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EU Environmental Compliance Assurance

Aleksandra Čavoški*

Context

On his election as Commission President in 2014, Jean-Claude Juncker brought significant change to the organisational structure of the European Commission with the objective of creating a closer dialogue with citizens by placing special emphasis on issues that 'really matter' to them.¹ In his opening statement to the European Parliament in July 2014, Juncker set out his new vision for the European Commission in the light of the changes brought by the Lisbon Treaty. As he is the first President of the Commission to be elected by the European Parliament, he envisaged the Commission's role as more overtly political. As a part of this new vision, Juncker pledged to regain the credibility of citizens while focusing on ten priorities that will lead to reform of the EU.² Without setting a separate priority related to the protection of the environment, environmental issues were set to be addressed in the context of creating new jobs and boosting growth and investment. The Commission expects that a new circular economy package will bring environmental benefits, 'green' the economy, and enable the use of resources in a more sustainable manner.³ Thus, environmental protection also has an instrumental value in creating a 'prosperous Europe with more jobs'.⁴

In order to fulfil this priority, the new Commission had to address the issue of poor compliance, particularly in sectors with high numbers of infringement cases such as the environment.⁵ The Commission estimated that economic costs related to non-compliance with the environmental *acquis* amounted to approximately EUR 50 billion a year in 2011, including costs related to infringement procedures.⁶ Just in the waste sector, full compliance with EU waste policy by 2020 has the potential to create an "additional 400,000 jobs and an additional turnover in the waste management and recycling industries of EUR 42 billion".⁷ Poor compliance in the environmental sector is also closely linked to the Commission's pledge to engage more closely with citizens.⁸ The environment is one of the policy areas regarded by citizens as high priority and personally important to them.⁹ To that end, the Commission published two separate papers on compliance – EU Law: better results through

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¹ "The Juncker Commission: The Right Team to Deliver Change", http://europa.eu/rapid/press-release_SPEECH-14-585_en.htm and "A New Start for Europe" at http://europa.eu/rapid/press-release_SPEECH-14-567_en.htm; The Juncker Commission introduced a 'new collaborative way of working' with project teams reflecting the Commission's political priorities. Vice-Presidents have the responsibility to direct and coordinate project teams. See more A. Čavoški (2015): A Post-austerity European Commission: no Role for Environmental Policy?, *Environmental Politics* 24(3), pp. 501-505

² See https://ec.europa.eu/commission/priorities_en

³ COM(2017) 33 final

⁴ "A New Start for Europe" at http://europa.eu/rapid/press-release_SPEECH-14-546_en.htm

⁵ See Annual reports on monitoring the application of EU law

https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en

⁶ COM(2016) 316 final at 3

⁷ COM(2017) 63 final at 2

⁸ See above n. 6 at 3-4

⁹ SWD(2018) 10 final at 4

better application¹⁰ and EU Actions to improve environmental compliance and governance (Environmental Compliance Assurance Action Plan)¹¹. The former sets out the Commission's overall strategy on the application, implementation and enforcement of EU law by identifying measures which should lead to better compliance across all sectors. The latter is the Environmental Compliance Assurance Action Plan with a set of nine measures specific to environmental policy with the aim of improving compliance with EU environmental law and strengthening environmental governance both in member states and the EU. This paper will analyse the approach to compliance in the environmental policy area in the light of the new Environmental Compliance Assurance Action Plan. This will be done by exploring the measures set out in the Action Plan and their alignment with the previous initiatives of the Commission to address poor compliance. Furthermore, the paper will provide a preliminary assessment on the effectiveness of these measures in bolstering compliance in environmental policy area.

The Commission's approach to compliance

The Commission as "guardian of Treaties" has a central role in ensuring compliance with EU law across the EU. In that capacity, the Commission deploys various measures and initiatives to address poor compliance across all sectors and in particular in the environmental sector. The use of these different approaches to compliance has been part of policy discussions on better governance and better application of EU law.¹² Compliance has also warranted significant scrutiny by modern theorists of international relations who have recognised enforcement and management theories as two main theoretical approaches to compliance.¹³ The management approach is based on cooperation and the use of non-coercive measures such as dispute resolution procedures, provision of technical and financial assistance and enhancement of transparency.¹⁴ This approach assumes that actors do not make a rational choice not to comply, but rather that compliance is hindered by financial, legal or technical difficulties surrounding the application of law. The enforcement approach is based on the use of coercive mechanisms as compliance is best ensured by the likelihood of monitoring and threat of sanctions.¹⁵ These approaches to compliance do not have only an academic or theoretical value but are regarded as significant from a policy perspective. The policy maker's choice of methods to address sources of non-compliance can be classified as grounded in either enforcement or management.

