

European Union Network for
the Implementation and Enforcement
of Environmental Law

NETWORK OF THE HEADS OF ENVIRONMENT PROTECTION AGENCIES



IMPEL-NEPA

Better Regulation Checklist

*Checklist to assess practicability and
enforceability of legislation*

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Introduction

There is increasing understanding of the importance of ensuring the practicability and enforceability of environmental legislation and the need to pay more attention to these aspects to enable implementation and reduce burdens on regulators and those regulated. This Checklist responds to that need. It was developed by IMPEL (European Union Network for the Implementation of Environmental Law – www.impel.eu) and NEPA (Network of Heads of Environment Protection Agencies - <http://epanet.ew.eea.europa.eu>) for assessing environmental legislation with a primary focus on EU environmental legislation and associated national legislation, and its practicability and enforceability at the national level. The Checklist is the joining together of the former Practicability & Enforceability Checklist of IMPEL and the Barriers to good environmental regulation Checklist of NEPA¹.

The checklist helps to identify barriers and better regulation opportunities in the legislative process. It poses questions relating to legislative policy and choice of instrument, suitability for transposition and implementation, quality of the legislation, practicability of compliance by the target group, and enforceability. To date it has been successfully used by IMPEL to check and improve Commission proposals for recasts of the Integrated Pollution Prevention and Control (IPPC) and Waste Electronics and Electrical Equipment (WEEE) Directives. Also experts and authorities at Member State level have reported on the successful application of the Checklist.

Understanding practicability and enforceability

Practicability refers both to practicability as experienced by competent authorities and by the target group of the legislation. More explicitly practicability can be defined as:

- on the one hand, the suitability of the legislation for the purpose of its practical application by competent authorities in the Member States, taking into account the possible need for transposition into national law and for application through individual administrative decisions, as well as the infrastructure and resources needed in order to enable competent authorities to perform all their obligations under Community law and to take the necessary implementing decisions.
- on the other hand, the suitability of the legislation in terms of the definition of the obligations of the regulated target group in the Member States and of the feasibility for these individual addressees of the legislation to spontaneously comply with their obligations as defined.

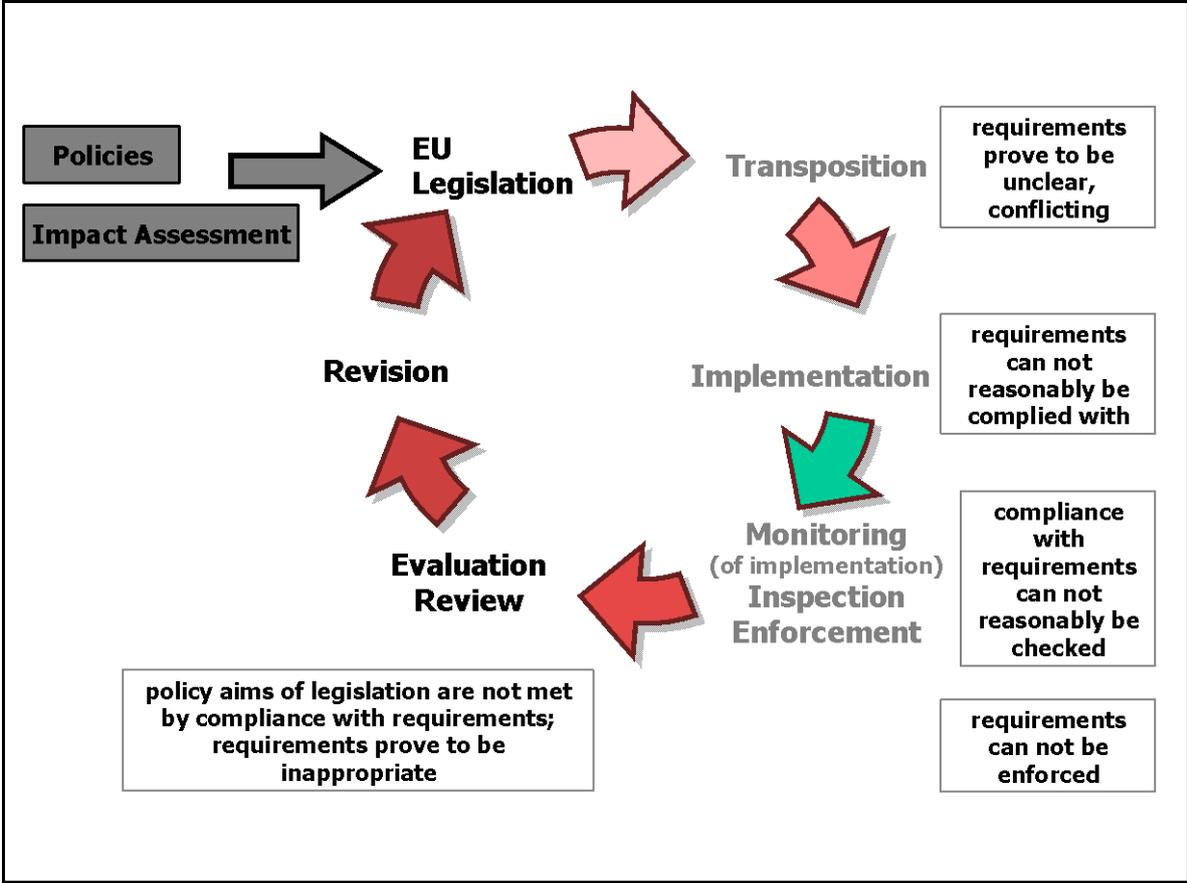
Enforceability refers to the suitability of the legislation in terms of the ability of the competent authorities to use legal and administrative means at their disposal under domestic law to encourage or, in the event of wilful non-compliance, compel individual

