are Italy (C-283/07; C-297/08; C-196/13 and C-323/13) and Greece (C-512/09; C-600/12; C-378/13; C-677/13).

<sup>121</sup> There was an overwhelming number of cases related to water *acquis* from 2007-2013. See for example C-85/07; C-147/07; C-233/07; C-264/07; C-335/07; C-390/07; C-438/07; C-516/07; C-351/09; C-481/09; C-526/09; C-276/10; C-301/10; C-458/10; C-565/10; C-297/11; C-366/11; C-403/11; C-151/12; C-193/12; C-237/12; C-23/13; C-85/13; C-356/13; C-395/13; C-190/14;

<sup>122</sup> An interesting example is Malta which at the time made a conscious decision not to make behavioural adjustments concerning hunting policy as this would necessitate changing a long standing culture of hunting (*Commission v Malta* C-76/08); A similar issue was raised in a case against Italy where the Italian government emphasised cultural and gastronomic traditions in Veneto which may have been jeopardised by the prohibition of hunting under the Birds Directive (*Commission v Italy* C-164/09).

<sup>123</sup> Shortly after the expiry of the transposition periods the Commission launched significant number of proceedings for a failure to transpose the Environmental Liability Directive – see C-331/08; C-328/08; C-330/08; C-402/08; C-417/08; C-422/08.

<sup>124</sup> See C-271/07; C-265/10; C-366/11

<sup>125</sup> See C-403/11; C-151/12

<sup>126</sup> See C-573/08

<sup>127</sup> See *Commission Italy* C-68/11

<sup>128</sup> It is also quite striking that non-compliance due to divergent opinions on the use of science is most prominent in cases which Commission launches an action against environmental leaders such as Sweden or Finland. See *Commission v UK* (C-390/07); *Commission v Sweden* (C-438/07); *Commission v Finland* (C-335/07)

<sup>129</sup> For example what falls within the definition of a combustion plant under Directive 2001/80 in C-346/08 *Commission v UK*; interpretation of “dismantling information” and “striping” under the Directive 2000/53/EC in *Commission v France* C-64/09. One interesting question that arose in regard to implementation of the *acquis* in UK and Ireland was the extent to which environmental directives may be transposed by case-law in common law systems as the Commission opposed the idea that this would be acceptable form of transposition - See *Commission v Ireland* C-427/07, *Commission v Ireland* C-50/09 and *Commission v UK* C-530/11.

<sup>130</sup> This is often the case with the nature and EIA *acquis* where the certain activities may affect flora and fauna. See cases *Commission v Spain* C-404/09.

What does this tell us about the Commission's efforts in deploying management and enforcement strategies and are they effective in addressing the reasons for non-compliance in the environmental policy area? Rational choices of member states not to comply undoubtedly question the effectiveness of the enforcement approach. One of the best illustrations is the implementation of the Urban Waste Water Directive where we can identify a steady and significant number of environmental infringements against almost all member states.<sup>131</sup> Even though the deadlines for transposition of the directive have long expired, member states make rational choices not to comply with the directive as the implementation of this directive is demanding due to financial and planning costs related to major infrastructure investment such as sewerage systems and treatment facilities.<sup>132</sup> In the case of Portugal, three judgments have already been delivered on matters related to urban waste water treatment and Portugal was referred for the fourth time to the ECJ in 2014.<sup>133</sup> If we compare this with the statistical data on imposition of sanctions it is clear that costs of timely compliance outweigh the potential costs of non-compliance embodied in sanctions. In 2013 the Commission recognised the need for capacity building to comply with this directive and EU funds were put at the disposal of several member states through Cohesion Fund and European Regional Development Fund to allocate to those regions lagging behind in implementing this directive.<sup>134</sup> It remains to be seen if this management approach will prove more successful in ensuring compliance than the enforcement approach in regard to the Urban Waste Water Directive.