¹⁰ 2017/C 18/02

¹¹ COM(2018) 10 final

¹² Presidency Conclusions Laeken 2001; COM(2001) 428; COM(2007) 502; COM(2008) 773; COM(2012) 259/2; COM(2015) 215

¹³ See A. Chayes and A.H. Chayes, "On Compliance", International Organisation, 47(2) 1993; G.W. Downs, David M. Rocke and P.N. Barsoom, "Is the good News about Compliance Good News about Cooperation", International Organization, 50(3) 1996; J. Tallberg, "Path to Compliance: Enforcement, Management and the European Union", International Organisations(2002) 56(3) pp. 609-643; M. Cremona (ed.), Compliance and Enforcement of EU Law (Oxford: Oxford University Press, 2012)

¹⁴ A. Chayes and A.H. Chayes, "On Compliance", International Organisation, 47(2) 1993

¹⁵ J. Tallberg, "Path to Compliance: Enforcement, Management and the European Union", International Organisations(2002) 56(3) at 611 and see G.W. Downs, David M. Rocke and P.N. Barsoom, "Is the Good News about Compliance Good News about Cooperation", International Organization, 50(3) 1996.

The infringement procedure as the main enforcement tool deployed by the Commission was prescribed in the founding EEC Treaty and as such was used from its early conception.¹⁶ In addition to this enforcement tool, the Commission has recognised the importance of non-coercive methods, known as the management approach, to improve compliance.¹⁷ A close examination of measures envisaged to address compliance reveals a greater focus of the Commission on the use of the management approach. Some of the measures deployed by the Commission include strengthening the links between EU institutions, member states and non-state actors, organising bilateral meetings of national experts with the Commission services to address transposition before transposition deadlines and more effective use of guidelines and interpretative texts developed by the Commission.¹⁸ Of particular importance for the development of the management approach to compliance was its landmark policy document “A Europe of Results – Applying Community Law” published in 2007.¹⁹ As a result of the growing number of infringement cases and instances of member states seeking explanations or guidance on legal matters, the Commission recognised the importance of using management measures, in particular focusing more on implementation through the policy cycle, efficient and effective information exchange, problem-solving and strengthening dialogue and transparency.²⁰

The management approach as a policy instrument has a particular purchase in environmental policy areas as member states experience range of difficulties in complying with EU environmental law. In its 2008 policy document ‘Implementing European Community Environmental Law’ the Commission affirmed the applicability of its new tactic set out in “A Europe of Results – Applying EU Law” to the environmental policy area.²¹ The heavy reliance on methods that can be classified as grounded in the management approach is evident in this policy document and justified by the need to apply the relevant environmental *acquis* “to a wide range of natural conditions” and in different national and administrative structures across the EU.²² Prevention of breaches throughout legislative and post-legislative activities is regarded as an important management measure and is best achieved by more effective information-gathering; tracking performance of member states; appropriate use of Community funds; assistance to pre-accession countries and development of Commission guidance documents.²³ Another example of the management approach envisaged in this policy document is the preference for problem-solving ‘to respond to specific concerns of the European public’.²⁴

¹⁶ Article 258 TFEU

¹⁷ See COM(2004) 839 final

¹⁸ See more on the complementary use of management and enforcement measures in the EU in J. Tallberg, “Path to Compliance: Enforcement, Management and the European Union”, *International Organisations*(2002) 56(3) pp. 609-643 and Aleksandra Čavoški, “An Assessment of Compliance Strategies in the Environmental Policy Area”, *E.L. Rev.* 2016, 41(2), pp. 252-274

¹⁹ COM(2007) 0502

²⁰ See above n. 19

²¹ COM(2008) 773 final

²² See above n. 20 at 3

²³ *Ibid* at 4-5

²⁴ See above n. 21 at 6

This is not to say that the Commission does not value the traditional enforcement approach based on monitoring and the use of sanctions.²⁵ In its latest policy document *The EU Law: better results through better application* aimed at all areas of EU competence, there is a noticeable shift to a more strategic use of traditional enforcement mechanisms across all policy sectors.²⁶ The Commission justifies this shift by emphasising the importance of enforcement for citizens in their lives and the importance of enforcement in supporting and complementing the delivery of the Commission's policy priorities.²⁷ Those traditional mechanisms are especially suitable in cases when member states fail to communicate transposition measures or transpose them incorrectly; when they fail to comply with the judgement of the CJEU under Article 258 and in cases of serious damage to EU financial interest of violations of EU exclusive powers.²⁸ However, their effectiveness in environmental law is somewhat limited.²⁹

Environmental Compliance Assurance Action Plan – a more effective management approach?