¹ The reports on these checklists can be found here: <http://impel.eu/wp-content/uploads/2010/02/2006-15-pe-checklist-FINAL-REPORT.pdf> and here: <http://epanet.ew.eea.europa.eu/foI249409/foI249409/foI249409/helsinki-statement>.

addressees to comply with their obligations under the legislation (either the directly applicable obligations laid down in EC Regulations or the obligations laid down in national implementing measures of EC Directives).

Practicability and enforceability issues can arise in all the stages of the EU regulatory cycle: at the transposition stage, the implementation stage and the stage of monitoring, inspection and enforcement. By ‘implementation’ we understand here all the measures and decisions of the competent authorities to apply the legislation, and all the measures by the addressees to comply with the legislation (e.g. applying for a permit, issuing of a permit and taking measures to comply with the permit obligations).

Figure 1: The EU Regulatory Cycle and examples of practicability and enforceability issues that can arise



This figure presents a schematic overview of the phases of a typical piece of EU environmental legislation, e.g. a Directive. A Directive that contains requirements to be complied with by companies in the Member States may, when it is transposed, implemented and enforced, cause various problems in practice. Some examples of these practicability and enforceability issues that can arise, are shown in the figure.

Use of the Checklist

The EU legislative process contains a range of steps – from considering the objectives and whether these are best met through EU initiative or national initiatives, to choosing the type of instrument (e.g. directive or regulation – if and where a legislative approach is considered appropriate), to drafting a legislative proposal, carrying out an Impact Assessment (IA) on the proposed legislation and negotiating an agreed final text.

On a national level, this sequence continues with transposition (in case of a directive), implementation, inspection, enforcement and monitoring. Subsequently, on the EU level a review and a revision of the legislation may take place. Not all issues of practicability and enforceability are due to a lack of consideration at the EU legislative drafting stage. Many problems of enforceability arise at the level of the Member States and have to be addressed through national legislation and national efforts (guidance, investment in inspection or enforcement capacity).

Practicability and enforceability considerations can be assessed and addressed at all stages by different actors and stakeholders. By actors we mean the policy and legal experts and officials of the Commission and of the Member States engaged in the different phases of the process of legislation, Members of the European Parliament and their staff and the legal/drafting services of the EP and Council secretariats. In their different capacities and roles, the following actors can all have a decisive influence on the final wording of environmental legislation:

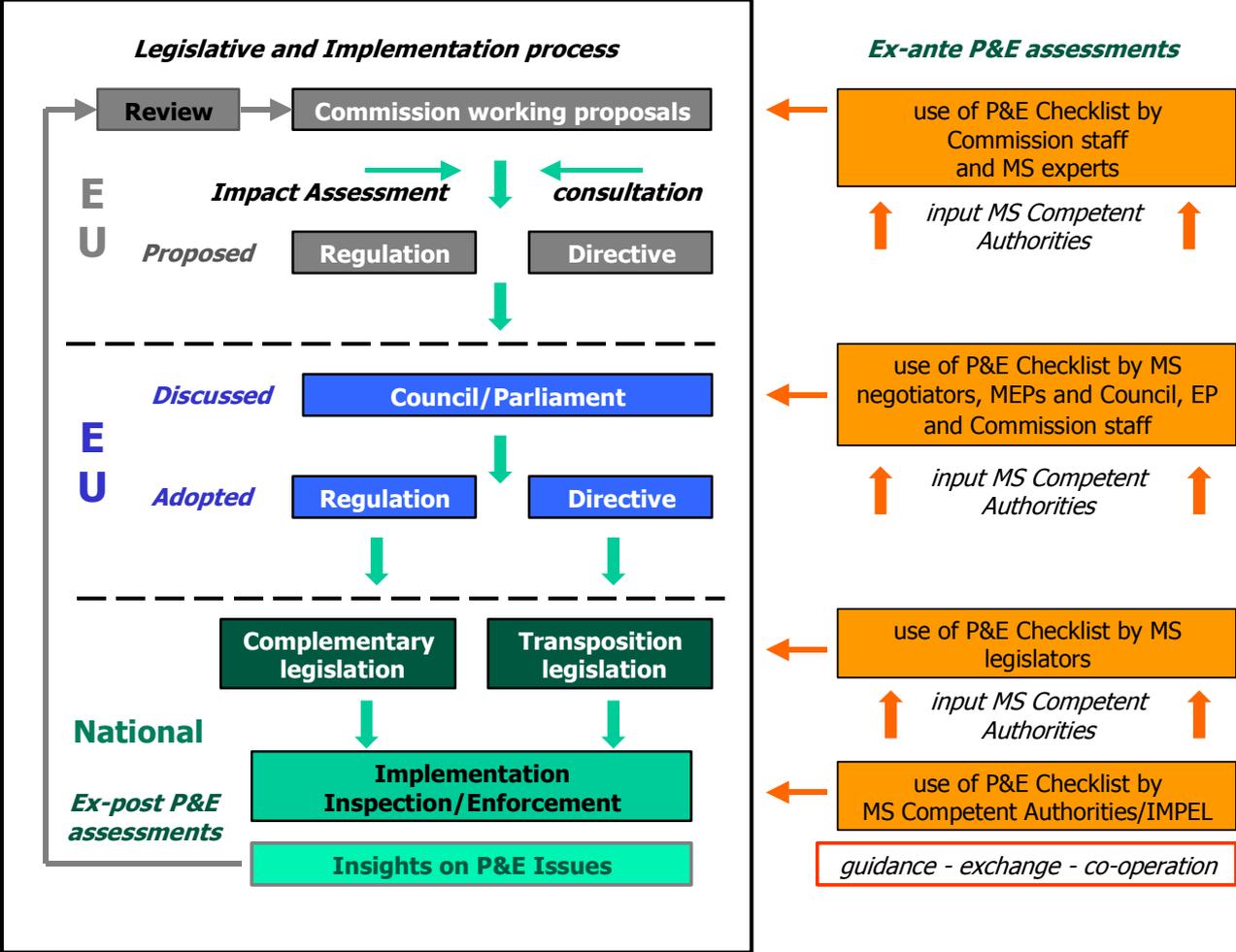
- **Commission:** DG Environment, DG Sanco (Health and Consumer Protection), DG Energy and Transport or DG Internal Market (when initiating environmental legislation) and other DGs through inter-service consultations;
- **Council (Member States):** Working Parties, COREPER, Presidency and Secretariat;
- **European Parliament:** Rapporteur & shadow Rapporteurs, individual MEPs (through amendments), especially members of the EP Environment Committee, and of the EP delegation to Conciliation Committee, Secretariat;
- **Member States:** when holding the Presidency or otherwise through their negotiators in Council and Conciliation Committee; national legislative drafting at the transposition/implementation stage.

These actors can and should try to design and draft the legislation in such a way that it can be implemented and enforced without any major problems. Together with the implementing and enforcing authorities in the Member States they can also consider measures that can further support the implementation, for instance the exchange of good implementation practices.

By stakeholders we mean all the interested/informed parties who in one way or another will be affected by the legislation, e.g. the different national authorities (administrative and judicial) competent for implementation and enforcement, the regulated community (e.g. industry) and NGOs. These stakeholders often can provide insights on practicability and enforceability issues, based on their own experiences and knowledge.

The Checklist consists of questions that are designed to enable actors and stakeholders in the legislative process to assess EC environmental legislation (and associated national legislation and implementation efforts) on various aspects of practicability and enforceability. Ex ante assessments at the early phases of the legislative process are most valuable – they can help in the development, completion or fine-tuning of legislation (and associated guidance). Ex post assessments during implementation can help as inputs to an eventual review and potential amendment of the legislation.