This demonstrates that the enforcement approach did not live up to its full potential which calls for a more rigorous approach by the Commission. Most importantly, this should entail more vigilance in using Article 260(2) and (3) as evidenced by its poor application in this policy area. That said, there may be questions about the justification of using a penalty under Article 260(3) if a member state failed to notify the Commission of a national measure for transposition which may be examined on another occasion. Wennerås also points out at the doctrine of general and persistent (GAP) infringements as another powerful tool developed by the Commission to tackle certain types of infringements more effectively and in a more systematic manner.<sup>135</sup> This new doctrine, initially developed in the environmental policy area is especially valuable for the environmental *acquis* as many directives require member states not only to put in place legal and administrative frameworks but also to ensure continuous application and enforcement of those provisions such as the Water Framework Directive and the Waste Framework Directive.<sup>136</sup> The enforcement approach would also benefit from expediting the infringement procedure as, at the moment, member states make a choice not to comply and buy time to make required adjustments. Finally, if a 'name and shame' strategy is to be regarded as sanction within the enforcement process, it would have to carry an actual reputational penalty for a member state, though this may be difficult to enforce.

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<sup>131</sup> Council Directive 91/271/EEC concerning urban waste-water treatment, OJ L 135

<sup>132</sup> See COM/2013/0574; See *Commission v Portugal* C-233/07; *Commission v Sweden* C-438/07; *Commission UK* C-390/07; *Commission UK* C-301/10; *Commission v Portugal* C-526/09; *Commission v France* C-23/13; *Commission v Spain* C-343/10; *Commission v Italy* C-565/10; *Commission v Italy* C-85/13; *Commission v Belgium* C-395/13

<sup>133</sup> C-530/07; C-526/09 and C-220/10; More on the fourth referral at [http://europa.eu/rapid/press-release\\_IP-14-815\\_en.htm](http://europa.eu/rapid/press-release_IP-14-815_en.htm)

<sup>134</sup> COM(2013) 0574, p. 10

<sup>135</sup> Pål Wennerås. "A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (GAP) Infringements. Lumps Sums and Penalty Payments", (2006) 43 Common Market Law Review, p. 61

<sup>136</sup> One of the recent examples was the failure of Italy to fulfil obligations under the Urban Waste Water Treatment Directive in two separate cases *Commission v Italy* C-565/10 and *Commission v Italy* C-85/13 where at least one of the GAP conditions was met. This is a dimension of scale where failure occurred in a great numbers of localities covering all geographical areas of the country.

Does this mean that the management approach is more effective in addressing sources of non-compliance? In regard to cases of non-compliance as a preference for member states, the Commission quite successfully uses the management approach to alleviate required adjustments. This is certainly true for former accession countries from Central and Eastern Europe which benefited extensively from transitional periods and accession funds to this end. If we assess their compliance by comparing the list of transitional measures and the number of infringement cases brought against those member states for failing to comply with those measures after the expiry of a transitional period, we can see that compliance records are impressive. Only in two cases has the Commission initiated the infringement proceedings for failing to comply with directives, for which Slovenia and Malta were granted transitional periods.<sup>137</sup>

Another testament to the effectiveness of dialogue as the main management approach tool within the infringement procedure is the significant number of “cases removed from the ECJ register” in the period from 2007 to 2013 which usually means the case has been settled to the Commission's satisfaction after the application to the ECJ has been made.<sup>138</sup> This will include both cases where member states make a conscious decision not to comply and cases where this is not the result of a deliberate decision. In most instances, the member state has agreed to do what the Commission required, while in a smaller number of cases the member state persuaded the Commission that there is no infringement or its interpretation of the law in question is incorrect or the Commission decided not to pursue the case for political reasons.<sup>139</sup> The Commission dealt reasonably well with cases of capacity limitations, which is evidenced by a negligible number of cases where member states invoked the lack of technical knowledge or disagreed with the application of science to environmental policy.<sup>140</sup> Still, a management approach must be reinforced to prevent cases of rule ambiguity which tend to occur quite frequently in this complex and technical area. Some of those cases may be explained by still unresolved expert resource issues within the Commission.

## 5. Concluding Remarks

As the environmental policy area is still identified as one of the most challenging areas for the implementation of the EU *acquis*, it was relevant to assess the compliance paths and the Commission's approach in inducing compliance. The latest report on monitoring the application of EU law indicated a rise in the number of environmental infringements cases, whereby a total of 1300 infringement cases remained open and of these 334 were environmental infringements, representing 26 per cent of the total.<sup>141</sup> The assessment was undertaken by using Tallberg's interpretation of enforcement and management strategies as it offers a broad approach to assess the Commission's role in ensuring compliance. This brings together the management and enforcement strategies to ensure rule conformity and interaction with other EU institutions, member states and citizens. It also provides an explanatory model that allows an assessment of the Commission's tools for compliance according to two particular methodologies.