In its latest Action Plan for the environment, *EU Actions to improve environmental compliance and governance*, the Commission sets out its more strategic and systematic management approach to support member states in improving compliance at the national level. Despite the primary responsibility of member states to implement and enforce EU environmental rules, the Commission recognises its leading role in providing tailored support to member states in ensuring compliance at the national level.³⁰ The new Commission's approach to compliance in this policy area is framed with a wider concept of 'environmental compliance assurance' understood 'to cover the range of interventions used by public authorities to ensure compliance'.³¹ This concept includes three main classes of public enforcement, including compliance promotion, compliance monitoring and follow-up and enforcement.³² However, this concept cannot be equated with the traditional term of 'enforcement' as compliance assurance captures a wider range of measures that member states may put in place to ensure compliance, in particular management measures based on cooperation and dialogue between different actors in policy-making.³³

This new approach does not imply that the Commission decided to radically depart from its previous approach to compliance as evidenced earlier by the complementary use of both enforcement and management approaches to compliance. Yet, this new concept of 'environmental compliance assurance' offers an overarching framework for a more

²⁵ See above n. 15

²⁶ See above n. 10

²⁷ Ibid

²⁸ Ibid at 14

²⁹ The environment still remains one of the areas in which member states tend not to comply with the Court's decision under Article 258 TFEU. Thus, those cases need to be referred again to the Court under Article 260(2) TFEU when the CJEU can impose financial penalties on member states. For example, in 2017 most of the cases referred again to the CJEU were related to the environment, in total 48 cases – see more in COM (2018) 540, Part I: General statistical overview. See also the Annual Report for 2016 COM(2017) 370 final.

³⁰ See above n. 6 at 4

³¹ See above n. 9 at 9

³² Ibid

³³ Ibid

balanced use of the management approach that will facilitate compliance by member states and ensure ‘coherence and synergy’ between different measures.³⁴ To that end, the Commission envisages a list of nine specific action points or measures, to be implemented from 2019 on a rolling basis, with the exception of two measures that were put in place in 2018.³⁵ This list of actions consists of general measures applicable to all environmental sectors and more specific measures applicable to certain environmental sectors. The following general measures are set out in the Action Plan: improving deployment of environmental compliance assurance expertise; identification of necessary professional skill-sets and training needs for environmental professionals in member states, facilitating the sharing of good practices and capacity building and use of geospatial intelligence for compliance assurance.³⁶ More specific measures applicable to particular environmental sectors include the preparation of a good practice guidance document on strategies for combating environmental crimes and other related breaches; compliance assurance in rural areas and preparation of technical guidelines for inspections of extractive waste facilities.³⁷

In implementing this new Action Plan the Commission plans to capitalise on existing links with member states through environmental networks, other EU institutions and in particular with EU citizens. The Commission is particularly reliant on the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) in implementing all nine action points as IMPEL already deploys various mechanisms of cooperation across the EU and amongst member states. This Action Plan would also help in reinforcing the role and organisational structures and mechanisms of existing European environmental networks which already play an important role in facilitating compliance with EU environmental law in member states. For example, it is expected that improving deployment of environmental compliance assurance expertise across the EU as a first action point set out in the new Action Plan will build upon the existing IMPEL mechanisms used to support implementation of environmental law in member states. A good illustration is the use of peer review mechanism carried out by IMPEL which will be strengthened by expanding its geographical coverage and subject areas.³⁸

Furthermore, the Action Plan envisages the creation of a group of experts on environmental compliance and governance, with responsibility for steering the implementation of the Action Plan and identifying new priorities of action in this policy area.³⁹ This group will consist of experts from member states and representatives from existing pan-European professional networks responsible for environmental compliance and governance. This group should also provide a forum to exchange views among experts. This should lead to more tangible outputs of their work such as “guidance documents on tackling environmental crime, handling of complaints and protecting the rural environment, and a