Figure 2 : The Legislative and Implementation process of EU legislation at EU and national level and where the P&E checklist could be used



The left column of this figure shows the different phases of the legislative and implementation process of EU legislation at EU and national level. The right side of the figure indicates the actors in that process that can perform ex-ante P&E assessments to address P&E issues and may use the checklist for that purpose (orange boxes). National authorities competent for implementation and enforcement may give input (insights on practicability and enforceability issues) to these actors. Insights on P&E issues, gained during the implementation phase (bottom left of figure) can also be gathered as part of an ex-post assessment and serve as input to a review and possibly revision of the legislation. Again the P&E Checklist may be used as a tool here.

The checklist is intended as a tool to assess and address practicability and enforceability issues in a structured way and to gather information and insights which can help inform and improve the legislative and implementation process and, ultimately, the effectiveness of EU environmental legislation.

It is drafted primarily for use by public authorities (authorities on the EU level, in Member States or co-operating in for instance the IMPEL Network) with the intention of ensuring the effectiveness of EC environmental legislation by having due regard to the main factors that may affect its practicability and enforceability. Other stakeholders, such as industry and NGOs, may also find the checklist useful though it has not been drafted from their perspective.

The questions in the checklist can be applied to evaluate legislation both ex ante and ex post. For the sake of simplicity of text, subsequent reference is to ex ante though the reader should remember that in all cases the questions also apply in the past tense where used as part of an ex post assessment.

The checklist is structured in such a way as to facilitate its use at various stages of the legislative and implementation process and to take into account the differences between different types of EC legislative acts as well as, where relevant, the requirements of transposition. The checklist is structured in five parts:

- A. Questions relating to legislative policy and the choice of legislative instrument**
- B. Questions relating to the suitability for transposition and implementation**
- C. Questions relating to the quality of the legislation**
- D. Questions relating to the practicability of compliance by the regulated target group**
- E. Questions relating to the enforceability of the legislation**

These five sections have different primary addressees/users and stakeholders and are generally to be applied at different stages of the legislative and implementation process.

The checklist is intended to help users address the relevant issues thoroughly. However, users should not feel intimidated by the number and range of questions, as no single user is expected to be able to answer all questions fully. Not all questions are relevant at all stages of the process, and users may decide to use parts of the checklist selectively, based on their specific role in the process, expertise and concerns. When assessing a piece of legislation one may consider identifying firstly a number of key elements or themes and then selecting, structuring and modifying the Checklist questions according to these elements or themes.

Different types of information and expertise will be required to answer different types of questions, and users may find that the most productive way of applying the checklist is to

create a panel of experts which collectively have the full range of knowledge required to address all the issues raised in the questions.

Obviously, answering many of the questions in the checklist implies some form of value judgement which will vary from user to user. In most cases, it will not be possible to answer these questions by "yes" or "no". Users are encouraged to approach them rather as open questions that call for a more sophisticated and nuanced answer. In a way, asking the questions is as important as answering them. In fact the questions here below can be used in different ways: as a real checklist, as a questionnaire and as an aide-mémoire.

The Checklist is presented below section by section, followed by short Question Sets Explanatory Notes.

The Checklist

A. Questions relating to legislative policy and the choice of legislative instrument

1. Is establishing new legislation essential for achieving the desired outcomes or could the use of existing instruments be sufficient?
2. If the proposed choice of legislative instrument is a Directive, is this choice justified in view of its contents and purpose?
Does it provide sufficient flexibility to facilitate its transposition and insertion into the national legal systems of the Member States, without compromising the effective achievement of the results it pursues?
Is the Directive sufficiently clear about the results to be achieved by Member States?
3. If the proposed legislative instrument is a Directive, has a proper balance been struck between general principles and detailed provisions?
Does the Directive allow for the use of different regulatory instruments and alternative options for implementation and, if so, is it sufficiently clear under what conditions these instruments and options can be applied?
Where desirable flexibility is provided by the Directive, would it nevertheless be useful to provide complementary, non-binding guidance material for Member State authorities in charge of transposition and implementation?
Where flexibility is considered undesirable, would the choice of a Regulation not have been more appropriate in view of the perceived need for a fully harmonized approach?
4. If the proposed choice of legislative instrument is a Regulation, is this choice justified in view of its contents and purpose?
Is it necessary that the intended measures be applied in a uniform manner in all Member States?
If there is no true need for uniform application, would the choice of a Directive not have been more appropriate in view of subsidiary considerations?
5. If the chosen legislative instrument is a Regulation, are its provisions actually capable of direct application in all Member States (taking account of local conditions, for example, soil physical and chemical properties, climatic features)?
Has the need for complementary legislation clearly been identified?
Are the best mechanisms or regulatory mix being used to deliver the desired outcomes?