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<sup>137</sup> *Commission v Slovenia* C-49/10; *Commission v Malta* C-252/08

<sup>138</sup> Although it is impossible to identify environmental cases the number of overall settled cases is impressive. In the period from 2007 to 2013, 249 cases were settled to the Commission's satisfaction.

<sup>139</sup> See A. Dashwood and R. White, “Enforcement Actions under Article 169 and 170”, (1989) 14 ELR 388; J. Mertens de Wilmars and IM Verougstraete, “Proceedings against Member States for Failure to Fulfil their Obligations” (1970) 7 CMLR 385

<sup>140</sup> See fn.127

<sup>141</sup> See fn.2, pp. 11-12.

The examination of the environmental policy area and sources for non-compliance validates the complementary deployment of both strategies as it offers a variety of preventive and coercive measures. However, the analysis demonstrates that the Commission uses the management approach more effectively to ensure compliance in the environmental policy area. Under this approach the Commission uses tailor made measures to address a wide range of reasons for non-compliance such as legal, administrative and financial adjustments by member states, capacity limitations and rule ambiguity. Likewise, by engaging citizens, NGOs and business in informing the Commission about potential infringements, this approach justifies the efforts of the Commission ‘to bring the EU closer to its citizens’. Despite the fact that Commission is making some strides under the enforcement approach in the field of the environment, the potential of this approach has not been fully realised. Without a more rigorous application of Article 258 and imposition of sanctions under Article 260, compliance is exposed to risk as member states often make rational choices not to comply. More effective use of those mechanisms and more expedient procedure would a good way to start.

### Annex 1: List of environmental infringement cases from 2007-2013<sup>142</sup>

Austria	C- 535/07; C-401/08; C-422/08; C-548/10; C-352/11
Belgium	C-93/07; C-271/07; C-100/08; C-342/08; C-258/09; C-513/09; C-538/09; C-36/10; C-265/10; C-366/11; C-533/11; C-395/13
Bulgaria	/
Czech Republic	C-378/09; C-481/09; C-276/10
Cyprus	C-340/10; C-412/12
Denmark	C-190/14
Estonia	C-515/09
Finland	C-335/07; C-328/08
France	C-106/07; C-147/07; C-241/08; C-330/08; C-443/08; C-64/09; C-383/09; C-35/10; C-395/10; C-515/10; C-193/12; C-237/12; C-23/13
Greece	C-81/07; C-264/07; C-293/07; C-259/08; C-286/08; C-368/08; C-512/09; C-534/09; C-297/11; C-517/11; C-600/12; C-378/13; C-677/13
Hungary	/
Ireland	C-427/07; C-188/08; C-279/11; C-374/11; C-158/12; C-50/09
Italy	C- 40/07; C-69/07; C-85/07; C-283/07; C-368/07; C-297/08; C-491/08; C-573/08; C-164/09; C-508/09; C-50/10; C-565/10; C-68/11; C-85/13; C-196/13; C-323/13
Latvia	/
Lithuania	/
Luxembourg	C-61/07; C-273/08; C-331/08; C-390/08; C-526/08; C-458/10; C-576/11
Malta	C-76/08; C-252/08; C-351/09
Netherlands	/
Poland	C-46/11; C-192/11; C-356/13
Portugal	C-233/07; C-530/07; C-30/09; C-37/09; C-526/09; C-220/10; C-34/11; C-223/11
Romania	C-522/09
Slovakia	C-331/11
Slovenia	C-402/08; C-49/10; C-365/10
Spain	C-480/07; C-516/07; C-308/08; C-392/08; C-404/09; C-48/10; C-90/10; C-343/10; C-403/11; C-151/12
Sweden	C-246/07; C-438/07; C-479/10; C-607/10; C-243/13
United Kingdom	C-247/07; C-390/07; C-346/08; C-417/08; C-495/08; C-557/08; C-530/11; C-259/09; C-301/10

<sup>142</sup> Except GMOs cases. It also includes cases brought under Article 260 TFEU