³⁴ Ibid at 22

³⁵ See above n. 11 at 6-7

³⁶ Ibid at 6-7

³⁷ Ibid at 6-7

³⁸ See above n. 9 at 28

³⁹ See above n. 9 at 26. See also Commission’s Decision on setting up a group of experts on environmental compliance and governance of 18.1.2018, C/2018/0010

new framework for assessing how well Member States are doing on environmental governance”.⁴⁰

Fulfilment of some the objectives of the Action Plan should also lead to a greater synergy and cross-compliance across environmental and other policy related sectors. The Action Plan envisages provision of guidance documents which will assist member states in various stages of compliance in rural areas, especially in relation to inspections and other forms of compliance monitoring. To that end, new guidance documents will mainly focus on legislation requirements subject to cross-compliance.⁴¹

It is important to assess the extent to which this ‘more strategic and coherent approach’ set out in the Action Plan will improve compliance in the environmental policy area. This has consistently been a policy area with poor compliance giving rise to environmental, economic and social costs.⁴² Given the importance of the environment to European citizens,⁴³ poor compliance may reduce citizens’ trust in the EU and further exacerbate the disengagement of citizens with the EU. Though it is still early to give a comprehensive assessment on the effectiveness of this new policy approach to compliance, a preliminary assessment of this more ‘strategic and comprehensive approach’ as seen by the Commission can be offered. This will be done by examining the reasons for non-compliance in member states and the alignment of the new list of measures with the previous Commission approach to compliance.

Reasons for non-compliance should be regarded as crucial inputs in framing the approach of the regulator to compliance. Depending on the reasons for non-compliance, the regulator will tailor its approach to best address the difficulties encountered by those regulated. The management approach assumes that actors have a general propensity to comply and cases of non-compliance should not be necessarily regarded as a deliberate decision to breach a provision.⁴⁴ This may be caused by difficulties in compliance often resulting from ambiguity and indeterminacy of legal rules legal, capacity or technical limitations or temporal dimensions of social and economic changes.⁴⁵ The enforcement approach assumes that actors’ predisposition to comply depends on the likelihood of detection through monitoring and the threat of sanctions.⁴⁶ Although the Commission pursues complementary use of the enforcement approach and management approaches to ensure compliance, its appreciation of the management approach in environmental policy area is noticeable, especially in the light of the new Environmental Assurance Compliance Action Plan. The heavy reliance of the Commission on management measures as opposed to its recourse to infringement procedure under the enforcement approach is justified by the reasons of non-compliance in member states.

⁴⁰ See http://ec.europa.eu/environment/pdf/13_03_2018_news_en.pdf; The group’s scope of work is stipulated in Article 2 of the Commission’s Decision on setting up a group of experts on environmental compliance and governance

⁴¹ See above n. 9 at 37-38

⁴² See above n. 6 at 3

⁴³ See above n. 9 at 4

⁴⁴ See above n. 14 and Tallberg, above n. 15

⁴⁵ See above n. 14 at 188

⁴⁶ See above n. 15 at 611

A recent 2016 Environmental Implementation Review - of difficulties in compliance at the national level – identified several common reasons for non-compliance in member states including the ineffective coordination among local, regional and national authorities; lack of administrative capacity and insufficient funding; lack of knowledge and data; lack of integration and policy coherence and insufficient compliance assurance mechanisms.⁴⁷ This demonstrates that member states, as encompassed by the management approach, fail to comply due to institutional, legal and financial limitations or lack of knowledge and expertise. The new set of general management measures set out in the Environmental Compliance Assurance Action Plan is tailored to support member states in overcoming these difficulties. First, those measures should improve the expertise of actors involved in compliance across the EU and improve their professional and training skills. Second, they should facilitate the sharing of good practices and promotion of funding opportunities. Of particular importance is sharing good practice in the handling of environmental complaints and citizen engagement at member state level, which should improve the credibility of EU and national institutions amongst citizens. This measure is aligned with the new Commission initiative applicable to all policy areas which should allow for a more effective handling of complaints by citizens or group of citizens.⁴⁸ Finally, proposed actions should help in building capacity and use of geospatial intelligence.