6. If economic instruments are proposed, will they be sufficiently harmonised at EU level?

B. Questions relating to the suitability for transposition and implementation

7. Does the legislative instrument clearly and unambiguously spell out the requirements and tasks for the Member State authorities competent for implementation?
Have Member States where necessary developed an implementation plan stretching from development of regulations to on-the-ground implementation?
8. To the extent that EU institutions or EU bodies, specifically established under the legislative instrument or designated by it, are given implementation tasks, is the division of responsibilities between these institutions or bodies and the competent Member State authorities clearly spelled out?
9. Does full implementation of the legislative instrument require the adoption of implementing measures at the EU level (i.e. delegated rule-making through comitology procedures)? If so, are such measures adequate and are they likely to be adopted in time?
10. Has the need for any support on EU level for the Member State authorities competent for implementation prior to the date of application of the legislative instrument (e.g. through guidance materials or other practical measures) sufficiently been considered?
11. Has the need for any cooperation between the Member States (and, if relevant, between Member States and non-member States) in the implementation of the legislative instrument sufficiently been considered?
Has sufficient attention been given to the possible need for exchange of experience on EU level between the Member State authorities competent for implementation after the coming into force of the legislative instrument?
12. Are the implementation burdens for the (Member State and, where applicable, European) authorities competent for the implementation of the legislation clear (human resources, financial resources, knowledge and/or training, performance of new functions, ICT, a deliverable IT infrastructure, organisational structure, etc.)?
Are these burdens proportionate to the intended results?
Have the proposals been scrutinised adequately to allow identification of alternative solutions which may result in reduced burdens?
Has a proper balance been struck between public and private burdens?

13. Is the legislation targeting properly at least those operators with the largest environmental impacts? Can others be left out of the scope of the legislation? Are there sufficient thresholds, de minimis values, exemptions, etc. to ensure that a disproportionate burden is not unintentionally imposed on business and competent authorities?
14. To the extent that the legislative instrument imposes monitoring and/or reporting obligations on Member State authorities, are these obligations proportionate to the intended results and has the resulting administrative burden been kept as low as possible?
15. To what extent are/were Member State authorities competent for implementation, businesses (in particular small businesses), environmental organisations and other stakeholders involved in the development of the legislation at the appropriate stages of the legislative process and have their opinions on implementation burdens been taken into account? Have they been consulted adequately to ensure they can make the necessary preparations for proposed changes? Is business providing adequate coordination to engage constructively with government and regulators?
16. Has there been engagement of other stakeholders, for example environmental organisations?
17. Is the time period allowed for transposition of the Directive into national law adequate (e.g. for administrative changes or making investments)? Does the date by which the Directive is to be transposed leave Member States sufficient time to properly prepare their implementing bodies for the practical aspects of implementation?
18. To the extent that the provisions of the Regulation are not fully self-executing, does the date by which the Regulation comes into effect leave Member States sufficient time to adopt whatever complementary national legislation may be required for its full implementation? Does that date also leave Member States sufficient time to properly prepare their implementing bodies for the practical aspects of implementation?

C. Questions relating to the quality of the legislation

19. Does the preamble clearly state the intended environmental result of the legislation?
Does the preamble justify and explain the enacting provisions in simple, understandable terms?
Is it fully consistent with these provisions?

20. Does the legislation contain any provisions without legislative character (e.g. wishes, political statements) which may confuse the addressees or seem to contradict the actual normative provisions?
21. Have all the key terms been properly defined, while avoiding excessive detail in definition which may hamper enforcement? Are the definitions clear and consistent with the definitions in related legislation?
Is the same term used throughout to express a given concept consistently with the definitions?
22. Is it clear from the provisions of the legislation who are the ultimate addressees of the rights and/or obligations they set out and are the rules formulated in such a way that the addressees can read and understand them easily?
Is the wording clear, simple, concise and unambiguous? Have unnecessary abbreviations, 'Community jargon' and excessively long sentences been avoided?
23. Are the rights and/or obligations of those to whom the legislation is to apply clearly defined?
Has the use of exceptions been minimised?
Are any technical standards laid down in the legislation clear?
24. Besides the actual target group, will other parties be confronted with the legal effects of the legislation and, if so, does this come across clearly?
25. Are the various provisions of the legislation consistent with each other?
26. Does the legislation fit with existing legislation (including any international conventions binding on the EC) and has pointless repetition of existing provisions been avoided?
Where there are other directives regulating the same or similar issues within the sector, does the proposed legislation fit with them also?
Are any references to other texts precise?
Have unnecessary cross-references which make the text difficult to understand been avoided?
27. Does the legislation contain annexes or refer to implementing rules to be laid down at EC level (delegated legislation), guidelines, technical reference documents or other documents that have to be taken into account for purposes of implementation and/or enforcement?

If so, is the legal status of these instruments clear and do they themselves meet the practicability and, where relevant, enforceability criteria of this checklist?
28. To the extent that the legislation amends or further develops existing legislation, have any opportunities for consolidation sufficiently been

considered?

Have any opportunities for integration with other relevant pieces of legislation sufficiently been considered?

Has any relevant case-law of the ECJ on the existing provisions been taken into account?

29. Is there a feedback loop for regulators, operators and other stakeholders to advise where changes are required to the legislation?

30. Is there a review stage for the legislation to be modified in the light of experience?

D. Questions relating to the practicability of compliance by the regulated target group

31. Is it clear who belongs to the target group?

Are the obligations clear to the target group, is the target group actually capable of understanding them and complying with them?

Has the need for compliance support initiatives been considered?

32. In the target group's perception, are the policy and rules embodied in the legislation likely to be regarded as reasonable and acceptable, and the burden of complying with them as not disproportionate?

Are the target groups resistant to any of the regulatory approaches proposed?

Does the target group feel it shares responsibility for putting this policy into practice?

If there is no specific target group, are the parties responsible for implementation clearly identified or identifiable?

33. In the target group's perception, does compliance with its obligations cost relatively little time, money and effort?

In the target group's perception, could breaking the rules be thought to yield little or no advantage (i.e. no incentive not to comply) or even disadvantages (i.e. positive incentive to comply)?

Are there net financial benefits or other advantages (e.g. improved image) accruing to the target groups who comply with the legislation (i.e. not just their costs)?

34. Can compliance with or contravention of the rules be easily and unambiguously established by the target group (e.g. through a fixed measurement method)?

35. Is there likely to be any horizontal supervision (e.g. financial auditing, disciplinary codes, auditing for certification) which may encourage or facilitate compliance with the rules laid down in the legislation?

36. Are there easy ways of avoiding compliance with the rules? Have the fraud-susceptible points in the legislation been identified and can measures be taken to address them?

E. Questions relating to the enforceability of the legislation

37. Is it clear which authorities will be in charge of checking compliance, carrying out inspections and enforcing the legislation and what their tasks and obligations will be?
Are the organisational and legislative frameworks of the competent authorities adequate to tackle and enforce EU directives?
38. To what extent were these authorities involved in the development of the legislation at the appropriate stage of the legislative process?
Has their opinion on the enforceability of the legislation and the burden involved been sought and taken into account?
39. Has the need for any support on EU level for the Member State authorities competent for inspection and enforcement prior to the date of application of the legislation sufficiently been considered?
Has the possible need for common guidance materials been anticipated?
40. What non-coercive means will be available to competent Member State authorities to achieve compliance without having recourse to formal enforcement action (e.g. penalties, coercive measures) under administrative or criminal law?
Are such means likely to be effective or is recourse to enforcement action likely to be frequently required?
41. Is it clear what provisions should be enforced and what provisions should have priority in this respect (core provisions of the legislation)?
Is it clear what means of enforcement under administrative and/or criminal law can be used under the terms of the legislation and are these likely to be effective?
42. Are the inspection and enforcement burdens for the competent authorities clear (human resources, financial resources, knowledge and/or training, performance of new functions, ICT, adequate laboratory testing system, organisational structure, etc.)?
Are these burdens proportionate to the intended results?
43. Are the monitoring and measurement methods to be employed consistently defined?
Is the compliance checking effort expected of competent authorities realistically feasible?