The Environmental Implementation Review also reaffirmed implementation gaps that vary across different sectors and member states that were previously identified in the 2008 Communication on implementing EC Environmental Law. The poor compliance record in certain environmental sectors is explained by complex environmental legislation which is based on “wide array of techniques, such as product standards, state-of-the-environment objectives, prohibitions and restrictions, economic instruments, sensitive area designations, plans and programmes, and public participation and information provisions”.⁴⁹ The compliance gap between member states results from a need to apply EU environmental law to a naturally and geographically diverse range of conditions⁵⁰ and various institutional and administrative structures put in place by member states⁵¹. To that end, the Environmental Compliance Assurance Action Plan sets out several action points that should address challenges particular to specific environmental sectors, taking into account different practices among member states. A good illustration is the need to provide member states with guidance that will ensure a minimum level of coherence across EU member states on how to tackle environmental crime and related breaches, with a particular focus on waste and wildlife. Besides clarifying the EU environmental obligations in the areas of waste and wildlife, the guidelines should also address related non-environmental crimes such as corruption, fraud, money-laundering and organised crime.⁵²

There is also a question of how well aligned the new strategic approach in the Environmental Compliance Assurance Plan is with the previous approach pursued by the

⁴⁷ See above n. 7 at 12-13. The document also identifies difficulties in compliance specific to each environmental sector.

⁴⁸ 2017/C 18/02, Annex on the Administrative procedures for the handling of relations with the complainant regarding the application of European Union law

⁴⁹ See above n. 21 at 3

⁵⁰ Ibid

⁵¹ See above n. 9 at 8

⁵² See above n. 9 at 34-36

Commission in the environmental policy area. Measures provided in the Plan do not represent a radical departure from the Commission's approach in the past. Over the years, the Commission successfully used different financial instruments to bolster compliance, in particular funds through the LIFE programme.⁵³ Similarly, the accession countries benefitted from a wide range of transitional periods which allowed for a gradual compliance with complex EU environmental legislation taking into account challenges specific to each new member state.⁵⁴ The Commission facilitated the interaction and exchange of knowledge between practitioners involved in the implementation of EU environmental law by supporting the work of several European networks of environmental compliance assurance.⁵⁵ Furthermore, the Commission regularly prepares risk-based Transposition Implementation Plans⁵⁶ and interpretative guidelines in different environmental sectors to facilitate implementation of the EU environmental legislation⁵⁷. The existing measures and initiatives by the Commission should be now pursued more strategically within overarching action points set out in Environmental Compliance Assurance Action Plan. This approach should result in better coordination not only between different environmental sectors and member states but also better interaction between related policy areas such as agriculture and research.

Conclusion

The success of the Environmental Compliance Assurance Action Plan depends on the clear division of responsibilities between actors involved in its implementation. Unlike many previous policy initiatives, this Action Plan sets out a clear structure, timeline and responsibilities allocated to actors involved, especially non-state actors. Their involvement has proven to be very beneficial especially in infringement procedures under the enforcement approach.⁵⁸ This will be an opportunity to further formalise non-state actors' participation in the policy-making process in relation to both management and enforcement approach to compliance. Equally, the Commission's work will be more transparent and open for greater scrutiny by all actors participating in the implementation of the Action Plan.

Thus, the pursuit of the management approach to compliance under the Environmental Compliance Assurance Action Plan should allow for a more coherent and strategic approach to compliance aiming at prevention of non-compliance at an earlier stage. By sharing practices, improving expertise and coordination across EU and member states, the

⁵³ <http://ec.europa.eu/environment/life/>. The Commission also successfully deploys other financial instruments such as structural and cohesion funds and funds under CAP to improve environmental compliance.

⁵⁴ 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* Annex V of the Treaty of Accession of Croatia (2012), *OJ 2012 L 112/21*

⁵⁵ IMPEL, EnviCrimeNet, EUROSAL, NEPA

⁵⁶ See <http://ec.europa.eu/environment/legal/law/compliance.htm>

⁵⁷ Guidance document on the Waste Framework Directive, http://ec.europa.eu/environment/waste/framework/pdf/guidance_doc.pdf; The Guidance document on hunting under the "Birds Directive", http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/hunting_guide_en.pdf

⁵⁸ See for example the national inventories of Important Bird Areas (IBA) compiled by the non-governmental organisation Birdlife International – SEC(2010) 1143 at 170

Commission will be able to address collectively common causes of poor compliance. However, there will still be cases when member states make rational choices not to comply and sometimes engage in systematic infringements. In those instances, the Commission has to use enforcement mechanisms more forcefully as only the complementary use of both approaches will address non-compliance in the EU.⁵⁹

⁵⁹ See above n. 15 and n. 18