44. Is sufficient capacity for the performance of the inspection and enforcement tasks available?
45. Where relevant, has the need for any cooperation and/or exchange of experience between competent Member State authorities in the actual inspection and enforcement of the legislation sufficiently been considered?
46. To the extent that EU-level bodies, specifically established under the legislation, are given tasks directly related to inspection or enforcement, is the division of labour between these bodies and the competent Member State authorities clearly spelled out?
47. Has the date on which the legislation will enter into effect been established in such a way as to allow sufficient preparation time for the Member State authorities competent for inspection and enforcement?
48. In the target group's perception, will there be a high risk of detection of a violation in the event of an inspection (i.e. a records inspection or a physical inspection) by the competent authorities?
Is the inspection technology used sophisticated enough?
Will there be a major real risk of detection in an inspection?
49. In the target group's perception, will there be a high risk of incurring a sanction if a violation is detected in an inspection or reported to the authorities?
Will there be a major real risk of a sanction being imposed once a violation has been detected or reported?
50. In the target group's perception, will the type of sanction associated with the violation and additional disadvantages of being sanctioned (e.g. damage to reputation) be regarded as sufficiently severe to have a deterrent effect?
51. In the target group's perception, will there be a high risk of a violation detected by others than the authorities (e.g. those exercising horizontal supervision or the general public) being reported to the authorities?
Does the target group think that people generally know which authorities to report detected violations to and would be generally inclined to do so?
52. In the target group's perception, is it likely that any violation would soon be noticed by its peers?
Does the target group's community generally disapprove of such violations?

Question Sets Explanatory Notes

A. Questions relating to legislative policy and the choice of legislative instrument

Primary addressee: Commission policy makers and MS experts involved in the consultation process.

Phase of the legislative process: very early stage of the legislative process, as part of IA when there is a proposal, and potentially as part of an ex post evaluation.

Explanatory remarks: The questions in this section relate to the choice of the legislative instrument – whether directive or regulation. They are inspired by relevant policy documents on the application of the principles of subsidiarity and proportionality and on 'better regulation'. In practice the choice of legislative instrument might well have been made before the Impact Assessment and the IA is only carried out on the actual proposal – i.e. after the choice between regulation or directive (or other instrument) has been made. In this case the evaluation of the practicability and enforceability of proposed legislation arises only after the basic policy choice to have recourse to legislation as an instrument has already been made.

In the Inter-institutional Agreement on better law-making of 16 December 2003, the European Parliament, the Council and the Commission have recalled the definition of the term 'directive' in Art. 249 of the Treaty, which provides:

'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' The same Inter-institutional Agreement further states that, in formulating proposals for directives, *'the Commission will ensure that a proper balance is struck between general principles and detailed provisions, in a manner that avoids excessive use of Community implementing measures.'* In the Agreement, the Commission commits itself to *'explain and justify to the European Parliament and to the Council its choice of legislative instrument'*.

The following provisions of the 1997 Protocol on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty are also directly relevant to the choice of legislative instrument: 'The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. (...) Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible,

consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.'

B. Questions relating to the suitability for transposition and implementation

Primary addressees: Commission policy makers, evaluation units, and Member States' policy and legal experts/negotiators

Important stakeholders: Member State authorities competent for implementation

Phase of the legislative process: is primarily focused on the proposal stage of the legislative process (and could be a core part of IA process). Potentially also as part of an ex post evaluation.

Explanatory remarks: This set of questions addresses the next stages in the EC regulatory chain, from the perspective of the public authorities competent for transposition and implementation in the Member States. Issues of practicability from the perspective of the regulated community are no less important, but are addressed by a separate set of questions (see section D).

Transposition, as explained above, is only relevant where the EC legislative instrument used is a Directive. In this case, implementation in the Member States follows transposition into their domestic law. In the case of a Regulation, no transposition is required, and the directly applicable provisions of the EC legislative instruments are to be implemented as such, though complementary provisions of domestic law may be required to enable effective implementation. Because of this fundamental difference between both types of legislative instrument, additional specific questions have been developed to complement the general ones that are common to both choices.

C. Questions relating to the quality of the legislation

Primary addressees: Commission, Council and European Parliament legal drafting units; MEPs; Member States' legal experts/negotiators

Important stakeholders: Member State authorities competent for implementation

Phase of the legislative process: This is at the proposal stage - where the concepts of the proposal (objectives, targets, target audience, timescales) have been worked out and need translation into robust legislative language.

Explanatory remarks: These questions relate to the intrinsic quality of legislative drafting and are formulated in such a way that they can be applied to any existing or proposed provisions of EC environmental legislation, whether in the form of a Directive or a Regulation, referred to as ‘the legislation’ (in the event of legislative proposals this obviously should be read as ‘the proposed legislation’).

D. Questions relating to the practicability of compliance by the regulated target group

Primary addressees: Commission policy makers, evaluation units, Member States’ policy experts/negotiators

Important stakeholders: Member State authorities competent for transposition and implementation and regulated target groups (e.g. industry)

Phase of the legislative process: is focused on the proposal stage of the legislative process (and could be a core part of IA process). Potentially also as part of an ex post evaluation.

Explanatory remarks: This set of questions is aimed at assessing the likely response of the regulated target group to the legislation, bearing in mind that the political choice to have recourse to legislation as a policy instrument has in principle been made. It draws most heavily on the [Table of Eleven](#), a tool developed in the Netherlands which can help map the strong and weak points of rules with respect to the likelihood of compliance and the feasibility of enforcement. It consists of eleven dimensions, which together determine the extent to which legislation is complied with. The eleven dimensions are formulated with a view to achieving the highest possible practicability in the fields of policy development and law enforcement.

In applying this part of the checklist, users should be aware that what matters for the ultimate addressees of the legislation is not so much the EC legislative text itself, but their perception of it, as they are confronted at their level with either the provisions of domestic law transposing the requirements of a Directive, or the directly applicable provisions of a Regulation, as interpreted and applied by competent Member State authorities in the domestic legal context, together with relevant complementary provisions of national law. Since all of these elements are not fully known at the time EC legislation is drafted, users of the checklist will have to make a number of assumptions about these various factors which will influence the target group’s perception and resulting behaviour. The relevance of some questions and the possibility of answering them with any degree of confidence will vary widely according to national circumstances. If it is not possible to address some questions during the legislative process at the EU level, the same questions will most likely have to be addressed at the stage of transposition or elaboration of complementary national legislation. To the extent that the ultimate impact of the legislation on the target group depends on choices made in a national legislative process, this section of the checklist will be of particular importance for those involved in this process.

Like all other sections, this section of the checklist has been drafted from the perspective of public authorities concerned with ensuring the highest possible level of compliance with rules that have been or are intended to be laid down. It is not primarily concerned with evaluating the burden and cost of compliance for the regulated community, which is an issue that normally should be addressed at an earlier stage in the policy development process, when the political decision whether or not to legislate, rather than how to legislate, is made. Obviously, the practicability of compliance is a question that is closely related to that of administrative burdens and compliance costs for the private sector, which are key issues for consideration in IA procedures. Consequently, those responsible for carrying out such procedures at the EU or Member State level may also find the questions in this part of the checklist useful, as will representatives of the regulated community who may be consulted during the IA process. The answer to some questions is likely to vary considerably depending on who answers them.

E. Questions relating to the enforceability of the legislation

Primary addressees: Commission, Council and European Parliament legal drafting units; MEPs; Member States' legal experts/negotiators

Important stakeholders: Member State authorities competent for enforcement (e.g. public prosecutors) – who know how the enforcement system works in practice.

Phase of the legislative process: is focused on the proposal stage of the legislative process (and could be a part of IA process), as well as at the stage of transposition into national legislation. Potentially also as part of an ex post evaluation.

Explanatory remarks: These questions address the final link in the regulatory chain: the possibility and likely effectiveness of the use by Member State public authorities of legal, administrative and other means at their disposal to check compliance and to convince or if necessary compel the ultimate addressees of the legislation to comply with their obligations, where they are found to be unwilling to do so without coercion. Enforceability, too, depends on a wide range of different factors, some of which are very difficult to judge at the time of drafting legislation at the EU level. Since compliance checking, inspection and enforcement remain essentially determined by national law, these questions will normally have to be addressed mostly at the stage of transposition (for Directives) or elaboration of complementary national legislation (for Regulations), taking into account specific national circumstances. However, if it is expected that the effectiveness of a piece of EU legislation heavily depends on adequate enforcement in the Member States, it is also crucial to already explore in the proposal phase what provisions should be regarded as key, what in practice is needed in terms of enforcement, whether the Member States have sufficient means in this respect and whether the EU legislation should contain concrete and detailed enforcement requirements. This also applies to the issue of enforcement co-operation between Member States in case of transboundary activities. Finally, users of the checklist should be fully aware of the fact that the decision to impose criminal sanctions on violators of environmental law ultimately depends on independent judicial authorities who operate in

accordance with general procedures, rules and principles of criminal law whose rationale is unrelated to the objectives of environmental policy.